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No. 37496-0-II

FILED
COURT OF APPEALS
DIVISION II

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

09 JAN 30 PM 12:20

STATE OF WASHINGTON
BY *cm*
DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

JASON A. WILSON,
Appellant.

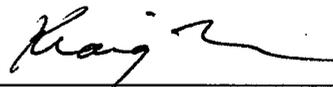
APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
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BY:



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WSBA #33270

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T A B L E

Table of Contents

STATEMENT OF CASE 1

ISSUE 2

 (1) The defendant has waived his challenge to any factual
 dispute as to his criminal history. 2

CONCLUSION 4

TABLE OF AUTHORITIES

Table of Cases

In re Goodwin, 146 Wn.2d 861 2-4

State v. Collins, 144 Wn.App. 547 (2008) 2, 4

STATUTES

RCW 69.50.401(d) 4

RCW 69.50.407 4

STATEMENT OF CASE

On December 10, 2007, Mr. Wilson was sentenced on two counts of Identity Theft in the Second Degree to a sentence of 43 months in the custody of the Department of Corrections. (CP 46-53). This judgment and sentence was the result of a plea agreement between the defendant the State, which was filed with the court. (CP 38-42). In that plea agreement, a criminal history was listed for the defendant. Also in the plea agreement is a section where the defendant agrees that his offender score is eight on each count. In writing near the section is a statement that the defendant intended to request a sentencing hearing. This portion was crossed out and the defendant initialed the section that says, "The defendant agrees that the following is accurate."

The plea agreement and judgment and sentence listed a VUCSA out of King County from March 2005 and counted it as one point on his offender score. On the plea agreement there is a notation next to this entry that states, "pled attempt." In the state of Washington an attempt to a felony VUCSA is a felony.

After sentencing, the defendant was informed by another attorney that one of his listed felonies was, in fact, pled as misdemeanor. This was done in King County Superior Court.

ISSUE

- (1) **The defendant has waived his challenge to any factual dispute as to his criminal history.**

The defendant relies on *In re Goodwin*, 146 Wn.2d 861 to support his argument that the defendant should be allowed to gain the benefit of a mutual mistake of the plea agreement without withdrawing his plea agreement. This case can be distinguished in that *Goodwin* applies when error in calculation of the offender score is obvious on the face of the judgment and sentence. In this case, the calculation of the offender score is correct based on what the judgment and sentence says. For this reason, the holding in *Goodwin* does not apply.

A case on point is *State v. Collins*, 144 Wn.App. 547 (2008). This case clarifies that a defendant cannot rely on *Goodwin* when the potential error in the judgment and sentence is not obvious on the face of the judgment and sentence.

John Collins was accused in King County Superior Court of the crime of Rape in the Second Degree, a class A sex offense. *Id.*, at 549. He entered into a plea agreement where he would be allowed to plead guilty to lesser felonies. In the pre-agreement he acknowledged that his offender score was accurately calculated, which included two out-of-state

sex offense convictions. Each one of these convictions counted as three points on his offender score. At sentencing, Collins demanded a sentencing hearing. The judge ruled that he violated the pre-agreement and withdrew his plea of guilty. The original charge of Rape in the Second Degree was reinstated. Collins appealed in an effort to retain the benefit of the plea bargain without have to be sentenced by the agreed offender score.

The appellate court ruled that *Goodwin* was not on point. This was because the error in the plea agreement was not obvious on the face of the document. The distinction is one of an error of verse an error of fact. An error of law, as to a defendant's offender score, would result in a sentence that is not authorized by statute. The remedy is simply correct the error.

In the case at bar, the plea agreement and judgment and sentence accurately reflect the calculation of offender score based on the listed felonies. If one of the these listed felonies is, in fact, not a felony then that is a factual dispute. At the time the agreement was entered into the defendant abandoned his challenge to this factual issue and agreed that his offender score was accurate. The agreement alleviated the State of an burden to prove any prior convictions. The State agreed to forego filing numerous similar charges against him based upon this agreement.

The claimed error is the inclusion of a conviction for Attempted Violation of the Uniform Controlled Substances Act - Possession of Methamphetamine in the offender score. This crime is a felony in the

State of Washington. RCW 69.50.407 States: “[a]ny person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” The appellant was prosecuted under 69.50.401(d) and pleaded guilty to an attempt to violate that section. By state law the appellant pleaded guilty to a felony. If an error was made, it was made in the King County Superior Court.

No error is apparent on the face of the Judgment and Sentencing in this case. Any attorney familiar with the SRA would make the same calculation given the facts listed as to the defendant criminal history. For these reason, the holding in *Goodwin*, does not apply in this case.

Only by going beyond the sentencing document can any argument be made as to error in the calculation of the appellant’s offender score, but in this case, their was no challenge to these facts because the defendant chose to take advantage of a plea agreement. Part of these agreement was the requirement that the defendant agree to his offender score. To challenge his offender score at this point is a breech of a valid and lawful plea agreement.

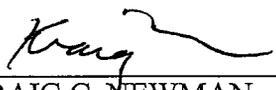
CONCLUSION

As in *Collins*, the defendant waved any requirement of the State to prove his prior criminal history. The court made a finding that his

offender score was eight based upon the defendant's agreement to that number's accuracy.

DATED this 29 day of January, 2009.

Respectfully Submitted,

By: 
KRAIG C. NEWMAN
Senior Deputy Prosecuting
Attorney
WSBA #33270

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DECLARATION OF MAILING

JASON A. WILSON,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 29th day of January, 2009, I mailed a copy of the Brief of Respondent to Vanessa M. Lee; Washington Appellate Project; 1511 Third Avenue, Suite 701; Seattle, WA 98101, and Jason A. Wilson 749606; Washington State Penitentiary; 1313 North 13th Avenue; Walla Walla, WA 99362, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 29th day of January, 2009, at Montesano, Washington.

Barbara Chapman