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Court of Appeals

Division III

State of Washington

34038-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MAXWELL D. JONES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

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

II. ISSUES PRESENTED

Should this Court remand to the trial court for resentencing and allow the State to produce documentation establishing the defendant's offender score because the defense attorney agreed with the State's understanding of the defendant's criminal history and calculation of the offender score at the original sentencing?

III. STATEMENT OF THE CASE

The defendant/appellant, Maxwell Jones, was charged by information with first degree robbery and second degree assault in the Spokane County Superior Court for acts occurring on April 3, 2013. CP 1. The defendant was convicted of the first degree robbery and acquitted of the second degree assault after a bench trial. CP 13-18; 9/30/15 RP 169-197.

At sentencing, the State argued the defendant had an offender score above a "9" based upon his prior offenses. 1/7/16 RP 202, 204. The defendant objected to the inclusion of his 2012 possession of a controlled substance conviction because he believed it was a misdemeanor or gross misdemeanor conviction. 1/7/16 RP 203.

During sentencing, the trial court apparently had a copy of the statement on plea of guilty for the 2012 possession of a controlled substance conviction and determined it was an unranked felony.¹ 1/7/16 RP 204. The court provided the copy of the statement on plea of guilty to the defense attorney and defendant to review. The defendant did not contest the validity of any other prior conviction or dispute that he was a “9-plus” for sentencing purposes. 1/7/16 RP 203-205. His standard range sentence was 129 months to 171 months based upon a “9-plus” offender score. CP 54; 1/7/16 RP 205. However, he did not sign the State’s understanding of criminal history or affirmatively acknowledge the existence of the prior convictions. CP 47-48.

At the time of sentencing, the defendant was serving a federal sentence of 144 months based upon three different felon in possession of a firearm convictions sentenced on November 18, 2014. 1/7/16 RP 206. The State requested the first degree robbery conviction run consecutive to the federal sentence. 1/7/16 RP 205-07. After argument, the defendant was sentenced to the high end of the standard range of 171 months to run concurrent with the federal sentence. CP 56; RP 237.

This appeal timely followed.

¹ Neither a copy of the judgment and sentence or the statement on plea of guilty for the 2011 possession of a controlled substance conviction was filed in the court file.

IV. ARGUMENT

A. THIS CASE SHOULD BE REMANDED TO THE SUPERIOR COURT FOR RESENTENCING TO ALLOW THE STATE TO PRODUCE DOCUMENTATION TO ESTABLISH THE DEFENDANT'S OFFENDER SCORE SINCE THE DEFENSE ATTORNEY STIPULATED TO THE DEFENDANT'S PRIOR CRIMES AND CALCULATION OF THE OFFENDER SCORE BUT THE DEFENDANT DID NOT AFFIRMATIVELY ACKNOWLEDGE HIS PRIOR CONVICTIONS.

Standard of review.

A defendant can appeal a standard range sentence if the court failed to follow proper procedures, including determination of the offender score calculation. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999). A sentencing court's offender score calculation is reviewed de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

When calculating an offender score, the State has the burden to prove that prior convictions have not washed out. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 875-76, 123 P.3d 456 (2005). The State also has the burden to prove the existence of prior convictions at sentencing by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). When a defendant affirmatively acknowledges at the sentencing hearing that the State's criminal history and offender score calculations are correct, nothing more is necessary, and the proof requirement is met. *State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P.3d 816 (2007). However, the Supreme Court has emphasized "the need for an

affirmative acknowledgement by the defendant of facts and information introduced for the purposes of sentencing” before the State will be excused from its burden of providing criminal history. *State v. Mendoza*, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009).

RCW 9.94A.525(2)(b) and (c) set forth the methods for calculation of an offender score using prior class B and class C felonies, including their respective “wash out” periods.² Essentially, class B prior offenses will not be counted in the offender score if the defendant does not commit a crime for 10 years after release from confinement and class C prior convictions will not be counted if the offender does not commit a crime for 5 years after release from confinement.

² Under RCW 9.94A.525(2)(b), class B felony offenses “wash out” of a defendant’s offender score “if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.”

Similarly, under RCW 9.94A.525(2)(c), class C felony offenses “wash out” of the defendant’s offender score “if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, 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.”

Argument.

The defendant asserts for the first time that his prior four class C felonies³ “may” have washed out and should not have been included in his offender score. Appellant’s Br. at 4-7. He further maintains that his two 2003 conspiracy to deliver a controlled substance convictions may have been the same criminal conduct, and his lawyer was ineffective for failing to argue this at the time of sentencing. Appellant’s Br. at 7-10.

At the time of sentencing, the defense attorney signed the understanding of defendant’s criminal history, but the defendant did not. CP 47-48. A notation on the signature page of the understanding of criminal history states, “the defendant refused to sign - challenges PCS conspiracy from 6/27/12 alleges it is a misd. [sic.]” CP 48. The trial court had the following discussion with the defense attorney and Mr. Jones.

THE COURT: Mr. Ryan, you said Mr. Jones is disputing his understanding of the criminal history. Is he disputing that he’s a 9-plus?

MR. RYAN: He is disputing, Your Honor, the first one down after the 3, felon in possession of a firearm, federal charges, the PCS conspiracy.

THE COURT: Okay.

MR. RYAN: Date of crime, 12-25-11. His understanding is that his attorney told him that was a misdemeanor or gross

³ Mr. Jones does not identify which convictions he believes were class C felonies at the time of sentencing.

misdemeanor, and based upon that, he entered a plea of guilty. It is my understanding that that is a felony. It remains a felony even though it is listed as a conspiracy. I believe it's an unranked conspiracy.

1/7/16 RP 202-03.

In response, the deputy prosecutor stated it was the State's position that the defendant had an offender score of "12" if the conspiracy to deliver a controlled substance was included in the offender score. 1/7/16 RP 204. Thereafter, the defendant's attorney acknowledged that the offender score was at least a "9."

THE COURT: All right. And so Mr. Ryan, I don't know that it's a big issue because our sentencing grid maxes out at the 9-plus. So even if Mr. Jones is right - and I'll try to sort that out before we finish -- it would just reduce him by one point. Are you disputing that he's a 9-plus?

MR. RYAN: No, Your Honor.

1/7/16 RP 204.

The trial court then determined from the defendant's statement on plea of guilty that the conspiracy to deliver a controlled substance was a felony.

THE COURT: All right. So I have the statement on plea of guilty in Spokane County Cause No. 12-1-00271-2. The statement on plea of guilty says he's pleading guilty to conspiracy to possess a controlled substance, Oxycodone. And it is listed as a felony, unranked felony; standard range of 0 to 12 months; maximum penalty, five years in prison, \$10,000 fine, which would have made it a felony.

Mr. Jones signed it. His attorney at the time was Ms. Blumhorst. Mr. Treppiedi was the prosecutor. Judge Cozza took the plea and sentence. So Mel, if you can hand this down and show it to Mr. Ryan, and his client can look that. Any reason he can't have a copy of that?

MR. TREPPIEDI: No.

THE COURT: I'll give Mr. Jones a copy so he can look at it later if he's got questions. But for purposes of today, it doesn't sound like there's a dispute that he's a 9-plus.

1/7/16 RP 205.

Neither the defense attorney nor the defendant disputed any other prior conviction. However, the defendant did not affirmatively state on the record or in writing that he agreed with the State's understanding of criminal history.

Accordingly, each prior conviction will be addressed in turn.

Convictions for felon in possession of a firearm.

The defendant's three separate federal felon in possession of a firearm convictions committed respectively on October 28, 2011, April 20, 2012, and August 6, 2012, and sentenced on November 18, 2014, are felony convictions. CP 47. *See* 18 U.S.C. § 922(g) (elements of the offense), and 18 U.S.C. § 924(a)(2) ("Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both").

The defendant makes no claim nor does he demonstrate that these particular federal felonies “washed out” or that they should not be counted as separate felony offenses toward his current conviction. Only slightly more than one year elapsed between the dates the defendant was sentenced on the federal crimes and the date of the present conviction, and he was currently serving the sentence on the federal crimes when he was sentenced for the current crime. Accordingly, the three separate convictions⁴ count as “3” points in the defendant’s offender score.

Conspiracy to commit a possession of a controlled substance conviction.

The conspiracy to commit possession of a controlled substance was committed on December 25, 2011, and defendant was sentenced on June 27, 2012, in Spokane County Superior Court. CP 47. Possession of a controlled substance is a class C felony, punishable by up to five years’ imprisonment. RCW 69.50.4013; RCW 9A.20.020.⁵

⁴ Offenses are the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). Courts narrowly construe the same criminal conduct rule and if any of the three elements is missing, each conviction must count separately in the calculation of the defendant’s offender score. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

⁵ As stated previously, the defendant did not sign the understanding of criminal history because he objected to the court counting this as a prior felony as he believed it should have been counted as a misdemeanor conviction. 1/7/16 RP 203, 241. This is the only conviction overtly contested by the defendant at sentencing.

If a defendant is prosecuted for a charge under the Uniform Controlled Substances Act, chapter 69.50 RCW, RCW 9A.28.010 applies. *See State v. Mendoza*, 63 Wn. App. 373, 377, 819 P.2d 387 (1991) (“The latter statute [RCW 69.50.407 (conspiracy)] is ‘a specific statute relating to conspiracies involving controlled substances and such an act of conspiracy must be charged under [RCW 69.50.407] to the exclusion of [RCW 9A.28.040] which deals with conspiracy in general”). RCW 9A.28.010 states:

In any prosecution under this title for ... conspiracy to commit a felony defined by a statute of this state which is not in this title...

....

(3) If the maximum sentence of imprisonment ... is less than eight years, such felony shall be treated as a class C felony for purposes of this title.

Under the Uniform Controlled Substances Act, the maximum penalty for a drug conspiracy is the maximum penalty for the completed offense. RCW 69.50.407. As noted, the maximum penalty for possession of a controlled substance is five years. The same maximum penalty therefore applies to an analogous conspiracy conviction. Because the penalty is more than one year but less than eight, the defendant’s conspiracy to commit possession of a controlled substance conviction is classified as a class C felony.

Here, it is unknown when the defendant was released from incarceration on this offense. The defendant did not remain crime free as he was sentenced on the federal possession of a firearm charges on November 18, 2014. An additional five-year “wash out” period would have extended to November 18, 2019. *See State v. Ervin*, 169 Wn.2d 815, 821, 239 P.3d 354 (2010) (any offense committed after the trigger date that results in a conviction resets the five-year clock).

Because not enough time elapsed for the crime to wash out and because the defendant did not remain crime free during the “wash out” period, this conviction added one additional point to his offender score.

Federal conviction for possession of a dangerous weapon.

The defendant was sentenced in the United States District Court of Eastern Washington on March 21, 2006 for a possession of a dangerous weapon charge. CP 47. It is unclear from the understanding of defendant’s criminal history either the nature or type of conviction. For example, it could be possession of a prohibited object designed and intended to be used as a weapon in violation of 18 U.S.C. § 1791(a)(1), (2) and (d)(1)(B) or possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g).

Nevertheless, it is a conviction which would retrigger the “wash out” period for the defendant’s prior offenses.

Second degree possession of stolen property conviction.

The defendant's second degree possession of stolen property was committed on September 3, 2003, and he was sentenced in the Spokane County Superior Court on November 17, 2003. CP 47. Possession of stolen property in the second degree is a class C felony. RCW 9A.56.160. Since it is unknown when the defendant was released from incarceration, the defendant would have had to remain crime free from the date of sentencing until September 3, 2008, for the second degree possession of stolen property conviction to wash out. The defendant did not remain crime free as he was sentenced on the federal possession of a dangerous weapon charge on March 21, 2006. The five-year "wash-out" period, therefore, extended to March 21, 2011. The defendant's next conviction date was June 27, 2012. Without knowledge of when the defendant was released on the federal possession of a dangerous weapon charge, this conviction would have potentially "washed out" and may not have counted toward the offender score.⁶

⁶ Although the defendant does not assign error to the inclusion of several of the crimes in the offender score because they "washed out," these particular convictions have been addressed in Respondent's brief because miscalculation of an offender score is a legal error if the offender score is based upon convictions that could not have been considered when properly calculating the defendant's offender score. *See State v. Wilson*, 170 Wn.2d 682, 688–89, 244 P.3d 950 (2010). The remedy for a

Conspiracy to deliver a controlled substance convictions.

The defendant was convicted and sentenced on two counts of conspiracy to deliver a controlled substances on November 26, 2003. CP 47. Unlawful possession of a controlled substance with intent to deliver, when completed, is a class B or class C felony depending on the nature of the controlled substance. RCW 69.50.401(2)(a), (b), (c), (d), and (e).⁷

Again, the underlying controlled substance is unknown as well as the date when the defendant was released from incarceration. Assuming the date of conviction, November 26, 2003, as the start date of the five-year “wash out” period, the defendant would have had to remain crime free until November 26, 2008, for the crime to “wash out.” The defendant did not remain crime free as he was sentenced on the federal possession of a dangerous weapon charge on March 21, 2006. The five-year “wash out” period would have extended to March 21, 2011. Without the necessary information to calculate the appropriate “wash out” period for the crime, including the defendant’s release from custody on the federal crime, it is

miscalculated offender score is resentencing using the correct offender score. *Id.* at 691.

⁷ The defendant’s argument that his two conspiracy to deliver a controlled substance convictions constituted the same criminal conduct for purposes of determining the offender score is without merit. *See infra* p. 17.

possible this offense washed out and should not have been included in the offender score calculation.

Second degree robbery conviction.

The defendant was convicted and sentenced to a second degree robbery in the Spokane County Superior Court on November 24, 2003. CP 47. The incident occurred on March 4, 2003. Second degree robbery is a class B felony. RCW 9A.56.210. It is classified as a violent offense. RCW 9.94A.030(55)(xi). Under RCW 9.94A.525(8), if the present conviction is for a violent offense, prior adult and juvenile violent convictions count as two points.

Because the conviction was a class B felony, and the ten-year “wash out” period commenced from the date of sentencing, the crime would not have “washed out” until November 24, 2013. Moreover, since the defendant had a conviction in 2006 for the federal possession of a dangerous weapon charge, again for the conspiracy to possess a controlled substance in 2012, and subsequently for the federal felon in possession of a firearm convictions on November 18, 2014, it triggered a new “wash out” date for the second degree robbery as November 18, 2024. Therefore, the robbery conviction counted as two points toward the offender score.

Attempted second degree assault.

The defendant was convicted and sentenced for attempted second degree assault in the Spokane County Superior Court on November 2, 2003. CP 47. Second degree assault is a class B felony. RCW 9A.36.021(2)(a). The statutory maximum sentence for class B felonies is 10 years. RCW 9A.20.021(1)(b). Second degree assault is a violent offense. RCW 9.94A.030(55)(viii). RCW 9.94A.525(4) requires the sentencing court to “[s]core prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.” Thus, under RCW 9.94A.525(4), the defendant’s prior attempted second degree assault would be treated as a completed second degree assault for purposes of calculating his offender score. *See State v. Becker*, 59 Wn. App. 848, 851, 801 P.2d 1015 (1990) (under an earlier SRA provision anticipatory crimes are to be treated the same as completed crimes for the purpose of offender score calculations); *State v. Knight*, 134 Wn. App. 103, 106-109, 138 P.3d 1114 (2006), *aff’d on other grounds*, 162 Wn.2d 806, 174 P.3d 1167 (2008) (conspiracy to commit robbery scores as two points rather than one against another current violent offense, because a completed robbery would score as two points); *State v. Ashley*, 187 Wn. App. 908, 352 P.3d 827, *reversed on other grounds*, 184 Wn.2d 1017 (2016)

(defendant's prior juvenile adjudication for attempted second degree assault was properly treated the same as the completed crime).

However, an attempt to commit a class B felony, such as second degree assault, is a class C felony. RCW 9A.28.020(3)(c).⁸

Since the conviction date was November 2, 2003 (and it is unknown when the defendant was released from incarceration) and because of the intervening federal and state convictions as discussed above, the crime would have washed out November 2, 2011.⁹

Based upon Respondent's review of the defendant's prior convictions and without the benefit of the prior judgment and sentences because of the defense attorney's prior acknowledgment of the criminal history at sentencing, Respondent calculates the defendant's offender score at an "8."

If this Court remands for resentencing, the proper procedure would be to allow the State to present documentation establishing the defendant's criminal history and offender score calculation.

In *Bergstrom, supra*, defense counsel agreed with the State's understanding of the defendant's criminal history and did not object to the

⁸ RCW 9A.28.020(c) states: "An attempt to commit a crime is a: ... Class C felony when the crime attempted is a class B felony."

⁹ If the crime had not washed out, the resulting offender score have been two points pursuant to RCW 9.94A.525(4).

prosecutor's sentencing range. The defendant independently argued that some of his prior crimes involved the same criminal conduct. The State relied on defense counsel's affirmative acknowledgment and did not offer any evidence. The Supreme Court found the State was entitled to rely on representations advanced by defense counsel, and the State reasonably relied on the defense attorney's stipulation when it calculated the defendant's offender score. Ultimately, the Court held the State should be allowed to introduce evidence of the defendant's criminal history at resentencing, emphasizing it is the State's burden to establish the defendant's criminal history. *Id.* at 97-98; *see also State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113, 121 (2009), *disapproved of on other grounds by State v. Jones*, 182 Wn. 2d 1, 338 P.3d 278 (2014) (where there is no objection at sentencing and the State consequently has not had an opportunity to put on its evidence, it is appropriate to allow additional evidence at a resentencing). RCW 9.94A.530(2) also permits both parties to present additional relevant evidence of criminal history at resentencing following remand from appeal or collateral attack.¹⁰

¹⁰ RCW 9.94A.530(2) states: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented."

B. THE DEFENDANT HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS LAWYER DID NOT ARGUE THE TWO COUNTS OF CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE CONVICTIONS WERE THE SAME COURSE OF CONDUCT AT SENTENCING FOR PURPOSES OF CALCULATING THE OFFENDER SCORE.

For the first time on appeal, the defendant argues that his two 2003 conspiracy to deliver a controlled substance convictions constituted the same criminal conduct for purposes of determining the offender score and his lawyer was ineffective for failing to argue same course of conduct at sentencing is without merit. Appellant's Br. at 7.

Where an alleged sentencing error "involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion," the error may not be raised for the first time on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002); *State v. Wilson*, 170 Wn.2d 682, 689, 244 P.3d 950 (2010). Because "[a]pplication of the same criminal conduct statute involves both factual determinations and the exercise of discretion," a defendant's affirmative acknowledgement in the trial court that her offender score was properly calculated prevents her from arguing for the first time on appeal that particular convictions, which were counted in the calculation of that score, amount to the same criminal conduct. *State v. Nitsch*, 100 Wn. App. 512, 518-26, 997 P.2d 1000 (2000); *see also In re Pers. Restraint of Shale*,

160 Wn.2d 489, 494-96, 158 P.3d 588 (2007) (adopting the reasoning in *Nitsch* and holding that waiver may apply where a defendant argues for the first time on appeal that two prior convictions constituted the same criminal conduct).

To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice would occur here if, but for counsel's deficient performance, there is a reasonable probability that his sentence would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). There is a strong presumption that counsel's performance was not ineffective. *McFarland*, 127 Wn.2d at 335. Here, the defendant fails to show either deficient performance or prejudice and his ineffective assistance of counsel claim fails.

Where concurrent offenses contain the same criminal conduct, the crimes are treated as one crime for sentencing purposes. RCW 9.94A.589; *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Separate offenses encompass the same criminal conduct when they involved the (1) same criminal intent, (2) same time and place, and (3) same victim. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). All three elements must

be present to support a finding of same criminal conduct. *Vike*, 125 Wn.2d at 410.

Other than a bare allegation that his lawyer at sentencing was deficient, the defendant has not provided any factual basis to conclude that his lawyer should have argued “same course of conduct” regarding the 2003 controlled substance convictions.

In addition, his lawyer was most likely aware of the sentencing history and incarceration dates of the defendant, and that if the judgment and sentences of the prior crimes had been before the trial court, the defendant’s offender score would have been well above a “9,” negating the effect of whether the crimes counted as a “1” or “2” in the offender score. Finally, the defendant has not established prejudice because he has not presented any evidence that the two crimes constituted the same criminal conduct.

V. CONCLUSION

Since the defendant did not affirmatively acknowledge his prior convictions and the defense attorney stipulated to the prior convictions and

calculation of the offender score, this Court should remand to allow the State to present documentation to establish the defendant's offender score.

Dated this 2 day of September, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

MAXWELL DELVON JONES,

Appellant.

NO. 34038-4-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 2, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Dennis W. Morgan
nodblspk@rcabletv.com

9/2/2016
(Date)

Spokane, WA
(Place)



(Signature)