

FILED
Jul 11, 2016
Court of Appeals
Division III
State of Washington

NO. 34038-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

MAXWELL DELVON JONES,

Defendant/Appellant.

BRIEF OF APPELLANT

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

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STATUTES

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ASSIGNMENT OF ERROR

1. The record, as it exists, does not support the State's calculation of Maxwell Delvon Jones' offender score.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did Mr. Jones receive effective assistance of counsel at his sentencing hearing when there was no challenge to his offender score?

2. Do any of Mr. Jones' prior convictions wash-out or constitute the "same criminal conduct"?

STATEMENT OF THE CASE

An Information was filed on April 5, 2013 charging Mr. Jones with first degree robbery and second degree assault. (CP 1)

Mr. Jones was in federal custody at the time and a *Writ of Habeas Corpus* was necessary to secure his attendance. (CP 74; CP 77)

There were multiple continuances following Mr. Jones' initial appearance. Mr. Jones waived his right to a jury trial. His case eventually proceeded to a bench trial on August 11, 12, 13 and 19, 2015. (CP 6; CP

82; CP 83; CP 84; CP 85; CP 86; CP 87; CP 88; CP 89; CP 90; RP 8, l. 16 to RP 15, l. 12)

The trial court entered its Findings of Fact and Conclusions of Law on January 7, 2016. Mr. Jones was sentenced that same date. The court determined that Mr. Jones was guilty of first degree robbery, but not guilty of second degree assault. (CP 13; CP 51)

Mr. Jones had previously waived his right to speedy sentencing. The sentencing waiver was entered on November 17, 2015. (CP 12)

The State presented a document entitled “Understanding of Defendant’s Criminal History”. The State calculated that Mr. Jones’ criminal history was a 9+. The document only indicates felony convictions. No misdemeanor/gross misdemeanor convictions are listed. (CP 47)

Defense counsel concurred that Mr. Jones’ offender score was a 9+. (RP 204, ll. 6-12)

Mr. Jones filed his Notice of Appeal on January 19, 2016. (CP 68)

SUMMARY OF ARGUMENT

In the absence of documentation to support the calculation of Mr. Jones’ offender score, combined with defense counsel’s failure to chal-

lunge the offender score at sentencing, there is no way to determine if the sentencing court's calculation is accurate.

It would appear that Mr. Jones' convictions for conspiracy to deliver a controlled substance on November 26, 2003 may constitute the "same criminal conduct" since the date for the crimes is the same - January 17, 2003.

Mr. Jones' convictions for attempted second degree assault on November 24, 2003 and second degree possession of stolen property on December 17, 2003 are class "C" felonies. *See:* RCW 9A.28.020(3)(c); RCW 9A.56.160.

It is difficult to determine whether the federal weapons possession conviction of March 21, 2006 is a class "C" or class "B" felony.

Due to the lack of a sufficient record Mr. Jones contends that his case needs to be remanded to the trial court for resentencing.

ARGUMENT

A. OFFENDER SCORE CALCULATION

RCW 9.94A.525(1)(c) states, in part:

Except as provided in (e) of this subsection, class C prior felony convictions ... shall not be included in the offender score if, since the last date of release from confinement

(including full-time residential treatment) pursuant to a felony conviction ... or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

Mr. Jones' prior convictions consist of the following:

<i>Crime</i>	<i>Date of Crime</i>	<i>Crime Type</i>	<i>Adult or Juv</i>	<i>Place of Conviction</i>	<i>Sent. Date</i>
FELON POSS FIREARM	080612		A	US DISTRICT OF EASTERN WASHINGTON	111814
FELON POSS FIREARM	042012		A	US DISTRICT COURT OF EASTERN WASHINGTON	111814
FELON POSS FIREARM	102811		A	US DISTRICT COURT OF EASTERN WASHINGTON	111814
PCS CONSP	122511	DRUG	A	SPOKANE CO, WA	062712
POSS WEAPON	021005		A	US DISTRICT OF EASTERN WASHINGTON	032106
PSP 2	090303	NV	A	SPOKANE CO, WA	121703
DCS CONSP	011703	DRUG	A	SPOKANE CO, WA	112603
DCS CONSP	011703	DRUG	A	SPOKANE CO, WA	112603
ROBBERY 2	030403	V	A	SPOKANE CO, WA	112403
ASSAULT 2 ATT	062601	V	A	SPOKANE CO, WA	112403

Mr. Jones contends that his class "C" felonies may have washed out. The criminal history prepared by the State does not reflect any arrests for felonies, which later resulted in a conviction, between March 21, 2006 and October 28, 2011. The record does not set out what Mr. Jones' sentence was on his federal conviction for possession of a weapon on March 21, 2006. In the absence of that information all prior class "C" felonies

would have washed. There are four (4) prior class “C” felonies which would reduce Mr. Jones’ offender score below a 9.

Mr. Jones asserts that this particular issue is governed by *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009). The *Mendoza* Court conducted a comprehensive analysis of prior case law involving criminal history calculations. It concluded at 928-30:

These cases provide a foundation for considering what suffices as an acknowledgment in the present context. Importantly, we have emphasized the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing. [Citations omitted.] **The mere failure to object to a prosecutor’s assertions of criminal history does not constitute such an acknowledgement.** [Citation omitted.] Nor is a defendant deemed to have affirmatively acknowledged the prosecutor’s asserted criminal history based on his agreement with the ultimate sentencing recommendation. [Citation omitted.] It remains the State’s obligation to establish the criminal history by a preponderance of the evidence. [Citations omitted.] “Bare assertions” as to criminal history do not substitute for the facts and information a sentencing court requires. [Citation omitted.]

...

... [W]here ... there is no objection at sentencing and the State consequently has not had an opportunity to put on its evi-

dence, it is appropriate to allow additional evidence at sentencing.

(Emphasis supplied.)

Mr. Jones did not sign the criminal history document presented by the State. He objected to one (1) of the convictions which he believed was a misdemeanor/gross misdemeanor. Both the deputy prosecutor and defense counsel signed the criminal history.

Nevertheless, a sentencing court must conduct an independent analysis of a defendant's criminal history and make an independent determination of the correct offender score. The process is set out in *State v. Ervin*, 169 Wn.2d 815, 821, 239 P.3d 354 (2010):

In construing this statute [RCW 9.94A.-525(2)(c)], the Court of Appeals has helpfully broken it down into two clauses: A “trigger []” clause, which identifies the beginning of the five-year period, and a “continuity/interruption” clause, which sets forth the substantive requirements an offender must satisfy during the five-year period. *In re Pers. Restraint of Nichols*, 120 Wn. App. 425, 432, 85 P.3d 955 (2004). We adopt this terminology

When viewing the documentation presented to the sentencing court the trigger clause is obvious. However, the State failed to present proof to the sentencing court that would invoke the continuity/interruption clause.

It cannot be determined from the criminal history document whether the federal weapons possession charge is equivalent to unlawful possession of a firearm first degree (class “B” felony) or unlawful possession of a firearm second degree (class “C” felony).

Finally, in connection with the offender score calculation, no determination was made as to whether or not the convictions for conspiracy to deliver a controlled substance occurring on January 17, 2003 constituted the “same criminal conduct”. The only way to make that determination is based upon the facts presented at the sentencing hearing that occurred on November 26, 2003. The State’s failure to present a certified copy of that judgment and sentence precludes the determination on appeal.

As noted in *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997):

Porter must also prove that her criminal intent, viewed objectively, remained the same from one drug sale to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). The fact that the two charges involved different drugs does not, by itself, establish that Porter possessed a distinct criminal intent for each transaction. *See: State v. Garza-Villarreal*, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993).

If the conspiracy to deliver charges are the “same criminal conduct,” then a further reduction in the offender score occurs.

“... [A] defendant cannot agree to punishment in excess of that which the Legislature has established.” *In re Personal Restraint of Goodwin*, 146 Wn2d 861, 873-74, 50 P.3d 618 (2002).

If, indeed, there has been a miscalculation of Mr. Jones’ offender score, he has been punished in excess of statutory authorization.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel’s performance is deficient when it falls below an objective standard of reasonableness. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To demonstrate prejudice, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Thomas*, 109 Wn.2d at 226 (quoting *Strickland* [*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)] at 694). Defense counsel’s failure to argue same criminal conduct at sentencing can amount to ineffective assistance of counsel. *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004)

“[I]t is the defendant who must establish that crimes constitute the same criminal conduct” at sentencing. *State v. Aldana Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013).

State v. Rattana Keo Phuong, 174 Wn. App. 494, 547, 299 P.3d 37 (2013).

The *Rattana* Court concluded that defense counsel's performance was deficient at sentencing since a reasonable possibility existed that attempted rape and unlawful imprisonment offenses could constitute the same criminal conduct.

It is important to note that the criminal history document indicates that both offenses of conspiracy to deliver a controlled substance occurred on the same date. There is no way to determine if they involved the same controlled substance. Moreover, the intent would be the same. Furthermore, drug offenses are public offenses as opposed to having individual victims. *See: State v. Williams*, 135 Wn.2d 365, 367, 957 P.2d 216 (1998).

As announced in *State v. Garza-Villarreal*, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993):

We therefore hold concurrent counts of possession with intent to deliver which occur in the same transaction constitute the same criminal conduct because the objective criminal intent in each case is identical - an intent to deliver any controlled substance in the future. We hold concurrent counts of delivery which occur in the same transaction likewise constitute the same criminal conduct because the objective criminal intent in each case is identical - an intent to deliver any controlled substance in the present. In the absence of evidence the defendant intended to deliver in multiple transactions, it would be inappropriate to conclude that the

defendant intended to deliver the substances
in multiple transactions.

The State did not present any underlying factual predicates with regard to the conspiracy to deliver a controlled substance. It does not appear that the sentencing court had any independent knowledge concerning those offenses. Defense counsel did not raise the question of “same criminal conduct.”

The combination of potential wash-outs and “same criminal conduct” effectively increased Mr. Jones’ sentencing range. The sentencing range at 9+ is one hundred twenty-nine (129) to one hundred seventy-one (171) months. If his offender score is reduced as a result of wash-outs or “same criminal conduct” the sentencing range is also reduced. (Appendix “A”)

CONCLUSION

The State failed to carry its burden of proof as to Mr. Jones’ criminal history. The information provided to the sentencing court does not establish by a preponderance of the evidence that Mr. Jones’ class “C” felonies did not wash-out.

Defense counsel's failure to raise the issue of wash-outs and "same criminal conduct" effectively prejudiced Mr. Jones. His offender score increased without the trial court being given the opportunity to make a determination as to whether or not a wash-out occurred or offenses constituted the "same criminal conduct."

"Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient." *Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 102 (2015).

Mr. Jones' case must be remanded for resentencing under the provisions of *State v. Mendoza, supra*.

DATED this 11th day of July, 2016.

Respectfully submitted,

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

P.O. Box 1019

Republic, WA 99166

(509) 775-0777

(509) 775-0776

nodblspk@rcabletv.com

APPENDIX “A”

ROBBERY FIRST DEGREE

RCW 9A.56.200
CLASS A – VIOLENT

OFFENDER SCORING RCW 9.94A.525(8)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Violent Offense with a Sexual Motivation Finding scoring form on page 184.

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Violent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 182.

ADULT HISTORY:

Enter number of serious violent and violent felony convictions x 2 = _____

Enter number of nonviolent felony convictions x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions x 2 = _____

Enter number of nonviolent felony dispositions x ½ = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions x 2 = _____

Enter number of other nonviolent felony convictions x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? + 1 = _____

Total the last column to get the **Offender Score** (Round down to the nearest whole number)

SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
	36m	42m	47.5m	53.5m	59.5m	66m	89.5m	101.5m	126m	150m
LEVEL IX	31 - 41	36 - 48	41 - 54	46 - 61	51 - 68	57 - 75	77 - 102	87 - 116	108 - 144	129 - 171

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 26 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 170 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 173.
- ✓ For sentencing alternatives, see page 163.
- ✓ For community custody eligibility, see page 171.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 168.

The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's or court's reliance on the manual, or for any other written or verbal information related to adult or juvenile sentencing. The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Caseload Forecast Council.

NO. 34038-4-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	SPOKANE COUNTY
Plaintiff,)	NO. 13 1 01269 4
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
MAXWELL DELVON JONES,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 11th day of July, 2016, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

COURT OF APPEALS, DIVISION III
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

E-FILE

SPOKANE COUNTY PROSECUTOR'S OFFICE

Attn: Brian O'Brien

SCPAAppeals@spokanecounty.org

E-FILE

MAXWELL DELVON JONES

C/O Dennis W. Morgan, Attorney at Law

PO Box 1019

Republic, Washington 99166

U.S. MAIL

(In federal custody some-
where - address unknown)

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

P.O. Box 1019

Republic, WA 99169

Phone: (509) 775-0777

Fax: (509) 775-0776

nodblspk@rcabletv.com