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OCTOBER 14, 2016
Court of Appeals
Division III
State of Washington

NO. 34371-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE OTTO RUNGE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Dewayne Runge received ineffective assistance of counsel at his sentencing hearing due to counsel's failure to request an available sentencing alternative and failure to argue that the offenses in Counts 1 and 2 and Counts 1 and 3 constituted the same criminal conduct, entitling him to a new sentencing hearing.

2. The trial court miscalculated Mr. Runge's offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Runge was eligible for a Drug Offender Sentencing Alternative, but trial counsel failed to request that the sentencing court consider that alternative. Where counsel's failure to argue for DOSA eliminated any possibility of receiving a drug treatment for his self-admitted heroin addiction, did Mr. Runge receive ineffective assistance of counsel? Assignment of Error 1.

2. Is reversal required where the trial court miscalculated Mr. Runge's offender score by erroneously counting his convictions for identity theft in the second degree and possession of stolen property in the second degree as separate offenses when the offenses in Counts 1 and 2 and Counts 1 and 3 constituted same criminal conduct? Assignment of Error 2.

3. Should this Court determine that Mr. Runge waived his right to appeal the miscalculation of the offender score where defense counsel did not challenge the calculation, is reversal required because Mr. Runge was denied his constitutional right to effective assistance of counsel? Assignment of Error

1.

C. STATEMENT OF THE CASE

1. Procedural history:

The Spokane County Prosecuting Attorney charged appellant Dwayne Runge with second degree possession of stolen property and two counts of second degree identity theft. Clerk's Papers (CP) 1-2; RCW 9A.56.160(1)(c); RCW 9.35.020(1), (3). The matter came on for jury trial on April 4 and 5, 2016, the Honorable Maryann C. Moreno presiding. Report of Proceedings¹ (RP) at 38-292.

The jury found Mr. Runge guilty of possession of stolen property and two counts of identity theft as charged. RP at 286-87; CP 101, 102, 103. Defense counsel filed motions for arrest of judgment and for new trial, arguing that identification of Mr. Runge by law enforcement as the perpetrator who appeared in videos from Walmart and Maverick Gas Station was insufficient identification for conviction. RP at 296-300; CP 110, 111. The court noted that an officer who knew Mr. Runge identified him as the person in the videos and the officer's testimony was admitted without objection, and denied the motion for arrest of judgment and motion for new trial, which were

¹ The record of proceedings consists of the following sequentially paginated hearings or trial dates: RP—March 3, 2016; March 18, 2016; April 4, 2016 (jury trial, day 1); April 5, 2016 (jury trial, day 2); and April 8, 2016 (motion for new trial, sentencing).

brought pursuant to CrR 7.4 and CrR 7.5, respectively. RP at 299-300; CP 112, 113.

The court sentenced Mr. Runge within the standard range. RP at 317; CP 121-133.

Timely notice of appeal was filed on April 8, 2016. CP 114. This appeal follows.

2. Trial testimony:

A car belonging to Alexandra Rich, a student at Eastern Washington University, was broken into the night of March 15, 2015 or early in the morning of March 16, 2015. RP at 115-16. The car was parked on the street in front of Ms. Rich's townhouse in Cheney, Washington, and the front passenger side window was shattered. RP at 166. Ms. Rich's wallet, which she had left on the passenger seat, was taken. RP at 116-17. The wallet contained her driver's license, student ID card, and debit card from Spokane Teacher's Credit Union. RP at 117. Mr. Rich notified the STCU of the theft and filed a fraud report with the credit union. RP at 123. After looking at the STCU records, she noted several unauthorized purchases, which she listed in the fraud report. RP at 123-24. The unauthorized purchase and attempted purchase included electronic equipment from Wal-Mart in Airway Heights, and cigarettes from a Maverick Gas Station on March 16, 2015. RP at 125.

Detective Justin Hobbs of the Cheney Police Department obtained

surveillance video of the attempted purchase of \$688.85 of electronic equipment by two men at Wal-Mart using Ms. Rich's debit card at approximately 6:18 a.m. on March 16, 2015. RP at 136, 146. Using videos of the purchase, the detective was able to retrace the men's activity in the store. RP at 137. Detective Hobbs testified that the purchase was unsuccessful because a personal identification number (PIN) was required, and that "after a few failed PINs," the transaction was denied. RP at 140. Detective Hobbs identified one of the men in the videos as Mr. Runge, and the other as Sean Maney. RP at 142.

Detective Hobbs also retrieved a video from Maverick gas station in Cheney. RP at 153. He testified that the video he viewed showed a man using a debit card identified as being issued to Ms. Rich to obtain three packs of cigarettes. RP at 157. The transaction took place on March 16, 2015 at approximately 5:44 a.m. RP at 164. The total amount of the cigarettes was \$23.18. RP at 210. Detective Hobbs identified the man he saw in the video as Mr. Runge. RP at 155.

Spokane police officer Mark Brownell viewed the videos and testified that he recognized one of the men in the video obtained from Walmart and the man in the video from Maverick gas station as Mr. Runge. RP at 174-76. He stated that although Mr. Runge had "gained a lot of weight," he recognized him from previous face to face meetings. RP at 176-77. Videos from the gas station and from Walmart of the March 16, 2015 transactions were admitted

and published to the jury. RP at 216, 236-39, 240.

Spokane Teachers Credit Union fraud protection manager James Fuher testified that STCU records show that on March 16, 2015 a purchase made in the amount of \$23.18 using Ms. Rich's debit card at Maverick Gas and that a short time later an attempt was made to access \$688.85 at Walmart, again using the debit card assigned to Ms. Rich. RP at 250. He stated that the Walmart transaction was declined due to an incorrect PIN. RP at 250.

The defense rested without calling witnesses. RP at 258.

D. ARGUMENT

1. TRIAL COUNSEL'S FAILURE TO REQUEST A DOSA VIOLATED MR. RUNGE'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Under RCW 9.94A.660, a defendant may be sentenced under the Drug Offender Sentencing Alternative (DOSA) if the defendant is not currently being convicted, or previously been convicted, of a felony that is either a sex or violent offense, is not subject to detainer, and if the standard sentence range is greater than one year of incarceration and does not involve a weapon enhancement. Here, although Mr. Runge qualified for sentencing under DOSA and acknowledged he was a heroin addict and that he had been a drug addict for 21 years, and although the court inquired regarding the application of DOSA, trial counsel failed to move for a DOSA sentence and instead acquiesced to a

sentence within the standard range. RP at 304-305, 310.

The federal and state constitutions guarantee a criminal defendant representation of counsel and due process of law. U.S. Const., amends. 6,14; Wash. Const. art. 1, § 3, 22. Sentencing is a critical stage of the proceedings where the defendant is entitled to counsel. *State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 323 (2004); *In re Morris*, 34 Wn. App. 23,658 P.2d 1279 (1983); see also *State v. Ford*, 137 Wn.2d 472, 484, 973 P.2d452 (1999) ("Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process."). The right to counsel necessarily includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The right to counsel is not satisfied merely by an attorney's presence in court; the attorney must actually represent the client:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland, 466 U.S. at 685.

A defendant's sentencing may be reversed due to ineffective assistance of counsel if counsel's performance falls below an objective standard of reasonableness and that deficiency prejudiced the defense. *Strickland*, 466 U.S. at 693-94; *State v. Stetson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997), cert. denied sub nom *Stetson v. Washington*, 523 U.S. 1008 (1998). At a minimum, counsel must conduct a reasonable investigation to determine how best to represent the client. *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001); *Saunders*, 120 Wn. App. at 824-25 (counsel ineffective for failing to argue multiple current offenses constituted same criminal conduct where evidence supported argument). While there is a presumption that counsel was effective, that presumption can be overcome by evidence that the attorney failed to properly investigate, determine appropriate defenses, or prepare for trial or sentencing. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). Counsel is ineffective where there is no legitimate strategic or tactical rationale for his conduct, at least none that any reasonably competent attorney would find reasonable. See *State v. McFarland*, 127 Wn.2d 322, 325, 899 P.2d 1251 (1995).

In this case, trial counsel fits very closely to the unacceptable “merely present” status mentioned in *Strickland*. *Strickland*, 466 U.S. at 685. Defense

counsel inexplicably chose not to argue for DOSA and instead acquiesced to a standard range sentence. RP at 304-05. Trial counsel's failure to request sentencing pursuant to DOSA fell below the objective standard of reasonable representation.

In order to qualify for DOSA, a defendant must be chemically dependent and in need of drug treatment. There are no provisions in RCW 9.94A.660, that a defendant must accept criminal responsibility in order to be sentenced under DOSA. Therefore, the fact that Mr. Runge chose to proceed to trial is not an impediment to DOSA; the only caveat is that implementation of a DOSA sentence is at the discretion of the sentencing judge, who must determine whether the community and the defendant would benefit from the offender doing DOSA.

The purpose of DOSA is provide an opportunity for treatment to offenders likely to benefit from it. It authorizes trial judges to give eligible offenders a reduced sentence, treatment, and increased supervision to help them overcome their addictions. *State v. Grayson*, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005); RCW 9.94A.660. A defendant is eligible for a DOSA sentence if (1) his current offense is not a violent offense or a sex offense and does not involve a firearm or deadly weapon sentence enhancement; (2) his prior convictions do not include violent offenses or sex offenses; (3) his current

offense is a violation of chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.58 RCW and involved only a small quantity of drugs; and (4) he or she is not subject to deportation. See RCW 9.94A.660(1).

Appendix A.

Mr. Runge meets the statutory eligibility requirements for DOSA consideration. His offenses are not violent or sex offenses and do not involve firearm or deadly weapon enhancements, he is not convicted of driving under the influence or physical control of a vehicle under the influence, and he has no current or prior convictions for a sex offense or a violent offense within ten years of the current convictions. CP 123-24. The standard range for his offenses exceeds one year, and his last DOSA was in 2001, and therefore has not received a DOSA more than once in the past ten years. RP at 304. Based on all the statutory factors, Mr. Runge is eligible for DOSA consideration. See RCW 9.94A.660(1).

Defense counsel was aware that Mr. Runge had a drug problem—specifically an addiction to heroin—and could benefit from a DOSA. At sentencing the court asked if Mr. Runge had received DOSA in the past, and Mr. Runge responded “[o]ne time in 2000 and one that was the last time I went to prison was in 2001.” RP at 304. Mr. Runge also stated, “I do know I have a drug habit. I have been a—I’ve been a drug addict for 21 years.” RP at 305.

The judge asked how much time Mr. Runge felt he deserved. RP at 307.

During his answer, Mr. Runge noted that he is a heroin addict. RP at 309, 310.

Following allocution, the following colloquy took place involving defense counsel Terence Ryan and deputy prosecuting attorney Reese Sterett:

THE COURT: But Mr. Ryan, didn't you have an option to enter a plea and ask for a prison-based DOSA?

MR. RYAN: Originally we did, your Honor, and then things changed when the prosecutor's policy. . .

THE COURT: Well, the prosecutor's policy is basically that you—you plead as charged and the state will recommend a prison-based DOSA.

MR. RYAN: And I don't remember why that was taken off—

THE DEFENDANT: He didn't want me to take it.

MR. RYAN: --the table but....

THE DEFENDANT: He wanted me to take it to trial.

THE COURT: And the reason I was —

MR. RYAN: I think it was—

THE COURT: —talking about this is because I just sentenced a co-defendant who has, I think, a worse record than Mr. Runge and he got a prison-based DOSA. So I need to —one of the purposes of the SRA is to make sure that punishment is commensurate with others committing the same types of crimes. So help me out here, Mr. Sterett.

MR. STERETT: Your Honor, the policy as of the 14th of January of this year indicates that if a defendant, due to any number of issues such as—well, mainly evidentiary issues or they only have one particular file, my office has authorized me to offer—either we would recommend a

high-end sentence or we would jointly recommendation a prison DOSA.

The policy also indicates that if a defendant has more than one file, then now I am not able to offer a prison-based DOSA. The only recommendation that I am authorized to make is plea as charged, high end, with a state's recommendation of consecutive sentences.

RP at 312-13.

Despite the virtual solicitation by the court for a request for DOSA, defense counsel persisted in arguing for bottom of the standard range, apparently believing that a DOSA could only be ordered upon a guilty plea in conjunction with a DOSA recommendation from the prosecutor's office. Hearing no motion for DOSA, the court ended the discussion regarding DOSA and imposed a standard range sentence of 45 months, followed by twelve months of community custody. RP at 317; CP 121-33.

Defense counsel's erroneous belief that DOSA was predicated upon a guilty plea and a recommendation by the state is prejudicial error. The DOSA statute provides that defendants who have serious drug problems can be sentenced under that option; it does not indicate that in order to receive a treatment alternative that the person must accept criminal responsibility. Were that the standard, the statute would indicate that a person who proceeded to trial was not eligible for the treatment alternative.

Mr. Runge meets the statutory criteria for DOSA, he is chemically dependent and stated clearly during allocution that he is willing to participate in

treatment. RP at 311. Mr. Runge clearly would benefit from DOSA. He acknowledged a long term drug addiction and noted that he had completed DOSA imposed in 2001, and that his longest period of prison incarceration was 14 months. RP at 309. Notably, he was crime-free from 2002 to 2013 and stated that he was doing well until he was convicted of two counts of theft in the second degree and possession of stolen property in 2014. RP at 308. It is not unreasonable to surmise that his long crime-free period was due at least in part to his prior successful completion of DOSA.

Counsel's failure to advocate for the available sentencing was clearly prejudicial. If counsel had moved for a DOSA, the court would have been required to consider that sentencing alternative, and in fact the court gave every indication that it would have approved DOSA. The court noted that she had just sentenced Mr. Runge's co-defendant "with a worse record than Mr. Runge and he got a prison-based DOSA." RP at 311-12.

Despite this broad, unmistakable entreaty that the court would look favorably upon DOSA for Mr. Runge, counsel essentially abandoned his duty to serve as an advocate for his client. Counsel apparently did not request DOSA because the prosecutor's office had enacted a "policy" of not "offering" prison based DOSA for offenders with "more than one file." RP at 312.

If the court imposed a DOSA sentence, Mr. Runge would be sentenced

to confinement for one-half the midpoint of the standard range, followed by community custody for one-half the midpoint of the standard range. Treatment could be provided during incarceration and would be required during community custody. RCW 9.94A.662(1). As a result of counsel's failure to request the alternative sentence, however, the court never considered a DOSA for Mr. Runge and sentenced him to near the top of the standard range, even though he met the statutory eligibility requirements and even though the court essentially invited defense counsel to make the request and despite his own client's statement that he would participate in DOSA. RP at 311.

Counsel's deficient performance completely foreclosed the possibility of needed treatment and a far more lenient sentence. This prejudice requires reversal of Mr. Runge's sentence.

2. THE TRIAL COURT MISCALCULATED MR. RUNGE'S OFFENDER SCORE BY ERRONEOUSLY COUNTING THE CONVICTIONS FOR IDENTITY THEFT IN THE SECOND DEGREE AND POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE AS SEPARATE OFFENSES WHEN THE OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. A

remand for resentencing is required because the trial court miscalculated Mr. Runge's offender score by erroneously counting his convictions for identity theft in the second degree and possession of stolen property in the second degree as separate offenses when they constituted same criminal conduct.

A trial court counts a defendant's prior offenses separately in determining the offender score unless it finds that the prior offenses encompass the same criminal conduct. RCW 9.94A.525(a)(i). Appendix A. Two or more offenses encompass the same criminal conduct if the crimes involved the same criminal intent, were committed at the same time and place, and involved the same victim. RCW 9.94A.589(1)(a); *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the objective criminal intent test, which requires a court to focus on the "extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." *In re Connick*, 144 Wn.2d 442, 459, 28 P.3d 729 (2001)(citing *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)); *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998). "Importantly, Washington courts look for the concurrence of intent, time and place, and victim by examining whether each offense was part of a recognizable scheme or plan and whether the

defendant substantially changed the nature of his criminal objective from one offense to another." *State v. Bickle*, 153 Wn. App. 222, 234, 222 P.3d 113 (2009).

Here, a jury convicted Mr. Runge of two counts of identity theft in the second degree and one count of possession of stolen property in the second degree, all committed on March 16, 2015, against Alexandra Rich. CP 1-2. The trial court counted the crimes as separate offenses and calculated Mr. Runge's offender score as "9 plus." The trial court erred in counting the crimes as separate offenses because the record substantiates that the offenses against Ms. Rich constituted same criminal conduct.

The offenses constituted same criminal conduct because the crimes were committed at the same time and place, involved the same victim, and involved the same intent. The possession of stolen property conviction was for possessing an access device belonging to Ms. Rich. CP 1. His identity theft conviction was for using a means of identification or financial information of another person. CP 1-2. The offenses involved the same continuing course of conduct that started when Mr. Runge allegedly obtained the access card and continued until he completed his last transaction, as found by the jury. The offenses took place at virtually the same times and the possession occurred at the same two places, required the same intent, and involved the same victim. RCW

9.94A.589(1)(a). When viewed objectively, the evidence establishes that the crimes of identity theft in the second degree and possession of stolen property in the second degree were committed simultaneously without any change in criminal intent. The evidence establishes further that the crimes were part of a recognizable scheme or plan to steal and use the access device and the nature of the criminal objective did not change from one crime to the other. The crimes in Counts 1 and 3, and Counts 2 and 3 therefore involved the same indistinguishable criminal intent. *In re Connick*, 144 Wn.2d at 215; *Bickle*, 153 Wn. App. at 234.

Consequently, Mr. Runge's sentence must be vacated and a remand for resentencing is required because the crimes of identity theft in the second degree and possessions of stolen property the second degree constituted same criminal conduct.

2. IN THE ALTERNATIVE, IF MR. RUNGE WAIVED HIS RIGHT TO APPEAL THE MISCALCULATION OF THE OFFENDER SCORE WHERE DEFENSE COUNSEL AGREED TO THE STANDARD RANGE AN DID NOT CHALLENGE THE CALCULATION REVERSAL IS REQUIRED BECAUSE MR. RUNGE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Should this Court determine that Mr. Runge waived his right to appeal the miscalculation of his offender score where defense counsel did not challenge the calculation at sentencing, reversal is required because Mr. Runge was denied

his constitutional right to effective assistance of counsel.

Generally, a defendant cannot waive a challenge to a miscalculated offender score. *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). However, a defendant waives his right to appeal her miscalculated offender score if he fails to challenge the calculation below and did not request that the sentencing court make a same criminal conduct determination. *State v. Wilson*, 117 Wn. App. 1, 21, 75 P.3d 573, review denied, 150 Wn.2d 1016 (2003). A defendant waives review of his offender score by agreeing to the calculation of her standard range at sentencing. *State v. O'Neal*, 126 Wn. App. 395, 433-34, 109 P.3d 429 (2005).

As noted in section 1, *supra*, defense counsel did not challenge the calculation of the offender score and in fact agreed to sentencing within the standard arrange. The Judgment and Sentence indicates that the court counted the offenses as separate offenses. CP 121-33. Defense counsel's performance was deficient because the identity theft in the second degree and possessions of stolen property in the second degree constituted same criminal conduct against Ms. Rich. Defense counsel's performance prejudiced Mr. Runge because with the offenses constituting same criminal conduct.

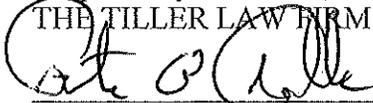
Reversal is required because defense counsel's performance fell below an objective standard of reasonableness and Mr. Runge was prejudiced because except for defense counsel's errors, the result of the proceeding would have been different. *Stenson*, 132 Wn.2d at 705, *McFarland*, 127 Wn.2d at 335.

E. CONCLUSION

Trial counsel's failure to request sentencing pursuant to the Drug Offender Sentencing Act and failure to argue that the offenses constituted the same criminal conduct denied Mr. Runge his constitutional right to effective representation, and his case must be remanded for re-sentencing. In addition, the trial court abused its discretion by failing to properly conduct the same criminal conduct analysis as sentencing.

DATED: October 13, 2016.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

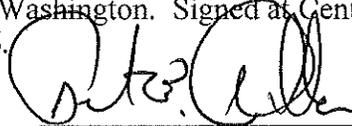
The undersigned certifies that on October 13, 2016, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division III, 500 N Cedar St, Spokane, WA 99260, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 13, 2016.



PETER B. TILLER

APPENDIX A

RCW 9.94A.525

Offender score.

The offender score is measured on the horizontal axis of the sentencing grid.

The offender score rules are as follows:

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.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses 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, 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.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses 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, 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.

(d) Except as provided in (e) of this subsection, serious traffic 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 conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), all predicate crimes for the offense as defined by RCW 46.61.5055(14) shall be included in the offender score, and prior convictions for felony driving while under the influence of intoxicating liquor or any drug

(RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)) shall always be included in the offender score. All other convictions of the defendant shall be scored according to this section.

(f) Prior convictions for a repetitive domestic violence offense, as defined in RCW 9.94A.030, shall not be included in the offender score if, since the last date of release from confinement 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.

(g) This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) 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;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile

convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(12) If the present conviction is for homicide by watercraft or assault by watercraft count two points for each adult or juvenile prior conviction for

homicide by watercraft or assault by watercraft; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for driving under the influence of intoxicating liquor or any drug, actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, or operation of a vessel while under the influence of intoxicating liquor or any drug.

(13) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(18) If the present conviction is for failure to register as a sex offender under RCW * 9A.44.130 or 9A.44.132, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior convictions for failure to register as a sex offender under RCW * 9A.44.130 or 9A.44.132, which shall count as one point.

(19) If the present conviction is for an offense committed while the offender was under community custody, add one point. For purposes of this subsection,

community custody includes community placement or postrelease supervision, as defined in chapter 9.94B RCW.

(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count one point for prior convictions of Vehicle Prowling 2, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.

(21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead [pleaded] and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead [pleaded] and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;

(b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was plead [pleaded] and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead [pleaded] and proven after August 1, 2011.

(22) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current

offense. Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

RCW 9.94A.660

Drug offender sentencing alternative—Prison-based or residential alternative.

(1) An offender is eligible for the special drug offender sentencing alternative if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533 (3) or (4);

(b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);

(c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The end of the standard sentence range for the current offense is greater than one year; and

(g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

(2) A motion for a special drug offender sentencing alternative may be made by the court, the offender, or the state.

(3) If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

(4) To assist the court in making its determination, the court may order the department to complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500.

(5)(a) If the court is considering imposing a sentence under the residential chemical dependency treatment-based alternative, the court may order an examination of the offender by the department. The examination shall, at a minimum, address the following issues:

(i) Whether the offender suffers from drug addiction;

(ii) Whether the addiction is such that there is a probability that criminal behavior will occur in the future;

(iii) Whether effective treatment for the offender's addiction is available from a provider that has been licensed or certified by the department of social and health services; and

(iv) Whether the offender and the community will benefit from the use of the alternative.

(b) The examination report must contain:

(i) A proposed monitoring plan, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others; and

(ii) Recommended crime-related prohibitions and affirmative conditions.

(6) When a court imposes a sentence of community custody under this section:

(a) The court may impose conditions as provided in RCW 9.94A.703 and may impose other affirmative conditions as the court considers appropriate. In addition, an offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring for alcohol or controlled substances.

(b) The department may impose conditions and sanctions as authorized in RCW 9.94A.704 and 9.94A.737.

(7)(a) The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence

have occurred.

(b) If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

(d) An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served under this section.

(8) In serving a term of community custody imposed upon failure to complete, or administrative termination from, the special drug offender sentencing alternative program, the offender shall receive no credit for time served in community custody prior to termination of the offender's participation in the program.

(9) An offender sentenced under this section shall be subject to all rules relating to earned release time with respect to any period served in total confinement.

(10) Costs of examinations and preparing treatment plans under a special drug offender sentencing alternative may be paid, at the option of the county, from funds provided to the county from the criminal justice treatment account under RCW 71.24.580.