No. 98736-0
COA No. 79653-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN ROBERT BRYSON

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Robert Bryson asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Kevin Robert Bryson*, No. 79653-4-I (June 8, 2020). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

Prior convictions do not count in a defendant's offender score where the defendant is crime-free for a statutory period of time. The State bears the burden of proving a defendant's prior convictions including whether prior convictions do not wash out.

Mr. Bryson had two Class B prior convictions and one Class C prior conviction that on the face of the Judgment and Sentence washed out, thus not counting in his offender score. The State failed to produce any evidence the prior convictions did not wash out. The trial court erroneously imposed a sentence which included the prior convictions in Mr. Bryson's offender score. Is an issue of substantial public interest

involved requiring reversal of Mr. Bryson's sentence and remand for resentencing required based on the trial court's imposition of an erroneous sentence?

D. STATEMENT OF THE CASE

An on-going dispute with his estranged wife resulted in Kevin Bryson suffering convictions for three counts of residential burglary, a count of felony harassment, a count of felony stalking and 11 counts of misdemeanor violations of a court order. CP 90-113. At sentencing, the State alleged Mr. Bryson had three prior felony convictions from 2002: two prior convictions for second degree assault, Class B felonies, and a prior conviction for third degree rape which was a Class C felony. CP 114. Mr. Bryson objected to the inclusion of these prior convictions on the grounds they had washed out:

> MR. ROTH: I'm done for now. Oh, one last thing. I'm sorry. I know the prosecutor said this doesn't make any difference, but in terms of the criminal history and the three felonies that were listed, for the record, I'm objecting to that. Those charges are -- are old, and I just want my objection noted for the record.
>
> MS. SEBENS: Can I clarify whether counsel is objecting to them scoring? Arguing that they wash?
>
> MR. ROTH: I believe -- (Simultaneous talking.)
>
> MR. ROTH: -- they should not score at this time.

> THE COURT: Why is that?
>
> MR. ROTH: Because of the age.
>
> THE COURT: Well, they'd have to wash out to not be considered.

3/6/2019pmRP 12.[1] In response, the State failed to produce any evidence in the record which established Mr. Bryson's prior felony convictions did not wash out. Nevertheless, the court imposed the sentence utilizing the washed out prior convictions. CP 124-25, 127.

The Court of Appeals ruled there was no evidence the trial court included the washed out convictions in the offender score because it found Mr. Bryson's offender score was "9 or more." Decision at 4-6.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

The trial court imposed an erroneous sentence when it included washed out prior convictions in Mr. Bryson's offender score.

A defendant's offender score is calculated by examining the defendant's criminal history as evidenced by his prior convictions. RCW 9.94A.030(11); RCW 9.94A.525. "In determining the proper offender score, the court 'may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved

[1] The three prior convictions were sentenced on the same date, raising an inference they constituted the "same criminal conduct." RCW 9.94A.525(5)(i).

in a trial or at the time of sentencing.'" *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012), *quoting* RCW 9.94A.530(2). "[T]he State bears the burden to prove the existence of prior convictions by a preponderance of the evidence." *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). "This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing 'some minimal indicium of reliability *beyond mere allegation.*'" *Id*. *quoting State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999).

Prior convictions are not counted if, through crime-free time spent in the community, they have "washed out." RCW 9.94A.525 (2)(b), (c); *State v. Zamudio*, 192 Wn.App. 503, 507, 368 P.3d 222 (2016). Class B felonies wash out after the defendant spends 10 consecutive years in the community without any subsequent convictions. RCW 9.94A.525(2)(b). Class C felonies wash out after five years. RCW 9.94A.525(2)(c).

Mr. Bryson objected to the inclusion of his prior felony convictions in his offender score. The State failed to produce any evidence the prior convictions did not wash out. The trial court

subsequently imposed an erroneous sentence when it included Mr. Bryson's prior washed out convictions.

A court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). An error in the calculation of the offender score can be raised for the first time on appeal. *State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). The calculation of the defendant's offender score is reviewed *de novo*. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014).

The defendant is not obligated to present evidence of his criminal history. *Hunley*, 175 Wn.2d at 910. The State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *Id.* at 909-10. This includes the burden to prove that prior convictions have not washed out for the purpose of calculating a defendant's offender score. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876-78, 123 P.3d 456 (2005). "Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove the existence of a prior conviction." *Hunley*, 175 Wn.2d at 910.

The State fails to meet the preponderance standard when it orally summarizes the defendant's prior convictions and does not

introduce any other evidence. *Id.* at 911-12. This lack of evidence, if it results in the convictions being counted toward the defendant's offender score, falls "below even the minimum requirements of due process." *Ford,* 137 Wn.2d at 481. This is because "'a prosecutor's assertions are neither fact nor evidence, but merely argument.'" *Hunley,* 175 Wn.2d at 912, *quoting Ford,* 137 Wn.2d at 483 n.3.

The State contended Mr. Bryson had three prior felony convictions, which on their face washed out. When challenged, the State provided no further proof to show the convictions did not wash out. The State bore the burden of proving the validity of these prior convictions, yet failed to carry that burden. Since the prior convictions washed out, it was error to include them in Mr. Bryson's offender score and impose a sentence based upon that offender score.

The Court of Appeals dodged the issue by finding that since Mr. Bryson's offender score was "9 or more," than there was no evidence the washed out convictions were included in the offender score. Decision at 4-6. But this holding ignores the rule that under the SRA, the sentencing court is required to properly calculate the offender score before imposing its sentence. *State v. Parker,* 132 Wn.2d 182, 189, 937

P.2d 575 (1997). By simply concluding that the offender score is "9 or more," the sentencing court and the Court of Appeals ignored this rule.

This Court should grant review to reinforce this rule that, even where the offender score is "9 or more," the court still has to correctly calculate the offender score. This Court should ten remand Mr. Bryson's matter to the trial court for resentencing.

F. CONCLUSION

Mr. Bryson asks this Court to grant review, reverse his sentence, and remand for resentencing.

DATED this 6th day of July 2020.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN ROBERT BRYSON, Appellant.	DIVISION ONE No. 79653-4-I UNPUBLISHED OPINION

DWYER, J. — Following his conviction of 11 counts of violation of a no-contact order, three counts of residential burglary, one count of harassment, and one count of stalking (with domestic violence pleaded and proved for all convictions), Kevin Bryson appeals. On appeal, he avers that the sentencing court erroneously included three prior felony convictions in the calculation of his offender score as "9 or more." Bryson also asserts entitlement to further relief in a statement of additional grounds. Because the sentencing court properly calculated the offender score by omitting the three prior felony convictions, his sentence falls within the appropriate standard range. Bryson's asserted additional grounds for relief are without merit.

Accordingly, we affirm.

I

Kevin Bryson and Kellie Hickok were married and had four children together. By July 5, 2018, Hickok had obtained a no-contact order and a civil protection order against Bryson. The following day, at around 2:21 a.m., Bryson entered Hickok's home. Hickok telephoned police. However, Bryson left before police arrived.

On September 10, 2018, at 2:54 a.m., Bryson removed Hickok's bedroom window screen, reached into her bedroom, and moved a fan that was on the windowsill. Later that day, at 8:30 p.m., Bryson returned to Hickok's home. Sue Bryson[1], Bryson's mother who lived in a separate home on the same property, telephoned 911 and reported that Bryson was in Hickok's home and had threatened to kill her. Bryson was subsequently arrested.

On September 11, Sue obtained a protection order against Bryson. From September 18 through September 30, Bryson made multiple attempts through a third party to contact Sue in violation of this protection order.

Bryson was charged with three counts of residential burglary, one count of stalking, one count of harassment, and 12 counts of violation of a no-contact order, with domestic violence alleged as an aggravating factor for each. One charge of violation of a no-contact order was later dismissed. On January 25, 2019, a jury convicted Bryson on all other counts.

At the sentencing hearing, the State presented sentence ranges based on an offender score of "9 or more" for the felony convictions of stalking,

[1] Because Kevin and Sue Bryson share a surname, we refer to Sue by her first name to avoid confusion. No disrespect is intended.

harassment, and residential burglary. Although the State mentioned that Bryson had three prior felony convictions, it did not rely on these convictions in calculating its standard range recommendations. The sentencing court noted that all three prior felony convictions were more than 10 years old. Ultimately, the trial court imposed upon Bryson a total of 96 months of confinement, the high end of the standard range for the stalking conviction. All other sentences were ordered to be served concurrently with this sentence.

Bryson appeals.

II

Bryson avers that the trial court erroneously included the three prior felony convictions in calculating his offender scores on the various felony convictions. This was wrong, Bryson contends, because the prior felony convictions were more than 10 years old and, thus, had washed out. We disagree. His argument is based on a false premise. There is no evidence in the record to indicate that the sentencing court included the prior felony convictions in its offender score calculations. Rather, the sentencing court correctly calculated Bryson's offender scores based solely on his other current convictions.

We review a disputed calculation of an offender score de novo. State v. Rodriguez, 183 Wn. App. 947, 953, 335 P.3d 448 (2014).

Pursuant to the Sentencing Reform Act of 1981, chapter 9.94A RCW, standard sentence ranges are set forth in a sentencing grid, the inputs for which are an offender score and the seriousness level of the offense. See RCW 9.94A.510. The standard sentencing range increases as the seriousness level

and offender score increase. See RCW 9.94A.510. The seriousness level is a numerical value representing the legislature's determination of the gravity of the convicted offense.[2] See RCW 9.94A.520. The offender score is a numeric representation of previous and current criminal history and is calculated according to a point accrual system devised by the legislature. See RCW 9.94A.525. For the purposes of calculating the offender score for one offense, other current offenses are treated as prior offenses. RCW 9.94A.589(1)(a). When more than 8 points count toward the offender score, the legislature categorizes the offender score as "9 or more." RCW 9.94A.510.

The sentencing court correctly calculated Bryson's offender score as "9 or more" as to each felony conviction being sentenced. Domestic violence was pleaded and proved for each conviction.[3] As such, Bryson's offender score as computed for the current offense of residential burglary included: 11 convictions of violation of a no-contact order, accruing one point per conviction (11 points); a single conviction for stalking, accruing two points (2 points); a single conviction for harassment, accruing two points (2 points); and two other concurrent residential burglary convictions, accruing two additional points each (4 points) — for a total of 19 points. See RCW 9.94A.525. His score was thus "19," which the legislature deems to be "9 or more." See RCW 9.94A.510.

Likewise, Bryson's offender score as computed for the current offense of stalking included: 11 convictions of violation of a no-contact order, accruing one

[2] The seriousness levels for the felony offenses of conviction herein are as follows: Stalking – DV, level 5; Residential Burglary – DV, level 4; and Harassment – DV, level 3.

[3] This is significant because pleaded and proved domestic violence can change point allocation, as it did herein, pursuant to RCW 9.94A.525(21).

point per conviction (11 points); a single conviction for harassment, accruing two points (2 points); and three convictions for residential burglary, accruing one point for each conviction (3 points) — for a total of 16 points. See RCW 9.94A.525. His score was thus "16," which the legislature deems to be "9 or more." See RCW 9.94A.510.

Similarly, Bryson's offender score as computed for the current offense of harassment included: 11 convictions of violation of a no-contact order, accruing one point each (11 points); a single conviction for stalking, accruing two points (2 points); and three convictions for residential burglary, accruing one point for each conviction (3 points) — for a total of 16 points. See RCW 9.94A.525. His score was thus "16," which the legislature deems to be "9 or more."
See RCW 9.94A.510.

Thus, as to each felony conviction for which he was being sentenced, Bryson's offender score was properly "9 or more."

Indeed, Bryson's current offenses properly accrue an offender score of "9 or more" without the inclusion of the three prior felony convictions that Bryson avers were erroneously included therein. This is significant because an offender score "reaches its maximum limit" when it exceeds 9 points. State v. France, 176 Wn. App. 463, 468, 308 P.3d 812 (2013). Any further increases in an offender score greater than 9 "do not increase the standard sentence range." France, 176 Wn. App. at 468. Because Bryson's current convictions alone result in his earning an offender score of "9 or more," the standard ranges as determined by the sentencing court were correct. The record does not support Bryson's

contention that any prior, "washed out" convictions were included in the sentencing court's computations.

III

In a statement of additional grounds, Bryson avers that he received ineffective assistance of counsel because his attorney told him "that nothing [he] could be convicted of was more than a misdemeanor and [he was] reassured [that he] could not be found guilty of [a] felony."

Our analysis of a claim of ineffective assistance of counsel begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To sustain a claim of ineffective assistance of counsel, Bryson must demonstrate (1) that his counsel's representation was deficient and (2) that there is a reasonable probability that, but for the counsel's deficient representation, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 334-35. Both prongs of the Strickland test must be satisfied or the claim is not sustained. Strickland, 466 U.S. at 687.

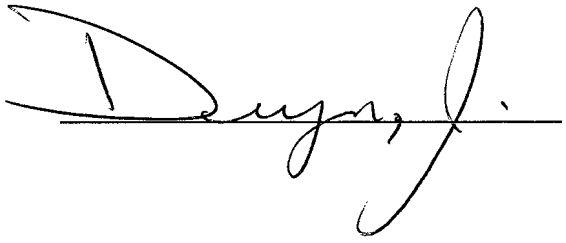
First, there is nothing in the record supporting Bryson's contention that his attorney had reassured him that he would not be convicted of a felony. Even assuming the validity of his contention, however, Bryson still fails to demonstrate how such a statement from his attorney negatively affected the outcome of the proceeding. Bryson's failure to substantiate a reasonable probability that, but for his attorney's errors, the result of the proceeding would have been altered, fails

to overcome the presumption that his "counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Thus, Bryson has not demonstrated that his convictions were the product of "a breakdown in the adversary process caused by deficiencies in counsel's assistance." Strickland, 466 U.S. at 700.

Moreover, there is no evidence in the record demonstrating that, but for the alleged errors of Bryson's counsel, Bryson would have enjoyed a more favorable outcome than that which occurred. Because Bryson points us to nothing that would show that his attorney's performance negatively affected the outcome of the proceeding, and in light of the abundant evidence against him, he fails to satisfy the Strickland test. Strickland, 466 U.S. at 687. Accordingly, he does not demonstrate an entitlement to relief on this claim.

Lastly, Bryson directs our attention to efforts he has made, while incarcerated, to reform his behavior. Assuming the sincerity of these efforts, he is commended. However, these efforts, while noteworthy, do not impact the validity of his judgment and sentence.

Affirmed.



WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

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