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I. **ASSIGNMENTS OF ERROR AND ISSUES**

A. **Assignments of Error**

1. The court miscalculated Appellant's offender score resulting in an unlawful sentence.

B. **Issues Pertaining to Assignments of Error**

(a) Governing law.

(b) The 1996 court had statutory discretion to rescore the two 1990 offenses as a single offense.

(c) The 2009 court did not address the question of the 1990 offenses.

(d) The 2010 court did not have statutory discretion to revisit the 1996 court's determination.

(e) The intervening residential burglary conviction did not expand the 2010 court's power.

(f) The State presented no evidence upon which the 2010 court could determine whether the disputed priors were same criminal conduct.

(g) If there was error in 1996, the State was barred from alleging it in 2010.

II. STATEMENT OF THE CASE

On November 30, 2010, Appellant, Thomas A. Sherrill, pleaded guilty to first degree unlawful possession of a firearm. CP 157. Initially, Sherrill signed a Statement on Plea of Guilty that listed his offender score as 6, with a standard range of 57-75 months. CP 158. Sherrill filed a motion to withdraw this plea, arguing that the offender score was incorrect. CP 20-23. After a series of unrelated procedural complications, the matter of the plea and sentencing again came before the court on April 29, 2010. RP 62-85.

On the advice of counsel, Sherrill withdrew the motion to withdraw his plea and allowed the guilty plea to stand, conditioned on the court's assurances that it would address the disputed score at sentencing. RP 68-70. There was no question that Sherrill disputed the offender score and intended to appeal an adverse ruling. The State did not make Sherrill's acquiescence to the higher score a condition for its sentencing recommendation.¹ RP 70.

Defense counsel argued the offender score was only five, not six as alleged by the State. RP 71. Sherrill based his challenge on the scoring history of two prior offenses that had been the subject of contradictory

¹ The recommendation appears generous on its face. RP 17. But the record contains no hint of the strength or weakness of the State's evidence.

offender score rulings by previous sentencing courts in 1990, 1996 and 2009. CP 21.

The State presented no evidence as to the correct scoring of those offenses. The sentencing court simply accepted the State's hand-waving argument that a 1990 decision to score the offenses separately was correct, that a 1996 determination by the same judge to score them as a single offense was a mistake, and that a 2009 Judgment and Sentence implicitly adopted the 1990 scoring. RP 78-82.

The sole issue on appeal is whether the current sentencing court erred in ruling that 1996 Judgment scoring the two 1990 offenses as one was a mistake and that the current court was not bound by that determination. RP 73-74.

Procedural History: Sherrill was convicted in 1990 of second degree burglary and first degree theft. CP 106. At sentencing, Judge James Sawyer found that those two offenses were not the same criminal conduct for sentencing purposes because different victims were involved. Accordingly, the court scored each offense as one point. CP 108.

In 1996, the same Judge Sawyer explicitly found that the same 1990 burglary and theft constituted a single offense for sentencing purposes and scored them as a single point. CP 133. The record contains

no indication that the State appealed the 1996 offender score determination and sentence.

On January 12, 2009, a different judge sentenced Sherrill for residential burglary. CP 119. The court entered no findings but appears to have scored each adult prior as one point, because the criminal history includes four adult felonies and the current theft was sentenced on a score of 5 and the current residential burglary was sentenced on a score of 6. CP 120-21. The State did not appeal the 2009 offender score and sentence.

The sentencing at issue in this appeal took place on April 29, 2010. CP 7, RP 62-85.

The court called for argument on the offender score issue. RP 70. The only evidence introduced by the State was the Judgment and Sentences from 1990, 1996, and 2009. RP 71; CP 106-156. The prosecutor confused defense counsel by appearing to claim – without any supporting documentation — that Sherrill had orally agreed at the plea hearing that the correct offender score was six. RP 71. The scoring issue was squarely before the court, however.

Defense counsel argued that the 1990 decision to score the offenses separately was superseded in 1996 when the same judge made an explicit finding that the same two offenses were the same criminal conduct. The then-prosecutor (now a Mason County superior court judge

herself, RP 24) also signed off on this Judgment and Sentence. CP 133; RP 71.

The State claimed that the 2009 Judgment and Sentence scoring all the prior adult offenses as one point constituted an implicit finding that the 1990 offenses were not same criminal conduct and should be scored separately. The State argued this was the only plausible explanation for the 2009 court's score, and that this "finding" was entitled to deference. RP 80-81. As authority, the State cited cases addressing the law of same criminal conduct, rather than the rules governing the calculation of offender scores. RP 79-80.

The court did not enter any findings of disputed fact but simply announced that Sherrill had benefitted from a mistake in 1996, but that, "That will not happen in this court." The court declared the correct offender score was 6. RP 76. One of the court's justifications was that Sherrill had signed the current plea statement that included the now-disputed score. RP 82.² The State then proceeded to recommend the middle of the standard range, pursuant to the agreement. CP 160; RP 77. The court sentenced Sherrill to 63 months on a score of 6. CP 9, RP 85.

Sherrill filed this timely appeal. CP 6.

² The court refers to a "transcript" of the prior sentencing, but the State did not offer any transcripts. The court is apparently referring to the hand-written entry in the 1990 J&S. See CP 108.

III. **ARGUMENT:** THE COURT MISCALCULATED
SHERRILL'S OFFENDER SCORE.

Summary: The governing law is the Sentencing Reform Act (SRA), decisions interpreting the SRA, and the equitable doctrines of res judicata and judicial estoppel. The 1996 court had statutory discretion to rescore the two 1990 offenses as a single offense. The 2009 court did not address the 1990 offenses, but simply followed RCW 9.94A.525(16) which requires each adult felony to be scored as a single point where the current charge is residential burglary. Unlike the 2009 conviction, the 2010 current offense of unlawful possession of a firearm did not invoke the SRA's residential burglary offender score provisions. The 2010 court did not have statutory discretion to revisit the 1996 court's revised determination, and the intervening residential burglary conviction did not affect the statutory requirement that a current court cannot arbitrarily ignore a prior court's classification of two offenses as a single offense for sentencing purposes. The 2010 court also lacked any evidence upon which to base a decision to overturn the 1996 court. Finally, the State's failure to appeal either the 1996 or the 2009 offender score calculation and sentencing bars the State from denying the preclusive effect of those judgments.

(a) **Governing law:** Calculation of a defendant's offender score is a question of law that this Court reviews de novo. *State v. McCraw*, 127 Wn.2d 281, 289-90, 898 P.2d 838 (1995) (superseded by statute on different grounds).³ In interpreting a statute, this Court looks first to the plain language. If the language is unambiguous, the inquiry goes no further; the Court enforces the statute in accordance with its plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If a criminal statute is deemed ambiguous, the rule of lenity requires the Court to construe it in favor of the defendant. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

This Court will not review a finding of fact as to same criminal conduct unless the record contains sufficient facts to support a finding either way on the presence of any of the three elements set forth in RCW 9.94A.401(a): (1) same time and place; (2) same victim; and (3) same objective criminal intent. RCW 9.94A.589; *State v. Anderson*, 92 Wn. App. 54, 62, 960 P.2d 975 (1998).

Calculating the Offender Score: The SRA instructs sentencing courts how to score current offenses that are being sentenced at the same time. With non-germane exceptions, "whenever a person is to be sentenced for two or more current offenses, the sentence range for each

³ See Laws of 1995, ch. 316, sec. 1.

current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” RCW

9.94A.589(1)(a). RCW 9.94A.589(1)(a) determines the standard-range

sentence for any offenses that are not serious violent offenses. RCW

9.94A.589(1)(b). RCW 9.94A.525 tells the court how to use the current and prior offenses in calculating an offender score.

The predecessor statute to RCW 9.94A.525 was former RCW 9.94A.360.⁴ Until 1995, it gave a current sentencing court unfettered discretion to score two prior offenses as a single offense, disregarding an earlier court’s finding that the offenses were not same criminal conduct. Former RCW 9.94A.360(6)(a)(i); *State v. McCraw*, 127 Wn.2d 281, 287, 898 P.2d 838 (1995) (superseded by statute on different grounds. See Laws of 1995, ch. 316, §. 1.) A court was even allowed to disregard its own affirmative findings that the offenses most probably were different criminal conduct:

RCW 9.94A.360(6)(a) provides that the current sentencing court shall determine whether offenses which were served concurrently shall be counted as ‘one offense or as separate

⁴ RCW 9.94A.360 was recodified as RCW 9.94A.525 by Laws 2001, ch. 10, § 6.

offenses'. The statute does not restrict the current sentencing court to the previous sentencing court's determination or to the application of the same criminal conduct standard imposed pursuant to RCW 9.94A.400(1)(a).

McCraw, 127 Wn.2d at 287.

But a 1995 amendment to former RCW 9.94A.360 eliminated the current sentencing court's discretion to disregard a previous court's same criminal conduct finding. The revised statute read: "Prior adult offenses which were found, under RCW 9.94A.400(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 whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.400(1)(a)[.]" Former revised RCW 9.94A.360(6)(a)(i) (emphasis added).

The plain meaning of this is that a current sentencing court can rescore previously ruled-upon offenses downward, but not upward. The current court must abide by a previous court's decision to count two offenses as one, but may independently apply RCW 9.94A.400(1)(a) to treat as a single offense any prior concurrently-sentenced offenses that had not previously been determined to be same criminal conduct.

Like its predecessor provision in RCW 9.94A.360(6)(a)(i), the plain language of RCW 9.94A.525 first discusses prior offenses that have previously been determined to be same criminal conduct, to which the previously-determined score mandatorily attaches. Then it too says that for other prior offenses for which concurrent sentences were imposed, the current sentencing court has discretion to determine how to score them. RCW 9.94A.525(5)(a)(i) (emphasis added).

Moreover, if the statute is deemed ambiguous, the rule of lenity requires the Court to construe it in favor of the defendant, absent legislative intent to the contrary. *Jacobs*, 154 Wn.2d at 601.

(b) The 1996 court had statutory discretion to rescore the two 1990 offenses as a single offense.

Thus, in 1996, RCW 9.94A.360(6)(a)(i) authorized the court to reevaluate the 1990 offenses and rescore them as a single offense.

This is what the court elected to do. CP 133, 138. The criminal history section of the 1996 Judgment and Sentence unequivocally states that the 1990 burglary and theft convictions “are one offense for purposes of determining the offender score.” CP 133.

This was not a mere careless oversight. Besides being done by the same judge, an offender score of ‘2’ in the sentencing data box is overwritten with several vertical lines forming a thick ‘1’. CP 133. And

the court cites as authority RCW 9.94A.360. CP 133. As discussed above, the 1996 version of .360 authorized the current sentencing court to rescore as a single offense any concurrently-sentenced priors other than those that were were “found, under RCW 9.94A.400(1)(a), to encompass the same criminal conduct[.]” RCW 9.94A.360(6)(a). Sherrill’s 1990 offenses were not found to be same criminal conduct. Therefore, they were “other” offenses which the 1996 court had statutory discretion to rescore.

Once the 1996 court revised its determination and rescored the 1990 offenses as a single offense for sentencing, the same provision of .360 divested the 2010 court of discretion to ignore that determination. RCW 9.94A.360(6)(a).

(c) The 2009 court made no findings regarding the 1990 offenses.

There is no reason to suppose the 2009 court addressed the 1990 offenses at all. The 2009 Judgment and Sentence contains no findings, and there is no suggestion the court did not apply RCW 9.94A.525(16):

If the present conviction is for... residential burglary, count priors as in subsection (7) of this section; however, count two points for each... prior burglary 2 conviction... . Subsection (7) says to... count one point for each adult prior felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

RCW 9.94A.525(7), (16).

Sherrill's current offense in 2009 was residential burglary. CP 119. The criminal history listed in the 2009 Judgment and Sentence shows four priors. Sherrill also had three juvenile theft 2^o convictions which should have added 1 ½ points to the score under RCW 9.94A.525(7) & (16). CP 108. But the State did not allege any juvenile convictions, and the court did not score any. CP 120.

(d) The 2010 court did not have statutory discretion to revisit the 1996 court's determination.

The 2010 court's conclusory ruling that the 1996 scoring of the 1990 offenses was a mistake is not supported by either the law or the facts.

As a matter of law, the current sentencing court did not have discretion under the SRA simply to ignore the previous court's same criminal conduct determination.

The State argued that RCW 9.94A.525(5)(a)(i) authorized Sherrill's 2010 sentencing court to determine the offender score without regard to the 1996 court's same criminal conduct determination. RP 75. But the prosecutor misstated the law.

The two 1990 offenses fell under the first clause of RCW 9.94A.360(6)(a)(i), not the second. They were offenses previously determined to constitute same criminal conduct, not "other" prior offenses for which concurrent sentences were imposed. Accordingly, RCW

9.94A.525 does not authorize the 2010 court to disregard the 1996 court's determination. By the plain language of the statute, the court could not simply ignore the 1996 court's ruling. RCW 9.94A.525(6)(a)(i).

(e) The intervening residential burglary conviction did not expand the 2010 court's power.

A court may not add language to a clear statute (even if it believes the Legislature simply forgot to include it.) *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997).

RCW 9.94A.525(16) divests the court of discretion to treat prior offenses as a single offense for sentencing purposes if the current offense is residential burglary. It does not say that this scoring prevails for all future sentencings. Nothing in the statute deprives the current court either of the obligation to honor a prior court's determination that two offenses should score as one, or of the discretion to apply RCW 9.94A.400(1)(a) to other prior offenses. RCW 9.94A.525(6)(a)(i).

(f) The State presented no evidence upon which the 2010 court could have based a finding that the disputed priors were not same criminal conduct.

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at

the time of sentencing, or proven pursuant to RCW 9.94A.537. RCW 9.94A.530(2). A defendant's current offenses must be counted separately in determining the offender score unless the court finds, based on admissible evidence, that some or all of the current offenses encompass the same criminal conduct. RCW 9.94A.400(1)(a); *Anderson*, 92 Wn. App. at 61.

In *Anderson*, as in Sherill's case, the record contained no findings on any of the elements of same criminal conduct. The Court could not, therefore, review the issue: "Because this court does not make factual findings, we will treat the trial court's calculation of Anderson's offender score as an implicit determination that his offenses did not constitute the same criminal conduct. Just as in cases where the trial court explicitly considers the issue, we will not disturb an implicit determination absent abuse of discretion or misapplication of the law." *Anderson*, 92 Wn. App. at 62.

Here, the 1996 court's calculation of the offender score constitutes an implicit determination of same criminal conduct. The record contains no contrary evidence and the State offered no evidence supporting a factual determination by the 2010 court as to the basis of the 1996 court's offender score calculation. The State simply did not produce sufficient

evidence to support a finding by the current sentencing court that the 1996 calculation was a “mistake.”

The State’s conclusory assertion that the 2009 court made an implicit finding that the 1990 offenses were not same criminal conduct (RP 80-81) is not supported by any evidence. Moreover, the prosecutor was simply wrong in arguing that this was the only plausible explanation for the 2009 court’s offender score calculation. Rather, as discussed above, RCW 9.94A.525(16) required the 2009 court to count all prior adult offenses as one point because the current crime in 2009 was residential burglary.

Neither did Sherrill’s signature on the statement on plea of guilty justify the court’s arbitrary imposition of the score reflected therein. Sherrill disputed that score throughout these proceedings and withdrew a motion to withdraw his plea in reliance on the court’s promise to revisit the offender score. RP 68-70.

Therefore, RCW 9.94A.530(2)’s restriction limiting the sentencing court solely to information proved at the time of sentencing obligated the State to produce proof that the 1990 offenses were incorrectly scored as a single point in 1996. The State did not do this.⁵ Instead, the court simply

⁵ As an example of sufficient evidence, the sentencing court in *State v. Blanks*, 139 Wn. App. 543, 161 P.3d 455 (2007), reviewed the probable

assumed that the 1990 court's same criminal conduct finding was correct and the 1996 court's implicit contrary finding was not. But the State offered no evidence of what facts were before the court, either in 1990 or in 1996. The same judge presided at both sentencings. CP 112, 142. The court may have revised the same criminal conduct determination based either on new evidence or on a different interpretation of the old evidence.

(g) The State was barred in 2010 from alleging an unappealed error from 1996.

It is a well-established common law rule that a party may challenge a sentence for the first time on appeal on the basis that it is contrary to law. *Anderson*, 92 Wn. App. at 61. This rule applies equally to the State. RAP 2.2(b)(6). Thus, the State could have appealed the 1996 offender score determination, if there was something wrong with it. *See, e.g., State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007) where this Court granted the State's request to reverse the trial court's offender score determination and remand for resentencing. *Wilson*, 136 Wn. App. at 600.

For whatever reason, the State decided not to appeal Sherrill's 1996 offender score calculation and sentencing. That decision has consequences for the sentencing at issue in this appeal. The doctrines of

cause affidavit in support of its finding that two offenses were not same criminal conduct. *Blanks*, 139 Wn. App. at 554.

judicial estoppel and res judicata bar the State from now challenging the 1996 Judgment and Sentence's preclusive effect.

(i) Judicial Estoppel: The doctrine of judicial estoppel is an equitable doctrine that precludes a party from asserting one position in one court proceeding and taking a clearly inconsistent position in another. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008). The doctrine applies whenever (i) a party's positions are clearly inconsistent; (ii) judicial acceptance of the inconsistent position creates the perception that either the first or the second court was misled; and (iii) the party asserting an inconsistent position would derive an unfair advantage if not estopped. *Campbell*, 164 Wn.2d at 539.

The State, not the defense, prepares a Judgment and Sentence. It is unlikely the 1996 court would have assigned an offender score of 1 without the prosecutor having argued for that. Therefore, the State in 2010 is asserting clearly a inconsistent position by arguing that the 1990 offenses should be treated as multiple offenses for sentencing purposes. This creates the perception that either the 1996 or 2010 court was misled, as, apparently, both were. Moreover, the State derives an unfair advantage if not estopped, because it can play fast and loose with the law according to what serves its purposes at any particular time. In Sherrill's case, for example, it may be a disservice to the prosecutor to assume she was

simply ignorant of the law in 1996, rather than that it served the State's purposes in 1996 to seek a lower offender score, and in 2010 it did not.

(ii) Res Judicata: The principles of collateral estoppel operate in criminal prosecutions. *State v. Eggleston*, 164 Wn.2d 61, 71, 187 P.3d 233, 237 (2008). When a factual issue has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *State v. Tili*, 148 Wn.2d 350, 360, 60 P.3d 1192, 1197 (2003).

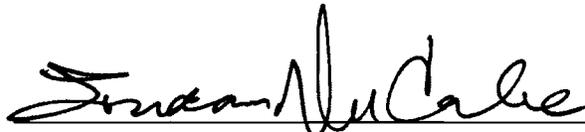
That is the case here. There is no res more judicata than a 15-year-old facially valid Judgment in a criminal case. The State is precluded from litigating the 1996 court's multiple offense scoring determination.

V. CONCLUSION

Former RCW 9.94A.360(6)(a)(i) gave the 1996 sentencing court discretion to revisit the scoring of the disputed 1990 offenses. RCW 9.94A.525(6)(a)(i) did not give the current sentencing court discretion to revisit the 1996 court's determination to score two 1990 offenses as a single offense. RCW 9.94A.525(16) did not apply, because the current offense in 2010 was not burglary. Therefore, the 1996 determination that the two 1990 offenses counted as a single offense was binding, and the offender score applicable to Sherrill's 2010 sentencing was five points, not six.

Accordingly, the Court should vacate Sherrill's sentence and remand for resentencing.

Respectfully submitted this 1st day of October, 2010.

A handwritten signature in black ink, reading "Jordan B. McCabe". The signature is written in a cursive style with a horizontal line underneath it.

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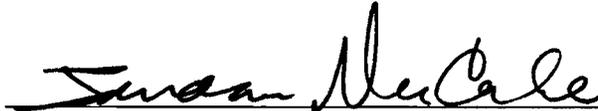
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