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NO. 68138-9-I

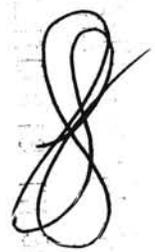
COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,
Respondent and Cross-Appellant,

v.

SASSAN MEHRABIAN,
Appellant and Cross-Respondent.



29

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

REPLY BRIEF OF CROSS-APPELLANT

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A. ARGUMENT

The trial court erred in failing to include one of Mehrabian's 1993 Theft in the First Degree convictions in his offender score. As argued in the Brief of Respondent and Cross-Appellant, section F, the plain language of RCW 9.94A.525(2)(b) requires inclusion of a prior Class B felony in a defendant's offender score unless the defendant has spent ten crime-free years in the community since "the last date of release from confinement . . . pursuant to a felony conviction." RCW 9.94A.525(2)(b) (emphasis added). Mehrabian's arguments to the contrary are unavailing.

First, Mehrabian defends the trial court's refusal to count his 1993 Theft in the First Degree conviction in his offender score by arguing that the legislature did not intend that a conviction should never wash out. This argument is beside the point. The starting point for discerning the legislature's intent in enacting a statute is its plain language. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Here, RCW 9.94A.525(2)(b) is unambiguous. It provides that a conviction is included in an offender score unless the defendant has spent ten crime-free years in the community since the last date of release from confinement. Mehrabian was last released from confinement pursuant to his 1993 conviction in

May 2003; thus, ten years had not elapsed and the conviction must be included in his offender score.

While Mehrabian is correct that RCW 9.94A.525(2)(b) does not specify that a crime can be “revived,” it also does not specify that, once a crime has “washed,” it can never be included in the offender score. Indeed, the term “wash” or “washout” does not appear in the statute at all. The statute should be read to give effect to its plain language.

Moreover, Mehrabian suggests that, under the State’s “interpretation” of the statute, an offense can never “wash out.” But Mehrabian’s own criminal history demonstrates that this is patently incorrect. Mehrabian was actually convicted of two counts of Theft in the First Degree in two separate cases in 1993. CP 168, 402. The State sought to include in his offender score only the conviction for which Mehrabian had spent time in custody in May 2003, effectively conceding that the other offense had washed. CP 168. This position is consistent with the plain language of the statute.

Second, Mehrabian misapprehends the State’s alternative argument that his September 17, 1993, conviction for Driving Without a Valid

Operator's License independently restarts the ten-year washout period. Specifically, Mehrabian argues that the State failed to prove that Mehrabian was confined pursuant to that conviction and, in any event, confinement under a misdemeanor conviction does not interrupt the washout period. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). This is correct but irrelevant, because it again ignores the plain language of RCW 9.94A.525(2)(b). That statute precludes washout unless a defendant has spent "ten consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(b) (emphasis added). Whether Mehrabian was confined or not is beside the point; he was convicted of "any crime," restarting the ten-year washout clock.

The language of RCW 9.94A.525(2)(b) is clear. It requires that Mehrabian's 1993 theft conviction be included in his offender score. This Court should conclude that the trial court erred in failing to do so. Accordingly, this Court should reverse the trial court's offender score calculation and remand for resentencing.

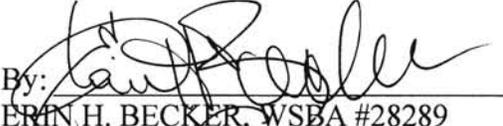
B. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's exclusion of Mehrabian's 1993 conviction for Theft in the First Degree from his offender score and remand for resentencing.

DATED this 19th day of December, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Lee Elliott, the attorney for the appellant – cross-respondent, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104, containing a copy of the Reply Brief of Cross-Appellant, in STATE V. SASSAN MEHRABIAN, Cause No. 68138-9-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame
Name
Done in Seattle, Washington

12/19/12
Date 12/19/12