

68075-7

68075-7

COA No. 68075-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DWIGHT BENSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Susan J. Craighead

2012 OCT 9 PM 4:35
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

SUPPLEMENTAL ASSIGNMENT OF ERROR
AND BRIEF IN SUPPORT THEREOF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUPPLEMENTAL ASSIGNMENT OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 2

MR. BENSON’S OFFENDER SCORE WAS
INCORRECTLY CALCULATED UNDER
THE DUI SCORING STATUTE. 2

a. The trial court’s offender scoring was legal error and may be
challenged for the first time on appeal. 2

b. Appealability. 3

c. Offender scoring for Felony DUI is limited to a statutorily
delineated class of convictions and a special set of “washout”
rules. 3

E. CONCLUSION 12

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Cross, 156 Wn. App. 568, 234 P.3d 288 (2010). 3

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 15

State v. Morales, --- P.3d ----, 2012 WL 1947882 (Wash.App. Div. 1, May 29, 2012) passim

State v. Wilson, 170 Wn.2d 682, 244 P.3d 950 (2010) 3

STATUTES AND COURT RULES

RCW 46.61.502 (3), 4). 5

RCW 9.94A.525(2) passim

RCW 9.94A.030(43) 5

RCW 46.61.5055 6

A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court miscalculated Mr. Benson's offender score under RCW 9.94A.525(2)(e) and State v. Morales, --- P.3d ----, 2012 WL 1947882 (Wash.App. Div. 1, May 29, 2012).

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court, at sentencing, miscalculate Mr. Benson's offender score by disregarding the offender scoring provisions of RCW 9.94A.525(2)(e), which limit the use of prior convictions for purposes of offender scoring and "washout" purposes in sentencing persons convicted of DUI?

2. May Mr. Benson challenge the sentencing court's legal error on appeal, where the offender scoring issue in this case involves an argument of incorrect application of the law?

3. Was defense counsel ineffective by agreeing to the offender score?

C. STATEMENT OF THE CASE

Dwight Benson was convicted of Felony DUI by a jury along with reckless driving and driving with a suspended license.

11/23/11RP at 530; CP 23-25. He was ordered to serve 60 months incarceration on the felony conviction based on an offender score of

“16,” to which score his trial counsel agreed. 12/9/11RP at 2, 9-10; 12/9/11RP at 3-26; CP 123, 132.

Mr. Benson appealed. CP 135. He filed his Appellant’s Opening Brief on May 29, 2012, raising various arguments. That same date, this Court decided State v. Morales, --- P.3d ----, 2012 WL 1947882 (Wash.App. Div. 1, May 29, 2012).

D. ARGUMENT

MR. BENSON’S OFFENDER SCORE WAS INCORRECTLY CALCULATED UNDER THE DUI SCORING STATUTE.

Mr. Benson’s convictions for crimes other than his 4 prior DUI convictions within 10 years could not properly be included as points in his offender score.

a. The trial court’s offender scoring was legal error and may be challenged for the first time on appeal. At sentencing, the trial court calculated Mr. Benson’s offender score on the Felony DUI conviction as “16,” based on the agreement of trial counsel, the 4 DUI convictions proved as part of the Felony DUI offense at trial, and on the prosecutor’s statement of Mr. Benson’s offender history. 12/9/11RP at 2, 9-10, 26; CP 129. Trial counsel appeared to also rely on the statement of Mr. Benson’s prior history as represented in the

Prosecutor's Case Summary and Request for Bail and/or Conditions of Release. CP 3-4.

b. Appealability. Mr. Jacob may appeal. A defendant may always challenge a miscalculated offender score for the first time on appeal where the alleged error is a failure to apply the correct sentencing law. State v. Wilson, 170 Wn.2d 682, 688–89, 244 P.3d 950 (2010) (offender scoring is a matter of statutory authority).

Further, to any extent that defense counsel misconstrued the correct law and therefore agreed to a score not calculated in accordance with RCW 9.94A.525, counsel violated Mr. Jacob's right to effective assistance under the Sixth Amendment, because non-deficient representation would have resulted in correct scoring. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); U.S. Const. amend. 6.

c. Offender scoring for Felony DUI is limited to a statutorily delineated class of convictions and a special set of "washout" rules.

The appellate court reviews a trial court's sentencing calculation *de novo*. State v. Cross, 156 Wn. App. 568, 587, 234 P.3d 288 (2010).

The present case is governed by RCW 9.94A.525(2) which, at subsections (d) and (e), provides rules for offender scoring that pertain

to sentencing on a conviction for Felony DUI. Those subsections state as follows, in pertinent part:

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if:

(i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or

(ii) the prior convictions would be considered “prior offenses within ten years” as defined in RCW 46.61.5055.

RCW 9.94A.525(2)(d), (e).

In the recent case of State v. Morales, this Court made clear that where a person has been convicted of Felony DUI, such conviction falls within the provisions of RCW 9.94A.525(2)(e). State v. Morales, --- P.3d ----, 2012 WL 1947882 (Wash.App. Div. 1, May 29, 2012, Slip Op. at p. 2). Under this subsection, which establishes offender

score calculation rules particular to the offense of felony driving while under the influence, a delineated set of prior convictions count as points in the defendant's score pursuant to the rules in the above statutory provisions. The Morales Court stated:

[S]ubsection (2)(e) also makes clear that the “[t]he prior convictions” that shall be included in the calculation of the offender score are limited to these: “felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses[.]”

State v. Morales, Slip Op. at p. 2. Pursuant to RCW 9.94A.030(43), "serious traffic offense" means “(a) Nonfelony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502), nonfelony actual physical control while under the influence of intoxicating liquor or any drug (RCW 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run unattended vehicle (RCW 46.52.020(5))[.]”

Only the prior convictions listed above could properly be included in Mr. Jacob's offender score pursuant to these provisions.

State v. Morales, Slip Op. at pp. 2-3; see also p. 5 (“[The] use of Morales's fourth degree assault conviction in his offender score is contrary to the provisions of subsection (2)(e)(i) [because] the classes

of 'prior convictions' that qualify for scoring for DUI related-felonies are limited, as set forth in the first part of section (2)(e)").

Accordingly, therefore, Mr. Jacob's multiple convictions for negligent driving, Driving While License Suspended, hit and run (attended), criminal trespass, assault, theft, and NVOL (no valid operator's license), could not properly be included as points in his offender score. See CP 3-4, CP 129.

The Morales Court next addressed the specific rules of offender scoring calculation using these convictions for sentencing on Felony DUI convictions, which rules appear in subsection (2)(e).

As an initial matter, Mr. Jacob's past convictions within the permitted category and which qualified as "prior offenses within ten years" as defined in RCW 46.61.5055 could properly be included in his score. Subsection (2)(e)(ii). Specifically, RCW 46.61.5055(14)(c) provides that "[w]ithin ten years" means that "the arrest for a prior offense occurred within ten years before . . . the arrest for the current offense." See Morales, Slip Op. at p. 3.

In Mr. Benson's case, these provisions would properly bring within his offender score for his current offense (committed April 2,

2011), assuming arrest dates within the prior ten years, the convictions for DUI from 2009, 2007 (two convictions), and 2006.

Next, the Court addressed the inclusion of other, older convictions within the class of scorable. First, the Court stated:

[T]he plain language of RCW 9.94A.525 indicates that arrests occurring more than 10 years before Morales's December 2009 arrest shall not be included under subsection (2)(e)(ii).

Morales, Slip Op. at p. 3. In Mr. Benson's case, this means that the remaining scorable convictions listed in the offender scoring in his judgment were not properly included in his score, at least not pursuant to RCW 9.94A.525, subsection (2)(e)(ii).

Then, the Court stated, the question became whether these older convictions could be part of the offender score under subsection (2)(e)(i). Morales, Slip Op. at p. 3. This Court stated as follows:

The classes of prior convictions that qualify for scoring are set forth in the first part of [(2)(e)(i)]. They include “serious traffic offenses” as well as two other classes of offenses. All of Morales's convictions from March 1990 through April 1992 are serious traffic offenses. The question is how many of these prior convictions were within five years of either “the last date of release from confinement (including full-time residential treatment) or entry of judgment of sentence.” [Where] there were more than five years between “the last date of release from confinement (including full-time residential treatment) . . . or entry of judgment and sentence[.]”

[t]his gap requires a washout of all of Morales's convictions from March 1990 through April 1992.

Morales, Slip Op. at pp. 3-4. Importantly also, only the specified class of prior convictions prevents *washout* under the five-year rule. As the Morales Court stated,

unlike subsection (2)(d) of RCW 9.94A.525, subsection (2)(e)(i) does not include a provision requiring that the defendant spend five years in the community “without committing any crime that subsequently results in a conviction.” Morales's assault conviction does not count for his offender score, nor does it interrupt the time between his 2001 DUI conviction and 1991 physical control conviction.

Morales, Slip Op. at p. 5. Mr. Benson contends that his offender score was not proved under RCW 9.94A.252(2)(e) and Morales.

The remedy for a miscalculated offender score is resentencing. State v. Wilson, supra, 170 Wn.2d at 691. Mr. Benson asks that his sentence be reversed and that the case be remanded for resentencing.

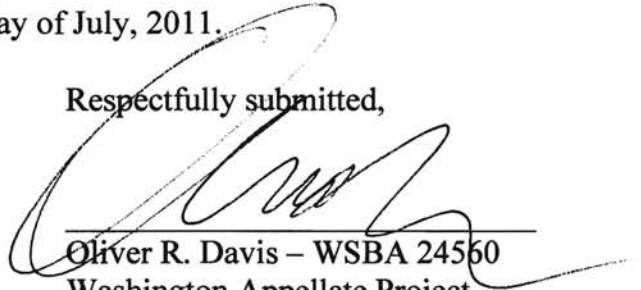
E. CONCLUSION

In addition to the arguments raised in his Appellant's Opening Brief, Mr. Benson's sentence must be reversed where the trial court erroneously calculated his offender score for the Felony DUI conviction, that was in excess of its statutory authority, and the

sentence for that conviction must be vacated and the case remanded for resentencing.

Dated this 3 day of July, 2011.

Respectfully submitted,



Oliver R. Davis – WSBA 24560
Washington Appellate Project
Attorney for Appellant

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


STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68075-7-I
v.)	
)	
DWIGHT BENSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF JULY, 2012, I CAUSED THE ORIGINAL **SUPPLEMENTAL ASSIGNMENT OF ERROR AND BRIEF IN SUPPORT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DONNA WISE, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
--	-------------------	-------------------------------------

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF JULY, 2012.

X _____ 

2012 JUL -5 PM 4:35
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710