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NO. 71033-8-I

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

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COURT OF APPEALS
CLERK OF COURT

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND A. ELLIOTT,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court error in the calculation of the defendant's offender score?

2. Can a defendant waive his right to challenge a miscalculation of an offender score if the miscalculation does not lead to punishment in excess of that which the Legislature has established?

II. STATEMENT OF THE CASE

The defendant was convicted by jury trial of one count of second degree burglary on September 18, 2013. CP 36. At sentencing the defendant's offender score was calculated as 13. CP 16. That score was based on the defendant's prior convictions for 9 adult felonies as follows: 3 counts: VUCSA – Possession (1/13/05); 1 count: second degree burglary (1/13/05); 1 count: second degree possession of stolen property 5/6/05; 1 count: third degree rape of a child 9/1/05; 1 count: VUCSA – Possession 9/8/05; 2 counts: second degree burglary 6/14/07. CP 15. The defendant acknowledged his prior convictions and agreed with the erroneous calculation of his offender score as being 13. RP 10/4/13 4.

III. ARGUMENT

The state concedes that applying the SRA scoring rules found in RCW 9.94A.525, the defendant's offender score was miscalculated at the time of sentencing. Based on the information before the court at the time of sentencing, the defendant's score should have been calculated as 12, not 13; RCW 9.94A.525 (1),(5)(a),(7), & (16). However, the state does not agree that the sentence is therefore unlawful or, therefore, requiring remand for resentencing.

A. CAN A DEFENDANT WAIVE HIS RIGHT TO CHALLENGE A MATHEMATICAL ERROR IN CALCULATING HIS OFFENDER'S SCORE IF THE RESULTING SCORE DOES NOT RESULT IN A "SENTENCE IN EXCESS OF LAWFUL AUTHORITY"?

The court has long held that a defendant could not waive his right to challenge a miscalculation of an offender score based on the reasoning that "a defendant cannot agree to punishment in excess of that which the Legislature has established." In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618, 625 (2002). For a sentence to be unlawful, the sentencing court must have exceeded its statutory authority. "For a judgment to exceed the court's statutory authority, we require more than an error that "invite[s] the court to exceed its authority"; the sentencing court must actually pass down a sentence not authorized under the SRA." In re Toledo-

Sotelo, 176 Wn.2d 759, 767, 297 P.3d 51, 55 (2013). However, in the case at bar, the defendant did not agree to a punishment in excess of that which the Legislature has established. In the case at bar, the court miscounted the defendant's score as a 13 when the correct calculation would have been 12. Despite the mathematical error, the defendant's standard range remains 51-68 months. The defendant affirmatively agreed his offender score was a 13. RP 10/4/13 4. There is no difference in the standard range sentence for an offender with a score of 12 from the range for an offender with a score of 13. The sentence issued is a legal sentence.

The defendant relies on Goodwin to support his claim that his sentencing was unlawful and remand is required. However, Goodwin implies that a lawful sentence would not carry the same remand requirement.

[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. This is true even where the sentence imposed is actually within the correct standard range, if the trial court had indicated its intent to sentence at the low end of the range, and the low end of the correct range is lower than the low end of the range determined by using the incorrect offender score.

In re Goodwin, 146 Wn.2d at 868.

The Supreme Court has recently held that even when a sentencing court had miscalculated the defendant's offender score and applied the wrong seriousness level, but somehow had arrived at the correct standard sentencing range, the sentence was a lawful sentence and remand was not necessary. "For an erroneous offender score to poison an otherwise accurate and statutorily authorized sentencing range would not advance any policy purpose articulated in RCW 9.94A.010." In re Toledo-Sotelo, 176 Wn.2d at 768.

The defendant raises the issue that he might have received a different sentence from the court had the court not miscalculated the defendant's offender score. Even though the court did refer to the defendant's offender score when indicating what it felt the a reasonable sentence would be, the defendant has not established that the court would not feel the same if the defendant had an offender score of 12, which is still substantially higher than the high end of the range, a 9. Furthermore, the defendant affirmatively agreed his offender score was 13. Since this agreement was not an agreement to a punishment in excess of what the Legislature has established; the defendant has waived his right to object to the miscalculation on appeal.

At the sentencing hearing, the prosecutor asked the court to impose a sentence at the high end of the range, 68 months, pointing out that the defendant was well above the high end of the scoring range and that much of his history was based upon prior burglaries. RP 10/4/13 2. At the hearing, the defendant affirmatively acknowledged his score was 13 and asked the court to impose a mid-range sentence of 60 months. RP 10/4/13 4-5. The court imposed a sentence within the standard range of 63 months. RP 10/4/13 8.

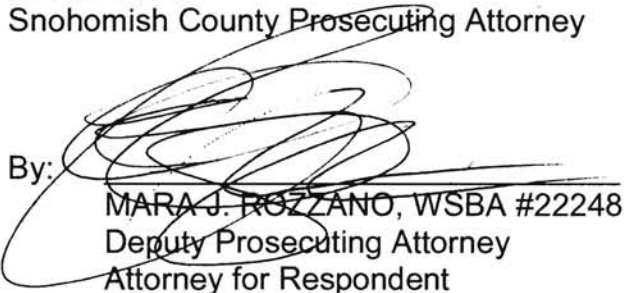
IV. CONCLUSION

For the reasons stated above, the sentence should be affirmed.

Respectfully submitted on July 9, 2014.

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By:



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