

71033-8

71033-8

NO. 71033-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND ELLIOTT,

Appellant.

2014 APR 28 PM 4:00
COURT OF APPEALS
DIVISION ONE
CLERK

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

The Honorable Eric Lucas, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE MISCALCULATED OFFENDER SCORE REQUIRES REMAND FOR RESENTENCING.	1
B. <u>CONCLUSION</u>	3

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Pers. Restraint of Goodwin</u> 146 Wn.2d 861, 50 P.3d 618 (2002).....	2
<u>In re Pers. Restraint of Toledo-Sotelo</u> 176 Wn.2d 759, 297 P.3d 51 (2013).....	1, 2
<u>State v. Crawford</u> 164 Wn. App. 617, 267 P.3d 365 (2011).....	1
<u>State v. Tili</u> 148 Wn. 2d 350, 60 P.3d 1192 (2003).....	2, 3

RULES, STATUTES AND OTHER AUTHORITIES

RCW 10.73.090	1
---------------------	---

A. ARGUMENT IN REPLY

THE MISCALCULATED OFFENDER SCORE REQUIRES
REMAND FOR RESENTENCING.

The court sentenced Elliott based on an offender score of 13. CP 16. The State concedes Elliott's correct offender score is 12. Brief of Respondent at 2. Yet the State argues resentencing is not required and relies on In re Pers. Restraint of Toledo-Sotelo, 176 Wn.2d 759, 761, 297 P.3d 51 (2013). But Toledo-Sotelo does not mandate the outcome here for several reasons.

First, the procedural posture of this case is entirely different. Toledo-Sotelo did not appeal his sentence. Id. at 763. He filed an untimely personal restraint petition more than two years after his sentencing. Id. Thus, the question before the court was whether the judgment and sentence was invalid on its face, which would permit him to avoid the one-year time bar of RCW 10.73.090. Toledo-Sotelo, 176 Wn.2d at 767.

By contrast, Elliott comes before this Court on direct appeal. Facial invalidity is not required. The State has conceded error. All that is required is that the error not be waived. See State v. Crawford, 164 Wn. App. 617, 621, 267 P.3d 365 (2011) (on direct appeal from motion to correct judgment and sentence, issue is whether court abused its discretion

by basing its decision on an error of law). Because this is a legal calculation in the offender score, it may not be waived. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). This court's review of an offender score on direct appeal is de novo. State v. Tili, 148 Wn. 2d 350, 358, 60 P.3d 1192 (2003).

Second, Toledo-Sotelo's case is different because the court's mistake was to believe his offender score was lower than it actually was. Toledo-Sotelo, 176 Wn.2d at 768. This case is more like Goodwin, where the error resulted in a sentence based on an offender score that was too high. 146 Wn.2d at 877-78.

Finally, the impact of the erroneously higher score is different. In Toledo-Sotelo, the court calculated a standard range of 72 to 96 months from an offender score of 3 and a seriousness level of XII. 176 Wn.2d at 769. The court imposed a sentence in the middle of the range, which was also the correct range for the true score of 4 and seriousness level of X. Id. at 768. If the court had known the score was actually even higher, there is no reason to believe it would have imposed a lower sentence.

By contrast, here, the court was faced with an offender score that exceeded the maximum end of the scale. The court was likely to consider that fact in determining where, within the standard range, to impose sentence. A correct understanding that Elliott's score exceeded the

maximum end of the scale by only three points rather than by four may have resulted in a lower sentence within the same range.

On direct appeal, an incorrect offender score requires remand “unless the record makes clear that the trial court would impose the same sentence.” Tili, 148 Wn. 2d at 358. On this record, it is not clear whether the court would have imposed the same sentence, had it known Elliott’s true offender score was 12, not 13. Therefore, remand is required. Id.

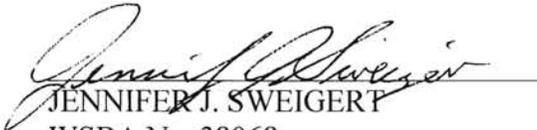
B. CONCLUSION

For the foregoing reasons, and for the reasons stated in the opening Brief of Appellant, Elliott’s sentence should be vacated and the case remanded for resentencing.

DATED this 28th day of July, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 71033-8-1
)	
RAYMOND ELLIOT,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] RAYMOND ELLIOT
4822 S 252nd PL, #210
KENT, WA 98052

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JULY 2014.

X *Patrick Mayovsky*