

68944-4

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NO. 68944-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

TONY PENWELL,

Appellant.

REC'D
NOV 28 2012
King County Prosecutor
Appellate Unit

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

The Honorable Jim Cayce, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

At resentencing the trial court erred by refusing to consider appellant's challenge to his offender score calculation.

Issue Pertaining to Assignment of Error

RCW 9.94A.530(2) provides: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." In light of this statute, did the trial court err by refusing to consider appellant's challenge to his offender score at the resentencing hearing?

B. STATEMENT OF THE CASE

1. Procedural Facts

In an unpublished decision issued October 1, 2007, the Court of Appeals (Division One) affirmed appellant Tony Penwell's King County judgment and sentence for first degree assault, second degree rape, unlawful imprisonment, felony harassment and witness tampering. CP 46-61. As part of that decision the Court rejected Penwell's pro se claim his offender score was miscalculated because some of his offenses constituted "same criminal conduct", holding that because his trial counsel "affirmatively agreed with the State's calculation of the applicable standard range," review was precluded. CP 58-59. Penwell's petition for

review of the Court of Appeals decision was denied on December 2, 2008. Supp CP __ (sub no. 254, Mandate & Decision in COA No. 55785-8-I, 2/26/09.

On May 17, 2010, the Court of Appeals (Division One) issued an unpublished decision granting a portion of a personal restraint petition filed by Penwell. The Court agreed with Penwell that the sentencing court erred in how it went about imposing lifetime no contact orders with regard to his children. CP 263-64.

In anticipation of the resentencing hearing, Penwell's counsel on remand filed a "Defense Memorandum on Re-Sentencing". CP 75-79. Counsel not only argued against imposition of lifetime no contact orders, but also argued Penwell's offender score should be lower based on a "same criminal conduct" analysis. CP 78-79.

The resentencing was held in King County superior court on May 24, 2012, before the same judge who had originally sentenced Penwell, the Honorable Jim Cayce. Supp CP __ (sub no. 266, State's Memorandum Regarding No Contact Orders Imposed at Sentencing, 5/9/12); RP 1. At that hearing the court refused to consider Penwell's challenge to his offender score, stating it was "untimely." RP 11. The court also stated that even if it were to accept a challenge to the offender score it "would just transfer it up to [the Court of Appeals] anyway to a PRP, so that you

can raise it there." Id. The court then exercised its discretion and re-imposed lifetime no-contact orders as to Penwell's children, with the caveat that his children could initiate contact with Penwell after they turned 18 years of age. CP 65-66, 80-83. Penwell appeals. CP 67-74.

C. ARGUMENT

THE RESENTENCING COURT ERRED BY REFUSING TO CONSIDER PENWELL'S CHALLENGE TO HIS OFFENDER SCORE.

By statute, Penwell was entitled to challenge his offender score upon remand for resentencing. The trial court's conclusion that Penwell's challenge was "untimely" was wrong. This Court should reverse and remand for resentencing.

"The primary purpose of statutory construction is to give effect to the legislature's intent." City of Bellevue v. E. Bellevue Cmty. Council, 138 Wn.2d 937, 944, 983 P.2d 602 (1999). "When a statute is not ambiguous, a court must determine the Legislature's intent by the language of the statute alone." State v. S.M.H., 76 Wn. App. 550, 559, 887 P.2d 903 (1995). The court must then apply the language as written. In re Personal Restraint of Sappenfield, 138 Wn.2d 588, 591, 980 P.2d 1271 (1999). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or

superfluous.” Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

The last sentence of RCW 9.94A.530(2) provides: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented."¹ There is nothing ambiguous about this sentence. It provides that "the parties" are entitled to relitigate the determination of an offender score if appellate review results in remand for resentencing. The prior determination does not control, and it is irrelevant whether the evidence submitted at resentencing was not previously submitted.

¹ This provision was added in 2008 in response to the decisions in In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002), State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) and State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999), which served to limit in some circumstances the prosecution's opportunity to prove criminal history if resentencing was ordered as a result of appellate review. Laws 2008, ch. 231, §§ 1 & 4. The Washington Supreme Court recently held RCW 9.94A.530(2) unconstitutional insofar as it permits a finding of criminal history solely based on a prosecutor's summary and a defendant's failure to object. State v. Hunley, ___ Wn.2d ___, ___ P.3d ___, 2012 WL 5360905 (Slip Op. filed November 1, 2012). The holding in Hunley does not impact the analysis here.

This statutory provision effectively exempts offender score calculations on remand from the "law of the case" doctrine.² See State v. Mendoza, 165 Wn.2d 913, 930, 205 P.3d 113 (2009) (recognizing that RCW 9.94A.530 allows for de novo determination of the offender score upon remand for resentencing following appeal).

Here, appellate review resulted in remand for resentencing. CP 41-73. Yet in direct contradiction of RCW 9.94A.530(2), the trial court refused to allow Penwell to present evidence relevant to his offender score calculation, holding the challenge was "untimely." RP 11. This was error. This Court should therefore reverse and remand for resentencing at which Penwell is afforded his statutory right to present evidence relevant to determination of his correct offender score.

² The "law of the case" doctrine;

generally "refers to 'the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand'" or to "the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case." Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 Lewis H. Orland & Karl B. Tegland, Washington Practice, Judgments § 380, at 55 (4th ed.1986) (footnote omitted)).

State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003).

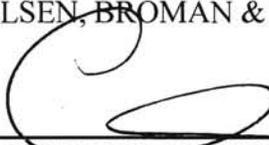
D. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for resentencing.

DATED this 20th day of November 2012.

Respectfully submitted,

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COA NO. 68944-4-1

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 NOVEMBER 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.

[X] TONY PENWELL
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SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF NOVEMBER 2012.

x Patrick Mayovsky

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE