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JANUARY 20, 2015

Court of Appeals
Division III
State of Washington

32324-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DREW A. ZISSEL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing sentence based on an incorrectly calculated offender score.
2. Defendant received ineffective assistance of counsel.

B. ISSUES

1. The defendant was convicted of robbery and burglary. The court found the offenses encompassed the same criminal conduct. The defendant had no prior convictions. Did the court lack authority to enter a sentence based on an offender score of two points?
2. After stating the two offenses were the same criminal conduct, the court indicated the offenses would be counted against each other in calculating the offender score. Did defense counsel provide ineffective assistance of counsel in failing to object to the court's incorrect statement and the resulting erroneous determination of the defendant's offender score and sentence?

C. STATEMENT OF FACTS

Drew Zissel was charged with first degree robbery and first degree burglary. (CP 5)

Kennedy Rainford told a jury that Mr. Zissel came through an unlocked window of the drive-through coffee stand where she was working, assaulted her and forced her to open the business safe and give him money. (RP 124-29) She said she recognized him as the man she had seen a few days earlier looking inside the coffee stand through the window. (RP 128-29)

A customer, Jacob Viveros, testified that he saw the robber leaving the coffee stand and briefly gave chase. (RP 254) He later identified a photograph of Mr. Zissel as the person he had seen. (RP 262)

Mr. Zissel testified that he had not committed the robbery, and he simply knew nothing about it. (RP 446-48)

The jury found Mr. Zissel guilty of both offenses. (RP 569) At sentencing, defense counsel attempted to argue that Mr. Zissel's standard range sentences would run consecutively, resulting even at the low end in a very long sentence, perhaps with the intention of suggesting the court should impose an exceptional sentence:

If you think that a forty-one month sentence on the burglary and twenty-six month sentence consecutive is a substantial

and very, very, very huge amount of time. Obviously Mr. Zissel will have a great deal of time to think but I –

(RP 582)

The court responded that the offenses constituted the same criminal conduct, would count against each other in determining the offender score, and would be served concurrently:

THE COURT: Well, I -- I don't think that they run consecutively. I mean, they run concurrently but they count against each other even though they are the same criminal conduct. Am I correct in that regard Mr. Ramm?

MR. RAMM: You are correct Your Honor.

(RP 583)

The court imposed concurrent sentences of 54 months and 34 months based on an offender score of two points for each offense. (CP 116)

D. ARGUMENT

1. THE OFFENDER SCORE WAS NOT CALCULATED CORRECTLY.

The court erred in determining the standard range for Mr. Zissel's sentence based on an offender score of two points. A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). Thus, a challenge to the offender score calculation may

be raised for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004).

The court expressly found the offenses constituted the same criminal conduct. (RP 583) They should have been counted as one crime:

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . .

RCW 9.94A.589(1)(a)

The offender score for an offense consists of points accrued for each other conviction entered on or before the date of sentencing:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

RCW 9.94A.525. Thus, when a defendant is sentenced for one crime, and has no prior offenses, his offender score is zero.

When the defendant is sentenced for two offenses which are found to have encompassed the same criminal conduct, the correct offender

score is zero. *State v. Edwards*, 45 Wn. App. 378, 380-82, 725 P.2d 442 (1986), overruled on other grounds by *State v. Dunaway*, 109 Wn.2d 207, 213, 743 P.2d 1237 (1987); see *State v. Rowland*, 97 Wn. App. 301, 304-05, 983 P.2d 696 (1999).

Mr. Zissel's sentence represents the top of the standard range for each offense using an offender score of two points. He was being sentenced for one crime, with no prior convictions. (CP 103) His properly calculated offender score is zero. See RCW 9.94A.125. The maximum standard range sentences for his robbery and burglary convictions were 41 months and 20 months, respectively.

The court lacked authority to impose sentences of 54 months and 34 months.

2. THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A criminal defendant has a Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the

trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998); *State v. McFarland*, 127 Wn.2d at 335.

Here, trial counsel failed to correct the court's misapprehension as to the effect of a finding of "same criminal conduct" on the offender score miscalculation, and failed to challenge the prosecutor's erroneous assertion that the judge's statement of the law was correct. Based on defense counsel's remarks, it is apparent counsel failed to consider, or be aware of, the rules governing the calculation of the offender score and standard range sentences.

E. CONCLUSION

Mr. Zissel's sentence should be reversed and the matter remanded for resentencing within the standard range based on an offender score of zero.

Dated this 19th day of January, 2015.

JANET GEMBERLING, P.S.



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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32324-2-III
)	
vs.)	CERTIFICATE
)	OF MAILING
DREW A. ZISSEL,)	
)	
Appellant.)	

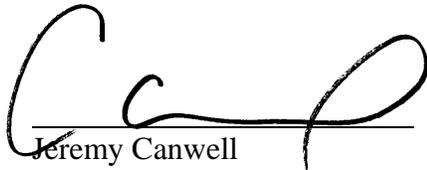
I certify under penalty of perjury under the laws of the State of Washington that on January 19, 2015, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

David Trefry
trefrylaw@wegowireless.com

I certify under penalty of perjury under the laws of the State of Washington that on January 19, 2015, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on January 19, 2015.



Jeremy Canwell
Office Assistant