

NO. 351718

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW THOMAS SCHWARTZ

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KLUCKITAT COUNTY  
The Honorable Randall Krog

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APPELLANT'S OPENING BRIEF

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**I. ASSIGNMENTS OF ERROR**

1. The trial court imposed a sentence based on an incorrect offender score.
2. The trial court erred when it included prior convictions that, by statute, should have “washed out” in the offender score.
3. Time spent in jail for willful failure to pay a financial obligation did not interrupt the statutory “wash out” period, under a different interpretation.

**II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Whether the “triggering period” to wash-out prior class C felony convictions under RCW 9.94A.525(2)(c) is restricted to the date of the last release from confinement pursuant to a felony conviction? (Assignments of Error 1, 2, & 3).

**III. STATEMENT OF THE CASE**

Matthew Thomas Schwartz (Mr. Schwartz) pleaded guilty to failure to register as a sex offender. 1/11/17 RP 21; CP 3-6; CP 1-2. At sentencing, on March 20th, 2017, the state presented the following as Mr. Schwartz’s criminal history.

<b>SENTENCING DATE</b>	<b>OFFENSE</b>	<b>FELONY CLASS</b>
7/10/1998	Second-degree Assault w/Sexual Motivation	Class A
7/22/1997	Forgery	Class C
9/04/2001	Fail to Register as a Sex Offender	Class C
11/03/2014	VUCSA - Possession of Methamphetamine	Class C

Based on his criminal history, the state calculated Mr. Schwartz’s offender score to be 6. CP 27-56. It argued the second-degree assault with sexual motivation offense, by statute, carried three points. The state added one point to that for the possession of

methamphetamine conviction, and two points for the forgery and the prior 2001 failure to register as a sex offender convictions.

According to the state, Mr. Schwartz had not been in the community five years without committing a crime that subsequently resulted in a conviction. It argued repeated jail-time sanctions the court imposed for willfully failing to pay legal financial obligations on the prior 2001 failure to register as a sex offender conviction reset the wash-out period. Therefore, none of Mr. Schwartz's prior convictions washed-out of his offender score under RCW 9.94A.525(2)(c). CP 27-56. Because he pleaded guilty, the state recommended he serve 17 months in prison, which was the bottom end of the standard range sentence. CP 27-56.

Mr. Schwartz objected to the state's calculation. He calculated his offender score to be 4. He argued neither the forgery nor the prior 2001 failure to register as a sex offender convictions should have counted. The reason being, based on his interpretation of RCW 9.94A.525(2)(c), those prior convictions washed-out of his offender score because he spent more than five years in the community, since the judgment and sentence for the prior 2001 failure to register as a sex offender conviction was entered. With an offender score of 4, Mr. Schwartz recommended a sentence based on the standard sentence range of 12 months plus one day to 14 months. CP 57-59.

The sentencing adopted the state's interpretation of RCW 9.94A.525(2)(c). It concluded none of Mr. Schwartz's prior convictions washed-out of his offender score and sentenced him to serve 17-months at the Department of Corrections. CP 60-74; 3/6/17 RP 28. This appeal followed. CP 76-91.

#### IV. ARGUMENT

BECAUSE RCW 9.94A.525(2)(C) IS SUSCEPTIBLE TO MULTIPLE REASONABLE INTERPRETATIONS, ONE INTERPRETATION BEGS THE “TRIGGERING PERIOD” TO WASH-OUT PRIOR CLASS C FELONY CONVICTIONS COULD BE “SINCE THE ENTRY OF THE JUDGMENT AND SENTENCE.”

##### Standard of review

This court reviews offender score calculations de novo. State v. Wilson, 113 Wash.App. 122, 136, 52 P.3d 545 (2002). Resolution of this case turns exclusively on a question of statutory interpretation, which is a question of law this court must also review de novo. In re Det. of Williams, 147 Wash.2d 476, 486, 55 P.3d 597 (2002); State v. Ervin, 169 Wash. 2d 815, 820, 239 P.3d 354 (2010).

When interpreting a statute, “the court’s objective is to determine the legislature’s intent.” State v. Jacobs, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, this court must “ ‘give effect to that plain meaning.’ ” Id. (quoting Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 9, 43 P.3d 4 (2002)). Plain meaning is discerned from all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Id. If, after this inquiry, the statute is susceptible to more than one reasonable interpretation, it is ambiguous and this court “may resort to statutory construction, legislative history, and relevant case law for assistance to discern legislative intent.” Id. (quoting Christensen v. Ellsworth, 162 Wash.2d 365, 373, 173 P.3d 228 (2007)).

##### Analysis

A sentencing court bears the ultimate responsibility to determine the correct offender score and sentencing range. State v. Malone, 138 Wash. App. 587, 593, 157

P.3d 909 (2007). Rules a sentencing court must use to score prior convictions are contained in RCW 9.94A.525. They 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....

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

[(2)(b)-(d) and (f) deal with convictions that are neither Class A nor sex prior felony convictions. Such convictions are included unless they have “washed out” by virtue of years of crime-free time in the community that vary by offense.]

State v. Baker, 194 Wash. App. 678, 680–81, 378 P.3d 243, 244 (2016).

Under these rules, a sentencing court counts prior convictions as criminal history, unless “wash-out” provisions apply. For example, RCW 9.94A.525(2)(c) provides prior class C felony convictions, other than sex offenses, “wash-out” of 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 since the entry of judgment and sentence, the offender had spent five consecutive years in the community without having been convicted of any crime. RCW 9.94A.525(2)(c). This wash-out provision has allowed for multiple reasonable interpretations. State v. Ervin, 169 Wash. 2d 815, 826, 239 P.3d 354, 359 (2010).

Here, the sentencing court adopted the state’s interpretation of RCW 9.94A.525(2)(c), when it calculated Mr. Schwartz’s offender score. The state argued RCW 9.94A.525(2)(c) should read, “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, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.” CP 27-56. Under the state’s interpretation, the only “triggering period” for the washout provision is *the date of the last release from confinement pursuant to a felony conviction*. It argued when the court imposed jail-time sanctions against Mr. Schwartz for willfully failing to pay legal financial obligations on the prior 2001 failure to register as a sex offender conviction, it reset his wash-out period three times. CP 27-56. The state relied on State v. Mehrabian, Wash. App. 678, 714, 308 P.3d 660 (2013), wherein Division One of this court held “*confinement pursuant to a felony conviction*” includes confinement for a community supervision violation term imposed based on the felony, such as the willful failure to pay legal financial obligations. State v. Mehrabian, 175 Wash. App. at 683. CP 27-56.

However, the way the legislature drafted RCW 9.94A.525(2)(c), there could be two “triggering periods,” under the statute. “Triggering periods” identify when the five-year period begins. State v. Ervin, 169 Wash.2d 815, 821, 239 P.3d 354 (2010). According to the state’s interpretation, the only “triggering period,” in RCW 9.94A.525(2)(c) is *the date of the last release from confinement pursuant to a felony conviction*. But phrase, “*or, since the entry of judgment and sentence*,” could render another “triggering period” that begins when the judgment and sentence was entered. In other words, RCW 9.94A.525(2)(c) could read, “class C prior felony convictions other than sex offenses shall not be included in the offender score if, *since the entry of the judgment and sentence* (emphasis added), the offender had spent five consecutive years

in the community without committing any crime that subsequently resulted a conviction.”  
CP 57-59.

Under this interpretation, since the court entered the judgment and sentence for the prior 2001 failure to register conviction, Mr. Schwartz had been crime free for more than five years. Therefore, the sentencing court here should have washed-out the prior forgery and the 2001 failure to register convictions, and should have sentenced Mr. Schwartz based on an offender score of 4.

## **V. CONCLUSION**

A miscalculated offender score is remedied by resentencing using the correct offender score. State v. Ross, 152 Wash.2d 220, 229, 95 P.3d 1225 (2004). Given the reasons argued above, we ask this court to remand this case to the lower court with instructions to resentence Mr. Schwartz according to the standard range sentence based on an offender score of 4.

Submitted this 10<sup>th</sup> day of October, 2017.

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## DECLARATION OF SERVICE

October 10, 2017

Court of Appeals Case No. 351718

Case Name: *State of Washington v. Matthew Thomas Schwartz*

I declare under penalty and perjury of the laws of Washington State that on **Tuesday, October 10, 2017**, I filed an appellant's opening brief with Division Three Court of Appeals and served copies to:

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