

FILED
Court of Appeals
Division III
State of Washington
5/3/2019 9:59 AM

No. 363406

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ELIAS F. VARGAS, APPELLANT

BRIEF OF RESPONDENT

W. GORDON EDGAR
Prosecuting Attorney

C. KURT PARRISH
Deputy Prosecuting Attorney
Attorney for Respondent

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TABLE OF AUTHORITIES

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I. INTRODUCTION

The State is satisfied with Mr. Vargas's Statement of the Case and Issues Relating to Assignments of Error. The State agrees that Mr. Vargas's offender scores were improperly calculated. The State agrees with the ranges as calculated by the Appellant on Counts I, II, and IV, but disagrees with the bases for the calculations. The State contends that the correct offender scores are as follow:

- Count I: 7
- Count II: 6
- Count III: 5
- Count IV: 7

Second, the State agrees with Appellant that the trial court did not conduct a sufficient colloquy regarding his ability to pay legal financial obligations (LFOs). Rather than strike all LFOs, as suggested by Appellant, the State submits that at resentencing, a more thorough colloquy should be conducted.

II. ARGUMENT

A. MR VARGAS'S OFFENDER SCORE CALCULATION

Fundamentally, the State and Appellant agree that there was a miscalculation of his offender score, and accordingly, the sentence of 61 months was outside of the proper standard range for Count I.

However, the basis for this conclusion is not agreed upon. The State submits that Appellant is mistaken as to the nature of Count III. Appellant indicates that all four of the counts against Mr. Vargas were domestic violence-related. App. Br. at 7. In fact, Count III did not have a domestic violence allegation.

The State further submits that Appellant did not take into consideration the fact that Mr. Vargas was on community custody through the Department of Corrections at the time the current offenses were committed. This fact adds one point to his offender score on each case.

Count I

Count I is Assault in the Second Degree¹, with a special allegation of domestic violence. To calculate the score, one follows

¹ RCW 9A.36.021

the directive of RCW 9.94A.525(21)(a)-(d). These instructions are reflected in the scoring sheet attached as Appendix A. The State submits that Mr. Vargas's score on this count is a seven:

Mr. Vargas's prior conviction for Assault in the First Degree² counts as two points because it is a serious violent felony. RCW 9.94A.525(8); RCW 9.94A.030(46)(a)(v).

Mr. Vargas's other current offense of Domestic Violence Harassment (Count II) counts as two points because it is covered in RCW 9.94A.525(21)(a).

Counts III and IV (Harassment and Domestic Violence Tampering with a Witness) count as one point each. RCW 9.94A.525(8) (One point for each nonviolent felony conviction).

Finally, Mr. Vargas was on community custody at the time the offenses were committed. *See* Appendix E; *See also* CP 116 at Line 15 (Box is marked in section declaring "The defendant committed a current offense while on community placement/custody (adds one point to score). RCW 9.94A.525."). Acknowledgement of information at sentencing includes information not objected to by the defendant. RCW 9.94A.530(2). Mr. Vargas

² Clerk's Papers (CP) at 55, 131.

never objected to the inclusion of his community custody status at the time of sentencing.

Further, the record contains Mr. Vargas's judgment and sentence from his prior Assault First Degree conviction, which is where the community custody condition flowed from. CP at 55, 60.

As a result of the above, the proper standard range for Count I is 43 to 57 months.

Count II

Count II is felony Harassment³ with a special allegation of domestic violence. Harassment is not a "violent" offense. As a result, Mr. Vargas's prior conviction for Assault 1st Degree only counts for one point on this charge. RCW 9.94A.525(7). Other than that distinction, this domestic violence offense is scored in the same way as Count I. Accordingly the offender score for Count II is a 6. The proper range for felony Harassment at an offender score of 6 is 22 to 29 months. See Appendix B.

Count III

As stated above, Count III is a non-domestic violence charge of felony harassment. This offense is scored according to RCW

³ RCW 9A.46.020(2)(b)

9.94A.525(7); i.e., one point for each current offense conviction and past adult felony conviction. Thus, the proper score for this charge is a 5. The sentencing range is accordingly 17 to 22 months. See Appendix C.

Count IV

Count IV is a charge of Tampering with a Witness⁴ with a special allegation of domestic violence. This is scored in the same way as Count II, a nonviolent domestic violence offense. However, we reach a different result on this count due to the fact that DV Harassment is included in RCW 9.94A.525(21)(a), allowing for a count of two points, while Tampering With a Witness is only counted as one. As a result, the final scoring for this count is a 7. See Appendix D.

In summary, the State submits that the proper offender scores for Mr. Vargas are 7, 6, 5, and 7, respectively.

B. LEGAL FINANCIAL OBLIGATIONS

The State is in agreement with Mr. Vargas that the trial court did not conduct an adequate inquiry on the record concerning his

⁴ RCW 9A.72.120

ability to pay before imposing certain discretionary legal financial obligations (LFOs). The State also concurs with Mr. Vargas that the \$100 deoxyribonucleic acid (DNA) fee should be stricken from the judgment and sentence due to his prior conviction and assessment of that same fee. However, with regard to all other LFOs, the State requests that this Court remand to the trial court for resentencing, allowing for an appropriate inquiry that meets the requirements of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

III. CONCLUSION

For the foregoing reasons, the State respectfully requests this Honorable Court affirm the convictions, but remand for sentencing in accordance with the arguments above.

Dated this 2nd day of May, 2019.

W. GORDON EDGAR
Prosecuting Attorney



C. Kurt Parrish #49735
Deputy Prosecuting Attorney
Attorney for Respondent

Appendix A

General Violent Offense Where Domestic Violence Has Been Plead and Proven

VIOLENT OFFENDER SCORING RCW 9.94A.525(21)

CURRENT OFFENSE BEING SCORED:

ADULT HISTORY:

Enter number of domestic violence felony convictions as listed below* x 2 =
 Enter number of repetitive domestic violence offense convictions (RCW 9.94A.030(42))
 plead and proven after 8/1/11 x 1 =
 Enter number of serious violent and violent felony convictions 1 x 2 = 2
 Enter number of nonviolent felony convictions x 1 =

JUVENILE HISTORY:

Enter number of subsequent domestic violence felony dispositions as listed below* x 1 =
 Enter number of serious violent and violent felony dispositions x 2 =
 Enter number of nonviolent felony dispositions x 1/2 =

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other domestic violence felony convictions as listed below* 1 x 2 = 2
 Enter number of repetitive domestic violence offense convictions plead and
 proven after 8/1/11 x 1 =
 Enter number of other serious violent and violent felony convictions x 2 =
 Enter number of other nonviolent felony convictions 2 x 1 = 2

STATUS:

Was the offender on community custody on the date the current offense was committed?..... Yes + 1 = 1

** If domestic violence was plead and proven after 8/1/2011 for the following felony offenses:*

Violation of a No-Contact Order, Violation of a Protection Order, Domestic Violence Harassment, Domestic Violence Stalking, Domestic Violence Burglary 1, Domestic Violence Kidnapping 1, Domestic Violence Kidnapping 2, Domestic Violence Unlawful Imprisonment, Domestic Violence Robbery 1, Domestic Violence Robbery 2, Domestic Violence Assault 1, Domestic Violence Assault 2, Domestic Violence Assault 3, Domestic Violence Arson 1, Domestic Violence Arson 2.

** If domestic violence was plead and proven after 7/23/17 for the following felony offenses:*

Assault of a Child 1, Assault of a Child 2, Assault of a Child 3, Criminal Mistreatment 1, Criminal Mistreatment 2.

STANDARD RANGE CALCULATION

Total the last column to get the **Offender Score** (Round down to the nearest whole number) = 7
 Seriousness Level =
Low to High

STANDARD SENTENCE RANGE 43 57

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 66 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

Assault Second Degree

RCW 9A.36.021(2)(a) CLASS B – VIOLENT/CRIMES AGAINST PERSONS OFFENDER SCORING RCW 9.94A.525(8)

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Violent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 263.

ADULT HISTORY:

Enter number of serious violent and violent felony convictions x 2 =
 Enter number of nonviolent felony convictions x 1 =

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions x 2 =
 Enter number of nonviolent felony dispositions x ½ =

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions x 2 =
 Enter number of other nonviolent felony convictions x 1 =

STATUS:

Was the offender on community custody on the date the current offense was committed? + 1 =

Total the last column to get the **Offender Score** (Round down to the nearest whole number) **7**

SENTENCE RANGE

Offender Score										
	0	1	2	3	4	5	6	7	8	9+
LEVEL IV	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	17.5m 15 - 20	25.5m 22 - 29	38m 33 - 43	50m 43 - 57	61.5m 53 - 70	73.5m 63 - 84

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 66 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

Appendix B

General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven

NONVIOLENT OFFENDER SCORING RCW 9.94A.525(21)

CURRENT OFFENSE BEING SCORED

ADULT HISTORY:

Enter number of domestic violence felony convictions as listed below* x 2 = _____
 Enter number of repetitive domestic violence offense convictions (RCW 9.94A.030(42))
 plead and proven after 8/1/11..... x 1 = _____
 Enter number of felony convictions 1 x 1 = 1

JUVENILE HISTORY:

Enter number of subsequent domestic violence felony dispositions as listed below* x 1 = _____
 Enter number of serious violent and violent felony dispositions x 1 = _____
 Enter number of nonviolent felony dispositions x 1/2 = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other domestic violence felony convictions as listed below* 1 x 2 = 2
 Enter number of other repetitive domestic violence offense convictions plead and
 proven after 8/1/11..... x 1 = _____
 Enter number of other felony convictions 2 x 1 = 2

STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) Yes + 1 = 1

* If domestic violence was plead and proven after 8/1/2011 for the following felony offenses:

Violation of a No-Contact Order, Violation of a Protection Order, Domestic Violence Harassment, Domestic Violence Stalking, Domestic Violence Burglary 1, Domestic Violence Kidnapping 1, Domestic Violence Kidnapping 2, Domestic Violence Unlawful Imprisonment, Domestic Violence Robbery 1, Domestic Violence Robbery 2, Domestic Violence Assault 1, Domestic Violence Assault 2, Domestic Violence Assault 3, Domestic Violence Arson 1, Domestic Violence Arson 2.

* If domestic violence was plead and proven after 7/23/17 for the following felony offenses:

Assault of a Child 1, Assault of a Child 2, Assault of a Child 3, Criminal Mistreatment 1, Criminal Mistreatment 2.

STANDARD RANGE CALCULATION

Total the last column to get the Offender Score (Round down to the nearest whole number) = 6
 Seriousness Level = _____
Low to High

STANDARD SENTENCE RANGE 22 29

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 66 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

Harassment Subsequent Conviction or Threat of Death

RCW 9A.46.020(2)(b) CLASS C* – NONVIOLENT OFFENDER SCORING RCW 9.94A.525(7)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Nonviolent Offense with a Sexual Motivation Finding scoring form on page 256.

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 254.

ADULT HISTORY:

Enter number of felony convictions x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions x 1 = _____

Enter number of nonviolent felony dispositions x 1/2 = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other felony convictions x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) _____ + 1 = _____

Total the last column to get the **Offender Score** (Round down to the nearest whole number)..... 6

SENTENCE RANGE

		Offender Score									
		0	1	2	3	4	5	6	7	8	9+
LEVEL III	2m	5m	8m	11m	14m	19.5m	25.5m	38m	50m	55.5m	
	1 - 3	3 - 8	4 - 12	9 - 12	12+ - 16	17 - 22	22 - 29	33 - 43	43 - 57	51 - 60*	

- ✓ For gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustment.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

Appendix C

Harassment Subsequent Conviction or Threat of Death

RCW 9A.46.020(2)(b) CLASS C* – NONVIOLENT OFFENDER SCORING RCW 9.94A.525(7)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Nonviolent Offense with a Sexual Motivation Finding scoring form on page 256.

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 254.

ADULT HISTORY:

Enter number of felony convictions 1 x 1 = 1

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions _____ x 1 = _____

Enter number of nonviolent felony dispositions _____ x 1/2 = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other felony convictions 3 x 1 = 3

STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) Yes + 1 = 1

Total the last column to get the **Offender Score** (Round down to the nearest whole number)..... _____

SENTENCE RANGE

		Offender Score									
		0	1	2	3	4	5	6	7	8	9+
LEVEL III	2m										
	1 - 3	1 - 3	3 - 8	4 - 12	9 - 12	12+ - 16	17 - 22	22 - 29	33 - 43	43 - 57	51 - 60*

- ✓ For gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustment.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

Appendix D

General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven

NONVIOLENT OFFENDER SCORING RCW 9.94A.525(21)

CURRENT OFFENSE BEING SCORED

ADULT HISTORY:

Enter number of domestic violence felony convictions as listed below* x 2 =
 Enter number of repetitive domestic violence offense convictions (RCW 9.94A.030(42))
 plead and proven after 8/1/11..... x 1 =
 Enter number of felony convictions 1 x 1 = 1

JUVENILE HISTORY:

Enter number of subsequent domestic violence felony dispositions as listed below* x 1 =
 Enter number of serious violent and violent felony dispositions x 1 =
 Enter number of nonviolent felony dispositions x ½ =

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other domestic violence felony convictions as listed below* 2 x 2 = 4
 Enter number of other repetitive domestic violence offense convictions plead and
 proven after 8/1/11..... x 1 =
 Enter number of other felony convictions 1 x 1 = 1

STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) Yes + 1 = 1

* If domestic violence was plead and proven after 8/1/2011 for the following felony offenses:

Violation of a No-Contact Order, Violation of a Protection Order, Domestic Violence Harassment, Domestic Violence Stalking, Domestic Violence Burglary 1, Domestic Violence Kidnapping 1, Domestic Violence Kidnapping 2, Domestic Violence Unlawful Imprisonment, Domestic Violence Robbery 1, Domestic Violence Robbery 2, Domestic Violence Assault 1, Domestic Violence Assault 2, Domestic Violence Assault 3, Domestic Violence Arson 1, Domestic Violence Arson 2.

* If domestic violence was plead and proven after 7/23/17 for the following felony offenses:

Assault of a Child 1, Assault of a Child 2, Assault of a Child 3, Criminal Mistreatment 1, Criminal Mistreatment 2.

STANDARD RANGE CALCULATION

Total the last column to get the Offender Score (Round down to the nearest whole number) = 7
 Seriousness Level =
Low to High

STANDARD SENTENCE RANGE 33 43

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 66 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

Tampering With a Witness

RCW 9A.72.120 CLASS C* – NONVIOLENT OFFENDER SCORING RCW 9.94A.525(7)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Nonviolent Offense with a Sexual Motivation Finding scoring form on page 256.

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 254.

ADULT HISTORY:

Enter number of felony convictions x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions x 1 = _____

Enter number of nonviolent felony dispositions x ½ = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other felony convictions x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) _____ + 1 = _____

Total the last column to get the **Offender Score** (Round down to the nearest whole number)..... _____

SENTENCE RANGE

Offender Score										
	0	1	2	3	4	5	6	7	8	9+
LEVEL III	2m 1 - 3	5m 3 - 8	8m 4 - 12	11m 9 - 12	14m 12+ - 16	19.5m 17 - 22	25.5m 22 - 29	38m 33 - 43	50m 43 - 57	55.5m 51 - 60*

- ✓ For gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustment.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

Appendix E



STATE OF WASHINGTON

**DEPARTMENT OF CORRECTIONS
COMMUNITY CORRECTIONS DIVISION**

325 North Chelan, Suite A • Wenatchee, WA 98801 • (509) 667-7050

Date: April 30, 2019

To: Douglas County Prosecuting Attorney's Office

From: Amy Wright, Community Corrections Officer 2
Department of Corrections

Re: Elias F. Vargas DOC#322876
Douglas County Cause #08-1-00056-1

On 9/15/08, Elias Vargas was sentenced in Douglas County Superior Court under cause # 08-1-00056-1 for Assault 1st Degree. The Court placed Vargas on 36 months of community custody supervision with the Department of Corrections (DOC). At sentencing and as part of his community custody supervision, Vargas was directed to abide by the following conditions: Perform affirmative acts as ordered by the Court and/or community corrections officer (CCO), report to and be available for contact with the assigned CCO as directed, and not use / possess / consume any controlled substances without a lawfully issued prescription, do not associate nor have contact with persons with felony convictions and/or persons known to use or possess controlled substances and have no violations of criminal law. Vargas agreed to comply with these conditions of supervision when he signed his Conditions, Requirements and Instructions form on 1/6/16.

On 8/16/17, Vargas release from the Chelan County Regional Justice Center after serving time for violations of his supervision. Vargas failed to report to the Department of Corrections as directed after his release from confinement (within one business day of release). CCO Andrade requested a warrant for Vargas' arrest on 8/18/17 as his whereabouts were unknown.

On 2/12/18, Vargas was arrested on the DOC Secretary's warrant and on new felony charges. On 9/14/18, Vargas was found guilty of the new charges. On 9/14/18, Vargas was found guilty by jury verdict of Assault in the Second Degree (Suffocation); two counts of Harassment (Prior or Threat to Kill) and Tampering with A Witness. On 9/24/18, Vargas was sentenced to 61 months on Count 1; 43 months on Count 2; 22 months on Court 3 and 43 months on Count 4. Vargas is currently in custody at the Washington Corrections Center.

Vargas was on supervision with the Washington State Department of Corrections at the time he committed the above mentioned charges on 2/12/18.

"Working Together for SAFE Communities"

I certify or declare under penalty of perjury of the laws of the state of Washington that the foregoing statements are true and correct to the best of my knowledge and belief.

Submitted By:

A. Wright

4/30/19

Date

Amy Wright
Community Corrections Officer 2
Wenatchee Office 2
325 N Chelan Avenue, Suite A
Wenatchee, WA 98801
Telephone: (509) 663-9712

DOUGLAS COUNTY PROSECUTING ATTORNEY

May 03, 2019 - 9:59 AM

Transmittal Information

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Superior Court Case Number: 18-1-00033-9

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