

NO. 34322-3-II

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

STATE OF WASHINGTON,
Respondent,

v.

JESSE WILLIAM HARFORD,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

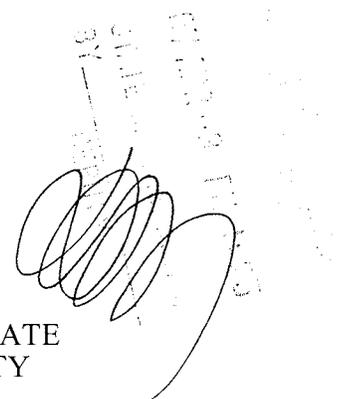
THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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ISSUES PRESENTED

1. Whether the offender score was correctly calculated.
2. Whether the State's inclusion of the defendant's new convictions in the offender score at sentencing was proper.
3. Whether defense counsel understood why the defendant's DUI convictions were included in the offender score.

STATEMENT OF THE CASE

The defendant, Harford, was charged by Information with one count of Attempting to Elude a Pursuing Police Vehicle on November 29, 2004. CP 1-2. The State prepared a Plea Agreement on November 30, 2004. CP 14-17. The Plea Agreement indicated Harford had an offender score of 6 based upon six prior convictions, Rape 3 in 1991, Unlawful Imprisonment in 1991, Driving Under the Influence in 1993, Theft 1 in 1999, Burglary 2 in 1999 and Failure to Register in 1999. CP 14-17. Based upon this offender score the Standard Range was 12+1 to 14 months. CP 14-17. The Plea Agreement offered that if Harford pled guilty to the charge of Attempting To Elude a Pursuing Police Vehicle, the state would agree not to file charges for Assault in the Second or Third Degree arising out of this incident, and recommend 12 months +1 day to run concurrent with time in Thurston County. CP 14-17. The agreement did not indicate a specific Thurston County case.

Harford entered a plea of guilty on July 25, 2005. CP 8-13. At the

entry of the plea of guilty Harford told the court he had no problems reading or writing, he had read the statement of defendant on plea of guilty, he understood everything in it, had the opportunity to carefully review it with his attorney, had no additional questions, read and understood his rights and that he lost those rights with entry of his plea of guilty and that entry of the plea was his own free and voluntary decision. RP 2-4. The statement of defendant on plea of guilty referenced the attached plea agreement in which the defendant agreed to the statement of criminal history in the plea agreement. CP 14-17.

Harford failed to appear for sentencing on August 29, 2005 and a Bench Warrant was issued. RP 7-8. Harford was sentenced for Failure to Register as a Sex Offender, Tampering with a Witness and Driving Under the Influence in Thurston County in November, 2005. Harford was arrested in this case and appeared before the court for sentencing on December 5, 2005. RP 9.

At sentencing the State indicated that due to the defendant's two new felony convictions and one Driving Under the Influence conviction, his offender score was now 9. RP 9, ln. 22-24; 10, ln. 20-2. Due to these new convictions, which increased the standard range to 22-29 months, the state recommended 25 months be imposed and that the time run concurrent with time imposed in Thurston County. RP 10, ln. 1, 25. Defense counsel and the prosecutor had a discussion off the record regarding the offender score, reviewed the defendant's criminal history,

and the defense counsel then told the court they agreed with the offender score of 9 and agreed with the State's recommendation of 25 months to run concurrent with the time in Thurston County. RP 11, ln. 4-14.

Defendant was sentenced to 22 months to run consecutive with the time ordered in Thurston County. CP 25-31. The defendant filed a Motion to Withdraw his Guilty Plea on December 28, 2005, the motion was denied. The defendant filed his notice of appeal in this case on December 30, 2005. CP 33-34.

ARGUMENT

1. The offender score used at sentencing was correct.

RCW 9.94A.525(1) states that “[a] prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed.” RCW 9.94.525(11) states that

[i]f the present offense is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.502(2), count one point for each adult and 1/2 for each juvenile prior conviction.

In this case, the offender score was calculated at 6 in the Plea Agreement and, increased to 9 on the date of sentencing. This increase was due to intervening convictions received by the defendant after entering his plea of guilty in this case and before the date of sentencing.

RP 9, ln. 16-20. The Plea Agreement, dated November 30, 2004, and the Statement of Prosecutor, filed August 26, 2005, each showed an offender score of 6, which was correct at the time each document was prepared. Harford pled guilty to Attempting To Elude a Pursuing Police Vehicle, a felony traffic offense on July 25, 2005. CP 8-13, RCW 9.94A.030(24)(a). At the time of his plea Harford had five previous felony convictions, these were counted as one point each. CP 14-17, Appendix A. Harford also had one prior Driving Under the Influence conviction, a serious traffic offense, from 1993 which counted as one point. CP 14-17, RCW 9.94A.030(40)(a). On November 15, 2005, Harford received three new convictions in Thurston County under Cause Number 05-1-897-4. RP 9, ln. 23-25; 10, ln. 8-10; 12, ln. 4-5, 8-11, 16-22; Appendix A.

Harford's 1991 Unlawful Imprisonment conviction does not wash out. RCW 9.94A.525(2) provides

[c]lass C prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) 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.

Harford was sentenced on the Unlawful Imprisonment charge in 1991; however, he was convicted of Driving Under the Influence and sentenced in 1993, less than five years later. Appendix A.

Harford's 1993 Driving Under the Influence conviction does not wash out and his 1991 Unlawful Imprisonment conviction does not

subsequently wash out. RCW 9.94A.525(2) states

[s]erious traffic offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently resulted in a conviction.

The defendant was sentenced for Driving Under the Influence in 1993. The defendant's next felony offense was for Failure To Register as a Sex Offender, occurring in June, 1999. Appendix A. The Plea Agreement's Statement of the Defendant's Criminal History states "*convictions do not wash out due to intervening misdemeanor convictions". CP 14-17. This statement applies to convictions listed on the criminal history which would otherwise "wash out" due to their age. Any convictions which "wash out" are not included in the Criminal History. These intervening misdemeanor convictions are not listed on the Plea Agreement, Statement of Prosecutor or Judgment and Sentence. During the six years between the 1993 Driving Under the Influence conviction and the subsequent felony conviction, Harford was convicted of 11 misdemeanors. Appendix A. As is indicated in the transcript of the sentencing proceedings, this criminal history was reviewed by defense counsel, Mr. Woodrow, at sentencing and prior to his statement to the court that he agreed that the offender score was 9. RP 11, ln. 6-8. Therefore, these 1991 and 1993 convictions were properly included and Harford's offender score was 6 at the time he pled guilty.

At sentencing Harford's offender score increased from 6 to 9 due to his new convictions. Harford was sentenced on November 15, 2005 to two felony charges in Thurston County, neither of these was a charge of Attempting to Elude a Pursuing Police Vehicle. Appendix A. He was also sentenced on November 15, 2005, in the same cause number as the two felonies, to one count of Driving Under the Influence. Appendix A. Pursuant to RCW 9.94A.525(1) and (11) and 9.94A.030, inclusion of these three convictions in Harford's offender score in this case was proper. Two felonies and one Driving Under the Influence conviction clearly are to be included in the offender score for a conviction for Attempting to Elude a Pursuing Police Vehicle. RCW 9.94A.525(11). These convictions existed before the date of sentencing for the offense for which the offender score was computed as required by RCW 9.94A.525(1).

Harford's criminal history supports the court's acceptance of the agreed offender score of 6 on the date of the plea (July 25, 2005) and 9 on the date of sentencing (December 5, 2005) as the intervening misdemeanor convictions prevented "wash out" of the 1991 Unlawful Imprisonment and 1993 Driving Under the Influence convictions. If this Court finds that the record is incomplete regarding the intervening misdemeanor convictions or subsequent felony and DUI convictions, the State respectfully requests this Court remand this matter for a sentencing hearing where the State will be required to prove each of the defendants' prior convictions.

2. The increased offender score used at sentencing was proper.

The defendant argues he is entitled to withdraw his guilty plea due to his detrimental reliance on the criminal history and accompanying sentencing recommendation in the Plea Agreement. “When a guilty plea is based on misinformation, including a miscalculated offender score that resulted in an incorrect higher standard range, the defendant may move to withdraw the plea based on involuntariness.” State v. Mendoza, 157 Wash.2d 582, 592, 141 P.3d 49 (2006). The defendant may move to withdraw his guilty plea on the basis of involuntariness even if the miscalculated offender score results in a lower sentencing range.

This case is unlike those where the State miscalculated the offender score included within the plea agreement. The offender score within the plea agreement was correct and the later increase in the offender score was within the terms of the plea agreement. Thus, there is no support for the claim that the defendant’s plea was involuntary and the State did not breach the Plea Agreement when it increased the offender score at sentencing due to the defendant’s new criminal convictions.

This contract, the Plea Agreement, contains qualifications upon which the offer is extended. CP 14-17. Section 1.11 of the plea agreement states, in bold, directly above the area where the defendant signed the plea agreement, **“The State’s recommendation will increase in severity if additional criminal convictions are found which were not known to the State or disclosed by the defendant prior to the plea of**

guilty, or if the defendant commits any new crime, fails to appear for sentencing or violates the conditions of release.” RP 14-17. After entering his plea of guilty in this case, Harford failed to appear for sentencing and then received additional convictions before reappearing for sentencing. RP 9, ln. 16-20. Thus, the increased offender score was anticipated by the terms of the plea agreement and these terms were accepted by Harford when he entered his plea. RP 14-17. There can be no detrimental reliance by Harford allowing withdrawal of his plea or specific performance for involuntariness of the plea due to detrimental reliance on the Plea Agreement because the State adhered to the terms of the Plea Agreement and the information within the Plea Agreement was accurate.

The offender score in the Plea Agreement was correctly stated as 6 with a recommendation at the bottom of the standard 12 + 1 to 14 month range. CP 14-17. The additional three points in the sentencing offender score occurred because the defendant received three new convictions (two felonies and one DUI) between the time he pled guilty in this case and was sentenced in this case. Appendix A. The State’s recommendation at the time of sentencing was 25 months. This recommendation was within the 22 - 29 month standard range due to his higher offender score. The offender score at the time of sentencing was 9, this score includes one point for each prior felony conviction, at the time of sentencing, and one point each for the two Driving Under the Influence convictions at the time of sentencing . CP 25-31. The Plea Agreement did not contain a

miscalculated offender score and the State therefore respectfully requests this Court affirm the denial of Appellant's Motion to Withdraw Guilty Plea due to detrimental reliance.

3. Defense Counsel understood why the defendants' DUI convictions were included in his offender score and such inclusion was proper.

To show ineffective assistance of counsel, an appellant must show that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. Denied 523 U.S. 1008 (1998). The defendant is prejudiced only if but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). On review, the court gives great deference to counsel's performance and begin with a strong presumption that counsel was effective. Strickland v. Washington, 466, U.S. 668, 689-90, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Appellant argues that counsel, Mr. Woodrow, was ineffective because he was unable to "explain the effect of a DUI on the offender score". Respondent's Brief 6. This is an unfair analysis of Mr. Woodrow's performance. While not the most eloquent statement of the

law, Mr. Woodrow's statement to the court regarding Harford's confusion is not so poorly made as to establish deficient performance.

At sentencing the prosecutor, Ms. Vingo, told the court that the defendant's offender score was 9 due to new convictions and that this score included two DUI's. RP 9, ln. 23-24. Mr. Woodrow then addressed the court and indicated that there were two additional felony convictions which he understood to increase the original offender score of 6 to an 8. RP 10, ln. 8-12. Ms. Vingo then indicated she believed Mr. Woodrow to be correct and asked the court to re-call the matter. RP 10, ln 13-15. When the matter was recalled Ms. Vingo told the court that the offender score was 9. RP 10, ln. 21-22. Mr. Woodrow then told the court that he had reviewed Mr. Harford's criminal history and that they were in agreement that the offender score was 9. RP 11, ln 6-8. Mr. Woodrow went on to tell the court "Mr. Harford was also confused with his offender score in Thurston County where the DUI's aren't counted over there. So, he has two DUI's here, which elevates him two additional points. So, we are in agreement with that." RP 11, ln. 8-11.

From this statement Appellant argues that "Counsel did not seem to be aware that the DUI's are counted, no matter what county in the state, for certain charges, such as the crime Harford pleaded guilty to in this matter." Respondent's Brief 6. This is an extreme interpretation of Mr. Woodrow's statement. Mr. Harford had just been sentenced in Thurston County to two felonies, neither of which was an eluding charge, and

neither of which would include DUI's in his offender score. Appendix A. It seems most likely that this is what caused Mr. Harford's confusion when he heard that his offender score was "two additional points" higher in this case than in his recently sentenced Thurston County case. RP 11, ln. 10-11. This does not mean Mr. Woodrow was unaware of why the DUIs were included in the offender score and, in fact, his statement to the court indicates he understood why this offender score was different from the one in Thurston County because the charges in Thurston County were not eluding charges and had discussed this difference with his client prior to agreeing to the offender score.

Appellant asks this court to remand this matter for Harford to decide whether to withdraw his guilty plea or seek specific performance due to a mistake in calculating his sentencing range and his counsel's ineffective assistance in not realizing the error. Appellant argues that the defendant did not realize his DUI was included in his offender score. There was no error in calculating the defendant's offender score and the DUI used in calculating the offender score was listed in the plea agreement. CP 14-17. The 2005 Driving Under the Influence conviction was listed in the Judgement and Sentence. CP 25-31. Mr. Woodrow's statement to the court at sentencing further indicates that Harford directly discussed the inclusion of the Driving Under the Influence convictions with his attorney at sentencing. Harford's own assertion in his Affidavit in Support of Motion to Withdraw Guilty Plea again confirms he was aware

his Driving Under the Influence convictions were included in his offender score because Harford himself argued to the court in this document that their inclusion was incorrect because they were not felonies. CP 35-37.

Appellant has presented insufficient evidence to establish that Mr. Woodrow's performance was deficient under an objective standard of reasonableness. Stenson, 132 Wn.2d 668. The record before this Court certainly does not overcome the strong presumption counsel was effective. Strickland, 466 U.S. 668. Mr. Woodrow's statement to the court indicates that he directly addressed with his client why the offender score included his Driving Under the Influence convictions and, based upon his agreement with the criminal history after reviewing the defendant's criminal history, understood why these charges were included in the offender score and properly did not object to their inclusion.

CONCLUSION

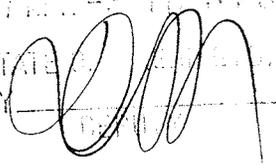
The State respectfully requests that this court affirm the sentence imposed by the court below or, in the alternative, remand this matter for a sentencing hearing for the state to prove the defendant's prior convictions. Harford's prior convictions in 1991 and 1993 did not "wash out" because Harford has 11 intervening misdemeanor convictions. There is no detrimental reliance as the increased offender score, sentencing range and recommendation were within the terms of the Plea Agreement due to Harford's new convictions after pleading guilty and before the date of

| CONVICTION | DATE OF SENTENCE | SENTENCING COURT | DATE OF CRIME | ADULT OR JUV. | TYPE OF CRIME |
|--|------------------|-----------------------------|---------------|---------------|---------------|
| RAPE 3 91-1-259-6 | 1991 | THURSTON COUNTY, WA | 1991 | A | F |
| UNLAWFUL IMPRISONMENT 91-1-259-6 | 1991 | THURSTON COUNTY, WA | 1991 | A | F |
| DUI 148734 | 1993 | THURSTON COUNTY, WA | 07/11/1993 | A | GM |
| DWLS 3 38181 | case archived | TUMWATER, WA | 07/22/93 | A | M |
| DWLS 3 76419 | case archived | THURSTON COUNTY, WA | 10/8/1993 | A | M |
| FAILURE TO REGISTER AS A SEX OFFENDER 72686 | case archived | THURSTON COUNTY, WA | 10/24/1994 | A | GM |
| DWLS 3 C228 | case archived | THURSTON COUNTY, WA | 02/22/1995 | A | M |
| POSSESSION OF MARIJUANA C229 | case archived | THURSTON COUNTY, WA | 02/22/1995 | A | M |
| DWLS 3 CR170294 | case archived | OLYMPIA MUNICIPAL COURT, WA | 11/12/1995 | A | M |
| ASSAULT (DV) CR176251 | case archived | OLYMPIA MUNICIPAL COURT, WA | 07/07/1998 | A | GM |
| VIOLATION NO-CONTACT ORDER A3769 | case archived | OLYMPIA MUNICIPAL COURT, WA | 08/05/1998 | A | GM |
| VIOLATION NO-CONTACT ORDER C12582TC | case archived | THURSTON COUNTY, WA | 01/13/1999 | A | GM |

APPENDIX A

| | | | | | |
|--------------------------------|---------------|-----------------------------------|------------|---|----|
| THEFT CR181121 | case archived | OLYMPIA MUNICIPAL COURT, WA | 05/06/1999 | A | GM |
| ESCAPE A3879 | case archived | OLYMPIA MUNICIPAL COURT, WA | 05/07/1999 | A | GM |
| FAILURE TO REGISTER | 1999 | THURSTON COUNTY, WA | 06/1999 | A | F |
| THEFT 1 | 1999 | LEWIS COUNTY, WA | 09/1999 | A | F |
| BURG 2 | 1999 | LEWIS COUNTY, WA | 09/1999 | A | F |
| FAILURE TO REGISTER | 2005 | THURSTON COUNTY, WA | 12/2004 | A | F |
| DUI | 2005 | THURSTON COUNTY, WA | 01/2005 | A | GM |
| TAMPERING WITH A WITNESS | 2005 | THURSTON COUNTY, WA | 05/2005 | A | F |

APPENDIX A

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STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,
Respondent,
v.
JESSE WILLIAM HARFORD,
Appellant.

No.: 34322-3-II
DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 2nd day of April, 2007, I mailed a copy of the Brief of Respondent and Notice of Appearance and Substitution to Roger A. Hunko; Attorney at Law; 569 Division Street, Suite E; Port Orchard, WA 98366 and to Jesse William Harford 981548; Airway Heights Corrections Center; P.O. Box 1899; Airway Heights, WA 99001-1899, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman