69906-7

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No. 69906-7-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RODNEY LOUIS GARROTT,

Appellant.

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

The Honorable Kimberly D. Prochnau

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated Mr. Garrott's right to due process and fundamental fairness in counting subsequent convictions in his offender score on resentencing.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Due Process Clauses of the United States and Washington Constitutions require the process at sentencing to abide by prevailing notions of fundamental fairness. Here, due to the failure of the State to timely move to resentence Mr. Garrott, he was subjected to a higher offender score once he moved to be resentenced several years later. Did the State's failure to act in a timely manner violate Mr. Garrott's right to fundamental fairness?

C. STATEMENT OF THE CASE

On April 23, 2004, Rodney Garrott was found guilty in King County Superior Court following a jury trial, of one count of residential burglary and one count of first degree trafficking in stolen property. Mr. Garrott appealed those convictions and this Court reversed the convictions based upon a finding of the ineffective assistance of trial counsel, and remanded for a new trial. *State v. Garrott*, 2005 WL 1302983 (No. 54256-7-I, May 23, 2005). Mr. Garrott subsequently

pleaded guilty to a single count of residential burglary, and on February 3, 2006, he was sentenced on that count.

While Mr. Garrott's appeal was pending, he entered a guilty plea to two separate cause numbers arising from two unrelated incidents: one count of residential burglary and one count of second degree possession of stolen property. CP 5-14, 299-308. Mr. Garrott was sentenced on those matters on May 28, 2004.[1] CP 23-30, 316-22. The State did not move to have Mr. Garrott resentenced on these offenses following his sentencing in 2006 on the 2004 convictions which were reversed.

On August 29, 2011, Mr. Garrott filed a Personal Restraint Petition (PRP) directly in the Supreme Court, moving to be resentenced on the May 2004 counts based upon the reversal of the April 2004 counts and subsequent resentencing in 2006.[2] In the interim between May 2004 and August 2011, Mr. Garrott had suffered additional felony convictions. CP 136-61. In its response to Mr. Garrott's PRP, the State conceded Mr. Garrott was entitled to be resentenced on the May

[1] Resentencing on these two convictions is the subject of this appeal.

[2] Mr. Garrott initially filed a Motion to Modify or Correct Sentence Pursuant to CrR 7.8. CP 41-84. The trial court transferred the motion to this Court pursuant to CrR 7.8(c)(2). CP 40.

2004 convictions, but contended that the subsequent convictions had to be counted in recalculating Mr. Garrott's presumptive sentence. CP 91-92. The Supreme Court granted Mr. Garrott's PRP, and remanded for resentencing. CP 398.

At resentencing Mr. Garrott moved to represent himself, which, following a colloquy, was granted. CP 166, 399; RP 19-31. Mr. Garrott objected to the addition of the subsequent convictions to his offender score as "prior convictions," contending it was the State's failure to move to have him resentenced in 2006 that caused the subsequent convictions to be counted in calculating his offender score in 2013. RP 61-64, 65-67. The trial court disagreed and resentenced Mr. Garrott, counting the subsequent convictions in his offender score. CP 192, 425; RP 67-68.

Mr. Garrott appeals. CP 291, 431.

D. ARGUMENT

THE DILATORY BEHAVIOR OF THE STATE VIOLATED MR. GARROTT'S RIGHT TO DUE PROCESS AND FUNDAMENTAL FAIRNESS

1. Mr. Garrott possessed the right to due process and fundamental fairness at sentencing. Article I, section 3 of the Washington Constitution and the Fifth Amendment of the United States Constitution provide, "No person shall be deprived of life, liberty, or property, without due process of law." The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *State v. Foster,* 91 Wn.2d 466, 473, 589 P.2d 789 (1979). The due process inquiry asks whether the complained of treatment is so arbitrary or unfair that it denies due process. *State v. Handley,* 115 Wn.2d 275, 290 n. 4, 796 P.2d 1266 (1990).[3]

"Although 'due process' cannot be precisely defined, the phrase requires 'fundamental fairness.'" *In re Dependency of K.N.J.,* 171

[3] While under RCW 9.94A.585(1), a defendant cannot appeal the length of a standard range criminal sentence, this prohibition does not prevent Mr. Garrott from challenging "the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision." *State v. Murawski,* 142 Wn.App. 278, 283, 173 P.3d 994 (2007), *review denied*, 164 Wn.2d 1005 (2008), *quoting State v. Williams,* 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). In addition, constitutional challenges to a sentence calculation are not subject to the general prohibition against appealing standard range sentences. *State v. Herzog*, 112 Wn.2d 419, 422-23, 771 P.2d 739 (1989).

Wn.2d 568, 574, 257 P.3d 522 (2011), *quoting In re Personal Restraint Petition of Blackburn,* 168 Wn.2d 881, 885, 232 P.3d 1091 (2010). A government deprivation of liberty must abide by "prevailing notions of fundamental fairness." *State v. Lord,* 117 Wn.2d 829, 867, 822 P.2d 177 (1991).

Under RCW 9.94A.589(1), the defendant's offender score is determined by "using all other current and prior convictions as if they were prior convictions[.]" 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).

On remand following a successful appeal, there is no prohibition against using the defendant's subsequent convictions in recalculating the standard range. *State v. Collicott,* 118 Wn.2d 649, 664-65, 827 P,.2d 263 (1992). In *Collicott*, the defendant pleaded guilty to several offenses in 1985, then appealed the sentences imposed, arguing the crimes constituted the same criminal conduct. In 1986, while the appeal was pending, the defendant pleaded guilty to another unrelated offense. *Id.* at 652-53. The Supreme Court reversed the 1985 sentences and held that on remand, the sentencing court could use the

1986 conviction as a prior conviction in recalculating the standard range. *Id.* at 664-65.

Collicott differs markedly from the case at bar. Here, the only reason the subsequent convictions could have been counted in calculating Mr. Garrott's presumptive sentence in 2013 was because of the State's failure to move for resentencing after the April 2004 convictions were reversed. All of Mr. Garrott's convictions occurred in King County, so the King County Prosecutor's Office was aware that the 2004 convictions had been reversed, but the Prosecutor's Office made no attempt to have Mr. Garrott resentenced on the May 2004 convictions. Further, the State acknowledged its error in its response to Mr. Garrott's PRP when it conceded the May 2004 convictions had to be remanded for resentencing. Had the State moved timely for resentencing in 2006, Mr. Garrott's offender score would not have been as high as it was when he was subsequently resentenced in 2013.

It is patently unfair, and violative of due process and fundamental fairness, for Mr. Garrott to suffer a greater sentence based upon the failure of the prosecutors. As a result, Mr. Garrott's right to be sentenced in a fundamentally fair manner was violated, thus his right to due process was violated. The rule in *Collicott* should not apply and

the subsequent convictions should not have been counted in recalculating Mr. Garrott's presumptive standard range.

2. The decision in *Collicott* does not compel the conclusion that the intervening convictions were required to be included in Mr. Garrott's offender score. In response to Mr. Garrott's argument that the intervening convictions should not count, the State has repeatedly claimed that *Collicott* requires they be included. CP 319-20. *Collicott* does not compel this conclusion, and to the extent this Court deems it does, the decision in *Collicott* should be reexamined.

Initially, the portion of *Collicott* that speaks to the scoring issue was *dicta* and should not be followed. The focus of the lead opinion written by Justice Smith, was whether the trial court's decision to impose an exceptional sentence was justified in light of the trial court's incorrect analysis of the same criminal conduct test. 118 Wn.2d at 667. This "lead" opinion was only joined by three other justices. The four justices would have reversed the imposition of the exceptional sentence, finding insufficient evidence in the record to support it. *Id.* at 661-63. The unanimous decision of the Court was to overrule its prior decision and adopt a different rule for determining whether offenses constituted the same criminal conduct. *Id.* at 667, 679-80. Thus,

Collicott stands only for the proposition that the correct test for determining whether offenses are the same criminal conduct is that announced in *State v. Dunaway,* 109 Wn.2d 207, 215, 743 P.2d 160 (1987). *Id.* at 669-70. The remainder of the decision, particularly that portion purporting to determine the defendant's offender score on remand, is dicta with no precedential value. *See Kailin v. Clallam County*, 152 Wn.App. 974, 985-86, 220 P.3d 222 (2009) (internal quotation marks omitted) (where there is "'no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.'"), *quoting W.R. Grace & Co. v. Department of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999).[4]

This Court should instead apply the test adopted by the Supreme Court in *State v. Whitaker*, 112 Wn.2d 341, 771 P.2d 332 (1989), which dealt with a similar issue. In 1981, Mr. Whitaker had been given probation and a deferred sentence for a negligent homicide conviction.

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[4] This rule was noted by the five justice concurrence/majority opinion:

> My disagreement with the majority opinion here is that it goes beyond what is necessary to resolve this case. I refer specifically to the discussions of collateral estoppel, the "clearly too lenient" standard, and the "zone of privacy" factor.
>
> *Whitaker,* 118 Wn.2d at 669-70 (Durham, J., concurring).

In 1986, the court revoked his probation and imposed the sentence originally deferred in 1981. In calculating his offender score, the Court included a 1986 reckless driving conviction as a prior conviction because it existed prior to the revocation hearing. Mr. Whitaker appealed the inclusion of this offense. The Supreme Court decided it was error to include the 1986 conviction as a prior offense, because to "hold otherwise would be illogical." *Id.* at 346. The Court held that when a trial court revokes probation for a pre-Sentencing Reform Act (SRA) offense and then calculates the offender score under the SRA guidelines, the date of sentencing relates back to the date of the original proceeding. *Id.* at 346-47.

Using *Whitaker* as a guide here, the trial court erred when it resentenced Mr. Garrott by counting the intervening convictions in his offender score when he was resentenced in 2013. When the April 2004 convictions were reversed, Mr. Garrott should have been resentenced. Because the State failed to move to have him resentenced in a timely manner, his intervening convictions were incorrectly treated as prior convictions. As noted in *Whitaker*, this produced an illogical result. The sentencing date for the May 2004 convictions on resentencing should have related relate back to May 2004 instead of 2013.

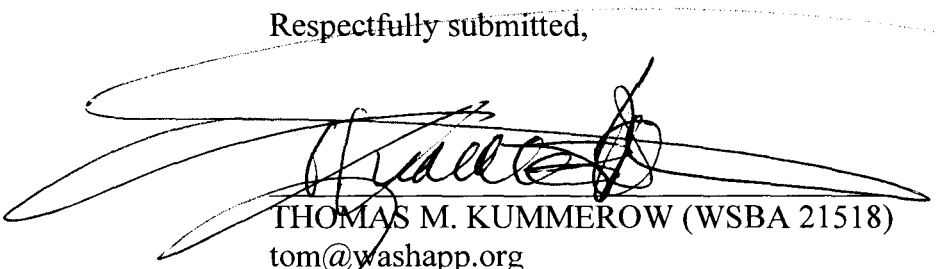
Mr. Garrott's sentence in this matter must be reversed and he must be resentenced without the use of the subsequent convictions that occurred between 2004 and 2013.

E. CONCLUSION

Mr. Garrott respectfully asks this Court to reverse his sentence and remand for a sentence without the subsequent convictions factored into the calculation of his offender score.

DATED this 28th day of August 2013.

Respectfully submitted,



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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69906-7-I
v.	)	
	)	
RODNEY GARROTT,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** 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] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] RODNEY GARROTT 855296 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF AUGUST, 2013.

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