

NO. 39023-0-II

COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY cm  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

VINH QUANG LAM, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 06-1-05830-7

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the 2008 amendment to RCW 9.94A.525(21) applies to a resentencing that occurs after a conviction has been reversed?
2. Whether the 2008 amendment to RCW 9.94A.525(21) is a permissible change to case law that does not violate the separation of powers?
3. Whether the 2008 amendment to RCW 9.94A.525(21) may be applied to this case and is not time barred where the amendment was made before the first appellate opinion issued in this case, and where the collateral attack time period has not yet begun to run?

B. STATEMENT OF THE CASE.

1. Procedure

On December 11, 2006, the State charged Lam with five counts based on an incident that occurred on December 9, 2006: Count I, Possession of a Stolen Firearm; Count II, Unlawful Possession of a Firearm in the Second Degree; Count III, Possessing Stolen Property In The First Degree; Count IV, Attempting to Elude A Pursuing Police Vehicle; Count V, Driving While Suspended or Revoked in The Second Degree. CP 1-4. An amended information was filed on April 26, 2007,

which added one firearm sentence enhancement to each of Counts III and IV. CP 7-10.

The case was assigned to the Honorable Judge Brian Tollefson for trial. CP 263. On May 8, 2007, the jury found the defendant not guilty as to Count I, but guilty as charged as to the remaining counts. CP 45-53. The jury also found the defendant was armed with a firearm when he committed Counts III and IV. CP 48, 52.

The defense moved to arrest the judgment as to Count II, claiming that the State failed to prove the firearm was operable. 54-64. The court denied the motion. CP 264-65. The court sentenced Lam on July 13, 2007. CP 266-77. The sentence was for a total of 111 months, which total was based on a sentence of 57 months on Count II, the 36 month firearm enhancement on Count III, and the 18 month firearm enhancement on Count IV (all of which had to run consecutive to each other). CP 272. Lam was also sentenced to 43 months on Count III, and 22 months on Count IV, but those times were imposed concurrent to the 57 months on Count II. CP 272. That sentence was based upon an offender score of 8 on each count, derived from ten prior convictions. CP 269. Two of those ten convictions were disallowed. CP 269. They were for two counts of Taking a Motor Vehicle Without Permission that occurred on 11-07-98 and 02-02-99, and which were sentenced together on 03-24-00. CP 269.

Lam appealed, and the court vacated his conviction for unlawful possession of a firearm, holding that the “To Convict” instruction as to that count was ambiguous such that it alleviated the State of its burden to prove Lam knowingly possessed the firearm. CP 117-25.

The defense moved to resentence Lam, while the State objected claiming the count had been remanded, and therefore sought to re-prosecute the vacated conviction. CP 126-39; [Memorandum of Journal Entry of 12-05-08]. However, on March 2, 2009, the State elected to dismiss Count II. CP 280-82.

On March 20, 2009, Lam was resentedenced to 43 months on count III, and 22 months on Count IV, with firearm enhancements of 36 and 18 months respectively on each count for a total period of incarceration of 43 month standard range sentence, plus 54 month consecutive enhancement time (= 97 months). At the resentencing, the parties disputed whether the State could now prove out the two prior convictions for taking a motor vehicle without permission that the court had disallowed at the prior sentencing. CP 144-49; 150-218. The court apparently counted the two prior convictions in the defendant’s offender score, so that his offender score was again an 8 (they were juvenile convictions worth .5 points each). CP 221-33.

The defendant timely filed the notice of appeal in this case on March 24, 2009. CP 236-254. As the sole issue on appeal, he now challenges the inclusion of the two previously disallowed convictions in the computation of his offender score. Br. App. 4-10.

2. Facts

The underlying facts of this case are irrelevant to this appeal, which is based solely on the defendant's challenge to the computation of his offender score for purposes of sentencing. Nonetheless what follows is a brief summary of the underlying facts of the case derived from the Declaration For Determination Of Probable Cause. CP 261-62

That in Pierce County, Washington, on or about the 9<sup>th</sup> day of December, 2006, the defendant, VINH QUANG LAM did commit the crimes of Taking Motor Vehicle in the Second Degree and Obstruction, and VINH QUANG LAM did commit the crimes of Possession of Stolen Firearm, Unlawful Possession of Firearm in the Second Degree, Possessing Stolen Property in the First Degree, Attempt To Elude Pursuing Police Vehicle, and Driving While License Suspended/Revoked in the Second Degree.

On December 9, 2006, at approximately 4:30 a.m. in Lakewood, Washington, Officer Mark Eakes of the Lakewood Police Department observed a 1990 Honda Civic. Police later estimated the value at \$3,000.00, and the owner estimated it at about \$1500.00. A computer

check revealed the car to be stolen from a Larry Miles in Enumclaw on December 2, 2006. At the time, Officer Eakes observed he was in full uniform in a marked Lakewood patrol car with lights and siren.

After getting behind the vehicle and obtaining backup, he and the backup unit activated their emergency equipment in an attempt to get the vehicle to pull over. The vehicle then accelerated and went onto I-5 where it weaved between lanes and reached a top speed of about 85 miles per hour.

The vehicle then continued northbound on I-5 until it reached the Portland Avenue exit where it exited, drove around a moving car and went into the oncoming lanes. At this time, the officer noted the driver did not have his lights on, and because of this shut down his emergency equipment. After a short period of time, it turned its light back on and the officer again turned on his emergency equipment. At this time the speed of the car was between 40 and 60 miles per hour, and turned north on M Street, and then south onto Q Street. Around this time, officers laid down stop sticks, and the vehicle swerved to avoid them and spun out and hit a curb and mail box.

Three Asian males were then observed to flee from the car on foot, and one remained in the car. They were apprehended shortly and identified as VINH QUANG LAM, VIEN QUANG LAM, and Malance

Saing. A fourth person remained in the car and was identified as Timothy Sek.

Sek was clear of warrants and said VINH QUANG LAM was driving. Saing also said VINH LAM was driving. Officers also found a wallet on the driver's seat which had a Washington ID card belonging to Vinh Lam. They also found a .45 automatic which had been stolen from a Mark Cournoyer in a burglary. It was protruding from under the driver's seat, and was fully loaded with one in the chamber and was cocked. VINH LAM has numerous felony convictions, including Taking Motor Vehicle Without Permission (Five convictions), and Possessing Stolen Property in the First Degree. At the time of the stop, his license to drive was Revoked/Suspended in the Second Degree.

VIEN LAM said he ran because there was a warrant for his arrest and that was why he ran. When asked who was driving, he said he wasn't a snitch and didn't remember. He said his brother bought the car a few days ago for \$600.00, but admitted they had no paperwork. When he was later falsely told that Vinh had admitted being the driver, VIEN then admitted that VINH was the driver.

VINH claimed he bought the car for \$600.00, but had no paperwork. He denied any knowledge of the gun, and when asked if he was the driver said he wasn't going to tell the officer.

C. ARGUMENT.

1. THE DEFENDANT'S CHALLENGE FAILS ON THE MERITS.

- a. The fact that Lam was resentenced after his conviction on one count was reversed does not preclude the application of RCW 9.94A.525(21) (2008).

In Laws of Washington 2008 c 231 §3, the Legislature added language to RCW 9.94A.525(21) as follows:

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. 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. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

Here, the defense reviews four cases that interpreted the SRA prior to the 2008 amendment, and that prohibited recalculation of offender scores on remand where the State failed to adduce evidence of criminal history in response to a specific objection. *See*, Br. App. 5-7 (discussing ***State v. Ford***, 137 Wn.2d 472, 973 P.2d 452 (1999)); ***State v. McCorkle***, 137 Wn.2d 490, 973 P.2d 461 (1999); ***State v. Lopez***, 147 Wn.2d 515, 55 P.3d 609 (2002); and ***In re Caldwell***, 155 Wn.2d 867, 123 P.3d 456

(2005). The defense then claims that the 2008 amendment to RCW 9.94A.525(21) must be in response to those cases, and then attempts to infer that the 2008 amendment is therefore limited to situations where a defendant appeals his sentence or offender score, and the appellate court remands for resentencing. Br. App. 7. This argument completely disregards and even inverts the principles of statutory interpretation that apply in Washington.

Interpretation of a statute is a question of law. *Millay v. Cam*, 135 Wn.2d 193, 198, 955 P.2d 791 (1998). "[T]he fundamental object of statutory interpretation is to ascertain and give effect to the intent of the legislature' which is done by 'first look[ing] to the plain meaning of words used in a statute.'" *State v. Sweet*, 138 Wn.2d 466, 477-78, 980 P.2d 1223 (1999). When words in a statute are plain and unambiguous, further statutory construction is not necessary, and the statute is applied as written. *Sweet*, 138 Wn.2d at 478, *Enterprise Leasing, Inc v. City of Tacoma*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999). If the statute does not define a term, the plain and ordinary meaning should be determined from a standard dictionary. *State v. Mullins*, 128 Wn. App. 633, 642, 116 P.3d 441 (2005). However, if a statute is ambiguous, the court refers to methods of statutory construction. *Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996). A statute is ambiguous if it is

susceptible to more than one reasonable interpretation. *Vashon Island Comm. For Self-Gov't v. State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995). But it is not ambiguous simply because different interpretations are conceivable and the court does not search for ambiguity by imagining a variety of alternative interpretations. *Mullins*, 128 Wn. App. at 642.

Here, the language of the 2008 amendment to the SRA provides:

....

Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

RCW 9.94A.525(21)

This language is simple and unambiguous. It emphasizes that “prior convictions that were not included in the criminal history in offender score shall be included.” The use of the word “shall” indicates that something is mandatory as opposed to permissive. See, *Case v. Dundom*, 115 Wn. App. 199, 202, 58 P.3d 919 (2002). Moreover, prior convictions that were not included shall be included upon any resentencing. By its plain language, the 2008 amendment is clearly not limited to cases where a defendant appeals his sentence or offender score

and the matter is remanded for resentencing. Rather, it relates to all resentencings.

Nor does the 2008 amendment which permits the State to prove the defendant's offender score anew at any resentencing violate double jeopardy. The State and federal double jeopardy clauses provide the same protection and are identical in thought, substance and purpose. *State v. Wright*, 165 Wn.2d 783, 791, 203 P.3d 1027 (2009); *In re Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000); *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). In *Monge v. California*, the United States Supreme Court held that, when the court reimposes a sentence after an appeal, even where there was a failure of proof in the first sentencing, the court may nonetheless consider the issue anew at the resentencing.<sup>1</sup> *Monge v. California*, 524 U.S. 721, 729-30, 734, 118 S. Ct. 2246, 141 L.Ed.2d 615 (1998).

The authority upon which the defendant relies interprets RCW 9.94A.525(21). However, that authority is no longer controlling where the statute has been amended by the legislature.

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<sup>1</sup> This provision does not apply to capital cases.

b. There Legislature's Amendment Of RCW  
9.94A.525(21) Does Not Violate The  
Separation Of Powers

The defense goes on to argue that the 2008 amendment violates separation of powers. Br. App. at 8. The defense apparently attempts to argue that the 2008 amendment attempts to perform judicial functions. Br. App. at 8. However, under the defense argument, it is in fact the court that would impose on the Legislature's powers.

The prior cases the defense relies upon interpreted the Sentencing Reform Act. *Caldwallader* relies on *Lopez* and *Ford*. *Caldwallader*, 155 Wn.2d at 877-78 (citing *Lopez*, 147 Wn.2d at 521; *Ford*, 137 Wn.2d at 483). *Lopez* in turn relies on *Ford*, and *State v. McCorckle*. *Lopez*, 147 Wn.2d at 520-21 (citing *Ford*, 137 Wn.2d at 485; *State v. McCorckle*, 88 Wn. App. 485, 499, 945 P.2d 736 (1997)). *Ford* itself was a companion case to the Supreme Court's opinion in *McCorckle*, and relied upon the Court of Appeals opinion in *McCorckle*, as did the Supreme Court in *McCorckle* itself. *Ford*, 137 Wn.2d at 485 (citing *State v. McCorckle*, 88 Wn. App. 485, 500, 945 P.2d 736 (1997); *McCorckle*, 137 Wn2d at 496-97 (citing *McCorckle*, 88 Wn App. at 498. The Court of Appeals in *McCorckle*, as in all these cases, interpreted the burdens of proof and the

requirement to object at sentencing matters as laid out in the SRA. *See, McCorkle*, 88 Wn. App. 485.

Where the case law that limited consideration of prior convictions on resentencing interpreted the SRA, the legislature is perfectly entitled to amend that legislation, and it has done so. The legislature was also entitled to draft that amendment so it applied to all resentenings that occur after the effective date of the legislation.

2. THE STATE'S CHALLENGE IS NOT TIME BARRED.

- a. The 2008 Legislative Change To RCW 9.94A.525(21) Applies To This Case Because It Became Effective Before The Opinion Was Filed On The First Appeal.

In Laws of Washington 2008 c 231 §3, the Legislature added language to RCW 9.94A.525(21) as follows:

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. 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. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

Laws of Washington 2008 c 231 §3 became effective on June 12, 2008. The court's opinion was not filed until July 28, 2008, and the mandate in the appeal did not issue until September 18, 2008. CP 118, 117.

Because the change to RCW 9.94A.525(21) became effective prior to the Court of Appeals issuing its opinion on the first appeal, the legislative change applied to that ruling and was controlling. Where the current version of RCW 9.94A.525(21) is controlling, the court did not err when it determined the defendant's offender score in a manner consistent with the requirements of the current version of RCW 9.94A.525(21).

b. Contrary To The Defendant's Assertion,  
The Collateral Attack Time Limit Has Not  
Yet Run.

The defendant claims that the one year time limit to challenge the judgment under CrR 7.8 and RCW 10.73.090 has expired and the State cannot now challenge the judgment. Quite to the contrary, not only has the time limit not expired, it has not yet even begun to run.

CrR 7.8(b) provides in pertinent part [emphasis added]:

**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud;** etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order or proceeding for the following reasons:

....

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

RCW 10.73.090 provides [emphasis added]:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, “collateral attack” means any form of post conviction relief other than a direct appeal. “Collateral attack” includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

- (a) The date it is filed with the clerk of the trial court;
- (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
- (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

Here, the second judgment and sentence was entered on March 20, 2009. That sentence has been appealed by the defendant and where this appeal is currently pending the mandate has obviously not entered. The State has no objection to the second Judgment and Sentence as entered by

the trial court. Nonetheless, the time period for collateral attack will not expire for at least a year after the entry of the mandate on this appeal.

D. CONCLUSION.

The 2008 amendment to RCW 9.94A.525(21) applies this case under the plain language of the amendment. The amendment does not violate separation of powers where it fell within the proper legislative function. Nor is the application of the amendment to this case on resentencing time barred.

DATED: December 9, 2009.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-9-09 *Theresa Kor*  
Date Signature

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STATE OF WASHINGTON  
BY *Theresa Kor*  
DEPUTY  
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