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Division III
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NO. 36807-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,
RESPONDENT

V.

BRANDON WILLIAM CATE
APPELLANT

RESPONDENT'S BRIEF

APPEAL FROM THE SUPERIOR COURT OF OKANOGAN
COUNTY THE HONORABLE CHRISTOPHER CULP
Okanogan County Case Number: 17-1-00039-4
Okanogan County Case Number: 17-1-00040-8

By:

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I. FACTS OF CASE

After two separate jury trials, Mr. Cate was convicted of two counts of burglary in the second degree, theft in the second degree, and two gross misdemeanors in *State v. Brandon William Cate*, 17-1-00040-8, and he was convicted of burglary second degree, malicious mischief second degree and theft second degree. RP 4, 12, 32. Mr. Cate was sentenced for both cases on the same day. RP 4, 27. The trial court imposed a consecutive sentences in the two matters based upon the feeling that if consecutive sentences were not ordered, Mr. Cate would be getting away with crimes as they would go unpunished. RP 15. The trial court did not enter written findings fact and conclusions of law stating the substantial compelling reason's the court ordered consecutive sentences. Mr. Cate appealed his sentence. See *State of Washington v. Brandon William Cate*, No. 35230-7-III (Okanogan County Number 17-1-00039-4).

The State submits that this Court remanded this matter to the Superior Court instructing it to do the following:

1. 17-1-00040-8: Reduce the Theft in the Second Degree conviction to Theft in the Third Degree;
2. Resentence both 17-1-00039-4 and 17-1-00040-8 to determine

- whether or not to impose consecutive or concurrent sentences;
3. Draft and enter written Findings of Fact and Conclusions of Law supporting a consecutive sentences if the trial court were to impose consecutive sentences in the two matters; and
 4. In determining Mr. Cate's offender score to count all current offenses in 17-1-00039-4 and 17-1-00040-8 against each other as other current offenses.

Mr. Cate was resentenced on May 9, 2019. RP 27. At that sentencing hearing, the Court accomplished the following:

1. In 17-1-00040-8, the court reduced the Theft in the Second Degree conviction to Theft in the Third Degree RP 27;
2. The Court calculated Mr. Cate's offender score in each case pursuant to offender sheets that the prosecutor prepared, and Mr. Cate did not object when asked if he agreed with the calculations of his offender score RP 32-34, 37;
3. The Court placed its reasoning and analysis regarding consecutive sentences pursuant to RCW 9.94A.535(2)(c) RP 15, 33, 37;
4. The Court then ordered that drafted written Findings of Fact and Conclusions of law describing the reasons for ordering that each sentence for the burglaries in 17-1-00039-4 and 17-1-

00040-8 to run consecutive to the other for a total of 119 months
RP 37-38; CP 23, CP2 17.

I. ARGUMENT

A. The Exceptional Sentence Should Be Affirmed

During sentencing for felony convictions, unless another term of confinement applies, a sentence within the standard sentence range shall be imposed by the court. RCW 9.94A.505(2)(a)(i). Generally, sentences in Washington State are served concurrently RCW 9.94A.589(1)(a). Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a). The court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Whenever a sentence is outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535.

One such aggravating factor that can result in an exceptional sentence is where a concurrent sentence is unjustified because it will result in the person sentenced has committed so many offenses that some of those offenses result in no punishment under the sentencing

scheme. Specifically, consecutive sentences are allowed when the defendant committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c).

To determine the standard sentencing range, one must find “the intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range.” RCW 9.94A.530(1). Seriousness levels and scores are codified and are found in RCW 9.94A.515. Burglary in the Second Degree has a seriousness level of III. RCW 9A.52.030.

To determine a defendant's offender score for sentencing, there are some rules that must be followed. First, the offender score is measured on the horizontal axis of the sentencing grid. RCW 9.94A.525. The offender score is the sum of points accrued under this section rounded down to the nearest whole number. RCW 9.94A.525. A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. RCW 9.94A.525(1). Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed “other current offenses” within the meaning of RCW 9.94A.589. RCW 9.94A.525(1). This offender score

calculation applies to both adult and juvenile prior convictions. RCW 9.94A.525(2)(g).

RCW 9.94A.535(2)(c) does not violate the Sixth Amendment because the determination of whether an offense goes unpunished under RCW 9.94A.535(2)(c) requires simple objective mathematical application of RCW 9.94A.510's sentencing grid to the current offenses. *State v. Alvarado*, 164 Wash.2d 556, 565, 192 P.3d 345, 349 (2008). Current offenses fall under the Blakely prior convictions exception, as no judicial fact finding is involved. *Id.* at 567. Current offenses are treated as prior convictions for purposes of computing the offender score in relation to imposing an exceptional sentence. *Id.* RCW 9.94A.535(2)(c) is known as the free crimes aggravator. *State v. France*, 176 Wash.App. 463, 468-469, 308 P.3d 812, 816, (2013). The free crimes aggravator is triggered when the defendant's high offender score combines with multiple current offenses to leave some of the current offenses going unpunished. *State v. France*, 176 Wash.App. 463, 469, 308 P.3d 812, 816 (2013). It is based solely upon mathematical calculation and is applied when "the number of current offenses results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant has committed fewer current offenses." *Id.* at 469-471.

At the time of sentencing, Mr. Cate's prior record was as follows:

1. 15-1-00031-2: Burglary in the Second Degree (RCW 9A.52.030(1)).
2. 05-1-00163-5: Intimidating a Public Witness (RCW 9A.76.180).
3. 05-1-00163-5: Assault Third Degree (RCW 9A.36.031).
4. Bail Jumping Class B or C Felony (RCW (9A.76.170(2)(c))). CP 4, 13, and RP 4, 32-33.

During the resentencing hearing the State calculated the sum of Mr. Cate's prior criminal conviction history to be score of 5 because the RCW 9.94A.525(16) directs the State and Court to count Mr. Cate's prior Burglary in the Second Degree conviction stemming from 15-1-00031-2 as two points and not one when calculating the offender score. VRP 32. The Court addressed Mr. Cate's offender score and added the sum of all of Mr. Cate's prior convictions and other current offenses. VRP 32-34, CP 57, CP2 at 63. The Court then entered written findings of fact and conclusions of law listing Mr. Cate's offender score as a 9+. CP 63. The State also calculated Mr. Cate's offender score based upon current offenses in 17-1-00040-8 and 17-1-00039-4. In determining the offender score for the Burglary charge in case 17-1-00039-4, the State calculated the two prior burglaries in 17-1-00040-8 as a total of 4 points (2 points each) because of RCW

9.94A.525(16). Then the State added 2 more points for the Theft in the Second Degree Conviction and the Malicious Mischief in the Second Degree conviction. Adding 5 points plus the 4 points from the convictions for other offenses in 17-1-00040-8, one obtains a sum of 9. There were two other current offenses in the 17-1-00039-4 matter yielding 2 more points (convictions for Theft in the Second Degree and Malicious Mischief in the Second Degree) total to 11. 9 points plus 2 more points yields a total offender score of 11 for the controlling Second Degree Burglary charge in 17-1-00039-4. Exhibits 1 and 2 scoring sheets at second sentencing.

Similarly, in 17-1-00040-8, the State first obtained the sum of Mr. Cate's prior convictions. As the controlling charge in 17-1-00040-8 was also burglary in the second degree, Mr. Cate's 2015 conviction for Burglary in the Second Degree is once again considered 2 points due to RCW 9.94A.525(16). Therefore, the State submitted that Mr. Cate's prior convictions equaled 5 once again equaled 5. In calculating other current offenses, the State submits that the Burglary in the Second Degree coming from case 17-1-00039-4 should have been counted as 2 more points. Furthermore, the other current convictions for Theft in the Second Degree and Malicious Mischief in the Second Degree were other current offenses and were one point each towards

the offender score for a total of two points. This would yield a score of 9+ points in 17-1-00039-4. VRP 32-33. But, Mr. Cate's score is still an 11 in 17-1-00039-4 because of the other current offense in 17-1-0040-8 that was not being counted. Therefore, Mr. Cate's offender score in each case at the time of sentencing was a 9+.

The Court went over Mr. Cate's prior convictions and offender score with Mr. Cate on the record. VRP 33, 34. Based upon the worksheets that the State prepared and the Defendant's failure to object after reviewing the worksheets, the trial court found that Mr. Cate was a 9+ in each case as to one or more counts. VRP 33, 34.

Once, Mr. Cate's offender score was calculated at a 9+ for any one of the charges filed in 17-1-00039-4 and 17-1-00040-8, the free crimes aggravator found in RCW 9.94A.535(2)(c) was triggered. The Court then provided analysis at sentencing under RCW 9.94A.589(1)(a). Mr. Cate's offender score for the Burglary conviction he was being sentenced for in 17-1-00039-4 was an 11. Furthermore, Mr. Cate's offender score for the Burglary counts in 17-1-00040-8 was also 11. The rule in RCW 9.94A.535(2)(a)(c) guided the court's reasoning in ordering consecutive sentences as the court indicated in its written Findings of Fact and Conclusion of Law that Mr. Cate's offender score was so high due to multiple current offenses that some

of the current offenses would go unpunished if the sentences were run concurrently.

The trial court also submitted in its Findings of Fact and Conclusions of Law that both 17-1-00039-4 and 17-1-00040-8 were tried on different days with separate juries. The offenses committed in each case involved separate and distinct acts, separate losses, different victims, and were committed at separate times, which made the acts separate and not considered the same criminal conduct pursuant to RCW 9.94A.589(1)(a) and RCW 9.94A.535.

B. Correction of 17-1-00039-4

The remedy for clerical or scrivener's errors in judgment and sentence forms is remand the trial court for correction of this error. *State v. Munoz-Rivera*, 190 Wash.App. 870, 895, 361 P.3d 182, 194, (2015). The State submits that the wrong sentencing ranges in the Sentencing Data portion of the Judgment and Sentencing form are listed for counts 2 and 3 in case 17-1-00039-4. The standard sentencing range should for counts 2 and 3 should be listed as 17-22 months based upon the offender score of 8. Mistakenly, count 3 lists a standard range of 33-43 months. Also, the total standard sentencing range should also state 17-22 months and not 22-29 months for the same counts 2 and 3.

Finally, the trial court should not have sentenced Mr. Cate to 38 months in count 3 because the standard range was only 17-22 months. This sentence ran concurrent to Mr. Cate's 59.5 months so it is still a harmless error as it did not affect his sentence. As a result, the sentence needs correction to fall in line with the standard sentencing range because currently Mr. Cate's sentence is outside the standard sentencing range for count 3 only in 17-1-00039-4. The matter should be remanded for that purpose only.

II. CONCLUSION

Mr. Cate's sentence entered on May 9, 2019 should be affirmed and upheld. However, the case should be remanded to the trial court solely to fix a scrivener's error in the judgment and sentence order and to resentence Mr. Cate on count 3 in 17-1-00039-4.

WHEREFORE, the State prays that this Honorable Court shall:

1. Deny Mr. Cate's appeal;
2. Remand case 17-1-00039-4 to correct the sentencing ranges found in the sentencing data portion of the judgment and sentence order; and
3. Resentence Mr. Cate on count 3 in 17-1-00039-4 only; and
4. Grant any other relief that this Honorable Court deems just and appropriate.

DATED this 5th day of January, 2020.

ARIAN NOMA
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A handwritten signature in black ink, appearing to read 'Arian Noma', is written over a horizontal line.

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COURT OF APPEALS
DIVISION III
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STATE OF WASHINGTON

Plaintiff/Respondent,

v.

BRANDON WILLIAM CATE,

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COA No. 368076

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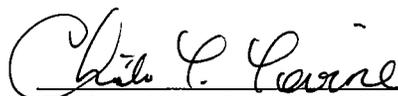
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Signed in Okanogan, Washington this 5th day of February, 2020.



Christa L Levine, Legal Assistant

OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

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