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Division II
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NO. 52595-0-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DARYL CLAY REID,

Appellant.

RESPONDENT'S BRIEF

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I. RESPONSE TO ASSIGNMENT OF ERROR

Reid waived his right to challenge his offender score on appeal by pleading guilty and acknowledging that his offender score and sentencing range were correct. Alternatively, even if this Court finds that he may challenge his offender score, remand for resentencing is not required.

II. STATEMENT OF THE CASE

The State agrees with Reid's recitation of the statement of the case with the exception that Reid signed a Statement of Defendant on Plea of guilty that agreed to his offender score and sentencing range, and agreed to his sentence range at the sentencing hearing.

III. ARGUMENT

A. Reid waived the right to argue that his offender score was miscalculated at sentencing.

A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Hickman*, 112 Wn. App. 187, 189, 48 P.3d 383 (2002). This includes challenging a sentence based on an offender score that includes convictions that have either washed out or are not comparable to Washington felonies. *State v. Collins*, 144 Wn. App. 547, 555, 182 P.3d 1016 (2008). This is because a sentencing court acts without statutory authority when it imposes a sentence based on a

miscalculated offender score. *In re Goodwin*, 146 Wn.2d 861, 867, 50 P.3d 618 (2002). Even if imposed pursuant to a plea agreement, a sentence given without statutory authority is ordinarily subject to challenge. *Id.*

However, the right to argue that one's offender score has been miscalculated can be waived. *Collins*, 144 Wn. App. at 555. A defendant who enters a guilty plea generally waives the right to challenge his criminal history. *State v. Harris*, 148 Wn. App. 22, 29, 197 P.3d 1206 (2008). This is because a defendant's agreed standard range sentence is based in part on his criminal history and because guilty plea agreements generally include an agreement to the criminal history. *Id.* Similarly, if the defendant affirmatively acknowledges that a foreign conviction is properly included in the offender score, the trial court does not need additional proof before issuing a sentence based on that score. *Collins*, 144 Wn. App. at 555; *State v. Ford*, 137 Wn.2d 472, 483, 973 P.2d 452 (1999); *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004).

Reid waived the right to challenge his criminal history by entering a guilty plea. In the Statement of Defendant on Plea of Guilty, section 6(c) states, "The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal

court, or elsewhere.” This put Reid on notice that his Oregon conviction would be included in his criminal history. Section 6(d) then states, “The prosecuting attorney’s statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney’s statement is correct and complete.” While the Prosecutor’s Statement of Defendant’s Criminal History was not attached to the plea statement, it was filed with the court, served on defense, and included in the Judgement and Sentence filed in this case. By signing the plea statement, Reid agreed to his offender score and his sentence range, including the Oregon conviction.

Reid further affirmatively acknowledged his offender score and sentencing range at the sentencing hearing. Reid was allowed to pursue a Drug Offender Sentencing Alternative, which he qualified for. However, at his sentencing hearing he decided to forgo that opportunity and request the 12 months and one day in prison. RP 15–17. Specifically, the deputy prosecutor handling the case said, “If he wants a year and a day, I suppose he can have it.” RP 17. Reid was aware of his sentencing range and his offender score, and waived any challenge to it by pleading guilty.

The cases cited by Reid in his opening brief all involve sentencing after a jury trial (except for *Ford*, in which the defendant contested his offender score at sentencing). Sentencing after a jury trial does not

involve any agreements or waivers that exist in the Statement of Defendant on Plea of Guilty. When a defendant pleads guilty, he thereby agrees to his offender score and sentencing range. Reid did not object at sentencing to his offender score or standard range, so he waived this argument on appeal. Therefore, Reid's sentence should be affirmed.

B. Even if this Court finds that the sentencing court erred, remand is not required because Reid's sentencing range would not change and the record indicates the sentencing court would have imposed the same sentence.

If a sentencing court incorrectly calculates a defendant's offender score, remand is the appropriate remedy unless the record "clearly indicates the sentencing court would have imposed the same sentence anyway." *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). In this case, it is clear that the sentencing judge would have imposed the same sentence whether Reid's offender score included the Oregon conviction or not. First, when a defendant is being sentenced on an offense under RCW 69.50.4013 (unlawful possession of a controlled substance) and has an offender score of six or above, the standard sentence range is twelve months and one day to twenty-four months. Above a score of six, additional felony points make no difference in the standard sentence range for possession of a controlled substance. With the Oregon conviction included, Reid's offender score is ten; without it his score is

nine. Either way, his standard sentence range is twelve months and one day to twenty-four months.

Second, the sentencing judge in this case sentenced the defendant to the low end of the range – twelve months and one day – based on the defense’s request. RP 17. The judge did not use Reid’s offender score as a basis to impose an exceptional sentence or even a mid-range sentence. Assuming the case were remanded for resentencing with an offender score of nine, the judge would impose the same low-end sentence of twelve months and one day. Therefore, remand is not required.

IV. CONCLUSION

The State respectfully requests that this Court deny Reid’s appeal as he waived the issue by pleading guilty and not objecting at his sentencing hearing. If this Court finds that a comparability analysis was required prior to sentencing, remand is nonetheless not required as the sentencing judge would have imposed the same sentence anyway.

Respectfully submitted this 1st day of April, 2019.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 15th day of April, 2019.

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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