NO. 35169-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LOUIS ARMIJO,

Appellant.

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

The Honorable Stephanie A. Arend

APPELLANT'S REPLY BRIEF

JASON B. SAUNDERS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT.

THE COURT ERRONEOUSLY USED THE GREATER SENTENCING RANGE IN THE ABSENCE OF ANY SPECIFIC FINDING AS TO WHEN THE OFFENSES OCCURRED

1. When a defendant is resentenced, a court must properly calculate his offender score to determine the standard range and he may appeal that determination on appeal. Following Mr. Armijo's successful PRP, this Court remanded his case for *resentencing* due to a Blakely violation. The State argues on appeal that while RAP 2.5(c)(1) specifically allows this Court to consider issues not raised in the first appeal of the same case, the rule does not "revive every issue which was not raised in an earlier appeal." Brief of Respondent at 5, citing State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). The State further argues "[i]f the trial court did not exercise its independent judgment or rule again on the issue, then it is not properly before the appellate court and *may not* be reviewed pursuant to RAP 2.5(c)(1).

RAP 2.5(c) addresses the scope of review when a case is again before the appellate court following a remand and limits the "law of the case" doctrine. RAP 2.5(c)(1) gives this Court discretion

to review an issue even if it was not raised in the first appeal. The rule reads:

> If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5(c)(1). Here, Mr. Armijo's issues are "otherwise properly before the appellate court" because 1) Mr. Armijo requested the sentencing court review his standard range sentence calculation (7/14/06RP 13); 2) the issue involves manifest error affecting a constitutional right; and 3) the issue involves the court's sentencing authority. The appellate courts must interpret the Rules of Appellate Procedure rules to promote justice and facilitate the decision of cases on the merits. RAP 1.2(a); State v. Olson, 126 Wn.2d 315, 318-19, 893 P.2d 629 (1995); Weeks v. Chief of Washington State Patrol, 96 Wn.2d 893, 896, 639 P.2d 732 (1982). Thus, this Court may exercise its discretion to review Mr. Armijo's argument.

Moreover, Barbario does not apply to the instant case because the ordered resentencing required the court to then calculate the standard range under the SRA. RCW 9.94A.505

specifically requires a sentencing court to correctly calculate a standard range sentence as provided under RCW 9.94A.510:

> (2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:
> (i) Unless another term of confinement applies, the court shall impose a sentence within the standard sentence range established in RCW 9.94A.510.

RCW 9.94A.510 directs the sentencing court to impose a standard range sentence based solely on the sentencing grid provided, which necessitates the sentencing court to first correctly calculate the offender score and then determine the standard range sentence according to the seriousness level of the crime. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004); State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994) (holding to properly calculate a defendant's offender score, the SRA requires that sentencing courts determine a defendant's criminal history based on his or her prior convictions and the level of seriousness of the current offense). When this Court found Mr. Armijo's sentence was unconstitutional and remanded the case for resentencing, his sentence was vacated and the sentence was void, the order had no effect. Thus, at resentencing, the court had to follow the SRA for proper calculation of the correct offender score and imposition of a standard range sentence.

Moreover, Mr. Armijo requested the court review the standard range calculation. 7/14/06RP at 13. By doing so, he has placed the State and the sentencing court on sufficient notice that the score may not be correct, which required the court to fulfill its statutory mandate under RCW 9.94A.505 and 9.94A.510 and properly calculate his offender score. Even if his defense counsel and the prosecutor had failed to correctly calculate the score, his request to the court to review the standard range calculation is sufficient to give the court an opportunity to correctly calculate his offender score.

Under RCW 9.94A.505 and .510, the resentencing court was required to recalculate the offender score to determine the standard range and utilize his independent judgment to do so. Moreover, Mr. Armijo specifically requested the court closely examine and correctly calculate his standard range sentence. 7/14/06RP 13. Because Mr. Armijo was before a resentencing court concerning the proper calculation of his offender score, he may argue his sentence on appeal. This standard range sentence calculation issue was not waived, because no sentencing court had yet determined his correct offender score or ever given him a proper sentence.

In State v. Harrison, the Washington Supreme Court ruled that the "law of the case doctrine" only applies to issues that a reviewing court has ruled on, and does not preclude a sentencing court from reconsideration of issues the reviewing court did not address. 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). The Supreme Court ruled,

> 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.'"

(Citations omitted.) 148 Wn.2d at 562. The Supreme Court recognized that the law of the case doctrine "serves to 'promote[] the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" (Citations omitted.) *Id.* The doctrine also helps "assure the obedience of lower courts to the decisions of appellate courts." (Citations omitted.) *Id.* But the Harrison Court made clear that issues not addressed by the appellate courts are not precluded on remand under the law of the case doctrine. 148 Wn.2d at 562-63.

Here, Mr. Armijo has never had a court correctly calculate his offender score and sentence him. Because no reviewing court

has considered the calculation of his standard range sentence, the law of the case doctrine should not prevent Mr. Armijo from presenting this claim on appeal following a resentencing hearing wherein a proper calculation of the offender score must be determined. Harrison, 148 Wn.2d at 562-63.

This Court should decide the sentencing issue on appeal to correct an unauthorized sentence. The Supreme Court has recognized that illegal sentences may be challenged for the first time on appeal. State v. Ford, 132 Wn.2d 472, 477, 973 P.2d 452 (1999), citing State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996); In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996). The Supreme Court has noted a reviewing court should correct illegal sentences when that issue is raised for the first time on appeal:

> A justification for the rule is that it tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court.

Ross, 152 Wn.2d at 229, quoting State v. Paine, 69 Wn.App. 873, 884, 850 P.2d 1369 (1993).

For the reasons stated in the Opening Brief, the sentencing court erred in imposing the standard range sentence in this case

because the ex post facto clauses prohibit the Legislature from enacting laws that alter the definition of criminal conduct or increase the punishment for a crime. State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999), citing Lynce v. Mathis, 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997); In re Personal Restraint of Stanphill, 134 Wn.2d 165, 169, 949 P.2d 365 (1998).

2. The record is sufficient for this Court to find the sentencing court erred in calculating the standard range sentence. The State on appeal argues the evidence in the record is insufficient to determine if the sentencing court applied the correct standard range sentence. BOR at 10. But the record is complete. This Court granted Mr. Armijo's motion to supplement the record with all the trial transcripts from the first appeal, and has recently granted Mr. Armijo's motion to supplement the record with the closing arguments from the first trial as of April 11, 2007. Accordingly, the record is complete for review and a sufficient record is before the Court to correct the illegal sentence.

The Aho Court ruled that when a defendant is wrongly charged with a crime not yet enacted at the time of the offense or the court imposes a newly increased sentence enacted by statute after the date of the commission of the crime, retrospective

application of the law produces a due process violation based upon similar underlying principles. 37 Wn.2d at 742. Thus, whenever a defendant receives greater punishment than the law allowed at the time of the offense, a constitutional violation occurs – a due process violation if the legislature intended only prospective application of a statue but a judge erroneously imposes a sentence *or* an ex post facto violation if the legislature changes a statute and intends to apply it retroactively and a person receives greater punishment than authorized by the statute in place at the time of the commission of the crime.

In Aho, the Supreme Court concluded:

> [b]ecause the jury did not identify when the acts that it found constituted the offenses occurred, it is possible that Aho has been illegally convicted based upon an act or acts occurring before the effective date of the child molestation statute.

Id. at 744. Finding defense counsel ineffective for proposing faulty jury instructions and for failing to object to the charging document, the Court reversed Aho's convictions as they violated due process, and remanded the case. Id. at 746.

In re Hartzell, the Court of Appeals found that when the Legislature increases the sentence for an offense during the period of the alleged offense and the evidence suggests the crime was

committed before the effective date of the increase, due process requires the lesser sentence be imposed. 108 Wn. App. at 945, citing State v. Parker, 132 Wn.2d 182, 191-92, 937 P.2d 575 (1997) (where jury not asked to determine when offenses were committed, and statute spanned charging period, application of standard range to offenses committed at end of charging period was erroneous). The Hartzell Court found the evidence supporting Hartzell's Alford plea sufficient to establish he committed child molestation in the first degree after the effective date of the statute at issue in Aho. Id. at 943. The evidence, however, was not sufficient to show he committed the offenses after July 1, 1990, the effective date of the changes made to community placement provisions. Id. at 945. Because the evidence could not establish he committed his offenses at the latest date in the charging period, apparently the policy of the Department of Corrections, the Court remanded for resentencing based on the assumption the crimes occurred before the July 1, 1990 changes to the Sentencing Reform Act (SRA) took effect. Id. at 944-47.

Critical to both Hartzell and Aho was a determination of actual offense dates. As in Aho, since the jury in the instant case made no determination as to when Mr. Armijo's offenses occurred,

it is impossible to now establish the dates of the offenses. The jury instructions and the jury verdict do not indicate which actual dates the jury found Mr. Armijo guilty of the offenses charged. Accordingly, Mr. Armijo requests resentencing under the appropriate earlier provisions of the SRA.

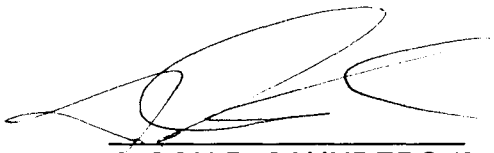
For Counts 1 (rape of a child in the first degree) and 3 (child molestation in the first degree), the State alleged the incidents happened between September 29, 1995 and September 29, 1999, and the jury agreed. CP 5, 6, 99, 101 (verdict forms). The verdict forms make no further mention of the offense date. CP 99, 101. Because there is no jury finding as to when the acts occurred in relation to the statutory amendments, the court's sentence, which assumes Mr. Armijo's offenses were committed between September 29, 1995, and September 29, 1999, violates due process. Mr. Armijo asks this Court to remand for resentencing, requiring imposition of the sentence and community custody or placement provisions in effect in 1995, providing him the appropriate "lesser sentence" required by Hartzell and Parker.

B. CONCLUSION.

For the reasons stated herein and in the Opening Brief, Mr. Armijo respectfully requests this Court remand for resentencing.

DATED this 13th day of April 2007.

Respectfully submitted,



JASON B. SAUNDERS (24963)
Washington Appellate Project (91052)
Attorneys for Appellant

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	)	
APPELLANT.	)	

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STATE OF WASHINGTON
BY

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 13TH DAY OF APRIL, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **STATEMENT OF ARRANGEMENTS** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR PIERCE COUNTY PROSECUTOR'S OFFICE 2000 LAKERIDGE DR SW OLYMPIA, WA 98502-6001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] LOUIS ARMIJO 906427 MCNEIL ISLAND CORRECTIONS CENTER PO BOX 881000 STEILACOOM, WA 98388-1000	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF APRIL, 2007.

X_____

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Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711