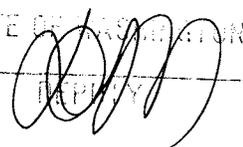


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

NO. 37392-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

TRAVIS LEE COMBS,

Appellant.

BRIEF OF APPELLANT

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J.M. 8-4-2008

 **ORIGINAL**

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it calculated the defendant's offender score by including one point for each prior felony because under the plain language of RCW 9.94A.525(15), all prior adult convictions count as a single point when determining the offender score on an escape conviction.

Issues Pertaining to Assignment of Error

Does a trial court err if calculates a defendant's offender score on an escape conviction by including one point for each prior felony when the plain language of RCW 9.94A.525(15) dictates that when sentencing a person on an escape charge the court should all prior convictions as a single count?

STATEMENT OF THE CASE

In July of 2007, the defendant Travis Lee Combs was incarcerated in the Washington State Department of Corrections work release facility in Longview pursuant to a felony conviction out of Lewis County. CP 10. On July 10, 2007, he left the facility for work but did not return at the end of his shift. RP 1-6. The next day, the police went to the defendant's uncle's residence and arrested him on a charge of First Degree Escape. *Id.* The defendant later explained that he had not returned to work release because he feared retaliation from other inmates. *Id.*

By information filed September 26, 2007, the Cowlitz County Prosecutor charged the defendant with one count of escape in the first degree under RCW 9A.76.110(1). CP 1-2. The defendant later pled guilty to that charge, upon the state's agreement to recommend an exceptional sentence downward to 36 months in prison. CP 5-13. In fact, the defendant has 20 prior felony convictions, and the state argued that the defendant's standard range was from 63 to 84 months in prison on an offender score of 20 points. CP 18. The defendant argued that under RCW 9.94A.525(15), all of the defendant's prior convictions scored as one point in total, and that the standard range was from 6 to 12 months. CP 14-17.

The trial court held that the defendant's offender score was 20 points, that the correct range was from 63 to 84 months in prison. RP 1-6. However,

the court did agree with the state's recommendation and imposed what it believed to be an exceptional sentence downward of 36 months in prison. CP 19-31. The defendant thereafter filed timely notice of appeal. CP 33.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT CALCULATED THE DEFENDANT'S OFFENDER SCORE BY INCLUDING ONE POINT FOR EACH PRIOR FELONY BECAUSE UNDER THE PLAIN LANGUAGE OF RCW 9.94A.525(15), ALL PRIOR ADULT CONVICTIONS COUNT AS A SINGLE POINT WHEN DETERMINING THE OFFENDER SCORE ON AN ESCAPE CONVICTION,

For most non-violent convictions under RCW 9.94A.525, a defendant's offender score is calculated by including "one point for each adult prior felony conviction." Subsection (7) of this statute states:

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, ***count one point for each adult prior felony conviction*** and one point for each juvenile prior nonviolent felony conviction.

RCW 9.94A.525(7) (emphasis added).

At counsel's best count, the legislature used the word "each" some 37 times in this statute to designate that "each" prior conviction should be counted as a separate unit when assigning offender points (some at one point per "each" prior, some at two points, and some at three). By contrast, in subsection (15) of the statute, the legislature did not use the word "each" to designate that prior convictions should be counted separately. This sections states:

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, ***count adult prior convictions as one point*** and juvenile prior convictions as ½ point.

RCW 9.94A.525(15) (emphasis added).

Under RCW 9.94A.030, first degree escape is a non-violent felony. Thus, in subsections (7) and (15) of RCW 9.94A.525, the legislature has set up a dichotomy between how most non-violent felony convictions are scored (per subsection 7) and certain specific felony convictions (per subsection (15)). There are two distinctions in these two sections. The first distinction is that in the former, prior juvenile convictions receive one point, while in the latter they only receive ½ point. The distinction comes from the legislature's decision to not use the word "each" in the latter subsection. Thus, in the former, the legislature mandates that the court "count one point for *each* adult prior felony conviction," while in the latter, the legislature mandates that the court "count adult prior convictions as one point." The language in these two related subsections could not be clearer. Under subsections (7) "each" prior conviction gets one point, while under subsection (15), all prior convictions are counted as a single point.

When interpreting a statute, a court must first assume that the Legislature means exactly what it says. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Thus, if the statute is clear on its face, its meaning is derived from the statutory language alone. *State v. Watson*, 146 Wn.2d 947, 51 P.3d 66 (2002). In *State v. Hall*, 112 Wn.App. 164, 48 P.3d 350 (2002), Division II of the Court of Appeals puts this rule as follows:

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Where the meaning of a statute is clear on its face, this court assumes that the Legislature “means exactly what it says” and we give effect to the plain language without regard to rules of statutory construction. *State v. Warfield*, 103 Wn.App. 152, 156, 5 P.3d 1280 (2000).

State v. Hall, 48 P.3d at 352.

In this case, the language of the statute is clear and unambiguous. Subsection (7) states: “count one point for *each* adult prior felony conviction.” Thus, “each” prior felony counts one point for offenses scored under this subsection. Subsection (15) states: “count adult prior convictions as one point” when calculating the offender score for escape charges. Thus, under subsection (15), all prior adult convictions only count as one point, not one point for “each” prior conviction.

In a recent decision, *In re Lofton*, 142 Wn.App. 412, 174 P.3d 703 (2008), Division I of the Court of Appeals comes to the opposite conclusion and states that the language of the statute is “unambiguous” that under subsection (15) “each” prior adult felony conviction should be given one point, just as “each” prior conviction gets one point under subsection (7). As the following explains, this holding is in error.

In support of its decision in *Lofton*, Division I notes that under subsection (5)(a) of the statute, the legislature states that “[i]n the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately” except prior convictions constituting the

“same criminal conduct,” or prior convictions committed before July 1, 1986. Thus, Division I in *Lofton* believes that in subsection (15) the legislature must have intended to count all prior convictions as separate points, in spite of the legislature’s decision not to use the word “each.” The problem with this argument is that it ignores subsection (14), which also excludes the use of some prior felony convictions in the offender score. This sections states: “[i]f the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score.” This section reveals that subsection (5)(a) is a general guideline, with sections (14) and (15) as specific, intended exceptions.

In *Lofton*, the court also relies upon that argument that the legislature (1) has given escape a particular seriousness score, (2) that particular seriousness score has ranges of ascending times at offender scores from 0 to 9 points, and (3) applying the plain meaning of the language in subsection (15) would render the ascending ranges in that particular seriousness level meaningless for the offense of escape. While this argument is correct factually, it is not a valid argument in support of the conclusion that the legislature must have intended to use the word “each” in subsection (14). The reason is that the legislature has, for a number of offenses, created ranges that can never be used because those ranges exceed the available statutory maximum for the offense. Thus, there are a number of logical inconsistencies

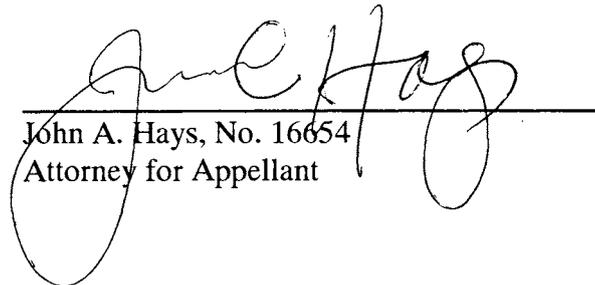
in the sentencing reform act. However, such an inconsistency is no legal justification for ignoring the plain language of the statute. In *Lofton*, the court did what it should not have done: it rewrote the statute to mean what Division I thinks the legislature should have done. The court should have given effect to the plain language of the statute. This court should not follow the decision in *Lofton*.

CONCLUSION

The trial court erred when it calculated the defendant's offender score, and thereby unintentionally imposed a sentence in excess of the standard range without entering supporting aggravating factors. This court should vacate the sentence and remand with instructions to sentence the defendant on a correct range of from 6 to 12 months on an offender score of 1 point.

DATED this 5th day of August, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 9.94A.525

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B 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 ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class 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.

(d) Except as provided in (e) of this subsection, serious traffic convictions 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 results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (> RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

(f) This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used.

The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), “served concurrently” means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction 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 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(12) If the present conviction is for homicide by watercraft or assault by watercraft count two points for each adult or juvenile prior conviction for homicide by watercraft or assault by watercraft; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for driving under the influence of intoxicating liquor or any drug, actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, or operation of a vessel while under the influence of intoxicating liquor or any drug.

(13) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(18) If the present conviction is for failure to register as a sex offender under RCW 9A.44.130(10), count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior convictions for failure to register as a sex offender under RCW 9A.44.130(10), which shall count as one point.

(19) If the present conviction is for an offense committed while the offender was under community placement, add one point.

(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count one point for prior convictions of Vehicle Prowling 2, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.

(21) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Accordingly, prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and

shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions.

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

STATE OF WASHINGTON,)
Respondent)
vs.)
COMBS, Travis Lee)
Appellant)

NO. 07-1-01250-5
COURT OF APPEALS NO:
37392-1-II
AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
COUNTY OF COWLITZ) ss.

CATHY RUSSELL, being duly sworn on oath, states that on the 4th day of AUGUST, 2008, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

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COWLITZ COUNTY PROSECUTING ATTY
312 S.W. 1ST STREET
KELSO, WA 98626

TRAVIS LEE COMBS #745962
WASH STATE REFORMATORY
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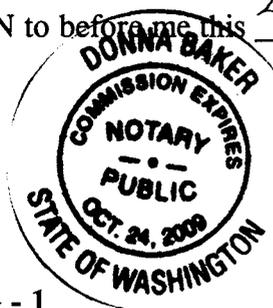
and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 4TH day of AUGUST, 2008.

[Signature]
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 4th day of AUGUST, 2008.



[Signature]
NOTARY PUBLIC in and for the
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Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09

AFFIDAVIT OF MAILING - 1

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