

FILED
Court of Appeals
Division III
State of Washington
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No. 35113-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MATHEW PHILLIPS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF BENTON

APPELLANT'S REPLY BRIEF

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B. ARGUMENT IN REPLY

1. The State failed to establish Mr. Phillips' offender score by sufficient proof.

The State and defense did not agree on Mr. Phillips' offender score at his sentencing. CP 41-44 (Defense Sentencing Memorandum asserting that Mr. Phillips has an offender score of eight); RP 5 (State asserting that Mr. Phillips had an offender score of nine); Brief of Appellant (BOA) at 7.

But the State simply does not address the fact that Mr. Phillips' sentencing memo asserted an offender score different than the score proffered by the State, thus ignoring that the record establishes that Mr. Phillips did not "affirmatively agree" to the prosecution's summary of his offender score. CP 41-44; *State v. Hunley*, 175 Wn.2d 901, 905, 287 P.3d 584 (2012).

The State tries to argue that Mr. Phillips in some way affirmatively acknowledged the State's version of his offender score, relying heavily on the "Amended Offer Letter" in the court file. Brief of Respondent (BOR) at 2 and 4. This offer letter appears to be signed by Mr. Phillips, but there is no date stamp on it to indicate that the court received it or on what date; the only date on the letter is September 20, 2016, which was about eight months prior to Mr. Phillips' sentencing in May of 2017. CP 16.

Thus the State erroneously claims, “at the time of his sentencing,” Mr. Phillips “signed a criminal history summary dated September 20, 2016, which indicated his offender score was 9.” BOR at 2 (citing to CP 16).

And though Mr. Phillips signed the judgment and sentence which contained the same summary of the offender score offered by the State eight months prior, this does not establish Mr. Phillips’ agreed to the offender score or that the State established his score by a preponderance of the evidence. *Hunley*, 175 Wn.2d at 909.

And the State even admits that the offender score provided in this offer letter was wrong. BOR at 4. Yet, the State cites to *State v. Zamudio*, which precluded a defendant from challenging his offender score on appeal when the defendant failed to establish that there was any error in his sentencing score. *State v. Zamudio*, 192 Wn. App. 503, 504, 509-510, 368 P.3d 222 (2016). But unlike in *Zamudio*, where the defendant did not “demonstrate *any* sentencing error,” here, by the State’s own admission, there was an error in Mr. Phillip’s offender score. *Zamudio*, 192 Wn. App. at 511 (emphasis in the original).

2. Reversal is required where the court relied on an incorrect offender score as the basis for imposing an exceptional sentence.

“A sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” *In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). The sentencing court relied on the state’s erroneous assertion that Mr. Phillips’ offender score was a nine. RP 5, 33. Yet the State also asserts that Mr. Phillips’ claim that he was sentenced pursuant to an incorrect offender score amounts to only “mights and maybes.” BOR at 7. But the State’s failure to establish by sufficient evidence that Mr. Phillip’s prior offenses were domestic violence convictions is far more than hypothetical, because this key fact determines whether these prior offense would count as one or two points under RCW 9.94A.525 (21); BOA at 8-10.

And this very real effect of being sentenced based on an incorrect offender score is central to Mr. Phillips’ second argument, that the trial court was not permitted to impose an exceptional sentence pursuant to RCW 9.94A.535 (2) (c), which allows the court to run the sentences consecutive when the “defendant's high offender score results in some of the current offenses going unpunished.” Had his offender score been lower than a nine, as asserted by Mr. Phillips at his sentencing, Mr. Phillips

would not necessarily have had more than one offense that would have gone unpunished absent an exceptional sentence. BOA at 15-17.

The State's dismissive characterization of Mr. Phillips' statutory and constitutional right to be sentenced based on the correct offender score should not be countenanced by this Court. Reversal for resentencing is required.

B. CONCLUSION

Because the State failed to establish Mr. Phillips' correct offender score at the time of his sentencing, and the court relied on an incorrect offender score in imposing an exceptional sentence, reversal of Mr. Phillips' exceptional sentence is required.

DATED this 20th day of December, 2017.

Respectfully submitted,

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RESPONDENT,)	
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v.)	NO. 35113-1-III
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KEVIN PHILLIPS,)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF DECEMBER, 2017, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF DECEMBER, 2017.

X _____ *gms*

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