

NO. 66216-3-I

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

REC'D

MAY 24 2011

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

REGINALD BREAUX,

Appellant.

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

The Honorable Theresa Doyle, Judge

BRIEF OF APPELLANT

CHRISTOPHER GIBSON
Attorney for Appellant

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

2011
K

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENTS</u>	5
1. THE TRIAL COURT SENTENCED BREAUX BASED ON AN INCORRECT OFFENDER SCORE FOR ONE OF HIS SERIOUS VIOLENT OFFENSES.	5
2. IF BREAUX WAIVED THE CHALLENGE TO HIS SENTENCE, THEN HE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.....	10
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Aberdeen v. Regan</u> 170 Wn.2d 103, 239 P.3d 1102 (2010).....	9
<u>In re Personal Restraint of Goodwin</u> 146 Wn.2d 861, 50 P.3d 618 (2002).....	6, 8
<u>In re Personal Restraint of Johnson</u> 131 Wn.2d 558, 933 P.2d 1019 (1997).....	6
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	10
<u>State v. Alvarado</u> 164 Wn.2d 556, 192 P.3d 345 (2008).....	6
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	6
<u>State v. Barnett</u> 139 Wn.2d 462, 987 P.2d 626 (1999).....	5
<u>State v. Benn</u> 120 Wn.2d 631, 845 P.2d 289 <u>cert. denied</u> , 510 U.S. 944 (1993).....	10
<u>State v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	9
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	6
<u>State v. Kyllo</u> 166 Wn.2d 856, 215 P.3d 177 (2009);.....	10
<u>State v. Malone</u> 138 Wn. App. 587, 157 P.3d 909 (2007).....	6

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Murray</u> 118 Wn. App. 518, 77 P.3d 1188 (2003).....	6
<u>State v. Reichenbach</u> 153 Wn.2d 126, 101 P.3d 80 (2004).....	11
<u>State v. Thompson</u> 143 Wn. App. 861, 181 P.3d 858 (2008).....	6

FEDERAL CASES

<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	10
--	----

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.510	8, 9
RCW 9.94A.515	7, 8
RCW 9.94A.525	6, 9
RCW 9.94A.530	6
RCW 9.94A.589	7, 8, 9
RCW 9.94A.595	8
Sentencing Reform Act.....	1, 5, 6, 7
U.S. Const. amend. VI.....	10
Wash. Const. art. 1, § 22.....	10

A. ASSIGNMENTS OF ERROR

1. The trial court erred by imposing sentences based on an incorrect offender score.

2. To the extent defense counsel failed to preserve appellant's right to challenge his offender score on appeal, appellant was deprived of his constitution right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Under the Sentencing Reform Act (SRA), when an offender is sentenced for two or more "serious violent offenses," the standard range sentence for the offense with the highest "seriousness level" is determined by calculating an offender score based on prior convictions and other current offenses that are not "serious violence offenses." The standard range for the other "serious violent offense" is determined using an offender score of zero. The resulting sentences for both offenses are then served consecutively.

a. Did the court err by imposing consecutive sentences for two "serious violent offenses" without calculating the standard range for one of them using an offender score of zero?

b. On remand for resentencing, because both "serious violent offenses" have the same "seriousness level," is appellant entitled to

have his offender score calculated in the manner that results in the lowest combined sentence possible?

2. If appellant is deemed to have waived any challenge to the offender score calculation and excessive sentence because trial counsel failed to properly preserve them, was appellant denied his constitutional right to effective assistance of counsel?

B. STATEMENT OF THE CASE

Appellant Ronald Breaux pleaded guilty to attempted first degree rape, second degree rape, and first degree rape. CP 143-72; 5RP¹ 16-33. As part of his plea, Breaux reserved the right to challenge the offender score calculation. CP 166; 5RP 19.

The State's statement of criminal history attached to the plea statement listed the following convictions:

<u>Year</u>	<u>Offense</u>	<u>State</u>	<u>Type</u>
1976	robbery	WA	Felony
1987	theft	WA	Misdemeanor
1992	burglary 2nd degree	WA	Felony
1995	drug possession	TX	Felony
1996	drug possession	TX	Felony

¹ There are seven volumes of verbatim report of proceedings referenced as follows: 1RP - 7/8/10; 2RP - 7/13/10; 2RP - 7/14/10 (am); 4RP - 7/14/10 (pm); 5RP - 7/21/10; 6RP 10/1/10; and 7RP - 10/8/10.

1997	burglary of vehicle	TX	Misdemeanor
2002	assault family violence	TX	Misdemeanor

CP 169.

Before sentencing, both parties submitted sentencing memoranda. According to the prosecutor, Breaux's offender score is "3" for the attempted first degree rape conviction, and "6" for both the first and second degree rape convictions. CP 210-12. For the second degree rape the prosecutor counted one point for each of Breaux's prior felony convictions except the 1976 robbery, three points for the first degree rape, and zero for the attempted first degree rape. CP 210. It appears the prosecution used a similar calculation for the first degree rape offender score. CP 212. For the attempted first degree rape, however, the prosecution counted one point for each prior offense, but zero for the other current offenses. CP 211.

Breaux's counsel argued none of Breaux's prior felony convictions should count because they had "washed out." CP 324-31. Counsel argued the 2002 Texas misdemeanor assault conviction did not interrupt Breaux's crime-free period because it was facially unconstitutional. More specifically, counsel contended it was the result of a "nolo contendere" plea, and argued that because Texas law does not require a factual basis to support such a plea, and because the judgment and sentence fails to show

the court that accepted the plea found a factual basis, it is facially unconstitutional. CP 326-29.

In response, the State noted the face of the 2002 judgment and sentence states the court considered "all the evidence" and concluded Breaux committed the offense. CP 254. In a separate argument, the prosecution claimed a 2005 community custody violation on one of the drug possession convictions also interrupted Breaux's period of crime-free time in the community. CP 253.²

At sentencing, after hearing brief argument from counsel, the court found Breaux's 2002 assault conviction was valid and that his prior convictions should be included in his offender score. 7RP 5-8. The prosecutor requested a high-end standard range sentence for each count, and asked that the sentences for attempted first degree rape and first degree rape should run consecutively to each other, but concurrent to the sentence for second degree rape. 7RP 9-11. When asked by the court to explain why two of the sentences should be served consecutively, the prosecutor replied:

² The prosecution filed two sets of additional materials for sentencing. One is another sentencing memorandum that appears to be a combination of its first presentence statement and memorandum, and includes a copy of the judgment and sentence for the 2002 assault family violence conviction. CP 298-323. The other contains supplemental documents regarding the 2002 assault conviction and a 2005 community custody violation. CP216-49.

Counts two [(attempted first degree rape)] and three [(first degree rape)] are serious, violent crimes, and serious violence [sic] run consecutive to one another. Therefore the rape in the second degree is only going to score against the highest level of either count two or three. So rape in the second degree is going to be used to score against count three. Count one scores against count three, but counts two and three are going to run consecutive to one another. And count two doesn't have anything to score against it because it's going to be running consecutive to one another. So we are going to add up the total standard range [and it] will be the addition of whatever the Court imposes for count two and count three. We will add that up for the total standard range.

7RP 10.

Defense counsel requested the court impose low-end standard range sentences. 7RP 16-18.

The court followed the State's recommendation and imposed high-end standard range sentences for each offense and ordered the sentences for attempted rape and first degree rape be served consecutively, for a total minimum sentence of 336 months. CP 174-84; 7RP 19. Breaux appeals. CP 185-96.

C. ARGUMENTS

1. THE TRIAL COURT SENTENCED BREAUX BASED ON AN INCORRECT OFFENDER SCORE FOR ONE OF HIS SERIOUS VIOLENT OFFENSES.

A court may only impose a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Whether a trial court has exceeded its statutory authority under the SRA is an issue of law

reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Questions of statutory interpretation are also reviewed de novo. State v. Alvarado, 164 Wn.2d 556, 561, 192 P.3d 345 (2008).

A sentencing court acts beyond its statutory authority when it bases a sentence on a miscalculated offender score. In re Personal Restraint of Johnson, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997); State v. Malone, 138 Wn. App. 587, 593, 157 P.3d 909 (2007). The remedy is vacation of the sentence and remand for resentencing using a correct score. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 877-878, 50 P.3d 618 (2002).

An unlawful sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Where legal error leads to an excessive sentence, waiver does not apply. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

The SRA requires a trial court to examine a defendant's prior convictions to determine his offender score. State v. Thompson, 143 Wn. App. 861, 865–66, 181 P.3d 858 (2008) (citing RCW 9.94A.525). “This offender score is then used to determine a defendant's standard sentencing range.” Thompson, 143 Wn. App. at 866 (citing RCW 9.94A.530).

Here, Breaux's convictions for first degree rape and attempted first degree rape constitute "serious violent offenses". RCW 9.94A.030(44).³

The SRA provides:

Whenever 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 RCW 9.94A.515 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 standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

RCW 9.94A.589(1)(b).

Therefore, the offender score for one of Breaux's "serious violent offenses" should be "zero" and the offender score for the other should be based on his prior and current convictions "that are not serious violent offenses." That is not, however, what occurred at Breaux's sentencing.

Presumably relying on the offender score calculations performed by the prosecution, the trial court sentenced Breaux based on a offender score of "6" for first degree rape, and "3" for attempted first degree rape,

³ "Serious violent offense" is a subcategory of violent offense and includes first degree rape and attempted first degree rape. RCW 9.94A.040(44)(vii), (ix). Second degree rape is only a "violent offense". RCW 9.94A.030(53)(a)(i) (all Class A felonies are "violent offenses").

even though they are both "serious violent offenses". CP 175. Based on unambiguous language in RCW 9.94A.589(1)(b), the offender score for one of these offenses should have been "zero". Therefore, remand for resentencing is required. Goodwin, 146 Wn.2d 861, 877-878.

What is not clear from RCW 9.94A.589(1)(b), is which of Breaux's two serious violent offenses the "zero" offender score should apply. Although the statutory language makes clear that it should not be the one with the highest "seriousness level", it fails to provides guidance for when the situation arises, as here, where both have the same seriousness level. See RCW 9.94A.515, .595 (both offenses have a "seriousness level of "XII").

Which offense has its standard range calculated using an offender score of zero makes a significant difference here because the standard range sentence for the attempted first degree rape is only 75% of the standard range for the completed offense. RCW 9.94A.595. Thus, if an offender score of "zero" is applied to the attempted first degree rape, the standard range for that offense is 75% of 93-123 months, or 69.75-92.25. RCW 9.94A.510, .595. And the standard range for the completed first degree rape would then be calculated using an offender score of "6"⁴ for a

⁴ The score is reached by counting one point for each of Breaux's prior offenses, 3 points for the second degree rape conviction, and zero for the attempted rape. See RCW 9.94A.589(1)(b) (excludes other current violent

range of 162-216 months. RCW 9.94A.510. If ordered served consecutively as allowed under RCW 9.94A.589(1)(b), the combined range is 231.75-308.25 months.

If an offender score of "zero" is applied to the completed first degree rape, however, the standard range is only 93-123 months. RCW 9.94A.510. And the standard range for the attempted first degree rape, using an offender score of "6" is 75% of 162-216 months, or 121.5-162 months. And if ordered served consecutively, the combined range is 214.5-285 months. The high end of this range is 23.35 months less than if a zero offender score is applied to the attempted rape, and 51 months less than what was actually imposed.

When there are two possible reasonable interpretations of statutory language, the rule of lenity requires it be construed strictly against the State and in favor of the accused. City of Aberdeen v. Regan, 170 Wn.2d 103, 116, 239 P.3d 1102 (2010); State v. Brown, 139 Wn.2d 757, 769, 991 P.2d 615 (2000). Here, RCW 9.94A.589(1)(b) provides no guidance as to which of the two "serious violent offenses" a "zero" offender score should apply when they are the same "seriousness level". Therefore, on remand for resentencing the "zero" offender score should apply to the first degree

offenses from the offender score calculation); RCW 9.94A.525(17) (if present conviction is for a sex offense, . . . count three points for each . . . prior sex offense").

rape conviction rather than the attempted first degree rape conviction because the resulting sentence range is most favorable to Breaux.

2. IF BREAUX WAIVED THE CHALLENGE TO HIS SENTENCE, THEN HE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

If this Court concludes Breaux waived his challenge to the sentencing error, he may nevertheless raise the error because his trial counsel was ineffective for failing to argue for a less onerous offender score and standard range sentence calculation. Thus, reversal for resentencing is still required.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

Only legitimate trial strategy or tactics constitute reasonable performance by counsel. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

The strong presumption that defense counsel's conduct is reasonable is overcome where no conceivable legitimate tactic explains counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here there is no conceivable legitimate tactical reason not to argue in favor of an offender score of "zero" for one of Breaux's two "serious violent offense" convictions. Failure to do so resulted in a minimum sentence that exceeds that authorized by statute. Reversal and remand for resentencing is required.

D. CONCLUSION

For the reasons stated, this Court should reverse and remand for resentencing based on a correct offender score and standard range sentence calculation.

Respectfully submitted this 24th day of May 2011,

NIELSEN, BROMAN & KOCH PLLC



CHRISTOPHER H. GIBSON,
WSBA No. 25097
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON,)

Respondent,)

v.)

REGINALD BREAUX,)

Appellant.)

COA NO. 66216-3-I

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 24TH DAY OF MAY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] REGINALD BREAUX
DOC NO. 254139
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF MAY, 2011.

x Patrick Mayovsky

2011 MAY 24 PM 4:09