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Court of Appeals
Division III
State of Washington
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No. 35554-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

NOE RUIZ ROQUE,

Appellant.

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

The Honorable Judge Scott R. Sparks

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Noe Ruiz Roque accepts this opportunity to reply to the State's brief. Mr. Roque requests that the Court refer to his opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

1. Mr. Roque can challenge the inclusion of his current gross misdemeanor cyberstalking (domestic violence) counts in his offender score for the first time on appeal.

This argument pertains to Issue 3(b) raised in Mr. Roque's opening brief. Mr. Roque argues the trial court erred by counting his current gross misdemeanor cyberstalking (domestic violence) convictions in his offender score, because these convictions are not "repetitive domestic violence offenses." *See* Appellant's Opening Brief pgs. 32-34.

In response, the State argues that this argument was waived by defense counsel at sentencing, when he agreed these convictions counted in Mr. Roque's offender score. *See* Respondent's Brief pgs. 28-30. At sentencing, in discussing Mr. Roque's offender score, defense counsel did characterize Mr. Roque's two current gross misdemeanor cyberstalking (domestic violence) convictions as repetitive domestic violence offenses. *See* RP 350-351.

Illegal or erroneous sentences can be challenged for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *see also State v. McCorkle*, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999). A defendant cannot waive a challenge to such a sentence by agreeing to a legal error in the lower court. *See In re Pers. Restraint of*

Goodwin, 146 Wn.2d 861, 867-74, 50 P.3d 618 (2002). “[W]aiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence” *Id.* at 874. However, a defendant may still be barred from raising the issue on appeal or be deemed to have waived the challenge if the defendant made an affirmative stipulation of fact or the claimed error involved a discretionary trial court decision. *See id.* at 874–75.

The issue of whether Mr. Roque’s two current gross misdemeanor cyberstalking (domestic violence) convictions count in his offender score is an issue that can be raised for the first time on appeal. This is a purely legal issue, involving statutory interpretation: whether gross misdemeanor cyberstalking (domestic violence) is a “repetitive domestic violence offense” under RCW 9.94A.030(42). *See* RCW 9.94A.525(21)(d); *see also Bahl*, 164 Wn.2d at 744; *McCorkle*, 137 Wn.2d at 495–96.

This issue does not involve a factual determination or the exercise of trial court discretion. Waiver does not apply. *See Goodwin*, 146 Wn.2d at 874. Accordingly, this Court should consider the issue of whether Mr. Roque’s two current gross misdemeanor cyberstalking (domestic violence) convictions count in his offender score for the first time on appeal.

C. CONCLUSION

Based upon the arguments set forth above and those set forth in Mr. Roque’s opening brief, his convictions should be reversed, or at a minimum, the case should be remanded for resentencing.

Respectfully submitted this 19th day of June, 2018.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35554-3-III
vs.) Kittitas Co. No. 17-1-00170-7
)
NOE RUIZ ROQUE) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 19, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

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PO Box 769
Connell, WA 99326

Having obtained prior permission, I also served a copy on the Kittitas County Prosecutor's Office at prosecutor@co.kittitas.wa.us using the Washington State Appellate Courts' Portal.

Dated this 19th day of June, 2018.


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