

66326-7

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NO. 66326-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

CRAIG COLEMAN,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict Mr. Coleman of unlawful delivery of a controlled substance.

2. The sentencing court erred in listing an offender score of 10 on the judgment and sentence, after properly agreeing with Mr. Coleman that his offender score is six.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In order to convict a defendant as an accomplice to delivery of a controlled substance, the State must present sufficient evidence to prove beyond a reasonable doubt that the defendant solicited another person or aided another person in delivering a controlled substance with knowledge that the substance delivered was a controlled substance. Here, an undercover officer asked Mr. Coleman for cocaine. Mr. Coleman said he did not have any but knew someone who did. Mr. Coleman walked down the street with the officer, and a dealer approached them. The officer gave the dealer money, the dealer dropped the cocaine in Mr. Coleman's hand, and the officer immediately snatched the cocaine out of Mr. Coleman's hand. Mr. Coleman did not address the dealer by name, did not hug her or shake her hand, and did not have any money or drugs on his person when he was arrested shortly

thereafter. Did the State fail to present sufficient evidence to convict Mr. Coleman of delivery of a controlled substance?

2. The sentencing court is obligated to calculate the correct offender score prior to sentencing a defendant. In this case, the State proposed an offender score of 10, but Mr. Coleman pointed out that four convictions the State listed had washed out, and the proper offender score was six. The sentencing judge said he would “accept that,” but then said, “If there’s a mistake in the scoring, somebody can complain about that to a different court. I don’t have all day, and I don’t have three law clerks working on it.” The court then signed a judgment and sentence listing an offender score of 10 and including the washed-out convictions in the criminal history. Must the case be remanded for correction of the judgment and sentence?

C. STATEMENT OF THE CASE

A little after midnight on March 31, 2010 Seattle Police officer Andrew West was working undercover as part of a proactive “buy-bust” team in the Belltown neighborhood. 3 RP 35-43, 71.¹ Officer West is experienced in narcotics operations, having arrested

¹ There are 4 volumes of verbatim reports of proceedings in this case: 1 RP (August 10, 11, and 12 of 2010), 2 RP (August 13, 2010); 3 RP (October 4, 6, 7, and 8 of 2010), and 4 RP (11/5/2010).

over 100 people for drug transactions. 4 RP 37, 53. Approximately 75% of the people Officer West has arrested in Belltown are African Americans like Mr. Coleman. 4 RP 54. African Americans do not make up 75% of the population of Belltown. 4 RP 54.²

On the evening in question, Officer West decided to target appellant Craig Coleman after making eye contact with him. 3 RP 55. Officer West said, "What's up?," to which Mr. Coleman responded, "You looking?" 3 RP 44-45. Officer West asked, "You got 40?" Mr. Coleman indicated he did not, but knew somebody who did. 3 RP 45.

Officer West and Mr. Coleman walked northbound on Second Avenue towards Battery Street. 3 RP 45. Soon, they were approached by a woman later identified as Shaniqua Bolds. 3 RP 46. Officer West repeated his desire to obtain \$40 worth of crack cocaine. 3 RP 46. Ms. Bolds told him to wait and she would go get it. 3 RP 46.

² The Task Force on Race and the Criminal Justice System has criticized the type of operation used here: "Regarding the enforcement of drug laws, researchers have discovered a focus on crack cocaine – a drug associated with blacks stereotypically and in practice – at the expense of other drugs, and that the focus on crack cocaine results in greater disproportionality, without a legitimate policy justification." Robert S. Chang, Taking to Task Race and the Criminal Justice System, Washington State Bar News, June 2011, at 32.

Officer West and Mr. Coleman continued walking. 3 RP 46. When they got to the corner of Second Avenue and Wall Street, Officer West asked Mr. Coleman where the dealer was. 3 RP 47. Mr. Coleman pointed to a car, where the dealer, Ms. Bolds, was sitting in the passenger seat. 3 RP 47. Officer West and Mr. Coleman walked to First Avenue, and the dealer's car pulled up next to them. Ms. Bolds told the two to keep walking. She met them at First and Wall, and got out of the car. 3 RP 47.

The dealer asked Officer West for the money, and Officer West asked her to show him the crack cocaine. She displayed the stones and put them in Mr. Coleman's hand. Officer West handed Ms. Bolds the money and grabbed the crack out of Mr. Coleman's hand. Mr. Coleman kept half of one of the stones, saying, "You need to hook me up." 3 RP 48.

After Officer West left and gave the "good buy" sign, another officer arrested Mr. Coleman. The officer searched Mr. Coleman, but did not find any drugs or money on him. 3 RP 57, 91-92.

The State charged Mr. Coleman with delivery of a controlled substance. CP 1-5. The prosecution's theory was that Mr. Coleman was liable as an accomplice to the dealer, Ms. Bolds. CP 56; 3 RP 147. After one jury could not reach a verdict, a mistrial

was granted and Mr. Coleman was retried. CP 30; 3 RP 7. The officers on the buy-bust team testified to the facts described above. After the second trial, the jury found Mr. Coleman guilty as charged. CP 64.

At sentencing, the State averred that Mr. Coleman had an offender score of 10, but Mr. Coleman argued four of his prior convictions had washed out so his offender score was six. Supp. CP ____, sub. no. 59 (Presentence Statement of King County Prosecuting Attorney); 4 RP 23. The court responded, "I will accept that. So let's move on to what we do from here. If there's a mistake in the scoring, somebody can complain about that to a different court. I don't have all day, and I don't have three law clerks working on it." 4 RP 23.

The court imposed a Drug Offender Sentencing Alternative (DOSA), with a 45-month term of confinement and 45-month term of community custody. CP 68; 4 RP 24-25. The judgment and sentence states that Mr. Coleman's offender score is 10, and it includes his washed-out convictions in the criminal history. CP 66, 72.

Mr. Coleman appeals. CP 76-78.

D. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. COLEMAN OF DELIVERY OF A CONTROLLED SUBSTANCE.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. The State failed to prove that Mr. Coleman delivered a controlled substance. The State charged Mr. Coleman with delivery of cocaine in violation of the Uniform Controlled Substances Act, RCW 69.50.401(1) and (2)(a). CP 1. That statute provides:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this subsection with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine.

The elements of the crime are (1) delivery of a controlled substance, and (2) knowledge that the substance delivered was a controlled substance. State v. DeVries, 149 Wn.2d 842, 849-50, 72 P.3d 748 (2003); State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

The State did not present sufficient evidence to prove beyond a reasonable doubt that Mr. Coleman delivered a controlled substance. Officer West testified that Mr. Coleman told him he did not have any cocaine for sale. 3 RP 45. When Mr. Coleman was arrested, the officer did not find any drugs or money on him. 3 RP 57, 91-92. The State argued that Mr. Coleman was guilty as an accomplice to the dealer,³ Ms. Bolds, but if Mr. Coleman had an agreement with the dealer he would not have needed to ask the buyer, undercover officer West, for a piece of the crack cocaine he had just purchased. 3 RP 48. Officer West testified that Mr. Coleman did not call Ms. Bolds over or gesture to her; rather Ms. Bolds approached them to set up the deal. 3 RP 56, 59. Officer West does not recall Ms. Bolds and Mr. Coleman even addressing each other by name, let alone hugging or shaking hands. 3 RP 59, 62. Officer West gave his money directly to Ms. Bolds. Ms. Bolds dropped the crack cocaine into Mr. Coleman's hand, but Mr. Coleman did not deliver it to Officer West. Rather, Officer West immediately snatched it out of his hand. 3 RP 48.

³ A person is liable as an accomplice if (a) with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020.

In sum, as Mr. Coleman pointed out in the trial court, Shaniqua Bolds is the dealer who delivered cocaine to Officer West. Mr. Coleman “didn’t deliver anything.” He was simply an addict “looking to get a piece of crack for himself.” 3 RP 158. Under these circumstances, the State failed to prove the crime charged beyond a reasonable doubt.

c. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Coleman committed the offense for which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is dismissal of the conviction based upon the State’s failure to prove Mr. Coleman delivered a controlled substance.

2. THE SENTENCING COURT AGREED THAT MR. COLEMAN’S OFFENDER SCORE IS SIX BUT THE

JUDGMENT AND SENTENCE INCORRECTLY
STATES THE OFFENDER SCORE IS TEN.

The Sentencing Reform Act (“SRA”) creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant’s offender score. RCW 9.94A.505, .510, .520, .525, .530; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525.

Prior Class C felony convictions “wash out” and may not be included in the offender score once five years have passed between the date of last release from confinement and the commission of a subsequent crime. RCW 9.94A.525 (2)(c). A judgment and sentence that includes a washed-out conviction in its history and offender score is facially invalid. In re the Personal Restraint of Goodwin, 146 Wn.2d 861, 867, 50 P.3d 618 (2002); In re the Personal Restraint of Williams, 111 Wn.2d 353, 361-62, 759 P.2d 436 (1988).

This Court reviews de novo the sentencing court’s calculation of the offender score. State v. Rivers, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

In this case, as Mr. Coleman's trial attorney stated, the correct offender score is six. 4 RP 23. The State proposed an offender score of 10, but this calculation includes four convictions for cocaine possession that washed out. Supp. CP ____, sub. no. 59 at 8; RCW 69.50.4013 (cocaine possession is a Class C felony); RCW 9.94A.525 (2)(c) (Class C felonies wash out after five years). The last of these four convictions was entered in March of 1992, and Mr. Coleman served three months in jail. Id. at 8. He did not commit his next crime until March of 2000, nearly eight years later. Id. When Mr. Coleman pointed out that four convictions washed out and the proper score was six, the sentencing judge said he would "accept that," but then said, "If there's a mistake in the scoring, somebody can complain about that to a different court. I don't have all day, and I don't have three law clerks working on it." 4 RP 23. The court then signed a judgment and sentence listing an offender score of 10. CP 66.

The sentencing court misunderstood its role. It is not for "a different court" to determine the proper scoring. "The sentencing court is obligated to calculate the correct offender score." In re the Personal Restraint of Call, 144 Wn.2d 315, 334, 28 P.3d 709 (2001) (emphasis added). Mr. Coleman's case should be

remanded for correction of the offender score and deletion of the four washed-out convictions from the criminal history. CP 66, 72.

E. CONCLUSION

Because the State failed to prove that Mr. Coleman delivered a controlled substance, Mr. Coleman respectfully requests that this Court reverse his conviction and dismiss his case with prejudice. In the alternative, his case should be remanded for correction of the offender score on the judgment and sentence.

DATED this 8th day of June, 2011.

Respectfully submitted,


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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66326-7-I
v.)	
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CRAIG COLEMAN,)	
)	
Appellant.)	

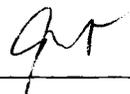
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I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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