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DEC. 18, 2017  
Court of Appeals  
Division III  
State of Washington

No. 35001-1-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

CATHE L. McNEILL, Appellant.

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BRIEF OF RESPONDENT

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**I. SUMMARY OF ISSUES**

1. DID THE SENTENCING COURT PROPERLY RELY UPON THE APPELLANT'S STIPULATION TO THE INCARCERATION PERIOD FROM A PRIOR CONVICTION AND RESULTING OFFENDER SCORE?
  
2. SHOULD THE APPELLANT BE PRECLUDED FROM RAISING A SCORING CLAIM WHERE THE APPELLANT'S STIPULATION TO FACTS CAUSED THE COMPLAINED OF ERROR?
  
3. DID THE COURT ABUSE IT'S DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS?
  
4. SHOULD THIS COURT DEFER ON THE ISSUE OF COSTS ON APPEAL UNTIL SUCH TIME AS THE STATE SUBMITS A COST BILL?

II. **SUMMARY OF ARGUMENT**

1. THE SENTENCING COURT PROPERLY CALCULATED THE APPELLANT'S OFFENDER SCORE BASED UPON THE APPELLANT'S STIPULATION TO THE INCARCERATION PERIOD IMPOSED IN A PRIOR CONVICTION AND RESULTING OFFENDER SCORE.
  
2. THE APPELLANT SHOULD BE PRECLUDED FROM RAISING A CLAIM TO INCORRECT OFFENDER SCORE WHERE THE APPELLANT'S STIPULATION TO FACTS CAUSED THE COMPLAINED OF ERROR.
  
3. THE COURT DID NOT ABUSE IT'S DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS.
  
4. THIS COURT SHOULD DEFER ON THE ISSUE OF COSTS ON APPEAL UNTIL SUCH TIME AS THE STATE SUBMITS A COST BILL.

### III. STATEMENT OF THE CASE

On July 29, 2015, after a lengthy investigation into her ongoing narcotics dealing activities, detectives from the local drug task force arrested the Appellant, Cathe McNeill, on four<sup>1</sup> counts of Delivery of a Controlled Substance, Possession of a Controlled Substance, Maintaining a Drug Dwelling, and Controlled Substance Conspiracy. Clerks Papers (hereinafter CP) 1-4. She was initially charged by Information with three counts of Delivery of a Controlled Substance (Methamphetamine), Possession of a Controlled Substance (Methamphetamine), and Maintaining a Dwelling or Place for Controlled Substances. CP 8 - 12. The State subsequently amended the Information to allege that each of the charges of Delivery of a Controlled Substance (Methamphetamine) in Counts 1, 2, and 3 were committed within a protected zone triggering the twenty-four month sentencing enhancement. CP 51-55.

The Appellant has an extensive criminal history including multiple convictions for controlled substances. CP 95. The Appellant was convicted on April 10, 2006 of four counts of Attempting to Obtain a Controlled Substance by Fraud. CP 95. Later that same year, the Appellant was convicted of Delivery of a Controlled Substance

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<sup>1</sup>The arresting officer booked the Appellant into jail on the more recent three counts of Delivery of Methamphetamine and also included a charge from March 7, 2013 of Delivery of a Controlled Substance relating to a controlled buy that date for alprazolam (Xanax) and morphine. CP 2. The State reserved filing of this charge. CP 8-12

(Methadone) and Unlawful Possession of a Firearm in the Second Degree, with Judgement and Sentence entering December 6, 2006. CP 95. The Appellant was sentenced to serve sixty (60) months on those convictions.

On November 14, 2016, after extensive negotiations, the State and the Appellant entered into a plea agreement wherein the State agreed to dismiss three felony charges (Counts 3, 4, and 5) in exchange for her pleas of guilty to two counts of Delivery of a Controlled Substance (Methamphetamine). CP 82. One of these dismissed counts was the charge of Maintaining a Dwelling or Place for Controlled Substances. CP 82. The Information filed in this matter alleged that the Maintaining a Dwelling charge commenced December 1, 2013. That crime therefore was committed only three and a half years after her now asserted release from prison in May of 2009. CP 12. The State further agreed to withdraw the applicable protected zone enhancements on the remaining counts. CP 82. As a condition of the plea agreement, the Appellant stipulated to her criminal history as recited in her Statement on Plea of Guilty. CP 82, 95. In the criminal history table attached to the Statement on Plea of Guilty was a notation that the Appellant served a sentence of sixty months on her 2006 conviction for Delivery of Methadone. CP 95. The Appellant, having stipulated to her criminal history, including the above notation, further stipulated that her resulting offender score was

seven. CP 82. The State agreed to recommend a sentence of sixty months which was low end of the standard range of sixty (60) to one-hundred twenty (120) months. CP 82.

The Appellant entered her pleas of guilty and the matter proceeded to sentencing on December 1, 2016. Report of Proceedings (RP) 105-112, 119-122, 127-143; CP 103-111.

During the sentencing hearing, the Appellant expressed confusion concerning her request for a DOSA (RCW 9.94A.660) sentence and how a sentence thereunder is calculated. RP134-137. Despite this confusion, and after clarification, the Appellant did not request to withdraw her plea. RP 134-136. Pursuant to the Plea Agreement, the Court imposed a sentence of 60 months on each count, concurrent. CP 103-111. After discussion of her financial situation, the Court declined to impose the three-thousand dollar (\$3,000.00) methamphetamine clean-up fine as well as the presumptive VUCSA fine of two-thousand dollars (\$2,000.00). RP 138-139. In response to the request for the methamphetamine clean-up, the Appellant told the court that she had already spent forty-thousand dollars cleaning up the property to ready it for sale. RP 136. The court chose to impose the remaining requested LFOs. CP 104. No objection was raised at that time by the Appellant. RP 139-143. The Appellant subsequently filed notice of appeal. CP 113.

#### **IV. DISCUSSION**

The Appellant has now appealed, claiming that her offender score was improperly calculated and that the Court erred in imposing LFOs. During the pendency of this appeal, the Appellant has, over State's objection, interjected additional information into the record that tends to refute her stipulation and undercuts the plea agreement. Because her stipulation supported the Court's calculation of her offender score, because her stipulation resulted in the error from which she now complains, and because the procedural strategy she has chosen unfairly prejudices the State who relied upon her stipulation in negotiating the plea agreement herein, this Court should deny her appeal.

1. THE SENTENCING COURT PROPERLY CALCULATED THE APPELLANT'S OFFENDER SCORE BASED UPON THE APPELLANT'S STIPULATION TO THE INCARCERATION PERIOD IMPOSED IN A PRIOR CONVICTION AND RESULTING OFFENDER SCORE.

As a starting point, the Appellant's argument assumes error but ignores her stipulation. Restating the issue presented herein, the Appellant must show that the Trial Court erred in calculating her offender score. Here, the Court relied upon a correct recitation of her criminal history. The Appellant does not challenge this recitation or claim infirmity with any of the listed convictions. While the State has the burden of establishing prior criminal history, affirmative acknowledgment of the conviction(s) by an offender satisfies the

State's burden. See State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Here, the Appellant affirmatively acknowledged her criminal history in both the Plea Agreement and the Statement on Plea of Guilty. Further, not only did the Appellant acknowledge her convictions, she stipulated that she was confined for sixty months on the most recent conviction. The Court was entitled to rely upon her affirmative acknowledgment (stipulation) of her criminal history as well as the her stipulation (affirmative acknowledgment) that her convictions had not washed out due to the incarceration period imposed on the latest prior convictions. See State v. Weaver, 140 Wn.App. 349, 352, 166 P.3d 761, 763 (Div. I, 2007)(*overruled in part by State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009)). See also State v. Huff, 119 Wn.App. 367, 80 P.3d 633 (Div. 2, 2003).

The sentencing court was entitled to rely upon both of her stipulations in calculating her offender score. Based upon her factual stipulation to her incarceration period, the trial court properly calculated her offender score as seven. As such, the trial court committed no error and her arguments to the contrary are without merit.

2. THE APPELLANT SHOULD BE PRECLUDED FROM RAISING A CLAIM TO INCORRECT OFFENDER SCORE WHERE THE APPELLANT'S STIPULATION TO FACTS CAUSED THE COMPLAINED OF ERROR.

The Appellant's arguments concerning her offender score should not be heard in this appeal. By stipulating to not only to her offender score, but also to the facts concerning confinement resulting from prior convictions which precluded certain convictions from washing, the Appellant invited any complained of error. In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 311-12, 979 P.2d 417, 426 (1999)(*a defendant may not set up error in a plea agreement and then assign error thereto on appeal*). Here, the Appellant negotiated for a substantial benefit from the plea agreement including dismissal of three out of five charges and withdrawal of enhancements. The Appellant agreed to the offender score calculation, including the facts that resulted therein. She cannot now enjoy further benefit by challenging the very sentence to which she agreed. She may not seek remedy from an invited error.

Additionally, the Appellant waived any objection to her offender score calculation by stipulating to the lack of a washout period and her resulting offender score. The Plea Agreement recited:

The Defendant hereby represents and stipulates that her criminal history is as set forth in the Statement on Plea of Guilty and includes six prior felony convictions, resulting in an offender score of 7.

CP 82. By signing below the table listing her criminal history in her Statement of Defendant on Plea of Guilty, she reaffirmed this representation to the sentencing court. CP 95. No objection to her

offender score was made at the time of entry of plea or at the time of sentencing. She cannot raise this issue now, for the first time on appeal, having stipulated to facts and the resulting the offender score, which stipulation induced the State to dismiss charges and enhancements.

In effort to avoid this obvious result, the Appellant shifts the focus to the State's obligation to provide proof of criminal history. It is understood that the State bears the burden of proof and production on this issue. "At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence." State v. Mendoza, 165 Wn.2d at 920. While the burden of providing an adequate record rests on the State, "This is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence." *Id.* Affirmative acknowledgment requires more than the mere failure to object to a prosecutor's recitation of criminal history or the mere agreement with the ultimate sentencing recommendation. *Id.* at 928. Here, the Appellant affirmatively acknowledged the correctness of the criminal history and presentencing offender score provided by the State, and affirmatively stipulated thereto, so she cannot object to the adequacy of the record.

In addition, while a defendant cannot agree to a sentence in

excess of statutory authority, "waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Here, the Appellant stipulated, in her recitation of criminal history, to her incarceration period resulting from her 2006 conviction for Delivery of Methadone. She further stipulated to the resulting offender score. She now challenges the facts to which she previously stipulated. Her argument here on appeal was therefore waived.

It should be noted at this point that the Appellant has effectively converted this direct appeal into a personal restraint petition, having supplemented the record with evidence that was not presented to the trial court in an effort to seek a remedy to which she has no equitable right. This allows her to enjoy all the benefits of her agreement and obtain additional benefits for which she did not negotiate.

While she avoids framing the issue as such, her argument is essentially that there was a mutual mistake of fact. Specifically, the parties erred in their understanding of her release date or the possible expiration of a washout period. The proper procedure would be to file a motion pursuant to CrR 7.8 requesting to withdraw the plea. See State v. Walsh, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001)(*guilty plea may be deemed involuntary where there is a mutual mistake of fact or law*)

*and where this mistake forms part of the basis for the defendant's plea*). The remedy for an involuntary plea is either specific enforcement<sup>2</sup> of the plea agreement or withdrawal of the guilty plea. *See Id.* Interestingly, in the context of her arguments, the Appellant avoids discussion of the voluntariness of her plea. For obvious reasons, she seeks a remedy for an error that she created, while maintaining all the benefits of the plea bargain she struck with the State.

The State gave up three felony charges and three protected zone enhancements which would have added twenty-four (24) months to her sentence. *See RCW 69.50.435(1)(c)*. Additionally, had this issue been presented during negotiations or otherwise raised below, the State could have modified the agreement to include the Maintaining a Drug Dwelling charge which has an offense date which would preclude any washing of prior convictions or potentially argued for an exceptional sentence based upon unscored prior convictions. *See RCW 9.94A.535(2)(d)*.

Had the Appellant filed a proper motion seeking the appropriate remedy, the State would have had the opportunity to renegotiate the plea agreement which would have reached the agreed

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<sup>2</sup>Based upon her chosen course, presumably the Appellant would not seek specific performance.

to result. Either the Appellant was misadvised and she should be given the opportunity to withdraw her guilty plea, or she didn't negotiate in good faith and laid in the weeds until it was too late for the State to respond.

Under these facts, this Court should consider the policies concerning application of the doctrine of equitable estoppel, which is grounded in the principle "that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975).

A party seeking the protection of the doctrine must establish three elements: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; (3) injury to such other party resulting from permitting the first party to contradict or repudiate such admission, statement, or act."

State v. Yates, 161 Wn.2d 714, 737-38, 168 P.3d 359 (2007)(*internal quotation omitted*). Here, the Appellant affirmatively asserted, not only her offender score, but the convictions and additional facts that result in that score. The State relied, in good faith, on that stipulation to support the plea agreement, to its detriment, dismissing charges and enhancements, and agreeing to a sentencing recommendation. The charge of Maintaining a Drug Dwelling that the State agreed to

dismiss would have interrupted the washout period. In light of her stipulation, it would be inequitable to allow the Appellant to raise this issue and prevail, having induced the State by her stipulation to dismiss certain charges that could have precluded the very arguments she now makes. She is not without remedy, should she decide to pursue the appropriate motion, but she should not be allowed “unjust enrichment” under these facts.

3. THE COURT DID NOT ABUSE IT'S DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS.

The Appellant next contends that the court erred in imposing certain legal financial obligations. Specifically, the Appellant asserts that the Court should not have imposed attorney costs of seven-hundred fifty dollars (\$750.00), sheriff's service fees totaling seven-hundred sixty dollars (\$760.00), the crime lab fee of one-hundred dollars (\$100.00), and a fine of one-thousand dollars (\$1,000.00). The Appellant lumps each of these assessments under the umbrella of “discretionary legal financial obligations.” The Appellant then equates discretionary with the statutory requirement that the court consider ability to pay before imposing costs. Keeping our eyes on the ball, the court acted within its discretion, despite the Appellant's apparent meager means, in imposing these legal financial obligations.

Starting with the thousand dollar fine, such fines are imposed pursuant to RCW 9A.20.021. There is no obligation by the court to

consider ability when imposing a fine under that statute. See State v. Clark, 191 Wn.App. 369, 375-76, 362 P.3d 309 (Div. III, 2015). Therefore, there can be no abuse of discretion by the court for imposition of this fine.<sup>3</sup>

With regard to the crime lab fee, the Appellant's argument is likewise misplaced. RCW 43.43.690(1) provides:

When an adult offender has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory, in addition to any other disposition, penalty, or fine imposed, ***the court shall levy a crime laboratory analysis fee of one hundred dollars for each offense<sup>4</sup> for which the person was convicted.*** Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.

*(Emphasis added)*. The statute requires imposition of the fee. "This assessment is mandatory if a laboratory analysis was conducted." State v. Clark, 195 Wn. App. at 873. The statute only allows suspension of ***payment*** upon a verified petition, and only allows suspension of the payment if the offender is found unable to pay. See RCW 43.43.690(1). The imposition of the fee is required regardless of ability to pay. The Appellant's claim is premature. She

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<sup>3</sup>It should be further noted that the court only imposed one fiftieth of the available fine. See RCW 69.50.401.

<sup>4</sup>In fact, the court should have imposed two hundred dollars (\$200.00) in lab fees as the Appellant was convicted of two felony counts.

should not be heard until such time as the State undertakes efforts to collect. See State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (Div. II, 2013).

The Appellant's argument may receive some traction with regard to the sheriff's service fees and the court appointed attorney fee. These are costs and as such, RCW 10.01.160(3) requires that the court consider the offender's financial situation and likely future ability to pay before imposing costs. At first blush, it would appear that imposition of these costs might be questionable. However, the Appellant's argument ignores the fact that, prior to imposing these fifteen-hundred ten dollars (\$1,510.00) in costs, the court struck five-thousand dollars (\$5,000.00) in applicable fines, including the two-thousand dollar (\$2,000.00) mandatory VUCSA fine. See RCW 69.50.430(2). See also State v. Cowin, 116 Wn.App. 752, 760, 67 P.3d 1108 (Div. II, 2003). As stated above, these fines are purely discretionary and may be imposed without regard to the Appellant's ability to pay. See Clark, 191 Wn.App. at 375-76. It should be further noted that the Appellant apparently had substantial funds (forty-thousand dollars) to expend on the residence she owned. RP 135. Having reduced substantially the Appellant's legal financial obligations, the court determined that the Appellant, if not saddled with these other obligations, could pay these costs. The Appellant's

argument uses the sentencing court's benevolence as a club with which to beat it over the head. The court considered the Appellant's circumstances and did not abuse its discretion in imposing these costs.

4. THIS COURT SHOULD DEFER ON THE ISSUE OF COSTS ON APPEAL UNTIL SUCH TIME AS THE STATE SUBMITS A COST BILL.

The Appellant requests that this court prospectively and summarily deny costs on appeal. The State respectfully requests this Court defer such finding until such time as the State submits a cost bill, if any, and allow a commissioner of this Court to decide the issue should it arise pursuant to RAP 14.2.

**V. CONCLUSION**

The Appellant's attempt to utilize the direct appeal process to obtain a more lenient sentence than she negotiated for should be rejected. The Appellant's stipulation to her incarceration period precludes her from seeking review as the claimed error was either invited or waived. If she was misled by her attorney, her remedy lies in CrR 7.8 or in a personal restraint petition seeking to withdraw her pleas of guilty. The sentencing court sufficiently considered her ability to pay and pared down the legal financial obligations in this matter accordingly. Accordingly, this Court should deny her appeal. The

State respectfully requests this Court issue a decision affirming the sentence imposed herein.

Dated this 15<sup>th</sup> day of December, 2017.

Respectfully submitted,



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Court of Appeals No: 35001-1-III

**DECLARATION OF SERVICE**

DECLARATION

On December 18, 2017 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

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I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on December 18, 2017.

  
\_\_\_\_\_  
LISA M. WEBBER  
Office Manager

DECLARATION  
OF SERVICE

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**ASOTIN COUNTY PROSECUTOR'S OFFICE**

**December 18, 2017 - 8:45 AM**

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