

FILED  
SEP 15, 2016  
Court of Appeals  
Division III  
State of Washington

NO. 339645

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON

Respondent

vs.

JEFFREY HOWARD KELLER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FO BENTON COUNTY

The Honorable Bruce A. Spanner

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APPELLANT'S OPENING BRIEF

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TANESHA LA'TRELLE CANZATER  
Attorney for Petitioner  
Post Office Box 29737  
Bellingham, Washington 98228-1737  
(360) 362-2435

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## I. ASSIGNMENTS OF ERROR

1. The court abused its discretion when it refused to consider whether or not the offender score it used to impose a new sentence was possibly miscalculated at a previous sentencing hearing.

2. The court erred when it used an offender that was potentially miscalculated to impose a sentence for three current convictions.

## II. ISSUES THAT PERTAIN TO ASSIGNMENTS OF ERROR

1. Did the court abuse its discretion when it refused to correct an offender score after it became aware of potential errors? (Assignment of Error 1)

2. Is the appellant entitled to another sentencing hearing? (Assignments of Error 1 and 2)

## III. STATEMENT OF THE CASE

Benton county superior court found Mr. Keller guilty of the gross misdemeanor third-degree theft, second-degree theft, and trafficking stolen property and sentenced him to confinement at the Department of Corrections for 84 months.

Mr. Keller appealed the convictions. CP 1-11; 12/17/15 RP 2. He argued the court erred when it sentenced him to 364 days for the gross misdemeanor, attempted third degree theft conviction because the standard sentence range for that offense was zero to 90 days. A commissioner affirmed Mr. Keller's convictions, but remanded the case to superior court to sentence Mr. Keller again on the gross misdemeanor third degree theft conviction congruent with the statutory maximum of 90 days. CP 36-41.

At the sentencing hearing, Mr. Keller objected to his criminal history. He insisted the judgment and sentence contained errors that rendered his offender score, as the court calculated, incorrect. 12/17/15 RP 3.

The court calculated Mr. Keller's offender score as 10 based on the following criminal history:

	<b>CRIME</b>	<b>DATE OF SENTENCE</b>	<b>SENTENCING COURT</b>	<b>DATE OF CRIME</b>
1	Theft in Second Degree	8/18/99	Benton	7/24/99
2	Theft in the First Degree	1/12/01	Benton	12/1/99
3	Burglary in the Second Degree	1/12/01	Benton	7/17/99
4	Burglary in the Second Degree	1/12/01	Benton	3/1/00
5	UIBC	11/30/01	Benton	10/24/00
6	Theft in the First Degree	11/15/02	Benton	5/21/01
7	Possession of Stolen Property in the Second Degree	11/15/02	Benton	1/30/02
8	Theft in the Second Degree	7/7/05	Benton	3/3/05
9	Possession of Stolen Property in the Second Degree	8/16/06	Benton	6/1/05
10	Possession with intent to Deliver Marijuana	8/16/00	Benton	4/13/06

Based on the same criminal history, Mr. Keller calculated his offender score as 6. CP 1-11. He maintained some of his prior convictions constituted the same criminal conduct, specifically, the first-degree theft conviction and the two second-degree burglary convictions entered on January 12, 2001, as well as the first-degree theft and the second-degree possession of stolen property convictions entered on November 15, 2002.

12/17/15 RP 3.

He also pointed out the sentence date and the crime date listed for the possession with intent to deliver marijuana conviction, were incorrect. The sentence date for that conviction was August 16, 2000, while the crime date was April 13, 2006. 12/17/15 RP 3; CP 1-11.

Mr. Keller also filed a motion to modify/correct his judgment and sentence, but the court refused to consider it. CP 29-44; 12/17/15 RP 4. The court amended the judgment and sentence according to the commissioner's ruling and essentially told Mr. Keller to file a personal restraint petition to challenge his offender score. CP 18-28; 12/17/15 RP 4. Mr. Keller asked this court to review the superior court's decision. CP 49-50.

#### IV. ARGUMENT

THE COURT WAS REQUIRED BY STATUTE TO CONSIDER WHETHER OR NOT PRIOR ADULT CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT BEFORE IT IMPOSED A POTENTIALLY EXCESSIVE SENTENCE FOR A SECOND TIME.

##### 1. Standard of review

This court will review a court's sentencing decision made under the Sentencing Reform Act of 1981 (SRA) to determine whether or not it abused its discretion or misapplied the law. State v. Elliott, 114 Wash.2d 6, 17, 785 P.2d 440 (1990); State v. Mutch, 171 Wash.2d 646, 653, 254 P.3d 803 (2011) (alteration in original) (quoting State v. Tili, 139 Wash.2d 107, 122, 985 P.2d 365 (1999)). The SRA imposes a regime of structured discretion. RCW 9.94A.010; State v. Shove, 113 Wash.2d 83, 88-89, 776 P.2d 132 (1989). It establishes guidelines for sentencing courts' discretion and makes how they exercise that discretion more principled. State v. Parker, 132 Wash. 2d 182, 186, 937 P.2d 575, 577 (1997).

A court abuses its discretion if its decision “(1) adopts a view that no reasonable person would take and is thus ‘manifestly unreasonable,’ (2) rests on facts unsupported in the record and is thus based on ‘untenable grounds,’ or (3) was reached by applying the wrong legal standard and is thus made ‘for untenable reasons.’ ” State v. Sisouvanh, 175 Wash.2d 607, 623, 290 P.3d 942 (2012) (*quoting* State v. Rohrich, 149 Wash.2d 647, 654, 71 P.3d 638 (2003)); State v. Johnson, 180 Wash. App. 92, 100, 320 P.3d 197, 201, *review denied*, 181 Wash. 2d 1003, 332 P.3d 984 (2014).

## 2. Analysis

a. The court had the authority and the duty to correct Mr. Keller’s offender score at the re-sentencing hearing. A court’s failure to follow the SRA is grounds for appeal, because a court only possesses the power to impose sentences authorized by law. State v. Osman, 157 Wash. 2d 474, 481–82, 139 P.3d 334, 339 (2006); Petition of Carle, 93 Wash. 2d 31, 33, 604 P.2d 1293, 1294 (1980). When a court imposed a sentence for which there is no authority in law, the court has the power and the duty to correct the erroneous sentence, when the error is discovered. Id., *quoting* McNutt v. Delmore, 47 Wash.2d 563, 565, 288 P.2d 848 (1955)); State v. Wilson, 170 Wash. 2d 682, 689, 244 P.3d 950, 953 (2010).

A court acts without authority under the SRA when it imposes a sentence based upon a miscalculated offender score. In re Pers. Restraint of Johnson, 131 Wash.2d 558, 568, 933 P.2d 1019 (1997). Offender scores establish the range within which defendants must be sentenced. State v. Larkins, 147 Wash. App. 858, 862, 199 P.3d 441, 442 (2008). The SRA requires courts to calculate offender scores based on “other current and

prior convictions.” RCW 9.94A.589(1)(a); State v. Williams, 176 Wash. App. 138, 141, 307 P.3d 819, 820 (2013), *aff’d*, 181 Wash. 2d 795, 336 P.3d 1152 (2014).

RCW 9.94A.525(5)(a)(i) explains how courts must score prior convictions. It reads:

In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except: (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations.

State v. Johnson, 180 Wash. App. 92, 100, 320 P.3d 197, 201, *review denied*, 181 Wash. 2d 1003, 332 P.3d 984 (2014).

RCW 9.94A.525(5)(a)(i) requires courts to treat prior offenses as a single offense if such offenses “were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct.” RCW 9.94A.525(5)(a)(i). If there was no such finding, then current sentencing courts must make their own determination under “the same criminal conduct analysis in RCW 9.94A.589(1)(a).” RCW 9.94A.525(5)(a)(i); State v. Johnson, 180 Wash. App. 101, 320 P.3d 197, 201–02, *review denied*, 181 Wash. 2d 1003, 332 P.3d 984 (2014).

Because “same criminal conduct” findings lower offender scores below the presumed scores, defendants bear the burden of proof. State v. Graciano, 176 Wash. 2d 531, 539, 295 P.3d 219, 223 (2013). Unlike the state that has to prove defendants’ criminal histories by a preponderance of the evidence, to prove two crimes manifested the same criminal conduct, the defendant must show the crimes required the same criminal intent, were committed at the same time and place, and involved the same victim. State v. Graciano, 176 Wash. 2d 531, 539, 295 P.3d 219, 223 (2013); State v. Ford, 137 Wash.2d 472, 479–80, 973 P.2d 452 (1999). The court will also look to whether one crime furthered another. State v. Graciano, 176 Wash. 2d at 540.

Here, at the resentencing hearing, Mr. Keller disputed his criminal history and tried to prove some of his prior convictions constituted the same criminal conduct. 12/17/15 RP 3-4. He filed a motion to modify/correct his judgment and sentence, but the court refused to consider it. CP 29-44; 12/17/15 RP 4.

He even argued the first-degree theft conviction and the two second-degree burglary convictions entered on January 12, 2001 should have counted as one offense, as well as the first-degree theft and the second-degree possession of stolen property convictions entered on November 15, 2002. 12/17/15 RP 3.

He argued the same held true for the possession with intent to deliver marijuana conviction and another second-degree possession of stolen property conviction, had the court acknowledged the sentence date and the crime date listed for the marijuana conviction were wrong. The sentence date listed for that conviction was August 16, 2000, while the crime date was April 13, 2006. CP 1-11. That meant the court sentenced Mr. Keller some six years before he actually committed the crime, which was most

unlikely. However, if Mr. Keller was sentenced on August 16, 2006 for both convictions, then it was quite possible they could have also constituted the same criminal conduct.

When the court realized the possibility Mr. Keller's offender score was miscalculated, it had the authority and the duty to correct the score. The court refused to exercise that authority and skirted its statutory duty instead. The court chose to just amend Mr. Keller's judgment and sentence according to the commissioner's ruling and essentially told Mr. Keller to file a personal restraint petition to challenge his offender score. CP 18-28; 12/17/15 RP 4.

b. Mr. Keller is entitled to another sentencing hearing. Our courts have often reaffirmed the principle that a sentence in excess of statutory authority is subject to challenge, and the defendant is entitled to be resentenced. In re Goodwin, 146 Wash. 2d 861, 869, 50 P.3d 618, 623 (2002).

Here, at the resentencing hearing, Mr. Keller raised enough issues to prove there may have been a fundamental defect in his offender score and his sentence may have been imposed without statutory authority. If some of his prior convictions constituted the same criminal conduct, then Mr. Keller's offender score would have been 6 instead of 10, which could have affected his sentence on the current convictions significantly. In light of that possibility, Mr. Keller should have another sentencing hearing to allow the court to determine whether or not his offender score was properly calculated.

## V. CONCLUSION

Mr. Keller asks this court to remand this case to allow Benton county superior court to calculate his offender score so that it can impose a sentence pursuant the SRA.

Submitted this 15<sup>th</sup> day of September, 2016.

s/Tanesha L. Canzater

Tanesha La'Trelle Canzater, WSBA# 34341

Attorney for Jeffrey Howard Keller

Post Office Box 29737

Bellingham, WA 98228-1737

(360) 362- 2435 (mobile office)

(703) 329-4082 (fax)

Canz2@aol.com

## DECLARATION OF SERVICE

September 15, 2016

Court of Appeals Case No. 339645

Case Name: **State of Washington v. Jeffrey Howard Keller**

I declare under penalty and perjury of the laws of Washington State that on Thursday, September 15, 16, I filed an appellant's opening brief at Division Three Court of Appeals and served copies to:

**ANITA PETRA**

Deputy Prosecuting Attorney  
Benton County Prosecutors Office  
[prosecuting@co.benton.wa.us](mailto:prosecuting@co.benton.wa.us)  
\*Ms. Petra accepts service by email.

**JEFFREY HOWARD KELLER, DOC # 799836**

Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

s/Tanesha La'Trelle Canzater  
Attorney for Jeffrey Howard Keller  
Tanesha L. Canzater, WSBA# 34341  
Post Office Box 29737  
Bellingham, WA 98228-1737  
(360) 362-2435 (mobile office)  
(703) 329-4082 (fax)  
Canz2@aol.com