

December 18, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the
Personal Restraint of

PHILLIP VICTOR HICKS,

Petitioner.

No. 51831-7-II

UNPUBLISHED OPINION

JOHANSON, J. — Phillip Hicks seeks relief from personal restraint resulting from his 2004 convictions for first degree murder while armed with a firearm (count I), attempted first degree murder while armed with a firearm (count II), and first degree unlawful possession of a firearm (count III).¹ The trial court used count I as the offense with the “highest seriousness level” for purposes of former RCW 9.94A.400(1)(b) (1999) and determined his offender scores were 6 on count I, 0 on count II, and 7 on count III. That made his standard sentence ranges 312-416 months on count I, 180-240 months on count II, and 67-89 months on count III. The trial court sentenced him to 416 months on count I, 240 months on count II, and 89 months on count III, with counts I and II to run consecutively and count III to run concurrently. It also imposed the two 60-month

¹ Because the State concedes that Hicks’s judgment and sentence is facially invalid, it is not subject to RCW 10.73.090’s time bar.

firearm sentencing enhancements, consecutive to the 656-month base sentence and to each other.

Thus, the total term of confinement was 776 months.

Former RCW 9.94A.400(1)(b) provides that

[w]henver a person is convicted of two or more serious violent offenses . . . arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under [former] RCW 9.94A.320 [(2000)] shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the sentence range for other serious violent offenses shall be determined by using an offender score of zero.

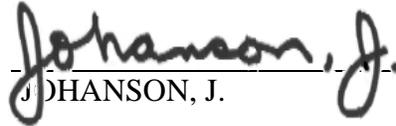
Hicks argues that under *State v. Weatherwax*, 188 Wn.2d 139, 156, 392 P.3d 1054 (2017), “when the seriousness levels of two or more serious violent offenses are identical, the trial court must choose the offense whose standard range is lower as the starting point for calculating the consecutive sentences.” The seriousness level for first degree murder and for attempted first degree murder are both XV. Former RCW 9.94A.320. But the standard sentence ranges for count II, as an attempted first degree murder, are only 75 percent of the standard sentence ranges for a completed first degree murder. Former RCW 9.94A.410 (1986). Because the standard sentence ranges for attempted first degree murder are necessarily lower than those for completed first degree murder, he contends that the trial court should have determined that his offender scores were 0 on count I, 6 on count II, and 7 on count III. That would have made his standard sentence ranges 240-320 months on count I, 234-312 months on count II, and 67-89 months on count III. Former RCW 9.94A.310 (2000). Thus, the longest sentences the trial court could have imposed were 320 months on count I, 312 months on count II, and 89 months on count III, with counts I and II to run consecutively and count III to run concurrently. Adding the two 60-month firearm sentencing enhancements, consecutive to the 632-month base sentence and to each other, the total term of

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confinement should have been 752 months. The State concedes that Hicks is correct and that he is entitled to be resentenced under *Weatherwax*. We accept the State's concession.

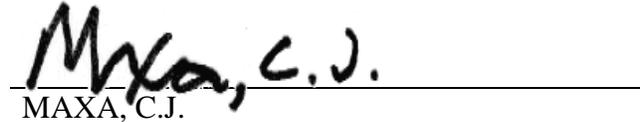
We grant Hicks's petition and remand his judgment and sentence for resentencing. We deny his request for appointment of counsel.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

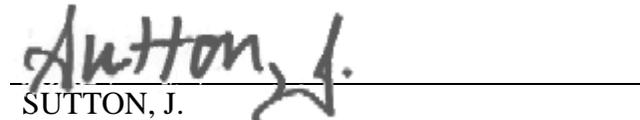


JOHANSON, J.

We concur:



MAXA, C.J.



SUTTON, J.