

**FILED**  
**Court of Appeals**  
**Division III**  
**State of Washington**  
**12/21/2018 9:51 AM**

NO. 36009-1-III

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

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STATE OF WASHINGTON,

RESPONDENT,

V.

SIMON CHARLES CRIBBS

APPELLANT.

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RESPONDENT'S OPENING BRIEF

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**A. APPELLANT'S ASSIGNMENTS OF ERROR**

1. Appellant claims that the offender score, based on out-of-state convictions, was miscalculated by the sentencing court based on RCW 9.94A.525(3).
2. Appellant claims that the sentencing court erred when it declined to treat Mr. Cribbs' convictions from November 21, 2003 as "same criminal conduct".
3. Appellant claims a scrivener's error occurred in Paragraph 2.2 of the Judgment and Sentence.
4. Appellant claims the court erroneously imposed a \$200.00 filing fee when it sentenced Mr. Cribbs on May 1, 2018.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Mr. Cribbs was not erroneously sentenced based on his out-of-state convictions because the washout period commencement date begins on the date of release from confinement pursuant to a felony conviction, not the date of the commission of the crime.
2. Mr. Cribbs convictions for Battery of Law Enforcement and Resisting with Violence charges from Florida are not the same-criminal conduct

3. Paragraph 2.2 of Mr. Cribbs Judgment and Sentence does contain a scrivener's error in Items 3 and 4.

4. The court erred in not conducting a colloquy regarding the appellant's indigency when it imposed the \$200.00 filing fee on the appellant during sentencing on May 1, 2018.

### **C. STATEMENT OF THE CASE**

#### **1. Procedural Facts**

On March 7, 2018, the Appellant was charged in Ferry County Superior Court on 5 counts: Assault in the Second Degree Domestic Violence – Strangulation, two (2) counts of Assault in the Fourth Degree Domestic Violence, Resisting Arrest, and Felony Harassment. CP 1-3.

On March 10, 2018, the State filed an Amended Information in order to correct the maximum penalty for the two (2) Assault in the Fourth Degree Domestic Violence charges. CP 4-6.

On April 4, 2018, prior to trial, the Appellant pled guilty to two (2) counts of Assault in the Fourth Degree Domestic Violence, as well as Resisting Arrest. CP 7-13.

At trial, on April 11, 2018, the jury found the Appellant not guilty of the Assault in the Second Degree Domestic Violence –

Strangulation, but did find him guilty of the lesser included charge, Assault in the Fourth Degree Domestic Violence. CP 14-16. The jury also found the Appellant guilty of Felony Harassment. CP 17.

The parties disputed the Appellant's offender score. The defense filed its sentencing memorandum on April 26, 2018 and the State filed its sentencing memorandum on April 27, 2018. CP 18-40.

On May 1, 2018, the parties argued the Appellant's scoring range and comparability to the sentencing court. RP 6-36. At that time, the sentencing court found the Appellant to have a score of six (6) and that his sentencing range was 22-29 months on the Felony Harassment conviction. RP 36. The Appellant was sentenced to 56 months total on May 1, 2018, which included 29 months on the Felony Harassment, plus 12 months for each of the Assault 4 convictions and 90 days for the Resisting Arrest charge, all to run consecutively. CP 267-278, RP 49-57. The Court highlighted the egregious nature of the offense and the apparent racist undertones of the Appellant's behavior and comments towards Officer Nick White of the Republic Police Department, who was the victim of the Felony Harassment conviction. RP 51. The Court specifically noted that, "Officer White is a man of color" and

“You threatened him not only with violence, but dehumanizing types of violence.” RP 51. The Court also noted that the Appellant referenced the Swastikas tattooed on his body when he was speaking with Officer White. RP 51.

Mr. Cribbs now appeals his sentence, claiming that his offender score was miscalculated, that the sentencing court erred when it did not find same criminal conduct for Mr. Cribbs’ November 21, 2003 Florida convictions, that some of his Florida convictions should have washed out, and that the court erroneously imposed a \$200.00 filing fee.

#### **D. ARGUMENT**

I. MR. CRIBBS WAS NOT ERRONEOUSLY SENTENCED BASED ON HIS OUT-OF-STATE CONVICTIONS BECAUSE THE WASHOUT PERIOD COMMENCEMENT DATE BEGINS ON THE DATE OF RELEASE FROM CONFINEMENT PURSUANT TO A FELONY CONVICTION, NOT THE DATE OF THE COMMISSION OF THE CRIME.

##### **A. Standard of Review on Appeal**

The courts review a challenge to the sentencing court’s offender score calculation de novo. *State v. Cross*, 156 Wn. App. 568, 587, 234 P.3d 288, 297 (2010).

B. Appellant's offender score, based on out-of-state convictions, was not miscalculated by the sentencing court based on RCW 9.94A.525(3).

The appellant in this case argues that his offender score was miscalculated because the sentencing court used the defendant's date of release as the commencement date of the 5 year crime-free washout period. Br. Appellant at 4-13.

When calculating an offender score, prior class C felonies wash out "if, since the last date of release from confinement...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." *Cross* at 587.

Under RCW 9.94A.525(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". Class A and prior sex convictions shall always be included in the offender score. RCW 9.94A.525(2)(a). Class B felony convictions shall not be included in the offender score, if since the last date of release from confinement pursuant to a felony conviction, if any, or the entry of judgment and sentence, the offender has spent ten

consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.94A.525(2)(b). 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...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. RCW 9.94A.525(2)(c). Wash out of an out-of-state conviction depends on the classification of the comparable Washington crime. *State v. Cameron*, 80 Wn.App. 374, 378, 909 P.2d 309, 311 (1996).

From the first listed conviction in Florida on November 29, 1993 for Burglary of a Structure and Grand Theft, Appellant has never remained crime-free in the community for a period of five years, let alone ten years. After the Appellant was released on that conviction on May 10, 1994, he was subsequently sentenced to another 11 months and 29 days on November 7, 1995 in Florida for probation violations. CP 30. Again on November 14, 1997, in Florida, the Appellant was convicted of Battery of a Law Enforcement Officer and was sentenced to one year which was suspended on conditions of probation, but he subsequently violated

that probation and that sentence was imposed. CP 30. On February 24, 1999, Appellant was convicted of one count of Escape and was sentenced to 23.7 months in prison, again in Florida, to run consecutive with the probation violation from the 1997 case. CP 30. Again on November 21, 2003 Appellant was convicted in Florida for four offenses in two separate causes. CP 30-31. Appellant was released on November 24, 2009 for those convictions. CP 31. Finally on November 12, 2013, in Florida, Appellant was convicted of Domestic Violence Battery and sentenced to 90 days in jail. CP 31. Therefore, none of Appellant's class C or B felonies should "wash-out".

Appellant claims that he was incarcerated longer than his ultimate sentence, and therefore he should be considered to have been "out of custody" for purposes of sentence calculation, even though he was not. The State respectfully disagrees. Appellant's original sentence was 15 years on both the Battery on a Law Enforcement Officer [BOLEO] and Resisting Arrest with Violence charges. CP 156-216. The first appellate case remanded for resentencing on the first offense only, and the Appellant was sentenced to 5 years on the BOLEO charge and the sentence of 15 years on the Resisting with violence charge remained unchanged.

CP 219-235. Appellant contends that he had 447 days of credit at the time of resentencing, which is nearly accurate – the Defendant had 450 days of credit. CP 219-235. The second appellate case remanded for resentencing on the Resisting with Violence charge, and upon resentencing, the Appellant was sentenced to 8.5 years. CP 217-235. Appellant was released from custody on November 24, 2009. CP 88-89. Therefore, the total incarceration time from arrest to release was 7 years, 3 months, 3 days. In Florida, a Defendant may not be released without serving at least 85% of his or her sentence. *Florida Statute 944.275(f)*. 85% of an 8.5 year (102 month) sentence is 86.7 months, or 7 years, 3 months, which what the Appellant served.

Thus, it is apparent that Appellant did not serve any time above and beyond his lawful final sentence, and that his time in the community should run from the date of actual release, November 24, 2009.

The purpose of RCW 9.94A.525 is to reward crime-free behavior after offenders are out of custody and in the community. Specifically the purpose is stated as to “Offer the offender an opportunity to improve himself or herself.” RCW 9.94A.010. The time an offender spent in custody should not count for the purposes

of wash-out as the offender in jail/prison is not remaining crime-free in the community. They are serving their punishment for a crime and using any date other than the release date for purposes of the wash-out provision is counter to the purpose of the statute. Finally, stating that the Appellant could have remained crime-free for that period of time is speculative. Therefore, the sentencing court did not erroneously sentence the Appellant based on his offender score because his felonies did not wash-out.

C. Appellant's prior out-of-state convictions were properly classified as Class C felonies when compared to Washington's Assault in the Third Degree statute.

RCW 9.94A.525(3) provides out-of-state 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". *Id.*

There are two steps of a comparability analysis. First, the court must compare the elements of the out-of-state crime with the elements of the Washington crime. If the elements are identical,

the out-of-state crime is legally comparable. *State v. Larkins*, 147 Wn.App. 858, 863, 199 P.3d 441 (2008); *State v. Morley*, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). If the elements of the out-of-state crime are narrower, the crime is legally comparable. *State v. Collins*, 1441 Wn.App. 547, 553, 182 P.3d 1016 (2008). However, if the elements of the out-of-state crime are broader, the crime is not legally comparable, but might still be factually comparable. *Id.*

Second, if the out-of-state crime is not legally comparable, the court can still look to facts of the out-of-state conviction to see if it is factually comparable. If the elements are not the same, then the court “must examine the undisputed facts from the record of the foreign conviction to determine whether the conviction was for conduct that would satisfy the elements of the comparable Washington crime.” *State v. Larkins*, 147 Wn.App. at 863. In other words, although the out-of-state crime is defined more broadly, we might be able to show that the actual conduct engaged in fell within the elements of the Washington crime.

Appellant contends that the Florida conviction for Resisting/Obstructing an Officer with Violence, a third degree felony in Florida, is only comparable to Washington’s Resisting Arrest or

Obstructing Law Enforcement Officer statutes, which are a misdemeanor and gross misdemeanor, respectively. The State disagrees. The State concedes that Washington's resisting and obstructing statutes would be comparable to Florida's Resisting/Obstructing an officer *without* violence, a separate Florida statute. However, neither Washington's resisting nor obstructing statutes contain any element of violence towards a law enforcement officer making the comparison to a resisting/obstructing *with* violence inapt. The closest analogous Washington offense is Assault in the Third Degree under RCW 9A.36.031(1)(a) or (g).

Florida's statute reads as follows:

"Whosoever knowingly and willfully resists, obstructs, or opposes any officer or member of the Florida Commission on Offender Review or any administrative aide or supervisor employed by the commission; parole and probation supervisor; county probation officer; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such

officer or legally authorized person, is guilty of a felony of the third degree”

Florida Statute 843.01.

Washington’s Assault 3 statute reads as follows:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

RCW 9A.36.031(1)(a) and (g).

Although, the two statutes have different names, they contain the same elements: assault/offering or doing violence to a law enforcement officer, and resisting/obstructing/opposing during the lawful execution of any legal/official duty. Because it contains the element of violence/assault, Assault 3 is a much better factual

fit than either resisting or obstructing, neither of which contains any element of violence or threat of violence. For this reason, the State asks the Court to uphold the classification of the out-of-state felony conviction for Resisting/Obstructing with Violence as a class C felony, as it would be the factual equivalent charge of Assault 3.

## II. MR. CRIBBS' CONVICTIONS FOR BATTERY OF LAW ENFORCEMENT AND RESISTING WITH VIOLENCE FROM FLORIDA ARE NOT THE SAME CRIMINAL CONDUCT

### A. Standard of Review on Appeal

The Courts review the sentencing court's determination of "same criminal conduct" for abuse of discretion. *State v. Aldana Graciana*, 176 Wn.2d 531, 533, 295 P.3d 219, 220 (2013). Under this standard, when the record supports only one conclusion on whether crimes constitute the "same criminal conduct", a sentencing court abuses its discretion in arriving at a contrary result. *Id.* at 537-538.

### B. The sentencing court did not err when it declined to treat Mr. Cribbs' convictions from November 21, 2003 as "same criminal conduct".

Each of a defendant's convictions count towards his offender score *unless* he convinces the court that they involved the same

criminal intent, time, place, and victim. *Aldana* at 540.

The State's burden to prove the existence of prior conviction at sentencing does not include establishing that current offenses...constitute separate criminal conduct. *Id.* at 539. The burden is on the moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor. *Id.* A "same criminal conduct" finding favors the defendant by lowering the offender score below the *presumed* score. *Id.* (emphasis in original). Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct. *Id.*

The Appellant was charged and convicted in Florida for Battery on a Law Enforcement Officer (hereinafter BOLEO) and Resisting Arrest with Violence on March 13, 2003. CP 162. These charges stemmed from an incident that occurred on August 31, 2002 in which the Appellant was in an altercation at the Baymont Inn. CP 184. The officers attempted to arrest the Appellant when he began shouting and flailing his arms. CP 184. The Appellant had to be wrestled to the ground by three (3) law enforcement officers and once he was handcuffed, he continued to kick his feet and flail his body. CP 184. During this incident, the Appellant kicked Corporal

Trujullo in the leg. CP 184.

Although only one of the arresting officers was physically struck, the Appellant threatened each of those officers with violence based on his actions that day. CP 178-184. The State would argue that this is not "same criminal conduct" as while it was the same intent (to avoid arrest), the same time, and the same place, there was more than one victim. Florida charged the Appellant with two crimes, BOLEO and Resisting an Officer with Violence, and he was convicted on both charges. While the charging document does say the victim is Deputy Trujullo, it also stated the victim is Deputy Tirrell, who was not listed as the victim on the BOLEO but as a victim in the Resisting an Officer with Violence. CP 178-179. Therefore there are two distinct crimes with two victims as both of these officers were there and were threatened with violence.

### III. A SCRIVENER'S ERROR DID OCCUR IN PARAGRAPH 2.2 OF THE APPELLANT'S JUDGMENT AND SENTENCE

The Appellant was charged with Burglary of a Structure and Grand Theft in Florida from an incident that occurred on May 14-17, 1993. CP 56. The Appellant pled guilty to these charges on November 29, 1993. CP 44. The Judgment and Sentence in the

case at hand, Paragraph 2.2, lines 3 and 4, shows that these were sentenced on January 13, 2012. CP 269. This is a scrivener's error and should be corrected. However, this error bears no relevance to the Appellant's sentence and should be corrected for the purpose of accurate records only.

IV. THE COURT ERRED IN NOT CONDUCTING A COLLOQUY REGARDING THE APPELLANT'S INDIGENCY WHEN IT IMPOSED THE \$200.00 FILING FEE ON THE APPELLANT DURING SENTENCING ON MAY 1, 2018.

The Washington Supreme Court ruled on September 20, 2018, that the \$200.00 filing fee is not to be imposed on indigent defendants, and that that rule applies prospectively. *State v. Ramirez*, Slip Opinion 95249-3 at 21. Because the Appellant's case was on appeal as a matter of right at the time House Bill 1783 was passed, the case was not yet final. *Id.* RCW 10.01.160(3) requires that the court inquire into a person's present and future ability to pay Legal Financial Obligations (LFOs). *Id.* at 16.

The court in the matter at hand did not engage in any colloquy regarding the Appellant's ability to pay. Should the case be remanded, the court must engage in this colloquy to determine if the

Appellant is indigent for purposes of imposition of LFOs.

**E. CONCLUSION**

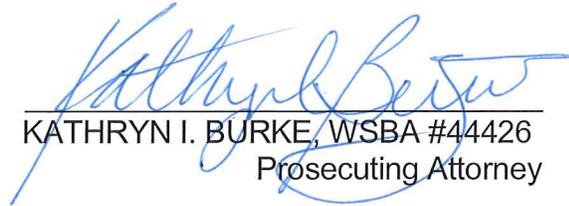
Mr. Cribbs was not erroneously sentenced based on his out-of-state convictions because the washout period commencement date begins on the date of release from confinement pursuant to a felony conviction per RCW 9.94A.525. Mr. Cribbs prior out-of-state convictions were properly classified as Class C felonies because they are comparable to Washington Assault 3 statute.

Mr. Cribbs convictions for Battery of Law Enforcement and Resisting with Violence charges from Florida are not the same criminal conduct as there were two separate officers at the scene, one of which was assaulted and one of which was threatened with violence, two separate crimes.

There is a scrivener's error in Mr. Cribbs Judgment and Sentence which should be remedied but has no effect on Mr. Cribbs sentence. Finally, the court erred when it failed to conduct a colloquy regarding Mr. Cribbs indigence when it imposed the \$200.00 filing fee.

Dated this 20 day of December, 2018

Respectfully Submitted by:



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# FERRY COUNTY PROSECUTORS OFFICE

December 21, 2018 - 9:51 AM

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**Appellate Court Case Number:** 36009-1  
**Appellate Court Case Title:** State of Washington v. Simon C. Cribbs  
**Superior Court Case Number:** 18-1-00009-2

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