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DIVISION II

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No. 37548-6-II

STATE OF WASHINGTON

BY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS LUDVIGSEN,

Appellant.

---

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

The Honorable F. Mark McCauley

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The State did not prove beyond a reasonable doubt that Mr. Ludvigsen had actual or constructive possession of the stolen property or that he knew the property was stolen.

2. The trial court erred by including “washed out” 1982 convictions for Violation of the Uniform Controlled Substances Act in Mr. Ludvigsen’s criminal history.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A defendant may not be convicted of a crime unless the State proves every element of the crime beyond a reasonable doubt. The State proved the police found stolen automobile parts near the driveway and inside the door of a home when Thomas Ludvigsen was present, and Mr. Ludvigsen said the automobile parts had been dropped off by another man a few days earlier. The State produced no other evidence connecting Mr. Ludvigsen to the stolen property or the residence where it was found. Viewing the evidence in the light most favorable to the State, must Mr. Ludvigsen’s conviction for possessing stolen property in the first degree be dismissed in the absence of proof of actual or constructive possession or knowledge the automobile parts were stolen?

2. With the exception of sex offenses, prior Class C felonies are not included in computing a defendant's offender score if the offender was crime-free in the community for five years after release from custody for the conviction. RCW 9.94A.525(2). In a 2002 unpublished decision, this Court determined Mr. Ludvigsen's 1982 prior convictions for a non-sex case should not have been included in computing his offender score because he was crime-free for the five years following release from the convictions. State v. Thomas Ludvigsen, Court of Appeals No. 28087-6-II, November 22, 2002. Where the relevant portions of the "wash out" provisions of the statute have not changed since that date, did the sentencing court err by including the 1982 convictions in Mr. Ludvigsen's criminal history and including them in the calculation of Mr. Ludvigsen's offender score for the current conviction?

### C. STATEMENT OF THE CASE

In the fall of 2006, a new Honda automobile was stolen from Aberdeen Honda. RP 21, 25.<sup>1</sup> After learning of a tip received by the Aberdeen police, Hoquiam police officers went to the residence at 360 Lawrence on December 17, 2006. RP 18-19, 29. The

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<sup>1</sup> The verbatim report of proceedings consists of two volumes. The volume that contains proceedings on February 12, 2008 (trial) and March 24, 2008 (sentencing) is referred to as RP. The volume containing proceedings on January 31, 2008, will not be cited.

officers noticed an engine, partially covered by a tarp, on an engine hoist adjacent to the driveway. RP 29-31. Officer Jeremy Mitchell knocked on the door. RP 30. Klee Ann Lowdermilk was living at the residence, and she gave Officer Mitchell permission to look at the engine.<sup>2</sup> RP 29-30.

The engine was clean, and the front wheel assembly axels were attached to the engine. RP 45-47. The VIN number on the engine matched that of the Honda stolen from Aberdeen Honda. RP 32, 44.

Ms. Lowdermilk accompanied Officer Mitchell to look at the engine, and she went back into the house two times while the officers were there. RP 32-33. The second time Ms. Lowdermilk emerged from the residence, Thomas Ludvigsen was with her, and Officer Mitchell told Mr. Ludvigsen he was there to recover the stolen engine. RP 34. Mr. Ludvigsen said he did not know anything about the engine and went back in the house. RP 34-35.

Mr. Ludvigsen emerged from the house later, upset and shaking. RP 34, 40. Mr. Ludvigsen said he did not want Ms. Lowdermilk to get in trouble and related that Jeremy Butts had

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<sup>2</sup> Ms. Lowdermilk was charged with possessing the stolen property in a separate information and found not guilty at a bench trial. RP 2.

dropped off the engine a few days earlier. RP 39-40. Mr. Ludvigsen did not know the engine was stolen. RP 40.

The Hoquiam police seized the Honda engine as well as two Honda wheels found inside the front door to the home, a spare tire found on another vehicle parked near the home, and coils and shocks located in the back of another vehicle on the property. RP 40-41, 47-48. Hoquiam Detective Shane Krohn went back to Ms. Lowdermilk's home on several later dates but did not recover any additional stolen auto parts. RP 49.

According to the former Aberdeen Honda owner, the parts manager determined the cost of replacing the recovered parts was \$12,800. This figure was apparently based upon the cost of each individual part in the engine because Honda will not sell an assembled engine. RP 27-28.

The Grays Harbor Prosecutor charged Mr. Ludvigsen with possessing stolen property in the first degree, alleging he possessed the engine, two wheels, tires and "other parts" from a 2007 Honda. CP 1-2. After a jury trial before the Honorable F. Mark McCauley, a jury convicted Mr. Ludvigsen as charged. CP 14; RP 66.

At sentencing, the court included 1982 convictions for violation of the Uniform Controlled Substances Act in Mr. Ludvigsen's criminal history and determined his offender score was 10 and his standard range 43 to 57 months. CP 20. Mr. Ludvigsen was sentenced to serve 57 months in the Department of Corrections. CP 23. This appeal follows. CP 28-29.

D. ARGUMENT

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. LUDVIGSEN KNOWINGLY POSSESSED STOLEN PROPERTY

a. The State was required to prove beyond a reasonable doubt that Mr. Ludvigsen knowingly possessed stolen property.

The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.<sup>3</sup> Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. 6,

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<sup>3</sup> The Fourteenth Amendment states in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Article 1, Section 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

Article 1, Section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury . . ."

14; Wash. Const. art. 1, §§ 3, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). The appellate court draws all reasonable inferences in favor of the State. State v. Summers, 45 Wn.App. 761, 764, 728 P.2d 613 (1986).

Mr. Ludvigsen was convicted of possessing stolen property in the first degree on December 7, 2006; CP 8 (Jury Instruction 5), 14, 19. At that time, the statute read:

(1) A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property other than a firearm as defined in RCW 9A.41.010 which exceeds one thousand five hundred dollars in value.

(2) Possessing stolen property in the first degree is a class B felony.

Former RCW 9A.56.150.<sup>4</sup> “Possessing stolen property” is further defined at RCW 9A.56.140:

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<sup>4</sup> RCW 9A.56.150(1) was amended in 2007 to add motor vehicle to the items excluded from the statute. Laws of 2007 ch. 199 § 6 (effective July 22, 2007).

“Possessing stolen property” means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.55.140(1). The elements of possessing stolen property in the first degree thus are (1) actual or constructive possession (2) of stolen property valued at over \$1,500, (3) with knowledge the property was stolen. RCW 9A.56.140(1); Former RCW 9A.45.150(1); Summers, 45 Wn.App. at 763; CP 8-9 (Jury Instructions 3, 5, 7).

b. The State did not prove beyond a reasonable doubt that Mr. Ludvigsen was in actual or constructive possession of the stolen automobile parts. The State’s witnesses testified that they found a stolen Honda engine and tires at a residence in Hoquiam and that Mr. Ludvigsen was present at the time of the discovery. RP 29-32, 34. Mr. Ludvigsen told the police another man had left the engine at the house a few days earlier. RP 34-35, 39-40. The State did not prove that Mr. Ludvigsen had any other connection to the home; there was no evidence he owned the home, resided at the home, or that he had actual or constructive possession of the

stolen automobile parts. Thus, the State failed to prove Mr. Ludvigsen possessed the stolen property.

i. The State did not prove actual possession.

Possession of contraband may be established by actual physical possession or constructive possession. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969); CP 9 (Jury Instruction 8). Actual possession occurs when the goods are in the defendant's personal custody. Callahan, 77 Wn.2d at 29; Summers, 45 Wn.App. at 763. The State did not prove Mr. Ludvigsen was in actual possession of the automobile engine or any of the automobile parts found at the Hoquiam residence.

In Callahan, the defendant was a guest in a houseboat that contained illegal drugs, and he admitted handling the drugs earlier that day but denied they were his, even though he admitted owning other items in the room including a book about drugs and scales. Callahan, 77 Wn.2d at 28. Close proximity to the drugs and the admission of handling them earlier, however, was not sufficient to prove actual possession. Id. at 29.

Here, the State provided even less proof than found in Callahan. Like Callahan, Mr. Ludvigsen was inside a home where stolen property was found, but most of the stolen property in this

case was outside the house. More importantly, there was no evidence Mr. Ludvigsen handled or controlled the stolen property, even briefly. Thus, the State did not prove actual possession.

ii. The State did not prove Mr. Ludvigsen was in constructive possession of the stolen property. Constructive possession occurs when a person has dominion and control over an item even if it is not in his actual physical possession. Callahan, 77 Wn.2d at 29. The appellate court must look at the “totality of the situation” to determine if there is sufficient evidence to establish a reasonable inference of dominion and control over contraband. State v. Cote, 123 Wn.App. 546, 549, 96 P.3d 410 (2004) (quoting State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)). Dominion and control over the premises where the item is found, for example, is a circumstance that may be considered in determining if the defendant had dominion and control over the item. State v. Shumaker, 142 Wn.App. 330, 334, 174 P.3d 1214 (2007). However, mere proximity to contraband does not establish constructive possession. Cote, 123 Wn.App. at 550.

An example of the evidence required to prove constructive possession can be found in Partin, where the court upheld a conviction for possession of marijuana found in a home used as a

motorcycle gang clubhouse, rejecting the defendant's argument that the State had not proved constructive possession. Partin, 88 Wn.2d at 905-08. In that case, the police had seen the defendant's motorcycle chained to the front porch of the house several times, and found his photograph and miscellaneous financial documents in his name inside the house; the defendant had used the address when reporting a stolen motorcycle; the house was listed as his address in a newspaper article found in the home; and he had asserted control over the house when the police responded to a loud party complaint. Partin, 88 Wn.2d at 907-08.

Unlike Partin, the State failed to produce any evidence demonstrating Mr. Ludvigsen exercised control of the house or the driveway area where the stolen property was located. His case is more like State v. Spruell, 57 Wn.App. 383, 388, 788 P.2d 21 (1990), where the police found the defendant in the kitchen of a home during a police raid and his fingerprints were on a dish on the kitchen table that appeared to have contained cocaine immediately prior to the police entry into the home. The State, however, produced no evidence the defendant was anything other than a visitor to the home, and thus did not establish dominion and control over the drugs found inside. Spruell, 57 Wn.2d at 388-89.

Similarly, this Court found there was insufficient evidence to prove the defendant constructively possessed stolen merchandise found in a car parked on the freeway in State v. McCaughey, 14 Wn.App. 326, 327, 329, 541 P.2d 998 (1975). The defendant was found asleep 5 to 10 feet from the car and talked the police about the merchandise. This Court concluded proximity to the stolen merchandise combined with the defendant's inconsistent statements concerning its acquisition did not supply the evidence necessary to support constructive possession. McCaughey, 14 Wn.App. at 329-30; accord Callahan, 77 Wn.2d at 30-31 (defendant not in constructive possession of drugs found near defendant in houseboat where he was guest, despite prior handling of drugs).

Mr. Ludvigsen's case is similar to McCaughey. Mr. Ludvigsen was seen in a home and admitted being at the home earlier that week, thus showing proximity to the stolen property. He made inconsistent statements to the police – first stating he did not know anything about the engine and then stating Jeremy Butts had brought it to the house a few days earlier. This evidence, however, does not establish constructive possession of the stolen automobile parts. McCaughey, 14 Wn.App. at 329-30.

c. The State did not prove beyond a reasonable doubt Mr. Ludvigsen knew the automobile parts were stolen. Mr. Ludvigsen told the police officer that he did not know the automobile engine was stolen, and later said Jeremy Butts brought the engine to the house. RP 34-35, 39-40. Thus, there is no direct evidence Mr. Ludvigsen knew the Honda parts were stolen.

The jury may find knowledge based upon circumstantial evidence if it concludes a reasonable person would have known the property was stolen. RCW 9A.08.010(1)(b); CP 9 (Jury Instruction 9). The deputy prosecutor argued in closing the jury could assume Mr. Ludvigsen knew the automobile parts were stolen because they appeared new. RP 56-58. The fact that an automobile part is clean, however, does not establish it is stolen.

The prosecutor also argued Mr. Ludvigsen should have known the parts were stolen because they were not connected to an auto body. The police officers, however, testified there were several automobiles around the residence, some of which appeared to be operable and some of which did not. RP 43-44. The Honda engine was in an area off the driveway on an "engine hoist." RP 30. This description evokes a home equipped for automobile maintenance work. The fact that automobile

maintenance was conducted at this home does not establish Mr. Ludvigsen knew the Honda parts were stolen.

d. Mr. Ludvigsen's conviction should be reversed and dismissed. The State did not prove Mr. Ludvigsen had actual or constructive possession of the stolen automobile parts. The State did not establish Mr. Ludvigsen had ever touched or controlled the automobile parts or that he had any possessory interest or control over the residence where they were found. The State also did not prove Mr. Ludvigsen knew the automobile parts were stolen.

Mr. Ludvigsen's conviction must be reversed and dismissed. Summers, 45 Wn.App. at 765; McCaughey, 14 Wn.App. at 330.

2. THE TRIAL COURT INCORRECTLY INCLUDED A WASHED OUT CONVICTION IN MR. LUDVIGSEN'S OFFENDER SCORE

The sentencing court included 1982 convictions for Violation of the Uniform Controlled Substances Act (VUCSA) as one conviction in Mr. Ludvigsen's offender score. This Court previously concluded those convictions "washed out" because Mr. Ludvigsen had been crime-free five years after release. State v. Thomas E. Ludvigsen, Court of Appeals Number 28087-6-II, 2002 Wash.App.LEXIS 2931 (November 22, 2002). While the Sentencing Reform Act's "wash out" provisions have been

amended since that date, the relevant portions of the statute remain the same. The trial court improperly included the 1982 convictions in computing Mr. Ludvigsen's offender score, and his case should be remanded for re-sentencing.

This Court reviews the sentencing court's computation of an offender score de novo. State v. Watkins, 86 Wn.App. 852, 854, 939 P.2d 1243 (1997). Although Mr. Ludvigsen's attorney did not object to the calculation of his offender score at sentencing, he may raise this issue for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). "It has been the consistent holding of this court that the existence of an erroneous sentence requires resentencing." Ford, 137 Wn.2d at 385 (quoting Brooks v. Rhay, 92 Wn.2d 876, 877, 602 P.2d 356 (1979)).

a. Class C felonies that are not sex offenses do not count in calculating an offender score if the offender was crime-free for five years after release from confinement for the conviction.

Washington's Sentencing Reform Act (SRA) creates a grid of sentence ranges based upon the statutorily-established seriousness of the current offense and the defendant's offender score. RCW 9.94A.517; RCW 9.94A.518; RCW 9.94A.525; RCW 9.94A.530; Ford, 137 Wn.2d at 479. To properly calculate the

offender score, the court must determine the defendant's criminal history, which is defined as a list of the defendant's prior criminal convictions and juvenile adjudications. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004); Watkins, 86 Wn.App. at 854; RCW 9.94A.030(14). In some circumstances, a prior conviction may not be counted in computing the offender score because it has "washed out." RCW 9.94A.525(2).

An offender's sentence is determined by the sentencing law at the time of the offense. RCW 9.94A.535; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Because the crime for which Mr. Ludvigsen was sentenced occurred on December 7, 2006, the statute in effect on that date controls.

Non-sex offense class C felonies are not included in a defendant's offender score if, after release, the defendant spent five consecutive years in the community without committing a crime. Former RCW 9.94A.525(2). The statute in effect in 2006 provided, in relevant part:

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.

Former RCW 9.94A.525(2).<sup>5</sup>

b. This Court previously ruled Mr. Ludvigsen's 1998 drug convictions should not be included in his offender score, and subsequent amendments to RCW 9.94A.525 do not alter that conclusion. The sentencing court's list of Mr. Ludvigsen's criminal history included as one conviction two counts of violation of the Uniform Controlled Substances Act, Grays Harbor Superior Court Cause Number 82-1-53-7, sentenced on November 19, 1982.<sup>6</sup> CP 20. Delivery of marijuana is a Class C felony. RCW 69.50.401(2)(c); RCW 69.40.204(c)(14).<sup>7</sup> The next conviction chronologically is the October 8, 1989, Grays Harbor conviction of VUCSA. Id.

This Court previously ruled the 1982 Grays Harbor VUCSA convictions should not have been included in Mr. Ludvigsen's offender score when he appealed his sentence for a 2001 vehicular

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<sup>5</sup> This provision is now found at RCW 9.94A.525(2)(c).

<sup>6</sup> This conviction does not appear on the prosecutor's list of convictions prepared prior to sentencing. CP 16-17.

<sup>7</sup> This Court listed the 1982 VUCSA convictions as delivery of marijuana. 2002 Wash.App.LEXIS 2931 at \*2-3.

assault conviction. State v. Thomas E. Ludvigsen, Court of Appeals Number 28087-6-II, 2002 Wash.App.LEXIS 2931 (November 22, 2002).<sup>8</sup> Reviewing the facts presented at the 2001 sentencing hearing, this Court concluded the convictions “washed out” because Mr. Ludvigsen spent five consecutive years in the community without being convicted of any felonies after his release from custody for the 1982 conviction and before his 1989 conviction. 2002 Wash.App.LEXIS 2931 at \*5-10.

Mr. Ludvigsen is aware that a prior conviction does not necessarily “wash out” simply because it was not included in a prior offender score, as sentencing is based upon the law in effect at the time of the current offense. Varga, 151 Wn.2d 191; Watkins, 86 Wn.App. at 855-56; Former RCW 9.94A.525(19) (2006). In this case, however, the relevant “wash out” provisions remain the same, and so does the statutory analysis.

In its earlier opinion, this Court set forth the relevant statutory provision:

Class C prior felony 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 had

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<sup>8</sup> For the convenience of this Court and the parties, a copy of the slip opinion is attached as an appendix to this brief.

spent five consecutive years in the community without being convicted of any felonies.

2002 Wash.App.LEXIS at \*5 (quoting former RCW 9.94A.360(2) (1988)). A comparison of that language and the 2006 version of RCW 9.94A.525(2), set forth at page 14 above, reveals that the only change is the exclusion of sex offenses from the wash-out provisions. Laws of 1990, ch. 3, § 706. Thus, this Court's prior determination that the 1982 VUCSA were not properly included in Mr. Ludvigsen's offender score remains correct. The 1982 VUCSA convictions "washed out," and should not have been included in computing Mr. Ludvigsen's criminal history.

c. The State was estopped from including Mr. Ludvigsen's 1982 VUCSA conviction in his criminal history. Collateral estoppel, or issue preclusion, prevents the re-litigation of issues raised and resolved in a prior verdict or judgment; the doctrine applies in criminal cases. *State v. Harrison*, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003). Washington utilizes a four-part test to determine if a previous litigation should be given collateral estoppel effect in subsequent litigation. The party asserting collateral estoppel must demonstrate (1) the issues are identical; (2) the prior adjudication was a decision on the merits; (3) the party against whom collateral

estoppel is asserted was a party or in privity with a party to the prior litigation; and (4) precluding litigation of the issue will not work an injustice against the party against whom collateral estoppel is to be applied. *Clark v. Baines*, 150 Wn.2d 905, 913, 84 P.3d 245 (2004); *Harrison*, 148 Wn.2d at 561. All four factors are met here.

Concerning the first and second factors, this Court made a decision on the merits concerning whether the 1982 VUCSA conviction should be included in Mr. Ludvigsen's criminal history and count in computing his offender score. This is the same conviction at issue here, and the relevant statutory language has not changed. This Court's opinion was a final determination, and the State did not seek review in the Washington Supreme Court. *RAP 12.3(a); RAP 12.5(a); In re Personal Restraint of Skylstad*, 160 Wn.2d 944, 948-49, 162 P.3d 413 (2007). The third factor is also easily met because the parties are the same.

Fourth, applying the doctrine of collateral estoppel here will not work an injustice to the State. The State has an interest in ensuring offender scores are accurate, as this further the SRA's goal of commensurate punishment for defendants with similar convictions and similar criminal records. The State will not be prejudiced if the correct offender score is used in this case.

Moreover, a review of the fourth factor depends primarily upon whether the parties to the earlier proceeding had a “full and fair hearing on the issues in question.” Clark, 150 Wn.2d at 913. Here, the State had a full and fair opportunity to present evidence concerning whether the 1982 VUCSA conviction “washed out” at the initial sentencing hearing, and was able to present its legal argument both in the superior court and the Court of Appeals. Thus, the fourth factor is met because the State will not be prejudiced by the application of collateral estoppel.

RCW 9.94A.525(18) does not prevent the application of collateral estoppel. The statute provides that the absence of a prior conviction from a defendant’s offender score or criminal history at a previous sentencing is not determinative of whether the conviction should be counted at a different sentencing hearing. RCW 9.94A.525(18). Enacted in response to the Washington Supreme Court opinions addressing “washed out” conviction,” the statute is designed to ensure that convictions not counted under prior or repealed versions of the SRA may be included “if the current version of the sentencing reform act requires including or counting those convictions.” Id; Varga, 151 Wn.2d at 183-85. That is not the

case here, as the SRA has not been amended or repealed in a manner that impacts the prior conviction at issue here.

d. Mr. Ludvigsen's case should be remanded for resentencing with the correct offender score. When a sentence is based upon an erroneous offender score calculation, the defendant is entitled to be resentenced. Ford, 137 Wn.2d at 485. The State may argue that the error in counting the 1982 VUCSA as a felony in computing Mr. Ludvigsen's criminal history is harmless because it does not impact his offender score for this offense. RCW 9.94A.510 (Table 1 – Sentencing grid) (effective July 1, 2004).

The erroneous computation of Mr. Ludvigsen's offender score, however, will impact him if he is ever convicted of another felony in the future. See Laws of 2008, ch. 231, § 2 (amending RCW 9.94A.500 to provide any "criminal history summary" prepared by the prosecutor or any government agency is "prima facie evidence" of the "existence and validity" of all convictions on the list). This Court should ensure Mr. Ludvigsen's criminal history is accurate and remand his case for resentencing without the 1982 convictions and with the correct offender score.

E. CONCLUSION

Thomas Ludvigsen's conviction for possessing stolen property in the first degree must be reversed and dismissed because the State did not prove beyond a reasonable doubt that Mr. Ludvigsen possessed the stolen property.

In the alternative, this Court should remand Mr. Ludvigsen's case for re-sentencing in light of the correct offender score.

DATED this 10<sup>th</sup> day of October 2008.

Respectfully submitted,



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Washington Appellate Project  
Attorneys for Appellant

**APPENDIX**

**STATE OF WASHINGTON v. THOMAS LUDVIGSEN**

**COURT OF APPEALS No. 28087-6-II**

**November 22, 2002**

LEXSEE 2002 WASH.APP.LEXIS 2931

STATE OF WASHINGTON, Respondent, v. THOMAS E. LUDVIGSEN, Appellant.

No. 28087-6-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2002 Wash. App. LEXIS 2931

November 22, 2002, Filed

**NOTICE:** [\*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: *114 Wn. App. 1045, 2002 Wash. App. LEXIS 3334.*

**PRIOR HISTORY:** Appeal from Superior Court of Grays Harbor County. Docket No: 00-1-00537-0. Date filed: 10/22/2001.

**DISPOSITION:** Reversed and remanded for re-sentencing.

**COUNSEL:** For Appellant(s): Brett Ballew, Attorney at Law, Elma, WA.

For Respondent(s): Gerald R. Fuller, Grays Harbor Co Pros Ofc, Montesano, WA.

**JUDGES:** Authored by Christine Jan Quinn-Brintnall. Concurring: David H Armstrong, Elaine Marie Houghton.

**OPINION BY:** Christine Jan Quinn-Brintnall

**OPINION**

QUINN-BRINTNALL, A.C.J. -- Thomas E.

Ludvigsen appeals the 57-month sentence imposed for his conviction for vehicular assault. Ludvigsen challenges the calculation of his offender score, arguing that two of his prior convictions had "washed out" under former *RCW 9.94A.360(2)* (2000),<sup>1</sup> and should not be counted in his offender score. A commissioner of this court considered Ludvigsen's challenge on accelerated review, pursuant to *RAP 18.15*, and referred it to a panel of judges. We remand for the sentencing court for re-calculation of Ludvigsen's offender score and for re-sentencing.

<sup>1</sup> Recodified as *RCW 9.94A.525* by Laws of 2001, ch. 10, § 6.

[\*2] On January 10, 2001, Ludvigsen pleaded guilty to vehicular assault. The State asserted, and Ludvigsen did not contest, that Ludvigsen's offender score was seven. Based on that offender score, the standard sentencing range for Ludvigsen's crime was 43 to 57 months. The sentencing court sentenced Ludvigsen to 57 months confinement.

On September 18, 2001, Ludvigsen filed a motion to modify his judgment and sentence. He contended that two of his convictions had "washed out" under former *RCW 9.94A.360(2)* (2000), and should not have been counted in his offender score. The State provided the court with documentation of Ludvigsen's prior convictions, which are as follows:

	CRIME	DATE OF SENTENCE	CAUSE NUMBER	JAIL TIME IMPOSED
1.	Theft 2nd degree	10/8/79	CR-1-329	60 days

2.	VUCSA Del. Marij. <sup>2</sup>	11/19/82	82-1-53-4	9 months
3.	VUCSA Del. Cocaine <sup>3</sup>	8/8/89	88-1-278-1	28 months
4.	DUI <sup>4</sup>	11/5/91	DC 2 # 6841	2 days
5.	VUCSA Poss. Cocaine <sup>5</sup>	2/8/93	92-1-359-0	4 months
6.	Unl. Poss. Firearm <sup>6</sup>	7/17/95	95-1-135-4	13 months
7.	VUCSA Poss Amphet			
	w/Intent to Del. <sup>7</sup>	12/23/96	96-1-432-7	43 months

[\*3]

2 Violation of Uniform Controlled Substances Act - Delivery of Marijuana.

3 Violation of Uniform Controlled Substances Act - Delivery of Cocaine.

4 Driving While Under the Influence.

5 Violation of Uniform Controlled Substances Act - Possession of Cocaine.

6 Unlawful Possession of a Firearm.

7 Violation of Uniform Controlled Substances Act - Possession of Amphetamine with Intent to Deliver.

The State also provided the sentencing court with an August 31, 1987 Order Modifying Conditions of Probation, in which a prior court had sentenced Ludvigsen to 60 days in jail for violating the conditions of his probation. Handwritten at the bottom of the 1987 order is the following:

1. Cause # 81-1-206: serve 60 days at jail and pay costs of proceedings including attorney fees.

2. Cause 82-1-53-4: serve 60 days jail consecutively with Cause 81-1-206 which 60 days jail be suspended on condition that he successfully participate in and complete alcohol and drug treatment/counseling as [\*4] recommended by his [Community Corrections Officer].

Clerk's Papers (CP) at 59. The sentencing court denied Ludvigsen's motion, and he appeals.

Ludvigsen and the State agree this appeal presents a single issue: what was the last date of release from confinement pursuant to Ludvigsen's 1982 felony conviction? If Ludvigsen's last date of release from confinement was earlier than November 17, 1983 (five years before his commission of delivery of cocaine on

November 17, 1988), then the 1979 theft conviction and the 1982 delivery of cocaine conviction would "wash-out" under former *RCW 9.94A.360(2)* (1988), which provided in pertinent part: <sup>8</sup>

<sup>8</sup> Both Ludvigsen and the State applied the version of former *RCW 9.94A.360(2)* (2000) that was in effect on the date when he committed the vehicular assault, November 8, 2000. But the applicable version of *RCW 9.94A.360* was that in effect on November 17, 1988, when he committed the delivery of cocaine, because the 1979 and 1982 convictions either "washed-out" or did not "wash-out" at that time. See *In re Personal Restraint Petition of Goodwin*, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002); *State v. Smith*, 144 Wn.2d 665, 670-71, 30 P.3d 1245 (2001), 39 P.3d 294 (2002); *State v. Cruz*, 139 Wn.2d 186, 190, 985 P.2d 384 (1999); and *State v. Dean*, 113 Wn. App. 691, 54 P.3d 243, 244 (2002).

[\*5] Class C prior felony 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 had spent five consecutive years in the community without being convicted of any felonies.

Ludvigsen contends that the court sentenced him to nine months confinement pursuant to his November 19, 1982 conviction, so his last date of confinement pursuant to the 1982 conviction was prior to November 17, 1983. <sup>9</sup> Therefore, he argues that before he committed delivery of cocaine on November 17, 1988, he "had spent five consecutive years in the community without being convicted of any felonies," so his 1979 and 1982 convictions had "washed-out" under former *RCW*

9.94A.360(2) (1988).

9 In his motion before the sentencing court, Ludvigsen argued that because the sentencing courts had "washed-out" his 1979 and 1982 convictions when sentencing him for his 1989 and 1991 convictions, the sentencing court in his current case was obliged by collateral estoppel and res judicata to do the same. The sentencing court disagreed. Ludvigsen has abandoned that argument on appeal, and so we do not address it. But, as this opinion concludes, the 1989 and 1991 sentencing courts correctly "washed-out" Ludvigsen's 1979 and 1982 convictions, so the same result would have been reached under the collateral estoppel and res judicata theories.

[\*6] The State responds that Ludvigsen was confined pursuant to his 1982 conviction when he violated the terms of his probation on the 1982 conviction. After being granted leave to supplement the record on appeal, the State provided documentation that on November 17, 1986, the State filed a petition to revoke or modify Ludvigsen's probation granted after a 1981 conviction (the details of which are not contained in the record) and after his 1982 conviction. The superior court ordered Ludvigsen to appear on December 1, 1986, to respond to the State's petition. Ludvigsen failed to appear, and the superior court issued a bench warrant on December 4, 1986. The Aberdeen Police Department arrested Ludvigsen on the bench warrant on May 3, 1987, and took him into custody. He appeared before the superior court the next day, May 4, 1987, when the superior court reduced his bail to zero and released him. The State argues that Ludvigsen's last date of confinement pursuant to his 1982 conviction was May 3, 1987. Therefore, the State contends Ludvigsen had not "spent five consecutive years in the community without being convicted of any felonies," and his 1979 and 1982 convictions had not "washed-out" [\*7] under former *RCW 9.94A.360(2)* (1988).

A challenge to the offender score calculation is a sentencing error that a defendant may raise for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999); *State v. Roche*, 75 Wn. App. 500, 512-13, 878 P.2d 497 (1994). This court reviews the trial court's calculation of an offender score *de novo*. *State v. Watkins*, 86 Wn. App. 852, 854, 939 P.2d 1243 (1997).

This court has held that confinement following a

probation violation or a community supervision violation is confinement "pursuant to a felony conviction," when that felony conviction established the terms of probation or community supervision. *State v. Blair*, 57 Wn. App. 512, 516-17, 789 P.2d 104 (1990); *State v. Perencevic*, 54 Wn. App. 585, 587-88, 774 P.2d 558, review denied, 113 Wn.2d 1017, 781 P.2d 1320 (1989). If a probationer is ordered confined after being found guilty of a probation violation, then the "last date of release from confinement," for purposes of the five-year "wash-out" provision of former *RCW 9.94A.360(2)* [\*8] (1988), is the last date of release from confinement on the probation violation, not the last date of release from confinement on the initial sentence. *State v. Smith*, 65 Wn. App. 887, 892-93, 830 P.2d 379 (1992); *Blair*, 57 Wn. App. at 516.

In *Blair*, the defendant had been twice sentenced to 90 days in jail for violating his probation on the underlying felony conviction. 57 Wn. App. at 514. In *Smith*, the defendant's parole was revoked and he was ordered confined under the terms of the sentence for his underlying felony convictions. 65 Wn. App. at 889. But the court in 1987 did not confine Ludvigsen for violating the terms of probation on his 1982 felony conviction. As to the 1982 felony conviction, the court ordered: "serve 60 days jail consecutively with Cause 81-1-206 which 60 days jail be suspended on condition that he successfully participate in and complete alcohol and drug treatment/counseling as recommended by his [Community Corrections Officer]." <sup>10</sup> CP at 59.

10 The record is silent on whether the drug and alcohol treatment was inpatient (custodial) or outpatient. Because the State has not argued for application of the "including full-time residential treatment" provision in former *RCW 9.94A.360(2)* (2000), it appears that the Community Corrections Officer did not require inpatient treatment.

[\*9] Thus, the only possible time when Ludvigsen could have been confined "pursuant to" the 1982 felony conviction was May 3 to 4, 1987, after his arrest on the bench warrant and before his release when the court reduced his bail to zero. Is that day in jail confinement "pursuant to" the 1982 felony conviction or is that day in jail confinement pursuant to the bench warrant for failing to appear? If the former, then the 1982 felony conviction does not "wash-out" under former *RCW 9.94A.360(2)* (1988). If the latter, then the 1982 felony conviction does "wash-out" under former *RCW 9.94A.360(2)* (1988).

We conclude Ludvigsen's confinement from May 3 to 4, 1987, was not confinement "pursuant to" the 1982 felony conviction. When the court imposed punishment for Ludvigsen's probation violation on the 1982 felony conviction, it imposed a 60-day jail sentence, with all 60 days suspended on conditions. The court did not credit Ludvigsen for any time served. Therefore, the court did not consider Ludvigsen's jail time on May 3 to 4, 1987, as part of the punishment for the probation violation on the 1982 felony conviction. Because the court did [\*10] not impose confinement as part of the punishment for Ludvigsen's probation violation on the 1982 felony conviction, Ludvigsen's confinement on May 3 to 4, 1987, was pursuant only to the bench warrant issued for his failure to appear and was not pursuant to the 1982 felony conviction. Ludvigsen's confinement pursuant to the bench warrant does not interrupt the five-year "wash-out" period for his 1979 and 1982 felony

convictions. Ludvigsen's sentence should be remanded for re-calculation of his offender score, omitting the "washed-out" 1979 and 1982 felony convictions, and for re-sentencing under the corrected offender score.

Reversed and remanded for re-sentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to *RCW 2.06.040*, it is so ordered.

QUINN-BRINTNALL, A.C.J.

We concur:

HOUGHTON, J.

ARMSTRONG, J.

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 37548-6-II
	)	
THOMAS LUDVIGSEN,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF OCTOBER, 2008, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MEGAN VALENTINE, DPA GRAYS HARBOR CO. PROSECUTOR'S OFFICE 102 W. BROADWAY AVENUE, ROOM 102 MONTESANO, WA 98563-3621	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] THOMAS LUDVIGSEN 631543 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF OCTOBER, 2008.

X \_\_\_\_\_ 

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