

FILED
COURT OF APPEALS
DIVISION II

08 NOV -3 AM 10:26 NO. 37496-0-II

STATE OF WASHINGTON

BY *cm*
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON WILSON,

Appellant.

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

The Honorable Gordon Godfrey

APPELLANT'S OPENING BRIEF

VANESSA M. LEE
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT 3

THE SENTENCE, BASED ON A MISCALCULATED
OFFENDER SCORE, IS A FUNDAMENTAL DEFECT
REQUIRING REVERSAL..... 3

1. A valid sentence must be authorized by statute. 3

2. Mr. Wilson’s sentence was unlawful 3

3. Mr. Wilson is entitled to relief from the unlawful sentence7

E. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Supreme Court

<i>In re Personal Restraint of Carle</i> , 93 Wn.2d 31, 604 P.2d 1293 (1980)	3, 7
<i>In re Personal Restraint of Gardner</i> , 94 Wn.2d 504, 617 P.2d 1001 (1980)	4
<i>In re Personal Restraint of Johnson</i> , 131 Wn.2d 558, 933 P.2d 1019 (1997)	3
<i>In re Personal Restraint of Moore</i> , 116 Wn.2d 30, 803 P.2d 300 (1991)	5
<i>McNutt v. Delmore</i> , 47 Wn.2d 563, 288 P.2d 848 (1955).....	3, 7
<i>State v. Barr</i> , 99 Wn.2d 75, 658 P.2d 1247 (1983)	5
<i>State v. Eilts</i> , 94 Wn.2d 489, 617 P.2d 993 (1980)	5
<i>State v. Goodwin</i> , 146 Wn.2d 861, 50 P.3d 618 (2002) ..	3, 4, 5, 6, 7
<i>State v. Hunsicker</i> , 129 Wn.2d 554, 561, 919 P.2d 79 (1996)	5
<i>State v. Palmer</i> , 73 Wn.2d 462, 438 P.2d 876 (1968).....	7
<i>State v. Sampson</i> , 82 Wn.2d 663, 513 P.2d 60 (1973)	3

Revised Code of Washington

RCW 69.50.401.....	4
RCW 69.50.407.....	4
RCW 9A.28.020	4

A. ASSIGNMENT OF ERROR

Jason Wilson's sentence lacks statutory authority and must therefore be reversed and remanded for re-sentencing.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A sentence which is based on a miscalculated offender score lacks statutory authority, whether or not the erroneous offender score was included in the plea agreement. Where a defendant entered a guilty plea but later discovered his offender score was miscalculated, resulting in a standard-range sentence that was too high, is remand for re-sentencing required?

C. STATEMENT OF THE CASE.

Jason Wilson pled guilty to two counts of identity theft in the second degree on November 16, 2007, before the Honorable Gordon Godfrey. CP 30-37, 38-42. The Prosecutor's Statement of Defendant's Criminal History, included in the Plea Agreement, listed seven felonies, including a Violation of the Uniform Controlled Substances Act ("VUCSA") committed in March 2005 in King County. CP 39-40, 45. On December 10, 2007, Mr. Wilson was sentenced to 43 months (the high end of the standard range, with an offender score of eight) on each count, to be served concurrently. CP 46-53.

On January 23, 2008, Jeannette Jameson, Mr. Wilson's attorney on a separate matter in King County, contacted Charles Clapperton, who was Mr. Wilson's attorney on this matter in Grays Harbor County. CP ____, sub. o. 55 (First Motion and Affidavit and Hearing Notice).¹ Ms. Jameson informed Mr. Clapperton that she had obtained a certified copy of Mr. Wilson's Judgment and Sentence for the King County VUCSA, showing Mr. Wilson was actually convicted of a gross misdemeanor, not a felony.² *Id.* Mr. Wilson moved for re-sentencing. *Id.*; CP ____, sub. no. 58 (Second Motion and Affidavit and Hearing Notice).

On March 17, 2008, a hearing was held before Judge Godfrey. The court ruled that Mr. Wilson could withdraw his plea, but denied the motion for re-sentencing. 3/17/08RP 4-5; CP 55. Mr. Wilson did not withdraw his plea but appealed the ruling and sentence.

¹ Attached to this Brief as Appendix A.

D. ARGUMENT

THE SENTENCE, BASED ON A MISCALCULATED OFFENDER SCORE, IS A FUNDAMENTAL DEFECT REQUIRING REVERSAL.

1. A valid sentence must be authorized by statute. It is well-established that a sentence which lacks statutory authority cannot stand. *State v. Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002), citing *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). “When a sentence has been imposed for which there is no authority in law, the trial court has the *power and duty to correct the erroneous sentence when the error is discovered.*” *In re Personal Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (italics in original), quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955) . . . , *overruled in part by State v. Sampson*, 82 Wn.2d 663, 513 P.2d 60 (1973). A sentence based on a miscalculated offender score not only lacks authority, but is “a fundamental defect that inherently results in a miscarriage of justice.” *Goodwin*, 146 Wn.2d at 860, quoting *Johnson*, 131 Wn.2d at 569.

2. Mr. Wilson’s sentence was unlawful. There can be no dispute that Mr. Wilson’s offender score lacked statutory authority. The King County Judgment and Sentence states that Mr. Wilson

was convicted of “*Attempted Violation of the Uniform Controlled Substances Act: Possession of Methamphetamine*” under RCW 9A.28.020 and 69.50.401(d). CP ___, sub. no. 55 (emphasis added). RCW 69.50.401(d) is a class C felony. Therefore, the conviction was a gross misdemeanor, and erroneously included in his offender score.³

Because a sentence resulting from a miscalculated offender score is a “fundamental defect,” the Supreme Court “has consistently rejected arguments that a defendant must be held to the consequences of a plea agreement to an excessive sentence. *Goodwin*, 146 Wn.2d at 870. In *In re Personal Restraint of Gardner*, 94 Wn.2d 504, 617 P.2d 1001 (1980), the defendant pleaded guilty to first degree possession of stolen property and second degree burglary, and the prosecution dropped additional burglary charges. The court imposed restitution for victims of the uncharged crimes, which was not authorized by the statute at that time. The Supreme Court remanded for imposition of restitution in accord with the statute, holding, “a plea bargaining agreement

³ Under RCW 9A.28.020(d), attempt to commit a class C felony is a gross misdemeanor, not a felony. Under RCW 69.50.407, the VUCSA conspiracy statute, an attempt to commit a class C VUCSA may be a class C felony. However, the Judgment and Sentence clearly show that Mr. Wilson was not charged or sentenced under this section.

cannot exceed the statutory authority given to the courts." *Id.* at 507.

The Court reiterated this holding in *State v. Eilts*, where a defendant agreed to restitution which exceeded statutory authority in exchange for probation. 94 Wn.2d 489, 617 P.2d 993 (1980), *superseded by statute/rule on other grounds by State v. Barr*, 99 Wn.2d 75, 658 P.2d 1247 (1983). In that case, the Court held, "a defendant cannot [through a negotiated plea agreement] empower a sentencing court to exceed its statutory authorization". *Id.* at 496-96. In *State v. Hunsicker*, the Court characterized *Eilts* "as holding that "an agreement to restitution imposed in excess of statutory authority does not bind the defendant or constitute a waiver to the unauthorized restitution. 129 Wn.2d 554, 561, 919 P.2d 79 (1996). *See also In re Personal Restraint of Moore*, 116 Wn.2d 30, 38, 803 P.2d 300 (1991)("the actual sentence imposed pursuant to a plea bargain must be statutorily authorized; a defendant cannot agree to be punished more than the Legislature has allowed for").

In *Goodwin*, as in this case, the guilty plea stated that the defendant agreed to the State's statement of petitioner's criminal history. The court erroneously included juvenile offenses in the

defendant's offender score. Holding the defendant's plea agreement did not waive his challenge to the "fundamentally defective" sentence, the Court clarified its prior holdings:

[W]e hold that in general a defendant cannot waive a challenge to a miscalculated offender score. There are limitations on this holding. 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.

Thus, the only question is whether this case involves a legal error or an issue of fact or trial court discretion. Just as the *Goodwin* Court rejected the State's argument that the miscalculated offender score was a "mutual mistake" going to the validity of the contract, the State's argument in this case that there was no "meeting of the minds" is irrelevant. *Id.* at 876, n6; 3/17/08RP 3.

Our focus is not the voluntariness of the plea agreement, nor are we engaging in a balancing process, weighing the harm to the State versus the harm to the personal restraint petitioner. Rather, we are considering a fundamental defect, which is not of constitutional magnitude, and whether that defect has resulted in a complete miscarriage of justice.

Id. at 876.

Here, the only issue is legal: whether the 2005 King County conviction was a felony or a gross misdemeanor. There is no factual dispute whatsoever. *Goodwin* dictates, therefore, that a “miscarriage of justice” has occurred through the miscalculated sentence, and must be rectified by re-sentencing.

3. Mr. Wilson is entitled to relief from the unlawful sentence.

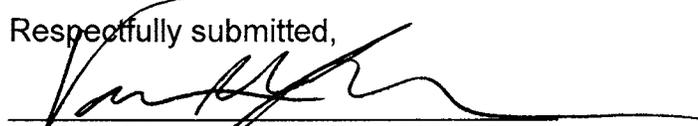
As the Supreme Court has held, “the trial court has the power and duty to correct the erroneous sentence, when the error is discovered.” *In re Personal Restraint of Carle*, 93 Wn.2d at 33 (emphasis omitted), quoting *McNutt v. Delmore*, 47 Wn.2d at 565; see also *State v. Palmer*, 73 Wn.2d 462, 475, 438 P.2d 876 (1968).

E. CONCLUSION

For the foregoing reasons, Mr. Wilson respectfully requests this Court vacate his sentence and remand for re-sentencing.

DATED this 31st day of October, 2008.

Respectfully submitted,



VANESSA M. LEE (WSBA #37611)

Washington Appellate Project
Attorneys for Appellant

APPENDIX A

FILED
IN THE OFFICE
OF COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF GRAYS HARBOR

State of Washington)	NO. 07-1-541-5
)	
Plaintiff,)	MOTION AND AFFIDAVIT
v.)	AND HEARING NOTICE
)	
JASON WILSON,)	
)	
Defendant.)	

I. NOTICE OF HEARING

TO: CLERK OF THE ABOVE-ENTITLED COURT:

AND TO: PROSECUTOR, FOR GRAYS HARBOR COUNTY.

On 1-28, 2007 at the hour of 1:30 p.m. at the
Grays Harbor County Superior Court, County Courthouse,
Montesano, Washington, the Defendant, by and through counsel,
will ask the Court to grant the following Motion.

II. MOTION

1. Relief Requested. COMES NOW CHARLES W. CLAPPERTON
counsel for the Defendant, JASON WILSON, and hereby moves
the Court for an order appointing an attorney to investigate
whether the defendant was sentenced using the correct
criminal history.

2. Basis. This Motion is based on the statutes, case law
MOTION AND HEARING NOTICE - 1

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Charles Clapperton
Attorney at Law
114 North 5th Street, P.O. Box 3016
Elma, WA 98541
Phone (360) 482-6000
Fax (360)482-6002

1 and civil rules of the State of Washington.

2 DATED this 23 day of January, 2008.

3
4 
5 CHARLES CLAPPERTON, WSBA #23574
6 Attorney for defendant

7 **AFFIDAVIT**

8 STATE OF WASHINGTON)
9) ss.
10 COUNTY OF GRAYS HARBOR)

11 Charles Clapperton, being first duly sworn on oath,
12 deposes and says:

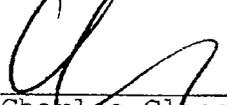
13 I am the attorney for the defendant in the above-
14 captioned matter, and hereby make this affidavit upon
15 personal information, knowledge and belief.

16 1. From the attached letter I believed that an
17 attorney needs to be appointed to investigate whether the
18 defendant was sentenced using the correct criminal history.

19 2. I have a conflict of interests and can not be
20 appointed.

21 I declare under penalty of perjury under the laws of the
22 State of Washington that the foregoing is true and correct.

23 DATED the 23 day of January, 2008.

24 
25 Charles Clapperton
26

1 SUBSCRIBED and SWORN to before me this 23rd day of
2 January, 2008.

3 Shandi Binkman
4

5 NOTARY PUBLIC in and for the State
6 of Washington, residing in monkaro
7 My term expires: 10-27, 2008

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Jeannette Jameson, Attorney At Law

16212 Bothell Way, S.E. # F221 Mill Creek, WA 98012
phone (425) 806-8067

January 23, 2008

Fax to (360) 482-6002,
Attn: Charles Clapperton, Attorney at Law

Dear Mr. Clapperton,

I am the attorney currently representing Jason Wilson on charges pending in King County. It appears that Mr. Wilson was recently your client in Grays Harbor Superior Court, case number 07-1-541-5.

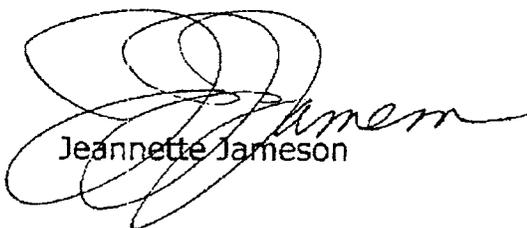
Mr. Wilson showed me his Judgment and Sentence for his Grays Harbor case, indicating that a prior King County case, 05-1-07902-5 KNT was counted as a felony point, raising his offender score from 7 to 8 points. I don't have a copy of the document as I am writing this, but I believe that he was sentenced to 43 months, the top of the range for Identity Theft in the Second Degree with 8 points. The range for 7 points would have been 22 to 29 months.

I checked at the clerks office and obtained a certified copy of Mr. Wilson's Judgment and Sentence for 05-1-07902-5 KNT, which is a non-felony Judgment and Sentence. The J & S indicates that Mr. Wilson was charged and sentenced under RCW 9A.28.020 and 69.50.401(D). 9A.29.020 provides that an attempt to commit a class "C" felony is a gross misdemeanor. 69.50.401(D) is a class "C" felony charge. Mr. Wilson was not charged or sentenced under RCW 69.50.407, the VUCSA attempt statute, which would have been a class C felony by operation of that statute. The conviction is final and was not appealed, therefore I believe that the principles of res judicata prohibited the State and the court from counting this conviction as a felony point in your sentencing hearing. State v. Sherwood, 71 Wash. App 481, P.2d 407, *review denied*, 123 Wash. 2d 1022, 875 P.2d 635 (1993).

I am attaching a copy of the J & S, and can provide you with the certified copy by mail if you need it. Mr. Wilson needs to have a CrR 7.8 motion filed in order to correct the error and be resentenced at the correct range. I would appreciate if you could advise me whether or not you can be reappointed to file the motion or who I would need to contact in order to have counsel appointed for Mr. Wilson for this purpose.

I can be reached at my office number (425) 806-8067 or cell phone (206) 240-4756 or you can email me at: jjdonandmack@comcast.net. I appreciate any help or guidance you can provide so that I can get this taken care of for Mr. Wilson. He will be here for a couple more weeks and I can get information to him as needed, including any documents that you may need signed. We are in the process of resolving his pending charge here as a misdemeanor, so he will remain at the same range if resentenced in your case.

Sincerely,



Jeannette Jameson

WUCSA OVER 21

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KING COUNTY SUPERIOR COURT CLERK KENT, WA

CERTIFIED COPY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

COMMITMENT ISSUED AUG 04 2005

STATE OF WASHINGTON,)	No. 05-1-07902-5 KNT
)	JUDGMENT AND SENTENCE,
Plaintiff,)	NON-FELONY - Count(s) I
v.)	[] DEFERRING Imposition of
JASON A. WILSON,)	Sentence/Probation
)	[] SUSPENDING Sentence
Defendant.)	

DAN MADSEN

The Prosecuting Attorney, the above-named defendant and counsel SANDRO PARROTTA being present in Court, the defendant having been found guilty of the crime(s) charged in the amended information on (DATE): 8-3-05 by guilty plea and there being no reason why judgment should not be pronounced;

IT IS ADJUDGED that the defendant is guilty of the crime(s) of: ATTEMPTED VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT: POSSESSION OF METHAMPHETAMINE. RCW 9A.28.020, 69.50.401(D)

IT IS ORDERED pursuant to RCW 9.95.200 and 9.95.210 that: [] the imposition of sentence against the defendant is hereby DEFERRED for a period of _____ months from this date upon the following terms and conditions:

OR

[x] the defendant is sentenced to imprisonment in the King County Jail, Department of Adult Detention, for 12 months on each count, said term(s) to run [] concurrently [] consecutively with each other, and to run [] concurrently [] consecutively with [] count(s) [] Cause No(s). _____ and the sentence (less any days of confinement imposed below) is hereby SUSPENDED upon the following terms and conditions:

(1) The defendant shall serve a term of confinement of 8 months [] in the King County Jail, Department of Adult Detention. [x] in King County Work/Education Release subject to conditions of conduct ordered this date, [] in King County Electronic Home Detention subject to conditions of conduct ordered this date, with credit for [x] 30 days served [] days as determined by the King County Jail, solely on this cause, to commence no later than 9/9/05 9:00 a.m. This term shall run [] concurrently [] consecutively with

Non-Felony Revised 11/2004

_____ This term shall run consecutive to any other term not specifically referenced in this order.

(2) The defendant shall be on probation under the supervision of the Washington State Department of Corrections and comply with the standards rules and regulations of supervision. Probation shall commence immediately but is tolled during any period of confinement. The defendant shall report for supervision within 72 hours of this date or release date if in custody. The length of probation shall be 24 months.

(3) Defendant shall pay to the clerk of this Court:

- (a) Restitution is not ordered;
- Order of Restitution is attached;
- Restitution to be determined at a restitution hearing on (Date) _____ at _____ m.;
- Date to be set;
- The defendant waives presence at future restitution hearing(s);

(b) \$ _____ Court costs;

(c) \$ 500⁰⁰ Victim assessment, \$500 for gross misdemeanors and \$100 for misdemeanors;

(d) \$ _____ Reconpmnt for attorney's fees to King County Public Defense Programs;

(e) \$100 DNA collection fee;

(f) \$ _____, Fine; \$ _____ of this fine is suspended upon the terms and conditions herein;

(g) TOTAL financial obligation: \$500⁰⁰ _____;

The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ 25 per month; On a schedule established by the Department of Corrections if it has active supervision of the defendant, or by the county clerk.

(4) The defendant shall complete _____ community service hours at a rate of not less than _____ hours per month to be completed by (Date) _____. If the defendant is not supervised by the Dept. of Corrections, community service will be monitored by the Helping Hands Program.

(5) The defendant shall not purchase, possess, or use any alcohol controlled substance (without a lawful prescription). The defendant shall submit to urinalysis and/or breath testing as required by the Department of Corrections and submit to search of person, vehicle or home by a Community Corrections Officer upon reasonable suspicion of violation;

(6) The defendant shall obtain a substance abuse evaluation and follow all treatment recommendations; _____
(may use evaluation if obtained during family ct. or dependency ct. matters)

(7) The defendant shall enter into, make reasonable progress and successfully complete a state certified domestic violence treatment program; _____

(8) [] The defendant shall have no contact with: _____

(9) [] The defendant shall have no unsupervised contact with minors.
contact

(10) [] The defendant shall have a biological sample collected for purposed of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in Appendix G (for stalking, harassment, or communicating with a minor for immoral purposes).

(11) [] The defendant shall register as a sex offender.

(12) The defendant shall commit no criminal offenses.

(13) [X] Additional conditions of probation are: Review - 6 mos. post Release Court
or earlier
may terminate probation, if all treatment conditions are
completed

(14) Additional conditions are attached to and incorporated as Appendix _____

Date: 8/3/05

Anna Harper
Judge, King County Superior Court
Print Name: Anna Harper

Presented by:

[Signature]
Deputy Prosecuting Attorney, WSBA # 25119
Print Name: Rich Anderson

Form Approved for Entry:

[Signature] 8342
Attorney for Defendant, WSBA #
Print Name: M. J. Sim

Defendant's current address:

32813 Hyde Ave.
Black Diamond, Wa.
98010

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

STATE OF WASHINGTON,)
)
 RESPONDENT,)
)
 v.)
)
 JASON WILSON,)
)
 APPELLANT.)

NO. 37496

FILED
 COURT OF APPEALS
 DIVISION II
 08 NOV -3 AM 10:26
 STATE OF WASHINGTON
 BY *Maria Arranza Riley*
 DEPUTY

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF OCTOBER, 2008, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|----------------------------|--|
| <p>[X] KRAIG NEWMAN
 ATTORNEY AT LAW
 GRAYS HARBOR CO. PROSECUTOR'S OFFICE
 102 W. BROADWAY AVENUE, ROOM 102
 MONTESANO, WA 98563-3621</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
 HAND DELIVERY
 _____</p> |
| <p>[X] JASON WILSON
 749606
 WASHINGTON STATE PENITENTIARY
 1313 N 13TH AVE
 WALLA WALLA, WA 99362</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
 HAND DELIVERY
 _____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF OCTOBER, 2008.

x _____ *gmr*

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