

COA NO. 47859-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD PINKNEY, III,

Appellant.

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

The Honorable Gary R. Tabor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court miscalculated the offender score.
2. Appellant received ineffective assistance of counsel at sentencing, in violation of the Sixth Amendment to the United States Constitution.

Issues Pertaining to Assignments of Error

1. Whether the court miscalculated the offender score by erroneously including a prior conviction?
2. In the alternative, whether trial counsel provided ineffective assistance at sentencing in agreeing to the offender score?

B. STATEMENT OF THE CASE

The State charged Edward Pinkney with felony violation of a no-contact order (VNCO) and bail jumping. CP 7. A jury convicted on both counts, returning a special verdict that the VNCO was a "domestic violence" offense. CP 34-36. Defense counsel stipulated to an offender score of 7 for the VNCO offense and 5 for the bail jumping offense. 6RP¹ 5-6. The court imposed a prison-based Drug Offender Sentencing Alternative (DOSA), resulting in a total of term of 27.75 months in prison

¹ The verbatim report of proceedings is referenced as follows: 1RP – 1/28/15; 2RP – one volume consisting of 2/3/15, 2/4/15, 2/8/15, 4/23/15; 3RP one volume consisting of 3/11/15, 6/4/15; 4RP – 4/9/15; 5RP – 7/23/15; 6RP 7/29/15.

and 27.75 months of community custody. CP 119, 121; 6RP 20-21. This appeal follows. CP 57-68.

C. **ARGUMENT**

1. **THE OFFENDER SCORE WRONGLY INCLUDES A PRIOR CONVICTION.**

The court committed an error of law by including a prior offense in the offender score. If the issue is waived because defense counsel agreed to the offender score, then counsel provided ineffective assistance. Either way, Pinkney's case must be remanded for resentencing with a reduced score.

a. **The correct offender score calculation for the current VNCO-DV offense is 6 points, not 7.**

Offender score calculations are reviewed de novo. State v. Moeurn, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010). The offender score for the current VNCO offense breaks down as follows.

The current offense of bail jumping counts one point toward the VNCO offense. RCW 9.94A.525(7) (where present conviction is for non-violent offense, count one point for each prior non-violent offense); RCW 9.94A.589(1)(a) (other current offense treated as prior conviction in computing offender score).

These felonies were also properly included in the offender score: (1) controlled substance violation (date of crime 2/13/15), (2) felony

VNCO-DV (date of crime 1/16/14) and (3) second degree assault (date of crime 7/19/01). CP 118. The controlled substance violation and second degree assault offenses each contributed one point. RCW 9.94A.525(7). The VNCO-DV offense contributed two points. RCW 9.94A.525(21)(a) (prior felony DV offense pled and proven after Aug. 1, 2011).

A prior gross misdemeanor conviction for fourth degree assault-DV (date of crime 3/11/13) was also included in the offender score. CP 118. This offense properly contributed one point to the offender score as a "repetitive domestic violence offense." RCW 9.94A.525(21)(c).

Based on the above crimes, the offender score is 6 points. None of the other criminal history contributes to the offender score.

Pinkney's criminal history includes a number of other DV misdemeanors, but none were pled and proven after August 1, 2011. As a result, none counted as a "repetitive domestic violence offense." RCW 9.94A.525(21)(c).

According to the face of the judgment and sentence, three prior felonies washed out from the offender score: (1) controlled substance violation (date of crime 7/2/06), (2) harassment-DV (date of crime 4/10/01) and (3) controlled substance violation conspiracy (date of crime 10/26/00). CP 118. These class C felonies washed out because Pinkney spent five consecutive years in the community crime free between 2006

and 2013. CP 118; RCW 9.94A.525(2)(c) (washout provision); RCW 26.50.110(5) (VNCO); RCW 9A.46.020(2)(b) (harassment); RCW 69.50.401(2)(a) (cocaine delivery); RCW 9A.28.040(3)(c) (conspiracy); State v. Wade, 186 Wn. App. 749, 778-79, 346 P.3d 838 (inchoate drug crime reduced from class B to class C felony), review denied, 184 Wn.2d 1004, 357 P.3d 665 (2015).

Based on the above calculation, the correct offender score for the VNCO offense is 6 points, not 7 points. A prior conviction was improperly included in Pinkney's offender score, resulting in the erroneous addition of one point to the current VNCO offense and increased standard range. CP 118-19. Reducing the score from 7 to 6 lowers the standard range from 51-60 to 41-54 months. See RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (seriousness level of V for VNCO). The lower score in turns affects the length of the DOSA sentence, changing half of the midpoint from 27.75 to 23.75 months for the confinement and community custody terms. See RCW 9.94A.662(1) (prison and community custody terms of DOSA are each one-half the midpoint of the standard sentence range). This case must be remanded for resentencing with an offender score of 6 for the VNCO offense. State v. Wilson, 170 Wn.2d 682, 691, 244 P.3d 950 (2010) (resentencing is remedy for miscalculated offender score).

b. The correct offender score calculation for the current bail jumping offense is 4 points, not 5.

Unlike the current VNCO-DV offense, the bail jumping offense does not include the prior fourth degree assault-DV offense in the offender score because bail jumping is not a DV offense. RCW 9.94A.525(21)(c). Also, the prior felony VNCO offense counts as 1 point rather than 2 because bail jumping is not a DV offense. RCW 9.94A.525(7); RCW 9.94A.525(21)(a). The prior felonies of (1) controlled substance violation (date of crime 2/13/15), (2) and second degree assault (date of crime 7/19/01) each contribute one point. CP 118. The current VNCO offense adds one point. RCW 9.94A.525(7). The other felony offenses wash out. CP 118. The correct offender score for bail jumping is therefore 4 points, not 5. With an offender score of 4, the standard range is reduced to 12+-16 months. See RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (seriousness level of III for bail jumping). This case must be remanded for resentencing with an offender score of 4 for the bail jumping offense.

c. The error in the offender score is not waived for appeal.

Erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Defense counsel stipulated to the offender score. 6RP 5-6. But a defendant cannot agree to

a sentence in excess of the authority provided by statute. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Thus, a defendant cannot waive a challenge to a miscalculated offender score when the miscalculation is based on legal error. Goodwin, 146 Wn.2d at 874; Wilson, 170 Wn.2d at 688. On the other hand, "waiver can be found where the alleged error involves an agreement to the facts, later disputed, or where the alleged error involves a matter of trial court discretion." Goodwin, 146 Wn.2d at 874.

The miscalculation of the offender score in Pinkney's case is legal error. As set forth above, the court failed to follow statutory requirements in calculating the offender score. The other misdemeanors do not qualify as repetitive domestic violence offenses as a matter of law and so cannot be included in the VNCO-DV offender score. The face of the judgment and sentence shows other prior felony offenses washed out. See State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004) (inclusion of washed out conviction is legal error that cannot be waived, citing Goodwin, 146 Wn.2d at 877-78). The court had no discretion in calculating the offender score and the calculation does not depend on facts later disputed. The error is not waived for appeal.

d. In the alternative, defense counsel provided ineffective assistance in agreeing to the offender score.

If this Court determines defense counsel waived the error by stipulating to the offender score, then counsel provided ineffective assistance. Every criminal defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Counsel was deficient in agreeing to an erroneous offender score. There is no conceivable legitimate tactic in agreeing to a sentence in excess of statutory authority. The deficiency prejudiced Pinkney by exposing him to a longer sentence. Remand for resentencing is required.

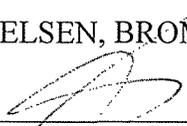
D. CONCLUSION

For the reasons set forth, Pinkney requests remand for resentencing with a reduced offender score for each current offense.

DATED this 29th day of January 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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DIVISION TWO

STATE OF WASHINGTON)	
)	
Appellant,)	
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v.)	COA NO. 47859-5-II
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EDWARD PINKNEY,)	
)	
Respondent.)	

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 29TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLAT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] EDWARD PINKNEY
DOC NO. 925257
CEDAR CREEK CORRECTIONS CENTER
P.O. BOX 37
LITTLEROCK, WA 98556

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JANUARY 2016.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

January 29, 2016 - 3:47 PM

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