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STATE OF WASHINGTON

NO. 40668-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

MICHAEL D. CRAWFORD,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause No. 09-1-00568-4

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340-0510
(360) 638-2106

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Crawford's motion to correct and/or modify his judgment and sentence by ruling that he was on community placement at the time he committed the current offense of perjury in the first degree.
02. The trial court erred in permitting Crawford to be represented by counsel who provided ineffective assistance by failing to object to or by assenting to the court's instruction 24 on the ground that the instruction included uncharged alternative means of committing the crime of interfering with the reporting of domestic violence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether a defendant who commits an offense while incarcerated on another offense is on community custody or placement at the time of commission of the new offense for the purpose of adding a point to his or her offender score under former RCW 9.94A.525?
02. The trial court erred in permitting Crawford to be represented by counsel who provided ineffective assistance by failing to object to or by assenting to the court's instruction 24 on the ground that the instruction included uncharged alternative means of committing the crime of interfering with the reporting of domestic violence.

C. STATEMENT OF THE CASE

On July 23, 2009, Michael D. Crawford (Crawford) pleaded guilty to perjury in the first degree, a class B felony under RCW 9A.72.020. [CP 2, 46-52-62]. His presumptive sentence range was 62 to

82 months [CP 47, 55] based on an offender score of 8, the calculation of which the State explained as follows:

They (two prior juvenile convictions) are counted, Your Honor, and that is because the parties are agreeing for purposes of this sentencing that crime number one and crime number three constitute same criminal conduct, Your Honor. And so the seven adult felonies would count as six points. The two adult - - two juvenile felonies would count as one point. And then he was on supervision, that counts as one point. For a total of eight. (emphasis added).

[RP 07/23/09 4].

Crawford said that he understood this [RP 07/23/09 4] before being sentenced to the agreed recommendation of 62 months, the low end of the standard range. [RP 07/23/09 6; CP 57].

On March 8, 2010, Crawford filed a motion under CrR 7.8 “to correct and/or modify his Judgment and Sentence [CP 64](,)” arguing that his previously determined offender score of 8 was incorrect because it included a point for him being on community custody at the time he committed perjury, with the result that he should be resentenced on the correct score of 7 points to the low end of the standard range of 51 months. [CP 64-67]. The trial court denied the motion. [RP 81].

It appears that the defendant’s position is he was in jail because the perjury was committed while he was at trial and he was being held on that. In this court’s opinion that doesn’t mean that he wasn’t still on community custody even though he was in custody. That community custody

period continues to run. I will deny his motion and I'd ask that you draft an order to that effect.

[RP 04/08/10 7].

Timely notice of this appeal followed. [CP 83].

D. ARGUMENT

01. A DEFENDANT WHO COMMITS AN OFFENSE WHILE INCARCERATED ON ANOTHER OFFENSE IS NOT ON COMMUNITY CUSTODY OR PLACEMENT AT THE TIME OF COMMISSION OF THE NEW OFFENSE FOR THE PURPOSE OF ADDING A POINT TO HIS OR HER OFFENDER SCORE UNDER FORMER RCW 9.94A.525.

A challenge to the calculation of an offender score may be raised for the first time on appeal. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999); RAP 2.5(a)(3). Our Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based on a miscalculated upward offender score, "that a defendant cannot agree to punishment in excess of that which the Legislature has established," and that "in general a defendant cannot waive a challenge to a miscalculated offender score." In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a

sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. State v. Mitchell, 81 Wn. App. 387, 390, 914 P.2d 771 (1996).

Here, as previously indicated, the court calculated Crawford's offender score as 8, which included one point based on the State's contention that Crawford was on community custody or placement at the time of the current perjury offense.¹ [RP 07/23/09 4]. He was not.

Under former RCW 9.94A.525(19), in effect at the time of Crawford's sentencing, one point is added to an offender score if the defendant committed the current offense while under community placement, which, for sentencing purposes, is the equivalent of community custody, which is defined as that "portion of an offender's sentence ... served in the community subject to controls placed on the offender's movement and activities by the department." (emphasis added). [Former RCW 9.94A.030(5). Another section of the statute defines community placement to mean

¹ There is an apparent scrivener's error in the Felony Judgment and Sentence, which mistakenly omitted a check in the box indicating that the "defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525." [CP 54].

that period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

Former RCW 9.94A.030(7). Importantly, former RCW 9.94A.625(3), in pertinent part, reads:

Any period of community custody, community placement or community supervision shall be tolled during any period of time the offender is in confinement for any reason....

It is undisputed that Crawford committed the current offense of perjury in the first degree under Thurston County cause number 09-1-00568-4 while in confinement during his testimony on February 25, 2009, in a prior case under Thurston County cause number 08-1-02248-3. [CP 3, 66].

Simply, Crawford was not under community custody or placement at the time of the current offense of perjury in the first degree. At that time, he was not serving a portion of any sentence in the community, former RCW 9.94A.030(5), and was not subject “to the conditions of community custody and/or postrelease supervision....” Former RCW 9.94A.030(7). And due to his confinement, any period community

custody or placement or supervision was tolled. Former RCW

9.94A.625(3).

This case should be remanded for resentencing under Crawford's correct offender score of 7, which does not include a point for community custody or placement.

02. CRAWFORD WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE THAT CRAWFORD WAS NOT ON COMMUNITY CUSTODY OR PLACEMENT AT THE TIME HE COMMITTED THE OFFENSE OF PERJURY IN THE FIRST DEGREE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not

required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of error invited by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)).

Should this court find that trial counsel waived the issue presented herein relating to the community-placement point added to Crawford's offender score by failing to object to or by assenting to the prosecutor's or the court's determination in this regard, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have so acted or failed to act, especially given the troubling aspect that the day before sentencing he had acknowledged that it was his "understanding after talking to Mr. Crawford that he wishes to plead guilty, but the issue is regarding his points." [RP 07/22/09 4]. For the reasons set forth in the preceding section of this brief, had counsel properly objected based on the grounds set forth in the preceding section

of this brief, the trial court would not have added the additional community-placement point to Crawford's offender score.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: again, for the reasons set forth in the preceding section of this brief, but for counsel's failure to object to or by assenting to the prosecutor's and the trial court's determination to add the community-placement point to Crawford's offender score, the trial court would not have so acted.

E. CONCLUSION

Based on the above, Crawford respectfully requests this court to remand for resentencing consistent with the argument presented herein.

DATED this 9th day of November 2010.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

John C. Skinder	Michael D. Crawford #771542
Deputy Pros Atty	S.C.C.C.
2000 Lakeridge Drive S.W.	191 Constantine Way
Olympia, WA 98502	Aberdeen, WA 98520

DATED this 9th day of November 2010.

Thomas E. Doyle
Thomas E. Doyle
Attorney for Appellant
WSBA No. 10634