

70536-9 REC'D

DEC 16 2013

King County Prosecutor
Appellate Unit

70536-9

NO. 70536-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALVIN BURNS,

Appellant.

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

The Honorable Monica J. Benton, Judge



BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
THE TRIAL COURT SENTENCED BURNS BASED ON A MISCALCULATED OFFENDER SCORE.....	2
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Detention of Hawkins</u> 169 Wn.2d 796, 238 P.3d 1175 (2010).....	7
<u>In re Personal Restraint of Higgins</u> 120 Wn. App. 159, 83 P.3d 1054 (2004).....	4
<u>In re Personal Restraint of Tobin</u> 165 Wn.2d 172, 196 P.3d 670 (2008).....	3
<u>State v. Breazeale</u> 144 Wn.2d 829, 31 P.3d 1155 (2001).....	7
<u>State v. Burns</u> 174 Wn. App. 1004 (2013).....	1
<u>State v. Coucil</u> 170 Wn.2d 704, 245 P.3d 222 (2010).....	7
<u>State v. Crawford</u> 164 Wn. App. 617, 267 P.3d 365 (2011).....	5
<u>State v. Delgado</u> 148 Wn.2d 723, 63 P.3d 792 (2003).....	5, 6
<u>State v. Ervin</u> 169 Wn.2d 815, 239 P.3d 354 (2010).....	4, 6
<u>State v. George</u> 160 Wn.2d 727, 158 P.3d 1169 (2007).....	7
<u>State v. Gray</u> 174 Wn.2d 920, 280 P.3d 1110 (2012).....	7
<u>State v. Jones</u> 172 Wn.2d 236, 257 P.3d 616 (2011).....	5

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Kelley</u> 77 Wn. App. 66, 889 P.2d 940 (1995).....	7
<u>State v. Kintz</u> 169 Wn.2d 537, 238 P.3d 470 (2010).....	5
<u>State v. Pacheco</u> 70 Wn. App. 27, 851 P.2d 734 (1993) <u>reversed in part on other grounds</u> , 125 Wn.2d 150 (1994)	3
<u>State v. Smith</u> 65 Wn. App. 887, 830 P.2d 379 (1992).....	8

RULES, STATUTES AND OTHER AUTHORITIES

13B Seth A. Fine & Douglas J. Ende Washington Practice: Criminal Law § 3505 (2013-2014 ed.)	7
Chapter 9.94A RCW	8
Former RCW 9.94A.360(2) (1994)	6
Laws 1995, Ch. 316, § 1	4
RCW 9.94A.345	8
RCW 9.94A.505	3
RCW 9.94A.525	3, 4, 5, 7, 8
RCW 69.50.407	3
Sentencing Reform Act.....	8

A. ASSIGNMENT OF ERROR

The trial court resentenced the appellant, Alvin Burns, based on a miscalculated offender score.

Issue Pertaining to Assignment of Error

The trial court concluded Burns' five-year wash out period for a 2004 drug conviction was reset to February 8, 2005, when Burns pleaded guilty to committing the misdemeanor of contributing to the delinquency of a minor on January 7, 2005. Did the trial court err by concluding the period started on the date of conviction rather than the date the crime was committed?

B. STATEMENT OF THE CASE

A King County Superior Court judge sentenced Alvin Burns on July 8, 2011 to a 60-month standard range sentence for possession of cocaine with intent to deliver. The court calculated Burns' offender score as 8. CP 4-13. Burns appealed, and this Court accepted the State's concession the correct offender score was 7. The lower score did not, however, affect Burns' standard range. This Court remanded for correction of the miscalculated offender score. State v. Burns, 174 Wn. App. 1004 (2013).

At the resentencing hearing, Burns contended his most recent prior class C felony conviction, for which he was sentenced May 6, 2004, should wash out. RP 6-8, 11-12. The trial court disagreed, finding a 2005 municipal court conviction reset the five-year clock running for the 2004 conviction. RP 12-13. The court entered the same 60-month sentence, but with a recalculated offender score of 7. CP 26-34; RP 13-14. Burns appealed. 36-46.

C. ARGUMENT

THE TRIAL COURT SENTENCED BURNS BASED ON A MISCALCULATED OFFENDER SCORE.

The trial court found the date of Burns' municipal court *conviction*, rather than the date he *committed* the offense, was the reset starting date for the five-year clock to begin ticking in 2005. This was error. It is the date of the commission of the offense, rather than the date of conviction, that triggers the clock. This error was critical to Burns and requires this Court to again reverse and remand for resentencing.

At the resentencing hearing, the State presented a packet of certified court documents, including a municipal court docket documenting the actions taken in January and February 2005. Supp. CP __ (sub. no. 100, Documents Considered at Sentencing, filed 8/28/13).

Through those documents, the State established Burns pleaded guilty to, and was sentenced for, conspiracy to deliver cocaine on May 6, 2004.

Conspiracy to deliver cocaine is an unranked felony. RCW 9.94A.505(2)(b); RCW 69.50.407; State v. Pacheco, 70 Wn. App. 27, 44, 851 P.2d 734 (1993) reversed in part on other grounds, 125 Wn.2d 150 (1994). For offender score purposes, the crime is considered a class C felony. See In re Personal Restraint of Tobin, 165 Wn.2d 172, 175, 196 P.3d 670 (2008) (defendant's wildlife convictions were properly included in his offender score because, although they were unranked, they were class C felonies).

RCW 9.94A.525(2)(c) governs the wash out of prior class C felony convictions. It provides:

[C]lass C prior felony convictions . . . shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without *committing any crime that subsequently results in a conviction*.

(Emphasis added). "Any crime" includes a misdemeanor crime. See In re Personal Restraint of Higgins, 120 Wn. App. 159, 164, 83 P.3d 1054

(2004) ("Under the 1995 amendment [to RCW 9.94A.525], misdemeanors as well as felony convictions interrupt the five-year wash-out period.").¹

Burns committed a misdemeanor, contributing to the delinquency of a minor, on January 7, 2005. Supp. CP __ (municipal court certified docket). The offense became a conviction when he pleaded guilty February 8, 2005. Id. Commission of this misdemeanor "reset" the commencement of the five-year clock because it interrupted the original clock that began ticking upon Burns' release from confinement for the 2004 class C felony.

State v. Ervin makes this clear:

In this case, the parties agree that the trigger date occurred sometime in 1994 or 1995 when Ervin was released from confinement pursuant to his 1994 felony conviction. Less than five years after his release, Ervin committed misdemeanor criminal trespass on April 15, 1999. Because Ervin was then convicted, this crime implicated the continuity/interruption clause, effectively resetting the five-year clock.

169 Wn.2d 815, 821, 239 P.3d 354 (2010).

The controlling question here is whether the reset five-year clock began to tick on the date Burns committed the misdemeanor or on the date

¹ In 1995, the Legislature amended the washout provision, which formerly read, in pertinent part, "the offender had spent five consecutive years in the community without being convicted of any felonies[.]" Laws 1995, Ch. 316, § 1.

he was convicted of the offense. Burns did not commit another crime until January 13, 2010, when he committed possession of cocaine with intent to deliver. CP 26.

The trial court held the reset clock began to tick on February 8, 2005 because Burns was convicted on that date. 1RP 11. Therefore, Burns interrupted the soon-to-expire five-year wash out period.

The trial court misinterpreted the wash out statute, which is facially clear. If a statute's meaning is plain on its face, courts give effect to that meaning. State v. Jones, 172 Wn.2d 236, 242, 257 P.3d 616, 619 (2011). Plain meaning is derived from reviewing the language of the text according to its ordinary meaning, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010); State v. Crawford, 164 Wn. App. 617, 622, 267 P.3d 365 (2011). Courts may not "add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

The operative phrase in Burns' case is the concluding phrase of RCW 9.94A.525(2)(c): "without committing any crime that subsequently results in a conviction." This language plainly indicates the correct trigger

date is the date of the commission of the later crime. Had the legislature wanted it otherwise, it could have used the phrase "being convicted of any crime." See former RCW 9.94A.360(2) (1994) (wash out occurs where "the offender had spent five consecutive years in the community without being convicted of any felonies."); Delgado, 148 Wn.2d at 727 (courts assume the legislature means precisely what it says).

Stated simply and in the words of the statute, the original clock begins to tick on "the last date of release from confinement" or "entry of judgment and sentence" if no confinement results. The reset clock begins on the date an offender commits "any crime that subsequently results in a conviction."

Burns has found no case directly on point. Although the court ultimately addressed a different issue in Ervin, the above-quoted portion of the opinion supports Burns' reading by specifying the date Ervin *committed* misdemeanor criminal trespass -- April 15, 1999 -- without specifying the date Ervin was later *convicted* of the offense.

Burns' position also finds the support of an oft-cited Washington commentator. The commentator noted the 1995 addition of the "any crime" language "should lead to a different result, i.e., whether a prior conviction washes out should be determined as of the date of commission

of the current offense." 13B Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 3505 (2013-2014 ed.).

If this Court disagrees that RCW 9.94A.525(2)(c) is clear, statutory interpretation is required. This Court reviews de novo questions of statutory interpretation. State v. Breazeale, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001). The goal is to determine and foster the legislature's intent. State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012).

If the statute can be reasonably interpreted in two or more ways, it is ambiguous and a court must use additional tools of statutory construction to determine its meaning. In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). Courts must construe an act as a whole, considering all provisions in relation to each other and harmonizing them rather than rendering any superfluous. State v. George, 160 Wn.2d 727, 738, 158 P.3d 1169 (2007). "Every word, clause, and sentence of a statute should be given effect, if possible." State v. Kelley, 77 Wn. App. 66, 72, 889 P.2d 940 (1995). Finally, absent legislative intent to the contrary, the rule of lenity requires a court to interpret an ambiguous statute in favor of the defendant. State v. Coucil, 170 Wn.2d 704, 706-07, 245 P.3d 222 (2010).

The "act" to be construed is the Sentencing Reform Act, chapter 9.94A RCW. Burns' reading of RCW 9.94A.525(2)(c) is consistent with RCW 9.94A.345, which provides, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."

Further, a conclusion that the reset clock does not start until the date of conviction ignores the language "without committing any crime that subsequently results in a conviction." The wash out period cannot, of course, be interrupted by commission of an offense that does not result in conviction. State v. Smith, 65 Wn. App. 887, 893, 830 P.2d 379 (1992). The legislature's choice of words prevents that from happening, which would be an absurd result. The language indicates that upon conviction, the reset clock is calculated to have started on the date the crime is committed.

This is the reasonable interpretation of the statute. The trial court's contrary interpretation is erroneous. This Court should reverse the trial court's judgment and sentence and conclude Burns' 2004 conviction for conspiracy to deliver cocaine washes out. The cause should be remanded for recalculation of the offender score and resentencing.

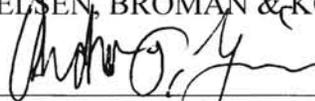
D. CONCLUSION

For the aforesaid reasons, this Court should find Burns' 2004 conviction washes, reverse his judgment and sentence, and remand for recalculation of his offender score.

DATED this 16 day of December, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70536-9-I
)	
ALVIN BURNS,)	
)	
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 16TH DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALVIN BURNS
DOC NO. 980694
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF DECEMBER 2013.

X *Patrick Mayovsky*

RECEIVED
DEC 16 2013
11:34 AM