

NO. 46124-2-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ILLYA N. WATKINS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Anne Hirsch, Judge
Cause No. 13-1-01612-9

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ISSUE PRESENTED

Whether, in light of State v. Rodriguez, ___ Wn. App. ___, 335 P.3d 448 (2014), a concurrent gross misdemeanor conviction for domestic violence counts in the offender score as a prior conviction for a “repetitive domestic violence offense” under the Sentencing Reform Act?

B. STATEMENT OF THE CASE

This court ordered supplemental briefing on whether State v. Rodriguez, ___ P.3d ___, 335 P.3d 448 (2014), affects this appeal. In Rodriguez, the court held that the SRA treats a concurrent gross misdemeanor conviction for a domestic violence offense as a “repetitive domestic violence” offense for purposes of determining a defendant’s offender score, even where the gross misdemeanor and the current felony DV offense occurred at the same time and place and were adjudicated at the same time and were sentenced at the same time. Id. at 453-54.

C. ARGUMENT

A CONCURRENT GROSS MISDEMEANOR
CONVICTION FOR A DOMESTIC VIOLENCE
OFFENSE DOES NOT COUNT TOWARD THE
OFFENDER SCORE AS A PRIOR CONVICTION
FOR A “REPETITIVE DOMESTIC VIOLENCE
OFFENSE” UNDER THE SENTENCING REFORM
ACT.

Only a “prior conviction for a repetitive domestic

violence offense” is included in an offender score under RCW 9.94A.525(21)(c). In Rodriguez, the court erred in concluding that her concurrent gross misdemeanor conviction—the conviction “arising from the same incident as the felony DV-VNCO for which her offender score was being calculated”—counts as a “prior conviction” under RCW 9.94A.525(1) or RCW 9.94A.589(1)(a). Rodriguez, 335 P.3d at 452-53. The court’s reasoning is unavailing, for it construes “prior conviction” under RCW 9.94A.525(1) in isolation to include any “conviction which exists before the date of sentencing for the offense for which the offender score is being computed.” There is no limitation on this logic, given that every conviction precedes sentencing,¹ a “prior conviction” would thus include other current offenses, all of which would have necessarily occurred before sentencing.

The court in Rodriguez ignored any meaningful distinction between “a prior conviction” and other “current” offenses addressed in RCW 9.94A.525(1): “Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.589.” Rodriguez’s concurrent gross misdemeanor conviction for domestic

¹ “‘Conviction’ means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.” RCW 9.94A.030(9).

violence was entered on the same date as her felony domestic violence offense and later sentenced on the same date as her felony conviction.² Rodriguez, 335 P.3d at 450. It is thus a current offense.³

In support of its analysis of RCW 9.94A.525(1), the court focused on the particular language of RCW 9.94A.589(1)(a), which states “the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for purposes of the offender score.” Rodriguez, 335 P.3d at 453. But the entirety of the language of RCW 9.94A.589(1)(a) precludes the conclusion that Rodriguez’s concurrent gross misdemeanor should have been treated “as if” it were a prior conviction for scoring purposes, since the provision that controls the scoring in this regard applies only to felonies because the statute uses the clause “the sentence range for each current offense.” RCW 9.94A.589(1)(a). (emphasis added). Such language, of course, presumes each current offense has a sentencing range to be determined by an offender score, and only felonies—not misdemeanors— have sentencing ranges determined by an offender score. RCW 9.94A.525. City of Bremerton v. Bradshaw, 121 Wn. App. 410, 413, 88 P.3d 438 (2004) (SRA does not apply to sentencing of misdemeanors).

² Watkins pleaded guilty to his felony DV offense and concurrent gross misdemeanor on the same date. [CP 26-34, 37-47].

³ “Current” means “presently elapsing” an “occurring in or belonging to the present time.” Webster’s Third New Int’l Dictionary 1924 (1993).

RCW 9.94A.589(1)(a) thus applies only when both current offenses have a sentencing range, as directed by the legislature's use of the word "each." The Rodriguez court's reading of the statute gives slight to this and is thus flawed, for "a court must not interpret a statute in any way that renders any portion meaningless or superfluous." Jongeward v. BNSF R. Co., 174 Wn.2d 586, 601, 278 P.3d 157 (2012).

The panel in Rodriguez incorrectly reasoned that Rodriguez's concurrent gross misdemeanor DV-VNCO must be treated as a prior conviction because "it is not the same criminal conduct as the felony DV-VNCO," Rodriguez, 335 P.3d at 453, further contending that "[t]he only time a current conviction is not counted as though it were a prior conviction under RCW 9.94A.589(1)(a) is if it is an 'other current offense' that is the same criminal conduct as the offense for which the offender score is being calculated." Id. But as no offender score attaches to misdemeanor convictions, they can never be part of the "same criminal conduct" with a felony offense, with the result that the court's reasoning is misplaced.

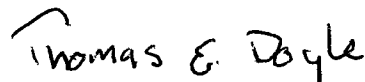
Only "repetitive" domestic violence offenses are subject to being included in the offender score, RCW 9.94A.525(21)(c), which includes any "[d]omestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense." RCW 9.94A.030(41)(a)(ii).

Rodriguez rejected the claim that the statute requires a repetitive pattern of domestic violence because “RCW 9.94A.030(41) does not qualify the definition of ‘repetitive domestic violence offense’ with anything other than the type of offense.” Rodriguez, 335 P.3d at 454. But such a reading cavalierly erases “repetitive” from the statute and in the process violates the tenet that every word in a statute must be given significance. State v. Roggenkamp, 153 Wn.2d 624, 624, 106 P.3d 196 (2005).

D. CONCLUSION

Based on the above, Watkins respectfully submits that the Rodriguez court simply got it wrong and that his concurrent conviction for gross misdemeanor assault in the fourth degree DV should not be included as a point in his offender score.

DATED this 19th day of December 2014.



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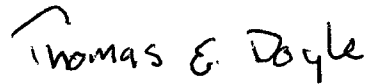
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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THOMAS E. DOYLE
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