

No. 46773-9

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT PETITION OF

JACOB IVAN SCHMITT,

PETITIONER.

**REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION
(CONSOLIDATED WITH DIRECT APPEAL)**

Jeffrey E. Ellis #17139
Attorney for Mr. Schmitt
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

A. INTRODUCTION

This case turns on whether a non-comparable, non-exclusive federal conviction—in other words, a crime that does not count as “criminal history”—interrupts the wash out period. It does not and the State points only to “logic” for support, ignoring contradicting caselaw construing the statute.

The State’s response invites this Court to avoid the ultimate issue. The State argues that, even if Schmitt was given affirmative misadvice about his offender score because it was reasonable to conclude that Schmitt’s federal bank robbery did not interrupt the wash-out period that advice was not deficient and Schmitt’s guilty plea was voluntary. Once, again, the State is incorrect. Inaccurate advice about an offender score can constitute deficient performance (*State v. Saunders*, 120 Wn.App. 800, 824–25, 86 P.3d 232 (2004)), just as it can render a guilty plea involuntary. *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006).

Because Mr. Schmitt’s bank robbery does not interrupt the wash out period, his prior second-degree robbery should not have been included in his offender score and Schmitt never faced persistent offender status if convicted of a most serious offender. As a result, his guilty plea was the product of ineffective assistance of counsel.

B. DISPUTED FACTS

The *Response* does not counter Mr. Schmitt's declaration with a contesting declaration. As a result, the competent, admissible facts in Schmitt's declaration should be treated as verities. *In re Rice*, 118 Wash.2d 876, 886, 828 P.2d 1086 (1992).

C. ARGUMENT

1. THE SENTENCING COURT ERRED WHEN IT INCLUDED THREE CRIMES THAT WASH OUT.
2. MR. SCHMITT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL MISCALCULATED MR. SCHMITT'S OFFENDER SCORE RESULTING IN MR. SCHMITT'S INVOLUNTARY GUILTY PLEA AND A SUBSEQUENT UNLAWFUL SENTENCE.

Introduction

Mr. Schmitt argues that his offender score is incorrect. The State's response is that it does not matter. The State argues that because the parties jointly recommended an exceptional sentence that any error in calculating the offender score was harmless.

A Sentence Based on an Incorrect Offender Score is Invalid

The State's harmlessness argument is undermined by the law. Courts have the duty and power to correct an erroneous sentence upon its discovery. This applies similarly to errors raised in a personal restraint petition. *In re Call*, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). A defendant cannot agree to an erroneous offender score. *In re Restraint of Goodwin*,

146 Wn.2d 861, 874, 50 P.3d 618 (2002). The State’s reliance on *State v. Nitsch*, 100 Wn.App. 512, 997 P.2d 1000 (2000); and *State v. O’Neal*, 126 Wn. App. 395, 432- 33, 109 P. 3d 429 (2005), is misplaced as both of those cases involve discretionary determinations. Whether two crimes constitute same criminal conduct is a discretionary decision. Whether crimes wash out is not.

An exceptional sentence premised on an incorrect offender score is harmless only where it is clear that the judge would have imposed the same sentence absent the error. *State v. Worl*, 129 Wash.2d 416, 918 P.2d 905 (1996) (“Imposition of an exceptional sentence is directly related to a correct determination of the standard range. That determination can be made only after the offender score is correctly calculated.”). The State points only to the plea agreement, but there is no exception to the rule for cases involving agreed recommendations by the parties. As a result, calculation of the correct offender score is necessary.

A Federal Crime That is Not Comparable to a Washington Crime Does Not Interrupt the Wash Out Period

The State’s argues that any finding of guilt for any federal crime is automatically a “conviction” within the meaning of RCW 9.94A.525(2). *Response*, p. 16. (“federal bank robbery is a crime even if it does not count for offender score purposes.”). The State argues that this result follows as a matter of common sense.

But, what the State thinks is “common sense” is not the law. The language of the statute, as construed by caselaw, controls.

The State completely fails to acknowledge, much less distinguish *State v. McCorkle*, 88 Wn.App. 485, 498, 945 P.2d 736 (1997); *aff'd* 137 Wn.2d 490, 496, 973 P.2d 461 (1999) (partially superceded by statute on other grounds). In *McCorkle*, the Court of Appeals held that a conviction for a non-comparable crime does not interrupt wash out. The Legislature is presumed to be aware of decisional law. However, at no point during any of the many subsequent amendments to the SRA has the Legislature indicated any attempt to modify that rule.

Mr. Schmitt was also “in the community” from May 5, 2001, until his arrest on this current offense for purposes of wash-out, since he was not in confinement “pursuant to a felony conviction.” Because the federal conviction is unclassified, it cannot be considered a felony, so any confinement that might have resulted from it, was not “pursuant to a felony conviction” as required by RCW 9.94A.525(2), and *State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354.

The State completely ignores *McCorkle, supra*, which makes very clear that an unclassified foreign conviction, and confinement pursuant to it, cannot be used to stop the wash out of other offenses.

Lastly, there is the matter of legislative acquiescence. In 2008, the legislature amended several sections of the SRA. Laws of 2008, ch. 231,

section 1. It's intent was clear: "Given 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), the legislature finds it necessary to amend the provisions in RCW 9.94A.500, 9.94A.525, and 9.94A.530 in order to ensure that sentences imposed accurately reflect the offenders actual, complete criminal history, whether imposed at sentencing or upon resentencing." *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014). The legislature clearly took the decision in *McCorkle* into consideration, and then made the amendments to RCW 9.94A.525, with the specific intentions of ensuring that "sentences imposed accurately reflect the offender's actual, complete criminal history." However, the Legislature made no changes to the portion of RCW 9.94A.525, regarding wash out or the classification of foreign convictions.

3. MR. SCHMITT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL MISCALCULATED MR. SCHMITT'S OFFENDER SCORE RESULTING IN MR. SCHMITT'S INVOLUNTARY GUILTY PLEA.
4. MR. SCHMITT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE MISADVISED SCHMITT THAT, IF CONVICTED, SCHMITT FACED A PERSISTENT OFFENDER SENTENCE.
5. MR. SCHMITT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL; DUE

PROCESS AND A STATE-CREATED LIBERTY INTEREST WHEN COUNSEL FAILED TO REQUEST AND THE TRIAL COURT FAILED TO DETERMINE WHETHER SCHMITT'S PRIOR ROBBERY 2 CONVICTION WASHED OUT PRIOR TO ACCEPTING A PLEA AGREEMENT THAT WAS PREMISED ON THE MUTUAL UNDERSTANDING THAT SCHMITT WOULD BE SENTENCED AS A PERSISTENT OFFENDER IF CONVICTED OF A MOST SERIOUS OFFENSE.

If this Court concludes that Mr. Schmitt's prior Robbery 2 conviction washes out, then Mr. Schmitt never faced a persistent offender finding. Because his guilty plea was premised on that advisement and because he would have made a different choice if he had been given accurate advice, he has established ineffective assistance of counsel. The State fails to respond to this argument.

It is well established that counsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent. But, the State does not respond to this argument. Instead, the State assumes away the issue.

The State argues that Mr. Schmitt's guilty plea was an intelligent decision because he was receiving a benefit when the State amended the charges so that Schmitt would not strike out. *Response*, p. 5 ("if the attorneys' and the court's view of the wash out rules was correct..."). But, that is not the issue. If Schmitt did not face the prospect of a persistent offender finding, then his guilty plea was premised on affirmative misadvice, which constitutes ineffectiveness. *State v. Sandoval*, 171

Wash.2d 163. 249 P.3d 1015 (2011). Once again, the State fails to cite, much less distinguish this authority.

The State asks the Court to conclude that Schmitt knew about the wash out argument before he elected to plead guilty. But, the State offers no evidentiary support for its argument. Under the pleading requirements for PRPs, if the State seeks to contest a material fact, it must submit a sworn statement including competent, admissible evidence. The State did not do so. As a result, the facts alleged by the State should not be considered by this Court.

The State then attempts to argue that Mr. Schmitt's own declaration undermines his claim. Schmitt's declaration clearly states that he asked trial counsel prior to, and during sentencing, if his second strike had washed out, and was told that it did not. Schmitt's declaration does not show awareness of the law, but instead shows that trial counsel gave Schmitt misadvice, which Schmitt relied on to his detriment. This is a classic case of ineffectiveness.

The *Findings of Fact and Conclusions of Law* stated numerous times that Schmitt's guilty plea was in order to avoid a sentence as a persistent offender. At the beginning of the sentencing hearing on September 12, 2014, the prosecutor stated: "This is an Amended Information from a third strike offense, and that is the basis for these being non-violent offenses." RP 4.

When the trial court was determining comparability of the federal bank robbery conviction, the prosecution clearly stated that even if the federal conviction was not comparable, Schmitt was still facing a persistent offender sentence: "But just for the record -- and I know that it's written in the documentation – regardless of what the court determines the defendant's offender score is, he wants to go forwards with this plea and this recommendation and receive the benefit of this not being his third strike, life without parole, regardless of what the standard range is and his offender score." RP, p. 10.

It is absurd for the State to contend that Schmitt was supposed to be the only person in the courtroom who knew the law, when he was the only one in the courtroom without legal training. Based on misadvice, Schmitt entered into a plea agreement with a sentence of 360 months, when he was only facing a maximum of 75 months if convicted and sentenced as originally charged.

Schmitt would have made a different decision had he been given accurate advice. He has conclusively established ineffective assistance of counsel.

//

//

//

D. CONCLUSION

Based on the above, this Court should either grant the PRP and order appropriate relief or remand for an evidentiary hearing.

DATED this 7th day of December, 2015.

Respectfully Submitted:

/s/Jeffrey E. Ellis
Jeffrey E. Ellis #17139
Attorney for Mr. Schmitt
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on today's date I e-filed the attached reply and served it by email on opposing counsel, Pierce County Prosecutor's Office and Mr. Schmitt's counsel on the consolidated direct appeal at:
pcpatcecf@co.pierce.wa.us;
backlundmistry@gmail.com

December 7, 2015//Portland, OR

/s/Jeffrey Erwin Ellis