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Court of Appeals  
Division II  
State of Washington  
1/23/2019 11:06 AM  
No. 52794-4-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

ROY DONALD STEEN, III,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 14-1-03270-8  
The Honorable John Hickman, Judge

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OPENING BRIEF OF APPELLANT

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STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

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## **I. ASSIGNMENTS OF ERROR**

1. The State failed to prove the facts supporting Roy Steen's proffered offender score by a preponderance of the evidence.
2. The trial court erred by sentencing Roy Steen with an offender score of 9 because the State failed to present sufficient evidence to establish Steen's criminal history.
3. Roy Steen's Judgment and Sentence contains a cost provision that is no longer authorized by the legal financial obligation statutes.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where Washington's sentencing statutes require the State to prove an offender score by a preponderance of the evidence, did the State fail to satisfy its burden where the record submitted did not support the proffered offender score? (Assignment of Error 1)
2. Where Washington's sentencing statutes require a sentencing court to hold an evidentiary hearing if a defendant objects to the State's proffered criminal history or offender score, did the sentencing court fail to satisfy its obligation when it failed to hold a hearing or demand proof

from the State after Roy Steen objected to several prior convictions and asserted that other convictions should wash out? (Assignment of Error 2)

3. Should Roy Steen's case be remanded to the trial court to amend the Judgement and Sentence by striking an interest accrual provision that violates a recent amendment to the legal financial obligation statutes? (Assignment of Error 3)

### **III. STATEMENT OF THE CASE**

By information filed August 20, 2014, the Pierce County Prosecutor charged Roy Donald Steen with one count of trafficking in stolen property in the first degree and one count of theft in the second degree. (CP 1-2)

On October 16, 2014, the parties entered into a Drug Court contract whereby the State agreed to eventually dismiss the charges if Steen successfully completed Drug Court, and Steen agreed to submit to a bench trial upon stipulated facts should he fail to complete the requirements of that program. (CP 8-11) Steen also promised to appear for periodic review hearings; to keep the treatment provider and the court advised of his current address at all times; to engage in "law abiding behavior" and not have any "criminal law violations;" and to not "possess or consume alcohol

and non-prescribed drugs.” (CP 10) Steen agreed that a violation of any of these terms could result in termination from the Drug Court program. (CP 10)

Three years later, on October 16, 2018, the State filed a motion to terminate Steen from Drug Court based on his failure to comply with the terms of the program. (CP 21, 23-25) Specifically, the State asserted that termination was warranted because Steen failed to appear at a review hearing on January 11, 2016 resulting in issuance of a bench warrant, and that Steen had been out of contact with treatment providers and the court thereafter, and that Steen had committed a criminal law violation when he was arrested for driving under the influence on December 23, 2015. (CP 17-19, 25; RP 5)

At a hearing held on October 24, 2018, the court found that Steen had violated the terms of the Drug Court agreement and that termination was appropriate. (RP 7-8; CP 27) The court held a stipulated facts trial and found Steen guilty of both charges. (RP 11; CP 28-33)

At the sentencing hearing held the following day, the State presented a written Stipulation on Prior Record and Offender Score containing a list of what it believed were Steen’s prior convictions,

resulting in a 9 point offender score.<sup>1</sup> (CP 64-67; RP 17) Steen objected to the State's offender score calculation. (RP 15, 18) Steen disputed the inclusion of 2009 convictions from Shasta County, California, and asserted that without those convictions his prior Class C felonies would wash out. (RP 18) Steen refused to sign the Stipulation on Prior Record and Offender Score. (RP 18; CP 67)

In response, the State informed the court that it believed its proffer was accurate based on "information that we gather from the Washington State Patrol and the National [Crime Information Center] -- NCIC." (RP 19) The prosecutor offered to bring evidence to prove Steen's criminal history, but the court declined, stating:

there's been no evidence proffered to dispute the actual record as we have it here today. If he -- we've laid it out on the record, the Court is satisfied with the material that I've received to date that that is a legitimate conviction, and he can preserve it for appeal if he wants to do that.

(RP 19)

The court imposed a term of confinement totaling 84 months.

(RP 14; CP 76) The court found that Steen was indigent and

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<sup>1</sup> A copy of the written Stipulation on Prior Record and Offender Score is attached in the Appendix.

waived all discretionary costs and fines. (RP 14-15; CP 73) Steen timely filed a Notice of Appeal. (CP 84)

#### **IV. ARGUMENT & AUTHORITIES**

- A. BOTH THE STATE AND THE COURT FAILED TO MEET THEIR STATUTORY SENTENCING OBLIGATIONS BY RELYING ON A CRIMINAL HISTORY AND OFFENDER SCORE THAT WERE NOT ESTABLISHED BY SUFFICIENT EVIDENCE.

In Washington, a sentencing court's calculation of a standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). A criminal defendant's offender score is calculated by examining the defendant's criminal history, which is a list of his or her prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525.

With some exceptions, each prior felony conviction counts as one point in a defendant's offender score. RCW 9.94A.525. However, prior Class B felonies wash out "if, since the last date of release from confinement... or entry of judgment and sentence" the offender spent ten consecutive years in the community without being convicted of any new crime. RCW 9.94A.525(2)(b). A five year wash out period applies to a Class C felony. RCW 9.94A.525(2)(c).

Unless the defendant pleads guilty, he or she is not obligated to present evidence of his or her criminal history. State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012) (citing State v. Lopez, 147 Wn.2d 515, 521, 55 P.3d 609 (2002)). Rather, the State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. Hunley, 175 Wn.2d 909-10. The State also bears the burden of proving any facts necessary to determine whether the prior convictions should be included in the offender score. In re PRP of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (1995); State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). This includes the burden to prove that prior convictions have not washed out. Cadwallader, 155 Wn.2d at 876-78.

The burden is on the State “because it is ‘inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.’” Ford, 137 Wn.2d at 480 (quoting In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)).

“Bare assertions, unsupported by evidence, do not satisfy the State’s burden to prove the existence of a prior conviction.” Hunley, 175 Wn.2d at 910. Thus, a prosecutor’s oral or written summary of criminal history is not sufficient to satisfy the State’s

burden. Hunley, 175 Wn.2d at 915.

The State may be relieved of its evidentiary burden only if the defendant *affirmatively* acknowledges its proffered criminal history. Hunley, 175 Wn.2d at 912. But “[w]here the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.” RCW 9.94A.530(2).

Steen did not enter a plea agreement. He had *no obligation* to present the court with evidence to prove or disprove the State’s representations about his criminal history. Hunley, 175 Wn.2d at 910; Lopez, 147 Wn.2d at 521. But Steen did dispute the 2009 Shasta County convictions and asserted that his earlier class C felonies should wash out. (CP 15, 18) His objection was sufficient to notify the sentencing court of its obligation to hold an evidentiary hearing and demand evidence of the prior convictions alleged by the State. The court therefore erred by sentencing Steen with an offender score of 9 because the State failed to present sufficient evidence to establish Steen’s criminal history by a preponderance of the evidence.

Steen objected to the State’s proffered criminal history and offender score. The State’s failure to provide evidence to support its proffer, and the trial court’s failure to require such proof before

accepting the State's calculation, was clear error. If a defendant does not affirmatively acknowledge his criminal history and the State does not provide facts or information establishing that history, resentencing is required. State v. Mendoza, 165 Wn.2d 913, 928-930, 205 P.3d 113 (2009). Steen's sentence must be vacated and his case remanded for resentencing.

**B. STEEN'S JUDGMENT AND SENTENCE CONTAINS AN INTEREST ACCRUAL PROVISION THAT IS NO LONGER AUTHORIZED BY THE LEGAL FINANCIAL OBLIGATION STATUTES.**

Steen was sentenced on October 25, 2018. The trial court found that Steen did not have the financial resources to pay discretionary fees. (RP 14-15) So the trial court imposed only the mandatory \$500.00 crime victim assessment fee. (RP 14-15; CP 73) The Judgment and Sentence also includes a boilerplate provision stating that "[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full[.]" (CP 74)

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783) amended the legal financial obligation (LFO) system in Washington State. As part of those amendments, House Bill 1783 eliminated interest accrual on the nonrestitution portions of LFOs. Laws of 2018, ch. 269, § 1;

State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

House Bill 1783's amendments were effective as of June 7, 2018.

The portion of the amendments pertaining to interest accrual amended RCW 10.82.090. That statute now provides, in relevant part, that "[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(1). Steen was sentenced after June 7, 2018, but the trial court failed to strike the improper interest accrual language. (CP 74) Steen's case should therefore be remanded to the trial court to amend the Judgement and Sentence so the interest accrual provision can be stricken.

## **V. CONCLUSION**

The prosecutor's unsupported summary of Steen's alleged prior convictions was insufficient to establish Steen's criminal history by a preponderance of the evidence. The sentencing court failed in its statutory duty when it sentenced Steen using an offender score of 9, and Steen's case must be remanded for resentencing. And the sentencing court must strike the interest provision from the Judgment and Sentence.

DATED: January 23, 2019

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM  
WSB #26436  
Attorney for Roy Donald Steen, III

**CERTIFICATE OF MAILING**

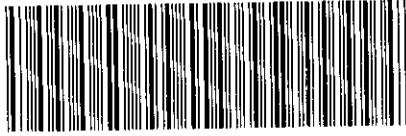
I certify that on 01/23/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Roy D. Steen, III, DOC# 976021, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM, WSBA #26436

**APPENDIX**  
STIPULATION ON PRIOR RECORD AND OFFENDER SCORE



14-1-03270-8 52254545 STPPR 10-25-18



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-03270-8

vs.

ROY DONALD STEEN, III,

STIPULATION ON PRIOR RECORD  
AND OFFENDER SCORE  
(Plea of Guilty)

Defendant.

Upon the entry of a plea of guilty in the above cause number, charge TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE; THEFT IN THE SECOND DEGREE, the defendant ROY DONALD STEEN, III, hereby stipulates that the following prior convictions are HIS complete criminal history, are correct and that HE is the person named in the convictions. The defendant further stipulates that any out-of-state convictions listed below are equivalent to Washington State felony convictions of the class indicated, per RCW 9.94A.360(3)/9.94A.525:

ALL CURRENT CONVICTIONS, THIS CAUSE NUMBER

Count	Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
I	TRAFF STOP PR		PIERCE CTY WA	7/19/14	A	NV	B	CT1: N/A CT2: 1	FELONY
II	THEFT 2		PIERCE CTY WA	7/19/14	A	NV	C	CT1: 1 CT2: N/A	FELONY

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

OTHER CURRENT CONVICTIONS, OTHER CAUSE NUMBERS (if any)

[X] None Known or Claimed, or:

10/29/2018 79250001

**PRIOR CONVICTIONS INCLUDED IN OFFENDER SCORE (if any)**

] None Known or Claimed, or:

Crime	Date of Sentence	Sentencing Court	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
BURGLARY 2	11-19-1988	KING CO. SUPERIOR COURT	08-25-1988	J	NV	B	5	FELONY
BURGLARY 2	11-19-1988	KING CO. SUPERIOR COURT	08-25-1988	J	NV	B	5	FELONY
ASSAULT 4		SEATTLE DIV. KCDC	02-10-1990	A	MISD			Misdemeanor
MAL MISCH 3		SEATTLE DIV. KCDC	02-10-1990	A	MISD			Misdemeanor
THEFT 3	09-25-1990	FEDERAL WAY DIV. KCDC	03-13-1990	A	MISD			Misdemeanor
THEFT 3	01-28-1992	CENTRAL MUNICIPAL COURT	09-14-1990	A	MISD			Misdemeanor
ASSAULT 4		DISTRICT COURT 1 (TACOMA)	10-29-1991	A	MISD			Misdemeanor
THEFT 3		DISTRICT COURT 1 (TACOMA)	10-29-1991	A	MISD			Misdemeanor
THEFT 3	02-21-1992	SOUTHWEST DIV. KCDC	02-14-1992	A	MISD			Misdemeanor
ASSAULT 4	02-21-1992	SOUTHWEST DIV. KCDC	02-14-1992	A	MISD			Misdemeanor
OBSTRUCTING	02-21-1992	SOUTHWEST DIV. KCDC	02-14-1992	A	MISD			Misdemeanor
UPCS - MARIJUANA	11-03-1993	7W DIST. CT. SOUTH HAVEN, MI.	10-20-1993	A	MISD			Misdemeanor
REFUSE TO GIVE INFO/COOP		DISTRICT COURT 1 (TACOMA)	01-23-1994	A	MISD			Misdemeanor
FISH W/O LICENSE		DISTRICT CT 3 (EATONVILLE)	02-21-1995	A	MISD			Misdemeanor
NVOL		DISTRICT CT 2 (GIG HARBOR)	03-10-1995	A	MISD			Misdemeanor
NARCOTICS		TACOMA MUNICIPAL COURT	02-21-1997	A	MISD			Misdemeanor
DWLS 3		DISTRICT COURT 1 (TACOMA)	05-30-1997	A	MISD			Misdemeanor
UPFGLM	06-03-1997	JEFFERSON COUNTY DISTRICT CT.	06-03-1997	A	MISD			Misdemeanor
UUDP	06-03-1997	JEFFERSON COUNTY DISTRICT CT.	06-03-1997	A	MISD			Misdemeanor
DUI	09-28-1997	JEFFERSON DISTRICT CT	06-03-1997	A	MISD			Misdemeanor
DWLS 3	09-28-1997	JEFFERSON DISTRICT CT	06-03-1997	A	MISD			Misdemeanor
FIREWORKS SALE		TACOMA MUNICIPAL COURT	07-02-1997	A	MISD			Misdemeanor

DWLS 3		TACOMA MUNICIPAL COURT	07-02-1997	A	MISD			Misdemeanor
VEH PROWL 2	04-20-1999	RENTON MUNICIPAL	02-01-1999	A	MISD			Misdemeanor
DWLS 3		TACOMA MUNICIPAL COURT	01-04-2000	A	MISD			Misdemeanor
BREACH OF PEACE		RENTON MUNICIPAL	02-13-2000	A	MISD			Misdemeanor
INDECENT CONDUCT	09-16-2002	TACOMA MUNICIPAL COURT	05-23-2002	A	MISD			Misdemeanor
DV - VIOLATION PROTECTION ORDER	11-01-2002	KING CO. SUPERIOR COURT	07-04-2002	A	MISD			Misdemeanor
DV - VIOLATION PROTECTION ORDER	11-01-2002	KING CO. SUPERIOR COURT	07-04-2002	A	MISD			Misdemeanor
POSS OF MARIJ		PACIFIC MUNICIPAL COURT	01-31-2003	A	MISD			Misdemeanor
DUI	05-19-2008	SHASTA, CA	04-28-2008	A	MISD			Misdemeanor
THREATEN CRIME W/INTENT TO TERRORIZE	12-28-2010	SHASTA, CA	08-27-2009	A	MISD			Misdemeanor
OBSTRUCTING	12-28-2010	SHASTA, CA	08-27-2009	A	MISD			Misdemeanor
RES BURG	03-12-1991	KING CO. SUPERIOR COURT	12-21-1990	A	NV	B	1	FELONY
TMVWOP	12-08-1992	KING CO. SUPERIOR COURT	05-08-1992	A	NV	C	1	FELONY
RES BURG	12-08-1992	KING CO. SUPERIOR COURT	05-22-1992	A	NV	B	1	FELONY
THEFT - TAKE/USE/TRANSFER MOVABLE PROP.	10-05-1992	ST. LOUIS DIST CT - DULUTH, MN	08-11-1992	A	NV	C	1	FELONY
PSP 2	05-24-1994	SUPERIOR CT - PIERCE CTY	04-11-1994	A	NV	C	1	FELONY
THEFT 2	01-08-1998	SUPERIOR CT - PIERCE CTY	11-11-1995	A	NV	C	1	FELONY
UPCS	07-21-2006	KING CO. SUPERIOR COURT	10-23-2002	A	NV	C	1	FELONY

The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct.

COUNTY NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9	IV	63-84 MONTHS	NONE	63-84 MONTHS	10 YRS
II	9	I	21-29 MONTHS	NONE	21-29 MONTHS	5 YRS

\*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

**The defendant further stipulates:**

- 1) Pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), defendant may have a right to have factors that affect the determination of criminal history and offender score be determined by a jury beyond a reasonable doubt. Defendant waives any such right to a jury determination of these factors and asks this court to sentence according to the stipulated offender score set forth above.
- 2) That if any additional criminal history is discovered, the State of Washington may resentence the defendant using the corrected offender score without affecting the validity of the plea of guilty;
- 3) That if the defendant pled guilty to an information which was amended as a result of plea negotiation, and if the plea of guilty is set aside due to the motion of the defendant, the State of Washington is permitted to refile and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution;
- 4) That none of the above criminal history convictions have "washed out" under RCW 9.94A.360(3)/9.94A.525 unless specifically so indicated. If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation.

Stipulated to this on the 24 day of October, 2018.

  
 ROSEMARIE WILHELM  
 Deputy Prosecuting Attorney  
 WSB # 20180

\_\_\_\_\_  
 ROY DONALD STEEN, III

\_\_\_\_\_  
 KELSEY PAGE  
 WSB # 39292

hrk

**January 23, 2019 - 11:06 AM**

**Transmittal Information**

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**Appellate Court Case Title:** State of Washington, Respondent v. Roy D. Steen III, Appellant  
**Superior Court Case Number:** 14-1-03270-8

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