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Division III
State of Washington
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36075-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

FELIPE MERCADO BARAJAS, JR., Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF RESPONDENT</u>	1
II. <u>RELIEF REQUESTED</u>	1
III. <u>ISSUES</u>	1
IV. <u>STATEMENT OF THE CASE</u>	1
V. <u>ARGUMENT</u>	2
A. <u>This Challenge to the Offender Score is a Poor Use of Court Resources</u>	2
B. <u>If Remanded, the Sentencing Court Should Apply HB 1783 Which Is Now Effective</u>	4
VI. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

State Cases

Page No.

Orwick v. City of Seattle,
103 Wn.2d 249, 692 P.2d 793 (1984) 2
State v. Jones,
182 Wn.2d 1, 338 P.3d 278 (2014) 4
State v. Ramirez,
191 Wn.2d 732, 426 P.3d 714 (2018) 5

Statutes

HB 1783 i, 1, 4, 5
RCW 9.94A.517 2
RCW 9.94A.525 3
RCW 9.94A.530 4
RCW 10.101.010 5
RCW 36.18.020 5
RCW 43.43.7541 6
RCW 46.61.024 3

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant. The Court should find the offender score challenge is moot.

III. ISSUES

1. Is the challenge to the offender score (whether a 6 or 7) moot, where the standard range is the same under either score, such that the Court can provide no relief?
2. Whether the matter should be remanded for consideration of LFOs under HB 1783?

IV. STATEMENT OF THE CASE

The Defendant was convicted by a jury of possessing methamphetamine. CP 4-5, 35. He does not challenge his conviction, but only his sentence (offender score and LFOs).

The judgment and sentence shows an offender score of 7, a

seriousness level of 1, and a sentencing range of 12+ to 24 months. CP 41. The Defendant questions whether his fifth conviction (Attempting to Elude a Pursuing Police Vehicle – sentenced on 02-19-02) may be scored as one of his seven points or whether it washes out. Appellant’s Brief at 5.

V. ARGUMENT

A. THIS CHALLENGE TO THE OFFENDER SCORE IS A POOR USE OF COURT RESOURCES.

The Defendant challenges one point in the offender score. Although the offender score is correctly calculated, whether it were a 7 (as is reflected in the judgment and sentence) or a 6 (as this appeal requests), there would be no change in the Defendant’s sentencing range.

**TABLE 3
DRUG OFFENSE SENTENCING GRID**

Seriousness Level	Offender Score 0 to 2	Offender Score 3 to 5	Offender Score 6 to 9 or more
III	51 to 68 months	68+ to 100 months	100+ to 120 months
II	12+ to 20 months	20+ to 60 months	60+ to 120 months
I	0 to 6 months	6+ to 18 months	12+ to 24 months

RCW 9.94A.517.

In other words, the claim is moot. *Orwick v. City of Seattle*, 103 Wn.2d 249, 692 P.2d 793 (1984) (a claim is moot when, although technically appealable, it may be deemed nonreviewable, because

the court cannot provide effective relief). Whether an offender score of 6 or 7, the outcome is necessarily the same. The standard range remains the same. The Court can provide no relief.

On February 19, 2002, the Defendant was sentenced for Attempting to Elude a Pursuing Police Vehicle. CP 41. The offense is a class C felony. RCW 46.61.024(1). The Defendant notes that a class C felony conviction is not included in the offender score *if he was crime-free in the community for five consecutive years after serving his sentence*. Appellant's Brief at 6, (citing RCW 9.94A.525(2)(c)). The claim is frivolous. The Defendant racked up 20 intervening misdemeanor convictions between the time the sentence was imposed on February 19, 2002 and the time the Rape of a Child in the Third Degree was committed on October 1, 2007. But because the matter was not raised below, the record has not yet been developed.

Absent any objection from defense, the prosecutor had no need to make the record of the intervening misdemeanors. Nor may the State provide that record here. RAP 9.1 (record on review limited). *But see* RAP 9.11 (court may direct additional evidence be taken).

However, the State will have that opportunity on remand. *State v. Jones*, 182 Wn.2d 1, 8, 338 P.3d 278 (2014) (citing RCW 9.94A.530 (“On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.”))).

The Defendant and his trial counsel knew his criminal history. CrR 4.7(a)(1)(vi) (prosecutor must provide in discovery any record of prior criminal convictions known to prosecutor). It would have been discussed during plea negotiations. Accordingly, appellate counsel could have obtained the information by reaching out to her client or the trial attorney. Alternatively, counsel could have obtained the gist of the information by a phone call or an email to the prosecutor’s office. And finally, the information is available through the JIS Link (NmCd: IN 086 09276). The matter is correctly scored.

The Court may find the claim moot or it may remand the matter. The outcome will be the same.

B. IF REMANDED, THE SENTENCING COURT SHOULD APPLY HB 1783 WHICH IS NOW EFFECTIVE.

On March 27, 2018, the Governor signed HB 1783 with an

effective date of June 7, 2018. The new law changes the nature of previously mandatory LFOs. The Defendant was sentenced prior to the effective date, April 24, 2018, such that the sentencing court continued to apply the law still in effect. However, the Washington Supreme Court has since decided that HB 1783 should be applied to cases not yet final. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). That would include this case.

Under the new law,¹ the court may not impose the criminal filing fee if the offender is indigent under RCW 10.101.010(3)(a) through (c). RCW 36.18.020(2)(h). The sentencing court found the Defendant was perennially unemployed and likely owed LFOs due to his significant criminal history. CP 42; RP (Sentencing) 6. On this record, one might infer poverty income under RCW 10.101.010(3)(c). This would permit the court not to impose the otherwise mandatory criminal filing fee.

Under the new law, the court may choose not to impose the DNA fee if “the state has previously collected” this fee in a previous

¹ N.B., prior to the passage of the law, the Defendant already could have obtained the same outcome through a motion to remit. In fact, an offender with many convictions, like Mr. Barajas, can obtain the same outcome with much less effort (and public cost) by approaching the county clerk and completing a form remission motion for costs in all cases in that county.

judgment. RCW 43.43.7541. Because the Defendant has so many LFOs and a poor record of repaying, it is possible that this fee has never been "collected." But that is a matter that can be explored below if remanded.

VI. CONCLUSION

The State respectfully requests this Court affirm the Appellant's unchallenged conviction. The State defers to the Court on the sentencing claims.

DATED: February 12, 2019.

Respectfully submitted:

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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED February 12, 2019, Pasco, WA



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