

IN THE COURT OF APPEALS DIVISION ONE,  
STATE OF WASHINGTON

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NO. 67259-2-I

STATE OF WASHINGTON,  
Respondent, Plaintiff,

v.

RAYNE DEE WELLS JR.,  
Appellant, Defendant, pro se

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APPELLANT'S SUPPLEMENTAL BRIEF

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SAN JUAN COUNTY

The Honorable Donald Eaton, Judge

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Rayne D. Wells Jr. #819131  
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A. ASSIGNMENT OF ERROR

1. THE SENTENCING COURT ERRED IN REFUSING TO DETERMINE CREDIT FOR TIME SERVED AND INDICATE SAID CREDIT ON JUDGMENT.
2. THE SENTENCING COURT ERRED WHEN INCLUDING CONVICTIONS OCCURRING AFTER ORIGINAL SENTENCING IN THIS CASE IN THE OFFENDER SCORE.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether it was error for the Superior Court to defer its obligation to calculate and indicate in the Judgment and Sentence the credit for time served up to the date of sentencing?

2. Whether the Sentencing Court erred in its determination of what constituted a "prior conviction" for the purpose of calculating the offender score?

3. Whether RCW 9.94A.525 (1) is ambiguous, or, whether the term "before the date of sentencing" is ambiguous as applied to resentencing or sentencing after conviction on a new trial?

4. Whether use of convictions for offenses occurring after date of commission of the underlying offense is contrary to legislative intent, or renders the term "prior" in the sentencing statutes superfluous?

5. Whether the Appellant had a reasonable expectation of finality in his sentence, and if so does the Sentencing Court's use of additional offenses to increase the sentence 40 months violate Double Jeopardy Protections?

C. STATEMENT OF CASE

Appellant, Rayne Dee Wells Jr., was convicted after plea in San Juan County cause # 00-1-05037-0 to Count I, Possession With Intent to Deliver Marijuana, Count II, Unlawful Possession

of a Firearm in the Second Degree, and, Misdemeanor Possession of Dangerous Weapons on School Facilities. Using an offender score of 3 based upon five juvenile offenses, the court sentenced Appellant to 12 months 1 day (an exceptional sentence of 1 day). Appellant was sentenced November 2000, completed his term of confinement in June 2001.

In 2007 Appellant filed a CrR 7.8 Motion seeking to withdraw the plea from 2000 based upon misinformation pertaining to his offender score and range of penalties. The Superior Court converted the Motion to a PRP and transferred it to the Court of Appeals for determination (COA #60984-0-I). The Court of Appeals granted the petition in December 2010 and remanded for further proceedings. After withdrawing the plea and proceeding to a bench trial, Appellant was convicted solely on Count II, Unlawful Possession of a Firearm in the Second Degree. VRP 05-11-11 at 273. The Court imposed a sentence of 51 months using an offender score of '9 or more' based upon inclusion of several convictions which occurred after the underlying offense. VRP 05-11-11 at 312. The Court granted credit for time previously served but refused to indicate what specific credit was to be applied.

The facts and procedural history provided in Appellant's Opening Brief is adopted herein as accurate. Defendant, Appellant appeals.

#### D. LAW AND ARGUMENT

1. THE SENTENCING COURT ERRED IN REFUSING TO DETERMINE CREDIT FOR TIME SERVED AND INDICATE SAID CREDIT ON JUDGMENT.

"When a person is convicted of a felony, the court shall

impose punishment as provided in this chapter." RCW 9.94A.505. "The Sentencing Court shall give the offender credit for all confinement time served before the sentencing, if that confinement was solely in regard to the offense for which the offender is being sentenced." RCW 9.94A.505 (6). Where a defendant who has successfully appealed has spent time in prison prior to winning his or her appeal, the State must give credit for that time against the sentence for any second conviction. The Constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing a sentence upon a new conviction for the same offense. North Carolina v. Pearce, 395 711, 718-19, 89 S.Ct. 2072, 2077, 23 L.Ed.2d 656 (1969); State v. Phelan, 100 Wn.2d 508, 515, 671 P.2d 1212, 1216 (1983). The trial court must give credit for pretrial incarceration and must indicate such credit on the face of the Judgment and Sentence. In re Phelan, 97 Wn.2d 590, 596, 647 P.2d 1026 (1982).

Here, the Appellant originally received 12 months 1 day and served out that entire term, which included both pretrial incarceration and state prison time. VRP 05-11-11 at 317. The State successfully urged the court (over Appellant's objection) to allow the Department of Corrections to calculate it. Id.

The Sentencing Court in this case had a duty in this case to award Appellant credit for all time served on this matter prior to sentencing. Phelan, 100 Wn.2d at 515; RCW 9.94A.505 (6). The Court's obligation extended beyond the award of credit, to setting out the credit in the Judgment and Sentence. In re Phelan, 97 Wn.2d at 596. This failure violated both Appellant's

Due Process Rights and the Constitutional protection from Double Jeopardy. U.S. CONST. AMEND. XIV and V.

2. THE SENTENCING COURT ERRED IN USING CONVICTIONS AT NEW SENTENCING WHICH OCCURRED AFTER ORIGINAL SENTENCING.

(a). The term "date of sentencing" in RCW 9.94A.525 (1) is ambiguous with regard to second or subsequent sentencing.

"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). Statutory construction questions are reviewed De novo. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 682 (2003). We look to the statutes plain language in order to give effect to the legislative intent. Wentz, at 346. A statute is ambiguous when the language is susceptible to more than one interpretation. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). The Rule of Lenity requires the court to interpret an ambiguous statute in favor of the accused. State v. Lively, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996).

Here, Appellant was originally sentenced in November 2000. On the "date of sentencing" the Appellant's only convictions were juvenile offenses, all but one of which didn't count under a former version of the SRA. CP 8-36. Appellant was convicted of subsequent offenses from December 2000 to August 2004. Appellant, 10 years after serving his term of confinement elected to withdraw his plea and took the charges to bench trial. Appellant was convicted on one count, the court used convictions which did not exist until after the date of sentencing to elevate his offender score beyond 9. VRP 05-11-11 at 312-13; CP 213-22.

The Sentencing Court Judge in this case noted that use of the post-original sentencing convictions 'seems unfair' and "works contrary to the goals of the SRA." VRP 05-11-11 at 312. Looking to the statutes plain language (Wentz) the language "date of sentencing" could easily be interpreted to mean the date of the original sentencing, not the date of resentencing or, as we have here a subsequent sentencing after a new trial.

The Rule of Lenity calls for a ruling favorable to the Appellant: Lively, at 14.

(b). The term "prior" in RCW 9.94A.525 (1) is ambiguous.

Questions of statutory interpretation are reviewed De novo. Wentz, at 346. The plain meaning of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which it was found, related provisions and the statutory scheme as a whole. Jacobs, at 600. If after examination of a statute we find that it is subject to more than one reasonable interpretation, the statute is ambiguous. *Id.* at 600-01. In the case of City of Seattle v. Winebrenner, 167 Wn.2d 451, 462, 219 P.3d 686 (2009), our State Supreme Court decided an issue analogous to the one presented herein. "Because the legislature failed to specify whether prior offenses included offenses that occurred both before and after the Defendant is sentenced on a deferred prosecution, we find that the statute is ambiguous, apply the rule of lenity and construe the statute in favor of the Defendant Petitioner." *Id.* at 462. The case reversed the Court of appeals ruling which construed the statute to mean that "prior offense" means offenses occurring before and after the current offense. This interpretation renders the word "prior" superfluous. *Id.* at 462-63. In interpreting a statute we must give meaning to every word and not render any part of the statute to be meaningless or superfluous. State v. Lilyblad, 163 Wn.2d 1, 6, 11, 177 P.3d 686 (2008).

Here, the court used convictions which occurred after original sentencing on the underlying matter in the offender score. The Sentencing court recognized that this seemed unfair and worked contrary to the goals of the SRA. VRP 05-11-11 at 312.

Though the case in Winebrenner dealt with the term "prior" or "prior offense" as it related to a deferred prosecution, the result is the same as in this case. As illustrated by the Honorable Judge Madsen, who concurred with the ruling but wrote separately. "assume as the City of Seattle argues, that "prior

offenses" includes all offenses prior to sentencing rather than prior to the current offense. A defendant who commits three offenses spread out in time will be sentenced with respect to each offense in light of the prior offenses which actually precede the current offense in time. When a defendant is sentenced for the second offense, only the first will be a "prior offense." When the Defendant is sentenced for the third offense, the first and second offenses will be "prior offenses." However, if the circumstances are that the defendant commits offenses that occur with in close proximity in time, and the defendant ends up being sentenced for the second offense after the third, the result can be that the defendant is sentenced for the second with the first and third offenses as "prior offenses." Then when the defendant is sentenced for the third offense, the first and second offenses are "prior offenses." Winebrenner, at 465. Judge Madsen points out that this scenario provides absurd results. This is the exact scenario we are faced with in this case, the hypothetical scenario presented by Judge Madsen is what occurred. The Appellant was sentenced for this case in 2000, the offenses were then used as points in the offender score in Skagit County three times for eight felonies, Douglas County for three felonies and Snohomish County for two felonies (all of which resulted in prison sentences). Then when this conviction was entered after withdraw of plea and bench trial the sentencing court used all of the Skagit, Snohomish and Douglas County convictions in the offender score as "prior convictions." VRP 05-11-11 at 288-91 and 312. The statute can clearly be interpreted more than one way as the sentencing Judge observed that use of the convictions worked contrary to the goals of the SRA. Ibid. It is clear that the statute was intended for circumstances where additional criminal history is discovered but not to allow additional punishment on old convictions because new offenses were committed, that would violate Double Jeopardy protections.

- (c). The increase from 12 months to 51 months confinement violates Double Jeopardy where Appellant had a reasonable expectation of finality in the completed confinement.

Double Jeopardy prohibits increasing a correct sentence. United States v. DiFrancisco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d. 328 (1980) at 138-39. The caselaw following DiFrancisco indicates that a defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, unless the defendant was on notice the sentence might be modified due to either pending appeal or the defendant's own fraud in obtaining the erroneous sentence. United States v. Jones, 722 F.2d 632, 638 (11th Cir. 1983); State v. Hardesty, 78 Wn.App. 593, 897 P.2d 1282 (1995) Affirmed in part, reversed in part, 129 Wn.2d 303, 915 P.2d 1080 (1996).

Here, the Appellant completed his entire sentence of 12 months 1 day based upon an offender score which was higher than it in fact should have been. VRP 05-11-11 at 279-284. That term of confinement was complete in August 2001. Now, in 2011 the court using Appellants current offender score increases the term of confinement to 51 months.

Appellant, as in Hardesty, had a legitimate interest in finality of his sentence of 12 months 1 day, so irregardless of Appellant exercising his statutorily created right to collateral attack and withdrawl of plea, the imposition of a sentence beyond the 12 months 1 day (51 months) violated Double Jeopardy and was nothing more than retaliation against Appellant for exercising his rights. This likewise violated Due Process under the 14th Amendment to the U.S. Constitution.

#### E. CONCLUSION

For the reasons stated herein the Appellant respectfully requests this court remand this matter to the superior court for resentencing with an accurate offender score using only convictions which were prior convictions on the date of the original sentencing hearing (November 2000), and to provide credit for time served and enter such credit on the Judgment.

Respectfully Submitted this the 12th of January, 2012



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DECLARATION OF SERVICE

I, Rayne Wells, certify that I deposited today in the internal mail system of McNeil Island Corrections Center a properly stamped and addressed envelope directed to:

*Appellant's Supplemental Brief*

*Mr. Charles Silverman  
San Juan County prosecutor  
PO Box 760  
Friday Harbor WA 98250*

Containing the following document(s):

*Appellant's Supplemental Brief*

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Submitted this 12th day of January, 2012, at ~~McNeil Island~~ Airway Heights Corrections Center, ~~San Juan County, Washington~~ Washington.

By [Signature]  
(Signature)

[Signature]

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