

Appellant
Counsel
RESPONSE
TO SAG

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

2007 NOV 13 PM 4:56
COURT OF APPEALS
STATE OF WASHINGTON

STATE OF WASHINGTON,)	No.35736- 4-II
Respondent,)	
)	RESPONSE TO
v.)	STATEMENT OF
)	ADDITIONAL
DERRICK BOYD,)	GROUND
Appellant.)	
_____)	

Pursuant to RAP 10.10, the Court has invited the parties to file responses to Appellant, Derrick Boyd's, statement of additional grounds. Counsel submits the following.

I. ARGUMENT

THE TRIAL COURT ERRED IN CALCULATING MR. BOYD'S OFFENDER SCORE

Due process requires the State prove an individual's criminal history and offender score by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). Where the court imposes a sentence other than that authorized by the SRA the court acts without statutory authority and the sentence may be appealed. State v. Parker, 132 Wn.2d 182, 188-89, 937

P.2d 575 (1997); Ford, 137 Wn.2d. 472, 477-78, 973 P.2d 452 (1999).

Mr. Boyd was convicted of two counts of first child molestation and one count of third degree assault of a child. CP 39. The trial court found Mr. Boyd's criminal history consisted entirely of seven misdemeanors. CP 40. The trial court determined Mr. Boyd's offender score was seven for each of the child molestation counts and two for the assault count. CP 40. determined Mr. Boyd's offender score for each of the

Prior to sentencing, Mr. Boyd entered a stipulation with the state that his criminal history consisted solely of the same seven misdemeanors listed by the court in its judgment, again no felonies were included. CP 34-35. The stipulation further provided:

The defendant stipulates that the above criminal history and scoring are correct, providing an offender score as follows, including current offenses, and stipulates that the offender score is correct.

CP 35.

Because a court exceeds its authority in imposing an incorrect sentence, such a legally incorrect sentence may be challenged on appeal even where the defendant had agreed to the erroneous sentence. In re the Personal Restraint Petition of

Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Goodwin

allowed:

While waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.

Id. at 874.

Mr. Boyd does not raise a factual challenge to his sentence. Thus, for example, he does not challenge the court's finding that his criminal history consists solely of the seven prior misdemeanors he stipulated to. Nor does Mr. Boyd challenge an exercise by the sentencing court of its discretion. Instead, the argument raised by Mr. Boyd is purely legal; that from the agreed criminal history, the calculation of his offender score despite his prior agreement is incorrect as a matter of law. Goodwin makes clear such challenges may be raised despite the prior agreement of the parties. Id. at 875-76.

RCW 9.94A.500(1) provides in relevant part

. . . . If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

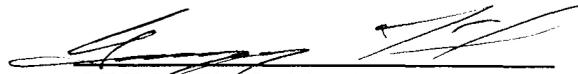
Based upon the criminal history it has found to exist, the court is then required to calculate the offender score pursuant to the provisions of RCW 9.94A.525 sets forth. Except for limited circumstances outlined in RCW 9.94A.525, none of which are present here, prior misdemeanor offenses do not contribute to an individual's offender score.

Pursuant to former RCW 9.94A.525(9) (16) (2001), Mr. Boyd's offender score for each of the child molestation counts was a four (one point for the assault of a child three and three points for the remaining child molestation) Mr. Boyd's offender score for the assault count was two (one point for each of the child molestation counts). Based upon his criminal history, current offense, and provisions of RCW 9.94A.525, Mr. Boyd's offender score could be no higher than four, and his agreement to a score of seven is legally incorrect. As Goodwin stressed, a court's sentencing authority is defined and limited by the SRA. The agreement of the parties cannot alter or expand that authority. Thus, the State and Mr. Boyd could simply not agree his offender score was seven where pursuant to the SRA it is only four.

II. CONCLUSION

Mr. Boyd's Statement of Additional Grounds correctly asserts his sentence is legally incorrect. Mr. Boyd is entitled to be resentenced based upon an offender score of four. Goodwin, 146 Wn.2d at 877-78.

Respectfully submitted this 13th day of November, 2007.



GREGORY C. LINK – 25228
Washington Appellate Project – 91052
Attorney for Appellant

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RESPONDENT,)	
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v.)	NO. 35736-4-II
)	
DERRICK BOYD,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 13TH DAY OF NOVEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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STATE OF WASHINGTON
BY _____ DEPUTY

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

x _____ *gry*

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