

68944-4

68944-4

NO. 68944-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TONY PENWELL,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

After a successful personal restraint petition, the defendant's case was remanded back to the trial court for the very specific and singular purpose of allowing the trial court to address the propriety of imposing a no-contact order with the defendant's biological children. The defendant now contends, for the first time, that RCW 9.94A.530(2) required the trial court to consider an unrelated "same criminal conduct" offender score argument. Should this Court reject the defendant's strained interpretation of RCW 9.94A.530(2)?

B. STATEMENT OF THE CASE

In November of 2004, the defendant was charged with assault in the first degree, rape in the first degree, unlawful imprisonment, and felony harassment. CP 1-9. The charges were based on the brutal rape and torture of KP, an attack that caused her to lose her unborn child. Id. A charge of tampering with a witness was added later. CP 13-15.

On January 19, 2006, a jury found the defendant guilty of assault in the first degree, rape in the second degree, unlawful imprisonment, felony harassment and tampering with a witness. CP 145-49.

For sentencing, the State calculated the defendant's offender score as a 9 on the assault in the first degree charge (the greatest charge), with a commensurate standard range of 240 to 318 months. CP 17, 121-25. The defendant agreed that this was his correct standard range. CP 58-59, 125. Citing the defendant's "unbelievably prolonged brutal attack" on KP, the court imposed a high-end standard-range sentence of 318 months. CP 21, 137-38. The defendant filed a direct appeal with this Court. CP 44-61.

One of the issues the defendant raised on appeal was a claim that his crimes constituted the "same criminal conduct" for sentencing purposes. CP 58. This Court rejected the defendant's claim, holding that his agreement to the calculation of the applicable standard range precluded appellate review. CP 58-59. A mandate was issued on February 18, 2009. CP 44.

The defendant also filed a personal restraint petition. In his petition, the defendant challenged the propriety of the trial court's imposition of a lifetime no-contact order with his biological children. CP 63. According to the Supreme Court, in order to impose a no-contact order with one's biological children, the sentencing court must engage in an on-the-record balancing of the competing

interests involved, i.e., a parent's right to parent their child, and the State's interest in protecting the child from harm. See In re Rainey, 168 Wn.2d 367, 229 P.3d 686 (2010). Based on Rainey, a decision that came out after the defendant was sentenced, this Court ruled as follows:

Because the record does not reflect the required consideration of the necessity for the [no-contact] orders imposed here...the case must be **remanded for resentencing as to the no contact orders** imposed by the court. The personal restraint petition is accordingly granted as to Penwell's challenge to the no contact provisions of his judgment and sentence and **the case remanded to the trial court for resentencing with respect to those provisions only.**

CP 64 (emphasis added, citations omitted). A mandate was issued on March 18, 2011. CP 62.

On May 24, 2012, the case was returned to the trial court for the very specific and singular purpose of allowing the trial court to address the propriety of issuing no-contact orders with the defendant's biological children--as directed by this court. RP¹ 2-3, 10. In regards to raising other issues before the trial court, defense counsel acknowledged that "I think we're probably bound by the law of the case doctrine." RP 10. Counsel added, "as I read the mandate, we're here only about the no-contact orders." RP 10.

¹ There is a single volume verbatim report of proceedings dated May 24, 2012.

Still, counsel mused whether “the court is willing” to consider a “same criminal conduct” offender score argument. RP 10. The court declined the offer. RP 11. The court issued a single order that addressed the sole issue of the no-contact order. CP 65-65. In conjunction with the order, the court issued findings of fact and conclusions of law supporting the court’s order. CP 80-83.

C. **ARGUMENT**

RCW 9.94A.530(2) DOES NOT REQUIRE THAT A SENTENCING COURT CONSIDER INFORMATION REGARDING A DEFENDANT’S CRIMINAL HISTORY AND STANDARD RANGE UNLESS THE DEFENDANT’S TERM OF CONFINEMENT IS AN ISSUE BEFORE THE COURT.

The defendant contends that under RCW 9.94A.530(2), any time a case is remanded from an appellate court to a trial court in regards to a sentencing issue, the trial court is absolutely required to consider a “same criminal conduct” scoring issue (or any other term of confinement or criminal history issue), if the defendant so request it—regardless of whether confinement or criminal history are issues before the court. This claim should be rejected. It is a strained interpretation of the statute, contrary to the intent of the legislature, and it would lead to absurd results.

A defendant's "standard sentence range" for an offense is determined by the offense's "seriousness score"² and the defendant's "offender score." RCW 9.94A.530. A defendant's offender score is comprised of the sum of the points for prior and other current convictions according to the rules articulated in RCW 9.94A.525. If two current offenses encompass the "same criminal conduct," they count as one point in calculating a defendant's offender score. RCW 9.94A.589(1)(a). Otherwise, one point is added to the offender score for each other current offense.

Crimes are considered the "same criminal conduct," if the trial court determines that the crimes required the same criminal intent, were committed at the same time, the same place, and involved the same victim. RCW 9.94A.589(1)(a); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). A defendant can waive a "same criminal conduct" claim. See In re Shale, 160 Wn.2d 489, 495, 158 P.3d 588 (2007) (waiver is "found where the alleged [sentencing] error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion") (citing In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618

² Although the term "seriousness score" is used in the statute, it is more commonly referred to as the "seriousness level" of an offense.

(2002)).³ Here, this Court previously ruled that the defendant waived any “same criminal conduct” claim. CP 58-59.

Along with the clear waiver that exists here, other procedural bars would normally prevent the trial court, or this court, from considering the defendant’s request. For example, the defendant never asserted before the trial court that under RCW 9.94A.530(2), it was **required** to consider a “same criminal conduct” argument. To the contrary, it is clear that counsel did not believe the issue was properly before the court when counsel asked merely whether the court was willing to consider the issue. RP 10. The failure to raise a specific objection, or to alert the court of an error so that the trial court has a chance to correct the error, constitutes waiver. See e.g. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993) (An objection must be sufficiently specific to inform the trial court

³ In Shale, the defendant was informed when he pled guilty that the State calculated his offender score as a nine. Shale, 160 Wn.2d at 495. Shale argued on appeal that the sentencing court erroneously failed to treat some of his crimes as the “same criminal conduct,” even though he never asked the sentencing court to make this part factual, part discretionary, determination. Id. The Supreme Court rejected Shale’s claim that he could raise a “same criminal conduct” claim for the first time on appeal. Shale, at 495; see also State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000) (cited with approval in Shale, at 494-95, the same criminal conduct inquiry involves factual determinations and the exercise of discretion, and the “failure to identify a factual dispute for the court’s resolution and... [the] failure to request an exercise of the court’s discretion,” waives the challenge to the offender score); and State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (Jackson’s failure to raise a same criminal conduct claim at his sentencing constitutes waiver of the right to appeal), rev. denied, 167 Wn.2d 1007 (2009).

and opposing counsel of the basis for the objection and to thereby give them an opportunity to correct the alleged error); State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985) (A party may only assign error in the appellate court on the specific ground of the objection made at trial. An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review). Thus, this issue is not properly before this Court.

In addition, the “[c]orrecting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed.” In re Goodwin, 146 Wn.2d at 877; see also State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993) (Supreme Court affirms dismissal of appeal where the court of appeals had previously remanded the case to the trial court after dismissing one of two counts of rape, the trial court then imposed the same exceptional sentence with a corrected offender score, and Barberio appealed the sentence); State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) (judgment is final when no appealable issue remains, implying that after a remand and resentencing, a defendant would be able to appeal only on the limited issue

wherein the trial court exercised discretion when imposing the new sentence). The portion of the defendant's sentence regarding his criminal history, offender score and term of confinement were not affected by the remand to determine the propriety of the no-contact order. This portion of the judgment and sentence was thus final, valid and not subject to modification or appeal.

Finally, the trial court was given a specific and clear directive by this Court. The trial court was to address a very specific and singular issue—the propriety of entering a no-contact order with the defendant's biological children. Once an appellate court has ruled on an issue, the court's decision becomes the "law of the case." State v. Strauss, 119 Wn.2d 401, 412, 832 P.2d 78 (1992). The "law of the case" doctrine refers to the "binding effect of determinations made by the appellate court on further proceedings in the trial court on remand." State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). Once the mandate is issued, the trial court is bound by the appellate court's determination. Strauss, 119 Wn.2d at 413. "If a trial court were free to ignore such orders, total chaos would result in the court system." Id.

Despite all of these legal bars to the defendant being able to raise a "same criminal conduct" scoring issue, the defendant

contends that his new interpretation of RCW 9.94A.530(2) trumps all. Specifically, he contends that under RCW 9.94A.530(2), the trial court was absolutely required to consider his “same criminal conduct” scoring argument despite the fact that the defendant’s criminal history, offender score, and term of confinement were not issues before the court. This strained interpretation of the statute is contrary to the legislative intent, and would lead to absurd results.

Statutory interpretation is a pure question of law subject to *de novo* review. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). In interpreting a statutory provision, a court’s primary objective is to ascertain and give effect to the intent and purpose of the legislature in creating the statute. State v. Sullivan, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001). To determine legislative intent, a court looks first to the language of the statute. State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). If the statute is clear on its face, the court must derive its meaning from the plain language of the statute alone. Sullivan, 143 Wn.2d at 176.

But in construing a statute, it is wrong to concentrate solely on the meaning of a word, phrase or sentence in isolation. Davis v. Dep’t of Licensing, 137 Wn.2d 957, 970-71, 977 P.2d 554 (1999).

Rather, the plain meaning of a statute is “discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” State v. Gray, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012). In other words, “the legislative intent must be gleaned from a consideration of the whole act, by giving effect to the entire statute and to every part thereof.” State v. Rinkes, 49 Wn.2d 664, 667, 306 P.2d 205 (1957). After all, the “purpose is to ascertain legislative intent of the statute as a whole.” Davis, at 971 (quoting State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994)). There is one “rule of statutory construction that trumps every other rule--the court should not construe statutory language so as to result in absurd or strained consequences.” Davis v. Dep’t of Licensing, 137 Wn.2d 957, 971, 977 P.2d 554 (1999); State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) (statutes should be construed to effect their purpose—unlikely consequences should be avoided); State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992) (unlikely, absurd, or strained results from a literal reading should be avoided).

The statute in question reads as follows:

9.94A.530. Standard sentence range

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for other adjustments as specified in RCW 9.94A.533 shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. ***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.***

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon

stipulation or when specifically provided for in RCW 9.94A.535(3) (d), (e), (g), and (h).

RCW 9.94A.530 (emphasis added).

The defendant relies on the single highlighted sentence—taken in isolation, to support his argument. However, in doing so, the defendant completely ignores the fact that this entire statutory provision deals singularly and solely with a trial court's determination of a defendant's standard range. Thus, taken in context, the single sentence would apply singularly and solely to cases wherein the trial court has a sentencing range issue before the court.

The sentence in question was added to the statute in 2008 in response to certain decisions by the Supreme Court that limited the State's ability to prove a defendant's criminal history upon remand after the defendant challenged his criminal history on appeal. See 2008 c 231 §§ 2-4. For example, in State v. Lopez,⁴ when the defendant objected to being sentenced as a persistent offender, the prosecutor informed the court that it had the documents in his office that were necessary to prove up the defendant's criminal history but because Lopez had not previously objected, he had not brought

⁴ 147 Wn.2d 515, 55 P.3d 609 (2002).

them with him. The trial court declined to the State's offer to submit the document while at the same time it imposed a persistent offender sentence.

The Supreme Court reversed Lopez's sentence and remanded the case back to the trial court. Despite the fact that the State could prove that Lopez was a persistent offender, the Supreme Court held that the State would not be allowed to prove Lopez's prior criminal history on remand. Lopez, at 523. This provided a clear windfall for Lopez. See also In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005) (State was prevented from proving on remand that one of Cadwallader's "strike offenses" did not wash out).

In each of the cases cited by the legislature when it amended the statute, the defendant's term of confinement was an issue before the trial court on remand and the State was prohibited from proving the defendant's true and accurate criminal history. The correction of this problem was the stated purpose of the legislature in amending the statute. See 2008 c 231 §§ 2-4. To require a trial court to consider frivolous issues or issues not before the court would be contrary to the legislative intent, inconsistent and a strained reading of the full wording of the statute, and would

lead to absurd results. After all, under the defendant's interpretation of the statute, if a case got remanded for the trial court to cross a "t" or dot an "i" in the judgment and sentence, a defendant could require the trial court to consider *ad nauseam* sentencing issues related to criminal history that may be frivolous, already decided, and the issue raised despite case law and court rule prohibitions.

Finally, even under the defendant's interpretation of the statute, his argument fails. The rule allows the parties to "present and the court to consider all relevant **evidence regarding criminal history.**" RCW 9.94A.530(2) (emphasis added). The defendant did not attempt to introduce any new evidence before the trial court. Rather, he wanted the trial court to consider a specific issue—a "same criminal conduct" issue. The rule specifically provides that it allows for the introduction of "relevant evidence regarding criminal history." In other words, the sentence of the statute the defendant relies, is a rule of evidence, not a rule that requires the trial court to consider certain issues.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's sentence.

DATED this 9 day of January, 2013.

Respectfully submitted,

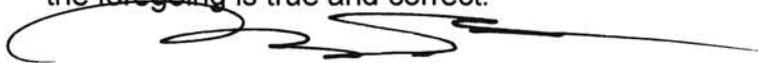
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. PENWELL, Cause No. 68944-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington

01-09-13

Date