

NO. 41214-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES HARTZELL,

Appellant.

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FILED  
BY  
CLERK  
JULY 11 2011  
SEATTLE  
COUNTY CLERK

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Wickham, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's sentence was vacated on appeal and remanded for resentencing. At the resentencing hearing the trial court erred by denying appellant his right to present evidence relevant to his offender score calculation.

Issue Pertaining to Assignment of Error

RCW 9.94A.530(2) provides: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." In light of this statutory provision, did the trial court err by concluding appellant's offender score at the original sentencing was "law of the case" and by refusing to allow appellant to challenge to his offender score at the resentencing hearing following the appeal?

B. STATEMENT OF THE CASE

1. Procedural Facts

By published decision issued July 19, 2010, the Court of Appeals (Division One) affirmed Appellant Charles Hartzell's Thurston County convictions for second degree assault with a deadly weapon and first degree unlawful possession of a firearm. CP 42-73; State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928 (2010). Remand for resentencing was

required, however, because the original sentencing court imposed a 36-month firearm sentence enhancement despite a jury finding only that the assault had been committed with a "deadly weapon." CP 66, 73; Hartzell, 156 Wn. App. at 943-44, 949.

A resentencing hearing was held in Thurston County superior court on September 16, 2010, before the same judge who had originally sentenced Hartzell, the Honorable Chris Wickham. CP 27; RP 1. At that hearing the prosecution submitted "a statement of criminal history and score sheets in lieu of [sic] the Court of Appeals opinion finding fault with the special verdict form [sic]." RP 4; CP 96-99. According to the prosecutor, Hartzell's offender score was "10" for the assault and "8" for the possession of a firearm. Appendix. The prosecutor requested that the court impose high-end standard range sentences of 96 months for the assault (84 months plus a 12 month deadly weapon enhancement) and 102 months for the firearm possession. RP 4.

Hartzell, who represented himself at the resentencing, sought to contest the prosecutor's offender score calculation. RP 7. Hartzell informed the court he had not had time to submit briefing regarding his offender score challenges because he was not notified of the resentencing until the day before he was transported from prison. RP 8. Hartzell nonetheless explained that some of his prior convictions should be

considered "same criminal conduct," thereby resulting in a lower offender score than alleged by the prosecutor. RP 8-9.

In response, the prosecutor argued:

Your Honor, I believe that the criminal history, as I've set forth, is the law of the case. My recollection is that we litigated this issue at the time of sentencing in March of '08. My recollection is that certified copies of his criminal convictions were provided to the court. In any event, I believe that the history - - this is the same history as we presented to the court at the time of the sentencing in March.

RP 10.

In reply, Hartzell requested a continuance to provide time for him to properly present his argument for why his offender score was less than that alleged by the prosecutor. RP 11. Hartzell later also noted for the court that under "State v. Mendoza"<sup>1</sup> he should be allowed to challenge his offender score upon resentencing. RP 15.

In rejecting Hartzell's request, the court stated:

The original sentencing in this case took place on March 7th, 2008. At that time the court was presented with a statement of criminal history. And I agree with counsel that at this point that criminal history is the law of the case. And I've seen and heard nothing that would persuade me otherwise. So I will sentence base on the criminal history presented by the State.

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<sup>1</sup> Hartzell was presumably referring to State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009). In Mendoza, the Court recognized that under RCW 9.94A.530, the State was entitled to relitigate Mendoza's offender score calculation at the resentencing hearing. 165 Wn.2d at 930.

RP 11-12.

The court then sentenced Hartzell as requested by the prosecutor.

CP 74-83; RP 12. Hartzell appeals. CP 84-94.

C. ARGUMENT

THE RESENTENCING COURT ERRED BY DENYING HARTZELL THE OPPORTUNITY TO CHALLENGE THE PROSECUTOR'S CALCULATION OF HIS OFFENDER SCORE.

By statute, Hartzell was entitled to challenge his offender score upon remand for resentencing following appeal. The trial court's conclusion that the law of the case doctrine<sup>2</sup> precluded Hartzell from such a challenge was wrong. This Court should reverse Hartzell's sentence and

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<sup>2</sup> The "law of the case" doctrine;

generally "refers to 'the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand'" or to "the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case." Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice, Judgments* § 380, at 55 (4th ed.1986) (footnote omitted)).

The doctrine serves to "promote[ ] the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (quoting 1B J. Moore, J. Lucas, & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 118 (1984)). The courts apply the doctrine in order "to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts." 5 Am.Jur.2d *Appellate Review* § 605 (2d ed.1995) (footnote omitted).

State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003).

remand for resentencing.

“The primary purpose of statutory construction is to give effect to the legislature’s intent.” City of Bellevue v. E. Bellevue Cmty. Council, 138 Wn.2d 937, 944, 983 P.2d 602 (1999). “When a statute is not ambiguous, a court must determine the Legislature’s intent by the language of the statute alone.” State v. S.M.H., 76 Wn. App. 550, 559, 887 P.2d 903 (1995). The court must then apply the language as written. In re Personal Restraint of Sappenfield, 138 Wn.2d 588, 591, 980 P.2d 1271 (1999). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

The last sentence of RCW 9.94A.530(2) provides: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented."<sup>3</sup> There is nothing ambiguous about this sentence. It provides

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<sup>3</sup> This provision was added in 2008 in response to the decisions in In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002), State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) and State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999), which served to limit in some circumstances the prosecution's opportunity to prove criminal history if resentencing was ordered as a result of appellate review. Laws 2008, ch. 231, §§ 1 & 4

that "the parties" are entitled to relitigate the determination of an offender score if appellate review results in remand for resentencing. The prior determination does not control, and it is irrelevant whether the evidence submitted at resentencing was not previously submitted. This statutory provision effectively exempts offender score calculations on remand from the "law of the case" doctrine. See Mendoza, 165 Wn.2d at 930 (recognizing that RCW 9.94A.530 allows for de novo determination of the offender score upon remand for resentencing following appeal).

Here, appellate review resulted in remand for resentencing of Hartzell. CP 41-73. Yet in direct contradiction of RCW 9.94A.530(2), the trial court refused to allow Hartzell to present evidence relevant to his offender score calculation, holding the "law of the case" doctrine precluded it. RP 11-12. This was error. This Court should therefore reverse and remand for the statutorily required resentencing at which Hartzell is afforded his right to present evidence relevant to determination of his correct offender score.

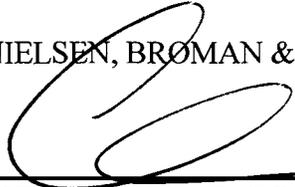
D. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for resentencing.

DATED this 17th day of November 2010.

Respectfully submitted,

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CHARLES HARTZELL,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19<sup>TH</sup> DAY OF NOVEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] CAROL LA VERNE  
THURSTON COUNTY PROSECUTOR'S OFFICE  
2000 LAKERIDGE DRIVE SW, BUILDING 2  
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- [X] CHARLES HARTZELL  
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ABERDEEN, WA 98520

BY \_\_\_\_\_  
Clerk of Court  
November 19, 2010  
Court Reporter

**SIGNED** IN SEATTLE WASHINGTON, THIS 19<sup>TH</sup> DAY OF NOVEMBER 2010.

x Patrick Mayovsky