

No. 46124-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ILLYA N. WATKINS,

Appellant.

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

The Honorable Anne Hirsch, Judge
Cause No. 13-1-01612-9

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Whether the decision of the Court of Appeals in State v. Rodriguez, ___ Wn. App. ___, 335 P.3d 448 (2014), affects the issues in this pending appeal.

B. STATEMENT OF THE CASE.

The parties have filed briefs in this matter. On December 10, 2014, Commissioner Bearse issued an order calling for supplemental briefing to address the impact of State v. Rodriguez, ___ Wn. App. ___, 335 P.3d 448 (2014), on the issues before the court in this appeal.

C. ARGUMENT.

The result in State v. Rodriguez is directly applicable to the this case.

Watkins claims that his offender score was miscalculated because the court, in calculating the offender score for his felony conviction for first degree theft, domestic violence, counted as one point a current conviction for fourth degree assault, domestic violence. The latter charge is a gross misdemeanor. CP 37, 39. Watkins argues that because it is not a prior conviction and not a felony, it should not count as a point in his offender score for the felony. Watkins entered pleas of guilty to these two charges on

March 14, 2014, the same day the sentence was imposed. CP 26, 37.

In Rodriguez, the situation was the same, with two exceptions. Rodriguez entered guilty pleas one week before sentencing, whereas Watkins pled and was sentenced on the same day. Rodriguez pled guilty to one count of felony violation of a no contact order, domestic violence, and one count of gross misdemeanor DV-VNCO. Rodriguez, 335 P.3d at 450. Watkins pled guilty to one count of first degree theft, domestic violence and one count of fourth degree assault domestic violence. CP 33. For purposes of this appeal, these differences are immaterial, as discussed below.

The court in Rodriguez analyzed the sentencing structure as follows. RCW 9.94A.525 provides that the offender score is the sum of the points which accrue as specified in that statute. RCW 9.94A.525(2)-(22) defines what constitutes a point in a variety of possible situations. The statute defines "prior conviction" as:

A prior conviction is a conviction which exists before the date of the sentencing for the offense for which the offender score is being computed. 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.

RCW 9.94A.525(1); Rodriguez, 335 P.3d at 453.

Turning to RCW 9.94A.589(1)(a), that statute provides:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions.

There follows an exception for counting two or more offenses as the same criminal conduct. Subsections (b) and (c) deal with situations not present in either Rodriguez or the present case. Rodriguez, 335 P.3d at 453. The court in Rodriguez noted that the defendant's convictions occurred a week before sentencing, and thus existed prior to the sentencing, but found that even if that were not the case, RCW 9.94A.589(1)(a) makes other current convictions the same as prior convictions for purposes of calculating the offender score. Id. Even though Watkins' convictions both occurred at the same hearing as the sentencing, logically speaking all convictions have to exist prior to sentencing. There is no requirement that any particular amount of time elapse between the conviction and sentencing for the conviction to be a prior.

However, that distinction is as immaterial in Watkins' case as it was in Rodriguez. The court then went on to examine RCW 9.94A.525(21)(c), which says:

If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7 through (20) of this section; however, count points as follows:

.....
(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

Rodriguez, 335 P.3d at 454.

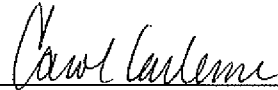
RCW 9.94A.030(41) defines "repetitive domestic violence offense" by listing several offenses, including "domestic violence assault that is not a felony offense under RCW 9A.36.041." RCW 9.94A.030(41)(a)(i); Rodriguez, 335 P.3d at 453-54.

The court in Rodriguez concluded that, reading the statutes together, a current conviction for a domestic violence gross misdemeanor counts as one point toward the offender score of the felony domestic violence offense being sentenced. Id. at 454. Because Watkins' situation is nearly identical, the same result should apply.

D. CONCLUSION.

The State respectfully asks this court to find that Rodriguez controls and that Watkins' current conviction for domestic violence fourth degree assault counts as one point toward his offender score for first degree theft, domestic violence.

Respectfully submitted this 12th day of December, 2014.



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CERTIFICATE OF SERVICE

I certify that I served a copy of Supplemental Brief of Respondent on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 1st day of December, 2014, at Olympia, Washington.



Chong McAfee

THURSTON COUNTY PROSECUTOR

December 12, 2014 - 2:22 PM

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