

72329-4

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NO. 72329-4-I

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

STATE OF WASHINGTON,

Appellant,

v.

DAVID R. ROSS,

Respondent.

2011 DEC -03 11:11:53
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
8

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the following order:

Both definitions of domestic violence in RCW 10.99.020(5) and RCW 26.50.101(1) need to be met for a finding that an offense is a domestic violence offense. Therefore 4 of Mr. Ross' prior VNCO misdemeanor offenses do not count as points towards his offender score on this cause # per RCW 9.94A.525(21) and RCW 9.94A.030(20).

"And" is not the same as "or." Statute must be read in conjunctive.

CP 192-93 (court's emphasis).

2. The trial court erred in determining that the defendant's offender score was 3.

3. The trial court erred in determining that the defendant's standard sentence range was 15-20 months.

4. The trial court erred in sentencing the defendant under the residential chemical dependency treatment-based alternative, based on the court's incorrect computation of the standard range.

II. ISSUE

When an offender is sentenced for the felony of violating a court order (domestic violence), do prior gross misdemeanor convictions for that offense count towards the offender score?

III. STATEMENT OF THE CASE

The defendant (respondent), pleaded guilty to violation of a court order. This crime was a felony because the defendant had two prior convictions for the same crime. The information also alleged that the victim was a family or household member. CP 190. In his plea statement, the defendant admitted these allegations. CP 176.

The defendant agreed that the court could review the Affidavit of Probable Cause to establish a factual basis for the plea. CP 175. According to that Affidavit, on January 14, 2014, police responded to a report of two people fighting in the parking lot of the Big Lots store on Evergreen Way in Everett. When they arrived, Catrina Parker reported that the defendant had just assaulted her. This was confirmed by independent witnesses. At the time, there was a no-contact order in effect, with Ms. Parker as the protected party and the defendant as the respondent. CP 186-87.

At sentencing, the parties agreed on three convictions that counted towards the offender score: current convictions for possession of a controlled substance and second degree identity theft, and a prior conviction for domestic violence assault. CP 136. The State also presented documents showing four prior convictions

for violating a protection order or no contact order. CP 51-108; ex. 1-4. The court found that these convictions existed. CP 16-17.

The court determined, however, that these convictions did not count towards the offender score. CP 192-93; Sent. RP 12. The court therefore imposed sentence using an offender score of 3 (for the prior assault and the two other current offenses). This led to a standard sentence range of 15-20 months. CP 17.

The court imposed sentence under the residential chemical dependency treatment-based alternative. This alternative involved no jail time. Rather, the defendant was sentenced to 24 months community custody, with 3-6 months of residential chemical dependency treatment. CP 18-19. The State has appealed from this sentence. CP 1.

IV. ARGUMENT

IN IMPOSING SENTENCE FOR A DOMESTIC VIOLENCE OFFENSE, PRIOR CONVICTIONS FOR CRIMES AGAINST FAMILY OR HOUSEHOLD MEMBERS COUNT TOWARDS THE OFFENDER SCORE.

The issue in this case involves computation of the defendant's offender score. "Offender score computations are reviewed de novo." State v. Rowland, 97 Wn. App. 301, 304, 983 P.2d 696 (1999). The relevant scoring rule is set out in RCW 9.94A.525(21):

If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead [sic] and proven, ... count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: [various felony domestic violence offenses];

(b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011.

Subsection (21)(c) incorporates the definition set out in RCW

9.94A.030(41):

(41) "Repetitive domestic violence offense" means any:

(a)(i) Domestic violence assault that is not a felony offense under RCW 9A.36.041;

(ii) Domestic violence violation of a no contact order under chapter 10.99 RCW that is not a felony offense;

(iii) Domestic violence violation of a protection order under chapter 26.09, 26.10, 26.26, or 26.50 RCW that is not a felony offense;

(iv) Domestic violence harassment offense under RCW 9A.46.020 that is not a felony offense; or

(v) Domestic violence stalking offense under RCW 9A.46.110 that is not a felony offense...

Here, the prior convictions were for domestic violence violations of protection orders and domestic violence violation of no contact orders. Such convictions are “repetitive domestic violence offenses” as defined in RCW 9.94A.030(41)(a)(ii) and (iii). This is not, however, enough for them to count towards the offender score under RCW 9.94A.525(21)(c). The State must also establish that “domestic violence as defined in RCW 9.94A.030 was plead[ed] and proven.”

The court must therefore look to the definition of “domestic violence” in RCW 9.94A.030(20): “‘Domestic violence’ has the same meaning as defined in RCW 10.99.020 and 26.50.010.” Those statutes set out two different definitions of “domestic violence.” RCW 10.99.020(5) contains the following definition:

“Domestic violence” includes but is not limited to any of the following crimes when committed by one family or household member against another:

...

(r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location

(RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145). . .

The prior convictions at issue here were for violations of the provisions of no-contact orders or protection orders. The State pleaded and proved that these crimes were committed by one family or household member against another. Ex. 1-4. These crimes therefore involved “domestic violence” as defined in RCW 10.99.020(5).

In contrast, RCW 26.50.010(1) sets out a different definition:

“Domestic violence” means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

In the present case, there was no showing that the prior convictions for violations of court orders involved physical harm or the threat of such harm. Consequently, these convictions did not involve “domestic violence” as defined in RCW 26.50.010(1). According to the trial court, this prevented them from being counted towards the offender score under RCW 9.94A.525(21)(c). The court ruled that to qualify as a “domestic violence” offense, a prior conviction must satisfy the definitions of “domestic violence” in *both*

RCW 10.99.020(5) and RCW 26.50.010(1). CP 192-93; Sent. RP 12.

After the sentencing in this case, Division Two addressed an identical issue in State v. Kozey, ___ Wn. App. ___, 334 P.3d 1170 (2014), petition for review filed, no. 90892-3 (10/14/14). The court pointed out that although “and” is presumptively conjunctive, the word “must sometimes be given disjunctive force to preserve legislative intent.” Id. at 1173 ¶ 16. A proper construction of RCW 9.94A.030(20) requires a disjunctive interpretation:

RCW 9.94A.030(20) does not state that conduct must meet the requirements of both RCW 10.99.020 and RCW 26.50.010 to count as domestic violence. Rather, it states domestic violence “has the same meaning as defined in RCW 10.99.020 and 26.50.010.”

RCW 10.99.020 sets out a nonexclusive list of specific crimes the legislature has deemed to be domestic violence when committed by one family or household member against another. RCW 26.50.010 eschews a specific list of crimes and instead sets out the types of acts the legislature has determined generally constitute domestic violence when perpetrated by one family member against another. With these differing conceptual approaches, there is no “same meaning” shared by both RCW 10.99.020 and RCW 26.50.010. Instead, RCW 9.94A.030(20) most logically reads as using RCW 10.99.020 to set out per se crimes of domestic violence and RCW 26.50.010 to define when a crime otherwise omitted from the nonexclusive list is nonetheless also deemed to involve domestic violence. For example, RCW

10.99.020 omits crimes such as third degree rape and child molestation, which would fall under the definition of "domestic violence" in RCW 26.50.010. Reading RCW 9.94A.030(20) to require conduct simultaneously to meet both RCW 10.99.020 and RCW 26.50.010 in order to constitute domestic violence for sentence enhancement purposes would forfeit this logic.

Kozey, 334 P.3d at 1173-74 ¶¶ 17-18 (citation omitted).

Moreover, a conjunctive reading would render superfluous the reference to RCW 10.99.020. "If the conjunctive reading of RCW 9.94A.030(20) were correct, then the list of crimes found in RCW 10.99.020 would have meaning only where the offender commits an act encompassed by RCW 26.50.010." Kozey, 334 P.3d at 1174 ¶ 20.

The reasoning of Kozey is sound and should be adopted by this court. Under that reasoning, the trial court erred in excluding the defendant's prior convictions from the offenders score. With these convictions included, the offender score would be 7 instead of 3. With a score of 7, the standard sentence range is 51-60 month, rather than the 15-20 months used by the trial court. (The range cannot go above the statutory maximum of 60 months.)

This increased offender score renders the trial court's sentence illegal. The court sentenced the defendant under the

residential chemical-dependency treatment alternative. For a defendant to be eligible for that alternative, the midpoint of his standard range must be 24 months or less. RCW 9.94A.660(3). The trial court computed the standard range as 15-20 months, which would satisfy this requirement. If, however, the sentence range is actually 51-60 months, the midpoint is far in excess of 24 months. With a correct offender score, the defendant was not eligible for sentencing under the residential treatment alternative.

The trial court erred in excluding prior convictions from the offender score. The case should therefore be remanded for re-sentencing. The court should re-determine the offender score and impose a valid sentence based on that score.

V. CONCLUSION

The sentence should be reversed and the case remanded for re-sentencing.

Respectfully submitted on December 5, 2014.

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