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DECEMBER 10, 2014  
Court of Appeals  
Division III  
State of Washington

No. 32545-8-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

STEPHEN A. BAILEY,

Defendant/Appellant.

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Appellant's Brief

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DAVID N. GASCH  
WSBA No. 18270  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred by including the 1998 conviction for second degree robbery in the offender score calculation.

2. The trial court erred in finding the prior convictions for taking a motor vehicle without permission and attempting to elude did not constitute the same criminal conduct.

3. The trial court erred in imposing a sentence based on an offender score of 9.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Since the transfer of Mr. Bailey's 1998 charge of second degree robbery to adult court was defective, should that conviction be included in the calculation of his current offender score?

2. Should the case be remanded to determine if the prior convictions for taking a motor vehicle without permission and attempting to elude constitute the same criminal conduct

**C. STATEMENT OF THE CASE**

In *State v. Bailey*, the Court of Appeals reversed Stephen Bailey's sentence as a persistent offender, finding his prior 1998 conviction for second degree robbery could not be used to sentence him as a persistent offender under the Persistent Offender Accountability Act (POAA). 179

Wash. App. 433, 335 P.3d 942, 947 (2014). This current appeal stems from Mr. Bailey's resentencing following that decision. CP 1767.

At resentencing, Mr. Bailey argued his prior 1998 conviction for second degree robbery that was the subject of the court of appeals opinion should not be counted at all in his offender score. RP 13-14. The sentencing court disagreed and counted the prior robbery as a prior conviction in computing the offender score. RP 45; CP 7.

Mr. Bailey also argued that his prior convictions for taking a motor vehicle without permission and attempting to elude constituted the same criminal conduct. The judgment and sentence from those two prior offenses showed an offense date of November 7, 2000, and neither box was checked indicating whether the offenses were or were not the same course of conduct. RP 15. The sentencing court disagreed stating, "[I]n order for them to be the same course of criminal conduct don't they have to share the same intent? . . . And the intent to steal is not the same as the attempt to elude." RP 17. The court included both convictions in calculating the offender score. RP 45; CP 7.

The court sentenced Mr. Bailey to 300 months based on an offender score of nine. RP 41-42. Mr. Bailey argued his offender score should only be 6. RP 22. This appeal followed. CP 1767.

#### **D. ARGUMENT**

Since the transfer of Mr. Bailey's 1998 charge of second degree robbery to adult court was defective, that conviction cannot be included in the calculation of his current offender score.<sup>1</sup>

The inclusion of a prior conviction in an offender score requires one to be an "offender". The Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, requires the sentencing court to calculate a defendant's offender score by the sum of points accrued under RCW 9.94A.525. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The State is required to prove the defendant's criminal history to the sentencing judge by a preponderance of the evidence. RCWA 9.94A.500(1); *State v. Ford*, 137 Wn.2d 472, 479–81, 973 P.2d 452 (1999); *State v. Ammons*, 105 Wn.2d 175, 185–86, 713 P.2d 719, 725–26 (1986), 718 P.2d 796, *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

A sentence based on an incorrect offender score calculation is a sentence in excess of that authorized by statute. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 872, 50 P.3d 618 (2002). Although the prosecution may agree to sentencing recommendations, the sentencing

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<sup>1</sup> Assignments of Error Nos. 1 and 3.

court bears the ultimate responsibility to determine the correct offender score and sentencing range. RCW 9.94A.460; *Ross*, 152 Wn.2d at 229.

For purposes of the SRA, an “offender” is defined as:

“Offender” means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110.

RCW 9.94A.030(34). This means a juvenile can be an offender only if he or she “committed a felony” and the “case is under [adult] jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110.” *Id.*

In the present case, prior to the remand for resentencing this Court held Mr. Bailey’s transfer to adult court on the 1998 charge was defective because (1) there was no evidence the waiver of juvenile court jurisdiction was knowing and intelligent, and (2) the juvenile court failed to enter findings that declination of juvenile court jurisdiction was in the best interest of Mr. Bailey or the public. *State v. Bailey*, 179 Wash. App. 433, 335 P.3d 942, 945 (2014) (citing *State v. Saenz*, 175 Wash.2d 167, 174-75, 283 P.3d 1094 (2012)).

The Bailey Court also stated emphatically, “Accordingly, we reverse the robbery sentence.” *Bailey*, 179 Wash. App. 433, 335 P.3d at 943. “A prior conviction is a conviction which *exists* before the date of sentencing for the offense for which the offender score is being computed.” RCW 9.94A.525(1) (emphasis added). A prior conviction that has been reversed no longer exists. See *In re Domanski*, 24 Wash. 2d 137, 138, 163 P.2d 593 (1945) (when Court ordered judgment reversed and new trial granted, thereby reversing judgment in full, judgment entered was nullity and of no legal effect). Similarly, since Mr. Bailey’s 1998 sentence was reversed, it is a nullity and of no legal effect. Therefore, it cannot be counted in his offender score.

2. The case should be remanded to determine if the prior convictions for taking a motor vehicle without permission and attempting to elude constitute the same criminal conduct.<sup>2</sup>

A defendant's current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses "encompass the same criminal conduct." RCW 9.94A.589(1)(a); *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998). "Same criminal conduct" is indicated when two or more crimes

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<sup>2</sup> Assignments of Error Nos. 2 and 3.

that require the same criminal intent are committed at the same time and place and involve the same victim. RCW 9.94A.589(1)(a). The absence of any of these elements precludes a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The Legislature intended that courts construe the phrase, "same criminal conduct," narrowly. *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). To determine if two crimes share a criminal intent, the focus is on whether the defendant's intent, viewed objectively, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Courts should also consider whether one crime furthered the other. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Standard of Review. Appellate courts review a trial court's finding that the offenses did not constitute the same criminal conduct for abuse of discretion. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Here, it is unknown whether the two crimes at issue constituted the same criminal conduct. But the trial court's conclusory statement that the two crimes cannot be the same course of conduct because "the intent to steal is not the same as the attempt to elude" (RP 17) is an incomplete statement of the law on this issue. If the defendant's intent, viewed

objectively, did not change from one crime to the next, and if the attempt to elude was in furtherance of taking a motor vehicle, the two crimes would constitute the same criminal conduct. The case should be remanded to make that determination and the offender score and sentence should be reduced accordingly.

**D. CONCLUSION**

For the reasons stated, the matter should be remanded for resentencing based on an offender score which does not include the prior 1998 conviction for second degree robbery and to determine whether the prior convictions for taking a motor vehicle without permission and attempting to elude constitute the same criminal conduct.

Respectfully submitted December 10, 2014,

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s/David N. Gasch, WSBA #18270  
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on December 10, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

Stephen A. Bailey  
#777393  
PO Box 7002  
Monroe, WA 98272

David B. Trefry  
[David.Trefry@co.yakima.wa.us](mailto:David.Trefry@co.yakima.wa.us)

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s/David N. Gasch, WSBA #18270  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)