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Division III
State of Washington
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36034-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

LESLIE LEE PITTMAN,

Appellant.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT 1

 1. Interpreting possession of a controlled substance as a strict liability offense and requiring Mr. Pittman to prove he unwittingly possessed the substance impermissibly shifted the burden of proof and violated the presumption of innocence and due process of law. 1

 2. The court erred relying on a prior acknowledgment in a different case to find the State met its burden of proving comparability of the two Texas prior convictions Mr. Pittman specifically challenged. 2

 3. Mr. Pittman received ineffective assistance of counsel when his attorney withdrew objections to four other Texas prior convictions that are not comparable to Washington felonies and they were included in his offender score..... 4

 4. The sentencing errors are not moot. 6

 5. This Court should accept the State’s proper concession and strike the imposition of certain legal financial obligations from Mr. Pittman’s judgment and sentence. 9

B. CONCLUSION 10

TABLE OF AUTHORITIES

Washington Supreme Court

In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002) 7

In re Personal Restraint of Johnson, 131 Wn.2d 558, 933 P.2d 1019 (1997)..... 7

State v. A.M., 194 Wn.2d 33, 448 P.3d 35 (2019) 1

State v. B.O.J., ___ Wn.2d ___, 449 P.3d 1006 (2019)..... 8

State v. Cate, ___ Wn.2d ___, ___ P.3d ___, 2019 WL 6766025 (December 12, 2019) 4

State v. Catling, 193 Wn.2d 252, 438 P.3d 1174 (2019) 10

State v. Hunley, 175 Wn.2d 901, 287 P.2d 584 (2012)..... 8

State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)..... 8

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)..... 9, 10

State v. Turner, 98 Wn.2d 731, 658 P.2d 658 (1983)..... 6

State v. Wilson, 170 Wn.2d 682, 244 P.3d 950 (2010)..... 8

Washington Court of Appeals

State v. Raines, 83 Wn. App. 312, 922 P.2d 100 (1996) 7

Washington Statutes

RCW 10.82.090 9

RCW 9.94A.500..... 3

A. ARGUMENT

- 1. Interpreting possession of a controlled substance as a strict liability offense and requiring Mr. Pittman to prove he unwittingly possessed the substance impermissibly shifted the burden of proof and violated the presumption of innocence and due process of law.**

Mr. Pittman denied knowingly possessing the methamphetamine contained in the pieces of paper and foil he collected from the trash. RP 375. But the court did not require the State to prove knowledge and instead shifted the burden of proof to Mr. Pittman to prove he unwittingly possessed the methamphetamine. CP 99-103; RP 434-35. The jury convicted Mr. Pittman because he was unable to prove his lack of knowledge by a preponderance of the evidence. CP 78.

As Mr. Pittman argued in his opening and supplemental briefs, the presumption of innocence and due process of law require the State, not the defendant, to prove the defendant knowingly possessed a controlled substance. Brief of Appellant at 9-13; Supplemental Brief of Appellant at 1-9. Alternatively, if the Court construes the possession statute to lack a mens rea requirement, it violates the Due Process Clause and is unconstitutional. *State v. A.M.*, 194 Wn.2d 33, 44-66, 448 P.3d 35 (2019) (Gordon McCloud, J., concurring). For these reasons, this Court must either find the statute unconstitutional and reverse and dismiss Mr.

Pittman's conviction or find the State bears the burden of proving knowledge, reverse Mr. Pittman's conviction, and remand for a new trial.

2. The court erred relying on a prior acknowledgment in a different case to find the State met its burden of proving comparability of the two Texas prior convictions Mr. Pittman specifically challenged.

The court included in Mr. Pittman's offender score two Texas prior convictions that Mr. Pittman specifically challenged: 2009 and 2007 convictions for unauthorized use of a vehicle.¹ CP 137-40, 165-68, 322, 352; RP 489-90. The court rejected his challenge and found these convictions comparable based on Mr. Pittman's acknowledgment of them in a prior 2014 case. CP 343-46 (Findings of Fact 3-5, Conclusions of Law 3-4); RP 490-91, 501. The inclusion of these two convictions changed Mr. Pittman's offender score from an eight, to which he stipulated, to a ten. Because collateral estoppel does not relieve the State of its burden of proving comparability at sentencing, the court erred in finding these two convictions comparable based on a prior acknowledgement in a different case, this Court should strike them from Mr. Pittman's offender score. Brief of Appellant at 14-31.

¹ While Mr. Pittman acknowledged the comparability of several other prior convictions and stipulated to an offender score that included them, Mr. Pittman explicitly challenged the comparability of these two prior convictions and objected to the court's inclusion of them in his offender score. CP 137-40, 165-68, 322, 352-53; RP 489-90.

In response, the State concedes that a prior acknowledgement does not bind a defendant in a future case.

The State acknowledges that the defendant's silence as to criminal history is not considered an acquiescence to such history, and that the defendant may object to the offenses he agreed to in a prior case as being criminal history in the present case, but the issue of the evidentiary use of such a signed acknowledgement or admission may be an issue warranting further discussion in a case where it matters because it actually affected the sentencing.

Brief of Respondent at 11 n.9. Curiously, despite this agreement, the State makes no mention of the court's ruling including these convictions based on Mr. Pittman's acknowledgment of their comparability in a different case. Instead, the State ignores this argument entirely.

RCW 9.94A.500 requires a court to make a criminal history and an offender score determination before sentencing a defendant. Nothing permits to court to find a defendant is bound by an acknowledgment made in different case. Here, despite Mr. Pittman's present affirmative challenge, the court held the State proved the comparability of Mr. Pittman's 2009 and 2007 unauthorized use of a vehicle convictions because in an unrelated previous sentencing hearing, Mr. Pittman acknowledged his Texas convictions were comparable to Washington felonies. CP 343-46 (Findings of Fact 3-5, Conclusions of Law 3-4); RP 490-91, 501.

The Sentencing Reform Act and due process of law require the court conduct a sentencing proceeding every time a defendant is convicted of a crime. *State v. Cate*, ___ Wn.2d ___, ___ P.3d ___, 2019 WL 6766025 (December 12, 2019) (recognizing prosecution's burden to prove defendant's criminal history by preponderance of evidence). The court erred in finding otherwise and in ruling Mr. Pittman's previous acknowledgment precluded him from challenging the prior convictions in the instant sentencing. This Court should reverse and remand for resentencing without the inclusion of these two non-comparable offenses.

3. Mr. Pittman received ineffective assistance of counsel when his attorney withdrew objections to four other Texas prior convictions that are not comparable to Washington felonies and they were included in his offender score.

In addition to the two Texas prior convictions that Mr. Pittman specifically challenged, the court included six other Texas prior convictions in Mr. Pittman's offender score. CP 322, 352. Mr. Pittman's attorney withdrew his objections to the comparability of these convictions and stipulated to an offender score that included these convictions. RP 489. Because four of these offenses have elements broader than the elements for similar offenses in Washington, they are not comparable. Therefore, Mr. Pittman received ineffective assistance of counsel where his attorney withdrew his objections and stipulated to an offender score

that included these offenses. The court sentenced Mr. Pittman with an inaccurate offender score, and this Court should reverse the sentence and remand for resentencing.

The State misunderstands Mr. Pittman's argument. The court found Mr. Pittman to have an offender score of ten. CP 323, 352. The State acknowledges Mr. Pittman challenged the inclusion of two of those points as not comparable, a challenge the court rejected in its written findings. Brief of Respondent at 19. Mr. Pittman agrees the remaining eight offenses, including six out-of-state offenses, are ones to which he stipulated. Brief of Respondent at 9-11; Brief of Appellant at 8, 31, 33, 46-47 (acknowledging withdrawal of objection and stipulation). That is precisely why Mr. Pittman raises the challenges to four of those six offenses not as a court error but as ineffective assistance of counsel. Brief of Appellant at 31-48.

With respect to his challenge to the comparability of these four out-of-state convictions based on ineffective assistance of counsel, Mr. Pittman rests on his opening brief. Brief of Appellant at 31-48. Mr. Pittman received ineffective assistance of counsel when his attorney withdrew challenges to four of his out-of-state convictions and affirmatively agreed to their inclusion in his offender score where they are

not comparable. This Court should vacate the sentence and remand for resentencing without their inclusion.

4. The sentencing errors are not moot.

An appeal is moot where it presents merely academic questions and the court can no longer provide effective relief. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983). Contrary to the State's argument, the issues regarding Mr. Pittman's erroneous offender score are not moot. Brief of Respondent at 7-8. True, Mr. Pittman has served his entire sentence. However, the State argued at the sentencing hearing and the court found that a prior acknowledgment in a different case bound the court's comparability determination and controlled Mr. Pittman's offender in the instant case. CP 343, 345. Because the court held Mr. Pittman was collaterally estopped from challenging his offender score based on an unrelated proceeding, it would seem the court's determination in this case could potentially bind another sentencing court in a future, unrelated case. Therefore, this Court can still provide effective relief to Mr. Pittman.

In this case, the trial court held:

[T]he State's burden to prove the prior convictions and determine comparability of out-of-state offenses is satisfied by the defendant's previous affirmative acknowledgement as to the comparability of his Texas convictions and his waiver of any objections to those convictions for sentencing purposes. . . . The defendant's previous affirmative acknowledgment, waivers, and stipulation made

with the advice of competent counsel before this Superior Court satisfy the requirements of the SRA. . . . As a result the State here has met its burden and the out-of-state convictions at issue shall be counted for sentencing purposes.

CP 345 (Conclusions of Law 3-4). It is insincere of the State to argue Mr. Pittman's appeal has no possibility of effective relief when it argued below that an acknowledgement in a previous sentencing proceeding bound Mr. Pittman in this sentencing proceeding. According to the State's logic, the court's ruling on comparability in this case could bind Mr. Pittman in a future case.

Moreover, an erroneous sentence could influence future sentencing court, and a defendant is entitled to have it corrected. *State v. Raines*, 83 Wn. App. 312, 315, 922 P.2d 100 (1996). Even where a defendant has served his entire sentence of confinement and community custody, the correction of a legal sentencing error provides a defendant with effective relief. *Id.*

"A sentencing court acts without statutory authority under the Sentencing Reform Act when it imposes a sentence based on a miscalculated offender score." *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997); *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002) ("[A] sentence that is based upon an incorrect offender score is a fundamental defect that

inherently results in a miscarriage of justice.”). The remedy for a miscalculated offender score is remand for resentencing, even where the erroneous offender score does not alter the presumptive range. *State v. Wilson*, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010); *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997); *see also State v. Hunley*, 175 Wn.2d 901, 916, 287 P.2d 584 (2012) (remanding for resentencing because “The judgment and sentence should reflect [the defendant’s] accurate offender score”).

Even if this Court disagrees and finds the appeal moot, this Court should still consider it as a continuing and substantial public interest. *State v. B.O.J.*, ___ Wn.2d ___, 449 P.3d 1006, 1010-11 (2019). The procedural matter by which a court determines comparability and calculates an offender score in a criminal matter is a question of a public nature. It would be desirable for the Court to authoritatively address this issue. In addition, this issue has the possibility of reoccurring in any criminal case in which the defendant has prior out-of-state convictions.

Because this Court may still provide Mr. Pittman with effective relief, the sentencing issues he raises in his appeal are not moot, and this court should address them. Alternatively, continuing and substantial public interest warrant this Court’s consideration of the issues.

5. This Court should accept the State's proper concession and strike the imposition of certain legal financial obligations from Mr. Pittman's judgment and sentence.

At sentencing, the trial court imposed the \$200 criminal filing fee, the \$100 DNA collection fee, and ordered interest accrue on all legal financial obligations (LFOs) from the date of the judgment through payment in full. CP 327-28. Because Mr. Pittman is indigent, because the State already collected a DNA fee from him, and because his LFOs did not include restitution, *State v. Ramirez* requires that all of these costs be stricken from his judgment and sentence. 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018). Brief of Appellant at 47-50.

The State agrees that Mr. Pittman is indigent and that *Ramirez* requires he receive the benefit of the 2018 amendments to the LFO statutes. Brief of Respondent at 28-29. Specifically, the State agrees the \$200 criminal filing fee and \$100 DNA fee must be stricken. Brief of Respondent at 29. This Court should accept the State's proper concession and order these impermissible LFOs stricken from Mr. Pittman's judgment and sentence.

The State fails to address Mr. Pittman's argument that RCW 10.82.090(1) prohibits the accrual of interest on nonrestitution LFOs and that the interest accrual clause must also be stricken. However, the State

agrees *Ramirez* holds the amendments to the LFO statutes apply prospectively to all cases pending on direct appeal and, therefore, must apply to Mr. Pittman. Brief of Respondent at 28. Therefore, the clause ordering interest accrual from the date of the judgment through payment in full must also be stricken from the judgment and sentence. *State v. Catling*, 193 Wn.2d 252, 259 n.5, 438 P.3d 1174 (2019) (remanding and directing court to revise judgment and sentence to eliminate prohibited nonrestitution interest on LFOs); *Ramirez*, 191 Wn.2d at 749-50 (reversing and remanding for trial court to amend judgment and sentence to strike criminal filing fee, DNA fee, and other discretionary LFOs from judgment and sentence).

B. CONCLUSION

Mr. Pittman's conviction for possession of a controlled substance should be reversed and remanded for a new trial because requiring Mr. Pittman to prove unwitting possession unconstitutionally shifted the burden of proof and violated the presumption of innocence and due process of law. Alternatively, if the statute has no mens rea element, it is unconstitutional, and Mr. Pittman's conviction must be reversed and dismissed.

In the alternative, this Court should remand for resentencing because the court included several Texas prior convictions in Mr. Pittman's offender score that are not comparable to Washington felonies.

Finally, the Court should accept the State's concession and strike the discretionary and prohibited LFOs from Mr. Pittman's judgment and sentence.

DATED this 20th day of December, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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

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RESPONDENT,)	
)	
v.)	NO. 36034-2-III
)	
LESLIE PITTMAN,)	
)	
APPELLANT.)	

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