

66306-2

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NO. 66306-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN STANLEY,

Appellant.

REC'D
MAY 31 2011
King County Prosecutor
Appellate Unit

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

The Honorable Michael C. Hayden, Judge

FILED
COURT OF APPEALS DIVISION #1
2011 MAY 31 PM 4:18

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The judgment misstates appellant's offender scores and standard ranges.

2. The sentencing court miscalculated appellant's offender score and standard range on his conviction for attempted bribery.

Issues Pertaining to Assignments of Error

1. Where the judgment in appellant's case misstates the applicable offender scores and standard ranges, is remand appropriate to correct these errors?

2. The court added one point to appellant's offender score for attempted bribery based on a belief appellant was on community custody when the crime occurred. He was not. Must appellant be resentenced under the correct offender score and lower standard range?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged John Stanley with three criminal offenses: (count 1) Robbery in the First Degree, (count 2) Possession of Cocaine, and (count 3) Attempted Bribery of a Witness. CP 8-10. A jury found Stanley guilty on all three counts.

CP 46-48. The court imposed a total sentence of 144 months, and Stanley timely filed his Notice of Appeal. CP 53, 59.

2. Substantive Facts

The robbery charge stemmed from events around 1:00 a.m. on May 28, 2010. RP 25. After spending the evening with friends, Abdiqahar Adan was dropped off in Seattle near 23rd and Jefferson, several blocks from his home. RP 151-152. As Adan walked home, he passed two men on the sidewalk heading in the opposite direction. He would later identify one of them as John Stanley. RP 155-156.

According to Adan, immediately after he and the two men passed, Stanley grabbed him from behind, placed him in a chokehold, and took him to the ground. RP 157-158. He also put an object against Adan's head and threatened to shoot him in the face. RP 158, 173. Adan had \$20.00 in his pocket, which he gave the men, but the second man demanded "everything" and rifled through Adan's pockets. RP 158-160. When Adan resisted, he was punched. RP 158-159, 168-169, 176-177. The second man took Adan's debit card, cell phone, student I.D., and the \$20.00. Adan refused to reveal his PIN number for the debit card, and both men then walked away. RP 160-161, 164.

Adan heard a phone ring and realized one of the men had dropped a cell phone, which Adan picked up. RP 162-163. Adan taunted the two men by yelling "I have your cell phone." RP 165. According to Adan, Stanley responded by running in his direction, so Adan quickly ran into a nearby AM/PM store, where he told the clerk he had been assaulted and needed help. RP 164-166. The clerk called 911. RP 165. Stanley also entered the store and offered Adan money if he would return the cell phone to him, but Adan refused. RP 167-168.

Both men were still in the AM/PM store when police arrived. RP 45-46. They were separated and interviewed. RP 45, 48-51, 77. Stanley was cooperative. RP 50. Adan had "a slightly bloody and swollen lower lip and swollen right cheek." RP 33. Medics arrived, examined Adan, and simply recommended that he apply ice to his injuries to reduce the swelling. RP 180-181.

Stanley was placed under arrest and transported to the East Precinct. RP 51-52, 77. In a search incident to arrest, officers discovered that Stanley was in possession of crack cocaine, which formed the basis of the charge in count 2. RP 63-64, 78-79, 86.

The attempted bribery charge was based on events a few weeks later at the King County Jail. Corrections Officer Chang An

testified that he saw Stanley hand a note to another inmate, who then passed the note to a third inmate who was about to be released from jail. RP 99-104. Officer An retrieved the note, which includes two telephone numbers belonging to Adan and indicates Adan should be contacted and offered payment if he agreed not come to court. RP 106, 181; exhibit 18. The note is signed "Doeloe." Exhibit 18. Using recorded phone calls Stanley made from the jail, the State presented evidence that he sometimes goes by the name "Doeloe." RP 109-113, 122-126.

3. Sentencing

The State initially calculated Stanley's offender score as 10 for the robbery, 8 for possession of cocaine, and 8 for attempted bribery, resulting in standard ranges of 129 to 171, 12 to 24, and 39.75 to 52.50 months, respectively. SRP¹ 5-6; Supp. CP ____ (sub no. 47, Presentence Statement of King County Prosecuting Attorney).

At the sentencing hearing, however, the parties concluded that a prior juvenile conviction for attempted robbery was not a "violent felony offense" and therefore should only count as ½ point in

¹ "SRP" refers to the transcript of the sentencing hearing on November 5, 2010.

the offender scores. SRP 9-11. Thus, Stanley's offender score was actually 8 for robbery, 7 for possessing cocaine, and 7 for attempted bribery. The standard range remained the same for the possession charge but decreased to 108 to 144 months for robbery and 32.25 to 42.75 for attempted bribery. SRP 10-12. The court imposed sentences within these ranges. CP 53; SRP 14-15.

C. ARGUMENT

1. THE JUDGMENT AND SENTENCE LISTS THE INCORRECT OFFENDER SCORES AND STANDARD RANGES.

Clerical mistakes in a judgment can be corrected at any time. See CrR 7.8(a). "A clerical mistake is one that when amended would correctly convey the intention of the court based on other evidence." State v. Priest, 100 Wn. App. 451, 455, 997 P.2d 452 (2000).

In Stanley's case, the sentencing court clearly intended to apply the reduced offender scores and standard ranges discussed at the sentencing hearing. The failure to modify the judgment, which was prepared with the State's initial erroneous calculations in mind, was simply an oversight. Nonetheless, based on the risk the incorrect information could mislead or confuse future sentencing courts, the judgment should be fixed. See State v. Casarez, 64

Wn. App. 910, 915, 826 P.2d 1102 (1992) (ordering amendment of judgment to reflect correct dates of offenses), aff'd, State v. Garza-Villarreal, 123 Wn.2d 42, 864 P.2d 1378 (1993).

2. STANLEY'S OFFENDER SCORE FOR ATTEMPTED BRIBERY IS 6.

A defendant may challenge a miscalculated offender score for the first time on appeal. In re Goodwin, 146 Wn.2d 861, 873-874, 50 P.3d 618 (2002); see also In re Johnson, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997) (a court is without statutory authority to impose sentence based on a miscalculated offender score).

Although the State initially thought Stanley's offender score for attempted bribery was 8, and the parties and court subsequently thought it was 7, it is actually 6.

Specifically, the State added one point to Stanley's score on this conviction – as it did for his two other convictions – based on the presumption he was on community custody at the time. Supp. CP ____ (sub no. 47, Presentence Statement of King County Prosecuting Attorney). RCW 9.94A.525(19), which controls calculation of offender scores, provides:

If the present conviction is for an offense committed while the offender was under community custody, add one point. For purposes of this section, community custody includes community placement or postrelease

supervision, as defined in chapter 9.94B RCW.

Because Stanley was on community custody from a prior offense at the time of the robbery and possession offenses, one point was properly added to his offender score for each of those offenses.

However, the conduct leading to Stanley's conviction for attempted bribery occurred weeks after his arrest, while he was incarcerated in the King County Jail. RP 99-104. And under RCW 9.94A.171(3), "[a]ny period of community custody shall be tolled during any period of time the offender is in confinement for any reason. . . ." Because Stanley was not under community custody when this offense was committed, one point should be subtracted from his offender score on count 3, resulting in an offender score of 6 and a standard range of 24.75 to 30.10 months.

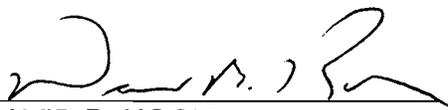
D. CONCLUSION

This Court should remand to the sentencing court for correction of the offender scores and standard ranges on the judgment and resentencing on count 3 within the lower standard range.

DATED this 31st day of May, 2011.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	COA NO. 66306-2-1
vs.)	
)	
JOHN STANLEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MAY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHN STANLEY
DOC NO. 869603
WASHINGTON STATE CORRECTIONS CENTER
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MAY 2011.

x Patrick Mayovsky

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