

67728-4

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NO. 67728-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERIC LOWE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Anita Farris, Judge

BRIEF OF APPELLANT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB 28 PM 4:19

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A. ASSIGNMENT OF ERROR

The sentencing court erred when it found that appellant had a juvenile assault conviction for purposes of his offender score.

Issue Pertaining to Assignment of Error

In 2000, appellant was charged in juvenile court with assault in the third degree, found guilty based on stipulated facts, and given a deferred disposition. In 2002, the conviction was vacated and the case dismissed with prejudice. Despite the vacation and dismissal, for appellant's current offense, the sentencing court counted the assault conviction when calculating his offender score. Did the court err?

B. STATEMENT OF THE CASE

The Snohomish County Prosecutor's Office charged appellant Eric Lowe with one count of residential burglary. CP 1. Facing the prospect of the State adding an additional charge, Lowe decided to plead guilty. 1RP¹ 2-3; 2RP 2.

The State calculated Lowe's offender score at 4, which included a 2000 juvenile felony for assault in the third degree. CP 50-51. In support of its calculation, the State submitted sentencing

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – May 6, 2011; 2RP – June 8, 2011; 3RP – August 23, 2011.

documents from Lowe's earlier convictions. CP 145-211.

For the 2000 offense, the State submitted a Deferred Disposition Order, which indicates that on November 27, 2000, the juvenile court found Lowe guilty of assault in the third degree based on stipulated facts and imposed a deferred disposition. The court deferred disposition for one year on condition that Lowe pay certain costs, perform community service, and comply with community supervision requirements. CP 149-154. Paragraph 3.14 of the order indicates:

DISMISSAL: At the conclusion of the period of deferral set forth above in the order of deferral and upon a finding by the court of full compliance and the conditions of supervision and payment of full restitution, the respondent's conviction shall be vacated and the court shall dismiss the case with prejudice.

CP 153.

In an apparent oversight, the State failed to include in its documents the subsequent order on the deferred disposition dismissing the assault conviction with prejudice. That order was entered September 17, 2002. CP 21-22.

At the plea hearing on the residential burglary, Lowe agreed with the State's calculation of his offender score and standard range. 2RP 4; CP 38. At sentencing, however, defense counsel placed on

the record Lowe's belief that, because the 2000 juvenile offense was ultimately dismissed with prejudice, it should not count in his offender score. 3RP 21. Counsel indicated he had not placed this objection on the record earlier because he could not find authority supporting Lowe's position. 3RP 21-23. Lowe indicated he had been led to believe that once he completed the terms of the deferred disposition, the assault could never be used against him. 3RP 23.

The court indicated it would include the assault in Lowe's offender score but leave the door open for counsel to raise the issue again. 3RP 23-24. Lowe asked for a continuance, but after counsel spoke to him off the record, counsel indicated they would proceed. 3RP 25-26.

By the time of sentencing, Lowe had additional convictions that increased his offender score from 4 to 8, resulting in a standard range of 53-70 months.² 3RP 2, 18, 20; CP 24-25. The court imposed 53 months, and Lowe timely filed his Notice of Appeal. 3RP 24; CP 1-13, 26.

Lowe subsequently filed a motion to withdraw his guilty plea based on the erroneous inclusion of the vacated juvenile assault

² Lowe was sentenced on these new convictions and the residential burglary at the same time. 3RP 2.

conviction in his offender score. CP 14-22. At the State's request, that motion was transferred to the Court of Appeals for consideration as a personal restraint petition.³ CP 65-211.

C. ARGUMENT

THE SENTENCING COURT ERRED WHEN IT USED LOWE'S VACATED JUVENILE ASSAULT CONVICTION TO CALCULATE HIS OFFENDER SCORE.

Deferred dispositions remain one of the few opportunities in the juvenile system where "juveniles retain the opportunity to avoid adjudication altogether[.]" State v. J.H., 96 Wn. App. 167, 180, 978 P.2d 1121, review denied, 139 Wn.2d 1014, 994 P.2d 849 (1999), cert. denied, 529 U.S. 1130 (2000).

The deferred disposition statute, RCW 13.40.127, provides:

At the conclusion of the period set forth in the order of deferral and upon a finding by the court of full compliance with conditions of supervision and payment of full restitution, the respondent's conviction shall be vacated and the court shall dismiss the case with prejudice, except that a conviction under RCW 16.52.205⁴ shall not be vacated.

RCW 13.40.127(9).

"Vacate" means "[t]o nullify or cancel; make void; invalidate."

Blacks Law Dictionary 1584 (8th ed. 2004). Once the trial court

³ The PRP is being considered in case number 68389-6-1.

⁴ Animal cruelty in the first degree.

vacated Lowe's juvenile assault conviction in 2002, it was nullified, cancelled, voided, and invalidated. In other words, it ceased to exist. And because it ceased to exist, it could not be counted when calculating Lowe's offender score on the current residential burglary.

Based on its response to Lowe's motion to withdraw his guilty plea, the State will likely respond here by relying on the statutory definitions for "conviction" and "criminal history." But these definitions do not control.

This Court reviews statutory interpretation issues de novo. State v. Roggencamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). Interpretations that lead to absurd or unjust results are rejected in favor of those that lead to reasonable ones. State v. McDougal, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992).

RCW 9.94A.525 provides the rules for calculating offender scores and requires the inclusion of "prior convictions." See generally RCW 9.94A.525. Below, the State noted that under RCW 9.94A.030(9), "conviction" means "an adjudication of guilt pursuant to title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." CP 87. The State then argued that because Lowe was adjudicated guilty when he received his deferred disposition, the 2000 assault must be counted when

calculating his offender score on the current offense. CP 87-88.

This statutory definition of “conviction” makes clear that an adjudication of guilt in a juvenile case qualifies as a conviction. But “[w]hen a trial court defers disposition of a juvenile offense under RCW 13.40.127, there has been no final settlement of the case.” State v. M.C., 148 Wn. App. 968, 972, 201 P.3d 413 (2009). Lowe’s adjudication was settled in 2002 when it was vacated.

Under the State’s theory, so long as there was an adjudication at some point, the offense must be counted in the offender score. Subsequent events are irrelevant, so that even where a conviction or adjudication was vacated on appeal, in a post-trial motion, or in a personal restraint petition, for example, it would still count toward the offender score. This is not a reasonable interpretation.

This Court rejected a similar argument in State v. Smith, 158 Wn. App. 501, 246 P.3d 812 (2010). Smith sought to clear his record of a 1989 felony conviction. In 1995 he had been convicted of a misdemeanor, but that conviction was vacated. The issue on appeal was whether the 1995 offense – although vacated – still qualified as a conviction, which would make Smith ineligible for vacation of his earlier felony. Smith, 158 Wn. App. at 503. The State argued that under the definition of “conviction” in RCW 9.94A.030(9), the

misdemeanor qualified as an adjudication of guilt regardless of its subsequent vacation. Id. at 508. In rejecting the argument, this Court said:

Smith does not dispute that he pleaded guilty to the misdemeanor offense and was convicted in 1995. But this definition of “conviction” does not show that the legislature intended courts to disregard the effect of a subsequent vacation order

Id. at 509. The State’s effort to disregard the vacation order in Lowe’s case warrants a similar rejection.

Below, the State cited Division Two’s decision in State v. Cooper, 164 Wn. App. 407, 263 P.3d 1283 (2011). CP 87. But that decision does not dictate a different result. The issue in Cooper was whether two 2008 Texas deferred adjudications counted as convictions for offender score calculations on defendant’s 2010 Washington offenses. Division Two held they did because, although the Texas court had not yet formally entered adjudications of guilt, it had accepted the defendant’s guilty pleas. Because RCW 9.94A.030(9) defines “conviction” to include “acceptance of a guilty plea,” the Texas offenses counted.⁵ Cooper, 164 Wn. App. at 408-

⁵ In addition, unlike Washington law, Texas law specifically permits sentencing courts to consider deferred adjudications – even where the adjudication was ultimately dismissed and discharged – at sentencing for a subsequent offense. Cooper, 164 Wn. App. at

411.

Cooper is correctly decided under its facts. Cooper's 2008 deferred adjudications were apparently still pending when he was sentenced in Washington in 2010 (one adjudication was deferred for two years and the other four years). Cooper, 164 Wn. App. at 409. Unlike Lowe, Cooper's adjudications had not been vacated. Had Lowe been in the same position, i.e., had his deferred disposition still been pending when sentenced on his current offense, it also may have qualified as a conviction. That Lowe's adjudication was ultimately vacated is the critical distinction.

In arguing for a contrary result below, the State also cited to the SRA's statutory definition of "criminal history," which means "the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere."⁶ CP 88 (quoting RCW 9.94A.030(11)). The statute provides that "[a] conviction may be removed from a defendant's criminal history only if it is vacated

412 n.5.

⁶ RCW 13.40.020(7)(b) expressly provides that for proceedings under chapter 13.40 (the Juvenile Justice Act), "[a] successfully completed . . . deferred disposition shall not be considered part of the respondent's criminal history."

pursuant to RCW 9.96.060, 9.94A.640, 9.95.240,⁷ or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon." RCW 9.94A.030(11)(b).

Lowe's juvenile assault adjudication falls outside the definition of criminal history for the same reason it falls outside the definition of conviction. There was no final settlement of the case until the adjudication was vacated with prejudice, at which time it ceased to exist. Subsection (b) of the statute, describing the circumstances under which a conviction can be removed from criminal history, presumes that final settlement of the case resulted in entry of a conviction. Because Lowe's adjudication did not ultimately result in such an entry, there is no need to remove it.

But even if Lowe's vacated adjudication can be considered criminal history, notably, RCW 9.94A.030(11)(c) indicates, "The determination of a defendant's criminal history is distinct from the determination of an offender score. . . ." Thus, an adjudication falling within the definition of criminal history does not necessarily count in

⁷ These statutes permit vacation of misdemeanor and felony convictions after completion of the sentence and satisfaction of other requirements.

the defendant's offender score.⁸ And for the reasons already discussed, Lowe's vacated assault adjudication does not count in his offender score.

Finally, to the extent there is any ambiguity in the SRA regarding whether vacated juvenile adjudications should be counted in an offender score, the rule of lenity requires strict construction of a sentencing statute and the benefit of any doubt flows to the defendant. In re Post-Sentencing Review of Charles, 135 Wn.2d 239, 249-250, 955 P.2d 798 (1998).

Removing Lowe's vacated 2000 assault from his offender score reduces his score from 8 points to 7 ½ points. And because the score is rounded down to the nearest whole number, his correct score is 7. CP 24-25; RCW 9.94A.525. This results in a standard range of 43-57 months. CP 50. If the sentencing court were to once again impose the low end of the range, Lowe's current sentence would be reduced by ten months.

⁸ For example, even a previously washed out conviction qualifies as "criminal history." State v. Varga, 151 Wn.2d 179, 191, 193, 86 P.3d 139 (2004). However, that same conviction may not count towards the offender score. See RCW 9.94A.525(2) (precluding use of conviction for offender score following period of time in community without new offense).

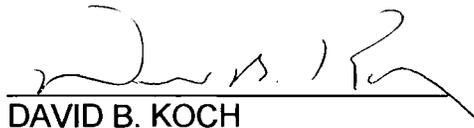
D. CONCLUSION

Lowe's sentence should be vacated and his case remanded for a new sentencing hearing using the correct offender score.

DATED this 28th day of February, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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Respondent,)	
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v.)	COA NO. 67728-4-1
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ERIC LOWE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF FEBRUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF FEBRUARY 2012.

x Patrick Mayovsky

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