

COA NO. 66918-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

ALLAN PARMELEE,

Appellant.

REC'D
DEC 23 2011
King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS BY
STATE OF WASHINGTON
2011 DEC 23 PM 3:07

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

The Honorable Sharon Armstrong, Judge

AMENDED BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing an exceptional sentence without statutory authority.

2. The court erred in computing appellant's offender score by failing to score prior federal offenses as one point total.

3. The court erred in failing to hold an evidentiary hearing on disputed sentencing facts pursuant to former RCW 9.94A.530(2) for the purpose of scoring appellant's prior federal offenses.

4. The court erred in computing appellant's offender score by including two non-comparable out-of-state convictions.

Issues Pertaining to Assignments of Error

1. Appellant's original sentence was vacated and resentencing took place in 2011. Did the trial court lack statutory authority to impose exceptional consecutive sentences based on a statutory aggravating factor that no longer exists, requiring remand for sentencing within the standard range?

2. Did the State fail to prove appellant's prior federal offenses should be counted separately for a total of eight points and did the trial court err in relying on disputed facts without holding an evidentiary hearing, requiring remand for sentencing within the standard range?

3. Did the State fail to prove appellant's two prior Illinois offenses were comparable to a Washington felony, requiring correction of the offender score and remand for resentencing?

B. STATEMENT OF THE CASE

A jury convicted Allan Parmelee of two counts of first degree arson. CP 35. The sentencing court computed Parmelee's offender score as "13." CP 36, 40. On June 3, 2004, the court imposed an exceptional sentence consisting of 288 months confinement on each count to run concurrently. CP 38. The court relied on four aggravating factors in support of the exceptional sentence, one of which was "the operation of the multiple offense policy results in a too lenient presumptive sentence pursuant to RCW 9.94.535(2)(i)." CP 41.

On June 24, 2004, the United States Supreme Court issued its decision in Blakely v. Washington, holding the Sixth Amendment requires any fact that increases the penalty for a crime beyond the prescribed statutory maximum other than the fact of a prior conviction must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

In light of Blakely, the State argued the "too lenient" factor under RCW 9.94.535(2)(i) could still be found by a judge rather than a jury and that this factor alone supported the exceptional sentence. CP 597-605.

The trial court entered a "clarifying order" vacating the other aggravating factors but retaining the "too lenient" factor as the basis to impose the same concurrent exceptional sentences. CP 606.

Parmelee later filed a personal restraint petition in which he argued the trial court miscalculated his offender score and violated Blakely by finding an aggravating factor that a jury needed to find. CP 657, 661-63 (State's response summarizing Parmelee's arguments).

In response to Parmelee's petition, the State conceded the Blakely error required remand for resentencing. CP 661-62. The State announced its intention to request empanelment of a jury on remand to consider the aggravating factors found by the court at the original sentencing hearing. CP 664. The State maintained Parmelee's arguments related to the offender score, if not time barred, "can and should be presented to the trial court at the resentencing hearing[.]" CP 663.

At that point in time, the Washington Supreme Court interpreted Blakely as requiring a jury to make factual determinations supporting exceptional consecutive sentences. In re Pers. Restraint of Van Delft, 158 Wn.2d 731, 740-43, 147 P.3d 573 (2006), abrogated by Oregon v. Ice, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), State v. Vance, 168 Wn.2d 754, 230 P.3d 1055 (2010). Under Van Delft, "the conclusion that allowing a current offense to go unpunished is clearly too lenient is a

factual determination that *cannot* be made by the trial court following Blakely." Van Delft, 158 Wn.2d at 742 (quoting State v. Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005)).

On January 14, 2009, the United States Supreme Court issued its decision in Oregon v. Ice, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009). Ice held a sentencing judge does not violate the Sixth Amendment by finding facts necessary to impose consecutive, rather than concurrent, sentences for discrete crimes. Ice, 555 U.S. at 163-64, 168.

On May 6, 2010, the Washington Supreme Court issued its decision in State v. Vance, 168 Wn.2d 754, 230 P.3d 1055 (2010). Relying on Ice, Vance held a trial judge's imposition of exceptional consecutive sentences based on a judge's own factual findings, including a finding that a presumptive sentence is clearly too lenient, did not violate a defendant's Sixth Amendment right to a jury trial. Vance, 168 Wn.2d at 757-58, 762-63.

On June 2, 2010, the Supreme Court granted Parmelee's personal restraint petition "only on the exceptional sentence issue." CP 636. It vacated the sentence and remanded for resentencing. CP 636.

On remand, the State requested imposition of exceptional consecutive sentences based on the "clearly too lenient" factor under former RCW 9.94A.535(2)(i). CP 645-46. In light of Ice and Vance, the

State maintained the judge had the authority to find the "clearly too lenient" factor and impose consecutive exceptional sentences based on that factor. CP 641, 645-46.

The State alleged Parmelee's prior felony criminal history consisted of one Washington conviction for stalking, two Illinois convictions for "deceptive practice," and federal convictions for alien smuggling (eight counts), transporting illegal aliens (eight counts), and conspiracy (one count), all of which added up to an offender score of "13." CP 637-38.

Parmelee filed a pro se resentencing memorandum objecting to imposition of an exceptional sentence for various reasons, including that his correct offender score was really three points and therefore the "clearly too lenient" factor was unavailable as a basis for imposing an exceptional sentence. CP 410-12, 417-29, 437-40. Parmelee argued the two Illinois convictions should not be included in his offender score because they were not comparable to a Washington felony offense and his 17 prior federal convictions constituted "same criminal conduct" and should be counted as one point total for offender score purposes. CP 425-29.

In its written response, the State maintained the exceptional sentence issue was the only issue before the trial court. CP 870-71. At the initial hearing following remand, the court allowed Parmelee to proceed

pro se and rescheduled the resentencing hearing. RP¹ 12, 18-22. In the midst of addressing Parmelee's pro se status, the trial court appeared to adopt the State's position that the offender score issues were not before the court and it would not entertain them. RP 5, 15.

At the resentencing hearing, Parmelee pressed his offender score arguments. RP 27, 31, 33-34. The judge acknowledged she reviewed Parmelee's sentencing materials and that she had a question about the comparability of the Illinois deceptive practice convictions. RP 27-28. The judge requested a response from the State on that issue. RP 28. The State asserted the Illinois counts for "deceptive practice" to which Parmelee pled guilty were comparable to the Washington offenses of forgery and theft. RP 28-29.

The judge then addressed Parmelee's argument that the federal convictions all counted as same criminal conduct, stating "Same criminal conduct will not take you down to one in this situation. I did read your brief, as I say, and that argument is unavailing." RP 29. Shortly thereafter, the same criminal conduct issue was discussed again. RP 31-34. The court noted Parmelee's argument that there was a single victim for all the counts and said "in fact there are eight victims -- the aliens who were

¹ The verbatim report of proceedings is referenced as follows: RP - one consecutively paginated volume consisting of 3/7/11 and 3/29/11.

transported." RP 31. Parmelee maintained the government was the victim and the State had not proven otherwise. RP 31-32.

The judge invited the State to respond to this argument. RP 32. The State bypassed the different victim rationale, instead contending the federal convictions related to alien smuggling were properly counted as eight points total rather than one point under a same criminal conduct analysis because there were eight different dates of smuggling. RP 33. In support of that contention, the State pointed to a federal appellate decision that addressed Parmelee's challenge to his federal sentence and the legal challenges brought by his co-defendants in that case. RP 32-33; United States v. Parmelee, 42 F.3d 387 (7th Cir. 1994).

Parmelee argued the State could not rely on the federal court decision to show lack of same criminal conduct. RP 33-34. After hearing argument from both sides, the court stated "Thank you, Mr. Parmelee, I think you have made your record, so your offender score is 13." RP 34.

The court imposed consecutive 130 month terms of confinement on each count. CP 551; RP 43. In support of this exceptional sentence, the court found Parmelee's offender score was "13" and that running the sentences concurrently would result in the receipt of a "free crime." CP 555. The court relied on the aggravating factor that "the operation of the multiple offense policy would be clearly too lenient without imposition of

consecutive sentences in this matter." CP 555. This appeal follows. CP 547.

C. ARGUMENT

1. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE EXCEPTIONAL CONSECUTIVE SENTENCES BASED ON AN AGGRAVATING FACTOR THAT WAS NOT AMONG THE LIST OF EXCLUSIVE FACTORS IN EFFECT AT THE TIME OF RESENTENCING.

The 2005 and 2007 amendments to the exceptional sentence statutory scheme do not include the "clearly too lenient" aggravating factor previously set forth in former RCW 9.94A.535(2)(i). The factor is unavailable as a basis for to impose an exceptional sentence where, as here, an offender's previous exceptional sentence was vacated and resentencing takes place after the amended legislation is in effect. The trial court lacked statutory authority to impose an exceptional sentence on Parmelee based on an aggravating factor that no longer exists under the statute.

a. The Trial Court's Lack Of Statutory Authority To Rely On The Aggravating Factor Under Former RCW 9.94A.535(2)(i) As The Basis For An Exceptional Sentence Is Properly Before This Court.

Parmelee objected to the exceptional sentence at the trial level but did not argue the theory that the court lacked statutory authority to impose an exceptional sentence based on the aggravating factor listed in former RCW 9.94A.535(2)(i). "In the context of sentencing, established case law

holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "[A] sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional." In Re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)).

A sentencing court's statutory authority under the Sentencing Reform Act is a question of law reviewed de novo. State v. Mann, 146 Wn. App. 349, 357, 189 P.3d 843 (2008), review denied, 169 Wn.2d 1018, 238 P.3d 502 (2010). Statutory interpretation is also question of law reviewed de novo. State v. Alvarado, 164 Wn.2d 556, 561, 192 P.3d 345 (2008).

b. The Supreme Court's Decision In Vance Does Not Answer The Statutory Question Posed By This Appeal.

A court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006).

RCW 9.94A.589(1)(a) provides "[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.535 lists the aggravating factors that may

support imposition of an exceptional sentence. Because Parmelee's crimes were not serious violent offenses, the trial court had to impose an exceptional sentence pursuant to RCW 9.94A.535 in order to impose consecutive sentences.

The issue here is whether the statutory scheme allowing for the imposition of exceptional consecutive sentences authorized the trial court to impose such a sentence by relying on an aggravating factor that no longer exists under the current sentencing scheme.

The Supreme Court's decision in Vance does not answer that question. It was decided solely on constitutional Sixth Amendment grounds. Vance, 168 Wn.2d at 759 ("The question before us . . . is whether . . . the Sixth Amendment right to trial by jury requires that a jury, not a trial judge, make findings of fact to support an exceptional consecutive sentence."). The Supreme Court did not address a trial court's authority to make the factual determination under state law because there was no separate argument for relief under independent state grounds. Id. at 763 n. 8.

Specifically, it did not address the statutory authority question raised in this appeal. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1,

124 Wn.2d 816, 824, 881 P.2d 986 (1994). Furthermore, cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

c. Legislation Enacted In The Wake Of Blakely Supersedes The Old Statutory Scheme For Determining Exceptional Sentences.

In Blakely, the United States Supreme Court held the Sixth Amendment requires any fact that increases the penalty for a crime beyond the prescribed statutory maximum other than the fact of a prior conviction must be submitted to a jury and proved beyond a reasonable doubt. Blakely, 542 U.S. at 301. Washington legislation in effect at that time authorized the judge to find such facts, including the fact of whether the operation of the multiple offense policy results in a presumptive sentence that is clearly too lenient. Former RCW 9.94A.535.

In response to Blakely, the Washington legislature enacted Laws of 2005, chapter 68, effective April 15, 2005. Laws of 2005, ch. 68, § 4. The express purpose of this statute was to bring Washington's Sentencing Reform Act into compliance with Blakely. Laws of 2005, ch. 68, § 1. This legislation, known as the "Blakely-fix," included procedural provisions that distinguished the roles of judge and jury depending on

which aggravator was at issue. RCW 9.94A.535. The judge was given authority to find certain aggravators, including the authority to find the multiple offense aggravating factor under RCW 9.94A.535(2)(c). RCW 9.94A.535(2). The jury was given authority to find other aggravators. RCW 9.94A.535(3).

The Washington Supreme Court in State v. Pillatos later held "Laws of 2005, chapter 68 applies to all sentencing proceedings held since it was signed into law by Governor Gregoire on April 15, 2005." State v. Pillatos, 159 Wn.2d 459, 465, 150 P.3d 1130 (2007). Pillatos further held "the Laws of 2005, chapter 68, by its terms, applies only to cases where trials have not begun or guilty pleas accepted." Pillatos, 159 Wn.2d at 480. In support of the latter holding, Pillatos relied on Laws of 2005, ch. 68, § 4(1) (codified at RCW 9.94A.537(1)), which states "At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range." Pillatos, 159 Wn.2d at 470.

The legislature reacted to Pillatos by amending the Blakely-fix legislation. Laws of 2007 ch. 205 § 1 provides:

In State v. Pillatos, 150 P.3d 1130 (2007), the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered

prior to the effective date of the act on April 15, 2005. The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.

The 2007 amendment added RCW 9.94A.537(2), which provides "In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing."

This legislation, known as the "Pillatos-fix," took effect on April 27, 2007. Laws of 2007, ch. 205 § 3. The resentencing provision under RCW 9.94A.537(2) applies in cases "where the defendant's trial began prior to the 2005 amendment and there has been a remand for a new sentencing hearing. State v. Powell, 167 Wn.2d 672, 679, 223 P.3d 493 (2009).

"[T]he 2007 amendments affirmatively changed the 2005 statutes so that Blakely's procedural requirements apply to all cases before the court, not just those where the defendant had not pleaded guilty or been tried." State v. Elmore, 154 Wn. App. 885, 906, 228 P.3d 760 (2010); see

also Mann, 146 Wn. App. at 360-61 ("the 2007 legislation effectively extends the original 'Blakely-fix' to all exceptional sentence cases that were remanded for resentencing based on the Blakely decision."). After the 2007 amendments changed the law, the Supreme Court treated the "applies to all pending criminal matters where trials have not begun or pleas not yet accepted" language under RCW 9.94A.537(1) as applicable only to the notice provision itself. Powell, 167 Wn.2d at 679-80.

d. The Current And Former Statutory Aggravating Factors Are Different.

Former RCW 9.94A.535(2)(i)² provides: "The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010." At Parmelee's resentencing, the court imposed an exceptional sentence based on this factor.³ CP 555.

RCW 9.94A.535(2)(c), in effect at the time of Parmelee's resentencing in 2011, lists this aggravating factor: "The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."

² Laws of 2003, ch. 267 § 4 (eff. July 27, 2003).

³ The provision was actually codified at former RCW 9.94A.390(2)(i) (Laws of 1997, ch. 52 § 4; Laws of 2001, 2nd sp.s. c 12 § 314) at the time of Parmelee's offenses in 1998 and 2002, but the original trial court and the State at resentencing cited to RCW 9.94A.535(2)(i). CP 41, 645-46.

The Blakely-fix legislation of 2005 gave birth to the aggravator described in RCW 9.94A.535(2)(c). Alvarado, 164 Wn.2d at 564-65. RCW 9.94A.535(2)(c) is not the same as former RCW 9.94A.535(2)(i): "there is a difference between the 'clearly too lenient' language in . . . former 'free crimes' provisions and the mathematical calculation that allows an exceptional sentence under RCW 9.94A.535(2)(c)." Id. at 566.

In contrast with the "clearly too lenient" factual finding that was a part of former RCW 9.94A.535(2)(i), "the only factors the trial court relies upon in imposing an exceptional sentence under RCW 9.94A.535(2)(c) are based on criminal history and the jury's verdict on the current convictions." Id. at 566-67. "This provision was designed to codify the 'free crimes' factor as an automatic aggravator *without the need for additional fact finding as to whether the existence of 'free crimes' results in a 'clearly too lenient' sentence.*" Id. at 567 (emphasis added).

Under former RCW 9.94A.535(2)(i), "a judge may rely on the aggravating factor that the presumptive sentence is too lenient when 'there is some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive sentencing range.'" Hughes, 154 Wn.2d at 136-37 (quoting State v. Fisher, 108 Wn.2d 419, 428, 739 P.2d 683 (1987)), abrogated on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546,

165 L. Ed. 2d 466 (2006). That inquiry required a court to find one of two factual bases to support the too lenient conclusion: "(1) 'egregious effects' of defendant's multiple offenses [or] (2) the level of defendant's culpability resulting from the multiple offenses." Hughes, 154 Wn.2d at 137 (quoting State v. Batista, 116 Wn.2d 777, 787–88, 808 P.2d 1141 (1991)).

On the other hand, RCW 9.94A.535(2)(c) simply requires an objective mathematical application of the sentencing grid to the current offenses, rather than the subjective application of factors under the former "clearly too lenient" language. State v. Newlun, 142 Wn. App. 730, 742-43, 176 P.3d 529, review denied, 165 Wn.2d 1007, 198 P.3d 513 (2008).

The two aggravators are thus different. The current aggravator omits the need for a "clearly too lenient" finding. The free crimes factor under RCW 9.94A.535(2)(c) did not exist until the legislature included that aggravator as part of the Blakely-fix legislation.

e. The Blakely Fix Legislation Applies To Parmelee's Resentencing.

At resentencing, the State requested imposition of exceptional consecutive sentences "pursuant to the provisions of RCW 9.94A.589(1)(a) and former RCW 9.94A.535(2)(i), which was in effect at the time of the Defendant's original sentencing." CP 645-46.

The statutes in effect at the time of Parmelee's original sentencing, however, were no longer operative and did not apply to Parmelee's resentencing in 2011. The trial court lacked statutory authority to impose an exceptional sentence based on the aggravating factor found in former RCW 9.94A.535(2)(i). As set forth in section 1. d., supra, the legislature intended the post-Blakely legislation to supersede previous exceptional sentence legislation and to apply to all resentencings that take place after the effective date of that legislation.

State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011) and State v. McNeal, 156 Wn. App. 340, 231 P.3d 1266, review denied, 169 Wn.2d 1030, 241 P.3d 786 (2010) (McNeal III) support this conclusion. In both cases, the post-Blakely statutory scheme applied to an offender who committed his crimes before that legislation took effect and was then subject to resentencing after it took effect. Mutch, 171 Wn.2d at 651-52, 656, 658; McNeal III, 156 Wn. App. at 351-54. Parmelee is in the same position.

Mutch committed his crimes in 1994 and had his sentence vacated in 2008. Mutch, 171 Wn.2d at 651-52. At the resentencing hearing following remand, the trial court imposed an exceptional sentence based on the free crime aggravating factor under RCW 9.94A.535(2)(c). Id. at

652, 658. The Supreme Court held the trial court had statutory authority to impose this exceptional sentence. Id. at 658.

McNeal III follows a similar course, but requires some unpacking. McNeal was convicted for crimes committed in 1996. State v. McNeal, 98 Wn. App. 585, 588, 590, 991 P.2d 649 (1999) (McNeal I), aff'd 145 Wn.2d 352, 37 P.3d 280 (2002); State v. McNeal, 142 Wn. App. 777, 780 n. 1, 175 P.3d 1139 (2008) (McNeal II). The trial court imposed an exceptional sentence based on the aggravating factor that the standard sentence would be clearly too lenient because the multiple offense policy would result in two offenses essentially going unpunished. McNeal I, 98 Wn. App. at 598.

McNeal's sentence on one count was later vacated and his case remanded for resentencing. McNeal II, 142 Wn. App. at 784. On appeal from the exceptional sentence imposed on remand, McNeal II held the trial court erred when it, rather than a jury, made the factual determinations required to impose the exceptional sentence "[b]ecause Blakely applied to McNeal's resentencing proceedings[.]" McNeal II, 142 Wn. App. at 788–89. Following remand, the court of appeals accepted discretionary review on the question of whether the trial court "has jurisdiction to impanel a jury pursuant to RCW 9.94A.537(2) for the

purpose of considering an aggravating factor not specifically contained in RCW 9.94A.535(3)." McNeal III, 156 Wn. App. at 350.

McNeal III held no statutory authority allowed a jury to find the free crime aggravating factor listed in RCW 9.94A.535(2)(c). McNeal III, 156 Wn. App. at 351. Rather, the resentencing court had authority to find the aggravating factor under RCW 9.94A.535(2)(c) without a jury and the resentencing court could impose an exceptional sentence based on that factor. McNeal III, 156 Wn. App. at 351-52.

McNeal III addressed the Court of Appeals decision in State v. Vance, 142 Wn. App. 398, 174 P.3d 697 (2008), rev'd on other grounds, 168 Wn.2d 754, 230 P.3d 1055 (2010). McNeal III, 156 Wn. App. at 354-55. In Vance, Division One "remanded for resentencing within the standard range because there was no then-existing procedure for impaneling a jury to consider the 'clearly too lenient' factor: This factor was not listed in RCW 9.94A.535(3), which provided "'an exclusive list' of the factors a jury may consider in deciding whether to impose a sentence above the standard range." McNeal III, 156 Wn. App. at 354-55 (quoting Vance, 142 Wn. App. at 407).

In holding the trial court had authority on remand to impose an exceptional sentence based on RCW 9.94A.535(2)(c), McNeal III distinguished Vance on the ground that the aggravating factor in Vance

involved a factual finding—whether a non-exceptional sentence resulted in punishment that was "clearly too lenient" — which, at that time, a jury was required to determine under Van Delft. McNeal III, 156 Wn. App. at 354 (citing Vance, 142 Wn. App. at 401–02). In contrast, the statute now allowed a judge to find the aggravator listed under RCW 9.94A.535(2)(c), which did not require a "clearly too lenient" factual determination. McNeal III, 156 Wn. App. at 355.⁴

McNeal III recognized "the legislature has crafted a procedure for the sentencing court to consider particular enumerated exceptional sentencing factors, including the 'free crimes' factor alleged here. See RCW 9.94A.535(2)(c)." Id. RCW 9.94A.535(2)(c) "authorize[d] the resentencing court to determine the 'free crimes' exceptional sentencing factor." Id.

Under McNeal III and Mutch, an offender like Parmelee whose offense occurred prior to the effective date of the post-Blakely legislation is subject to that legislation upon resentencing following vacature of the original sentence. The post-Blakely legislation governing the imposition

⁴ McNeal III noted "Although the Supreme Court's later holding in Vance made the statutory analysis in the court of appeals decision moot, the Supreme Court did not address the trial court's authority to make the factual determination under state law." McNeal III, 156 Wn. App. at 355 n.21 (citing Vance, 168 Wn.2d at 763 n. 8).

of exceptional sentences provides the statutory authority to impose an exceptional sentence at resentencing.

The trial court's reliance on the "clearly too lenient" aggravating factor listed under former RCW 9.94A.535(2)(i) was therefore misplaced. The statutory authority to impose an exceptional sentence based on that factor did not exist at the time of Parmelee's resentencing. To lawfully impose an exceptional sentence on Parmelee, the trial court needed to follow the requirements of the post-Blakely statutory scheme, including lawful reliance on an aggravating factor listed in RCW 9.94A.535. The court acted outside of its statutory authority in relying on the "clearly too lenient" aggravator under former RCW 9.94A.535(2)(i) and the exceptional sentence is therefore void. Paulson, 131 Wn. App. 588 (court action without statutory authority is void).

f. The Case Should Be Remanded For Imposition Of A Standard Range Sentence.

The State may claim the State should be given the opportunity to seek an exceptional sentence on remand based on RCW 9.94A.535(2)(c). That claim should be rejected. The only lawful remedy is reversal of Parmelee's exceptional sentence and remand for imposition of a sentence within the standard range.

Imposition of an exceptional sentence based on the aggravator found under RCW 9.94A.535(2)(c) would violate the constitutional prohibition against ex post facto laws. U.S. Const. art. 1, § 10, cl. 1; Wash. Const. art. 1, § 23. McNeal III and Mutch establish post-Blakely legislation applies to offenders who are resentenced following vacature of the original sentence and both recognize the trial court has statutory authority to impose an exceptional sentence under RCW 9.94A.535(2)(c).

But no ex post facto challenge to the imposition of an exceptional sentence based on RCW 9.94A.535(2)(c) was raised in McNeal III or Mutch. McNeal III, 156 Wn. App. at 354-55; Mutch, 171 Wn.2d at 656-58. McNeal III and Mutch therefore do not control and lack precedential value in relation to the ex post facto argument raised in this case. Berschauer/Phillips Constr. Co., 124 Wn.2d at 824; Kucera, 140 Wn.2d at 220; Electric Lightwave, Inc., 123 Wn.2d at 541.

Pillatos held the ex post facto clause is not offended by application of the Blakely-fix legislation to criminal conduct committed prior to effective date, but it did so only in relation to the procedural aspects of the statute, not its substantive aspects. Pillatos, 159 Wn.2d at 476-77. It noted, "Because the entirety of the statute is not before us, we are not rendering a decision about unchallenged portions of the statute." Pillatos, 159 Wn.2d at 472 n.6. Pillatos only addressed the procedural aspect of

Laws of 2005, Chapter 68 § 4(1), (2) that allowed a jury to be empanelled to find aggravating factors. Id. at 468, 474.

Its ex post facto holding did not reach the substantive portion of the Blakely-fix legislation, which becomes clear when one considers another part of the Pillatos decision: "Defendants argue that the 2005 legislature changed the aggravating factors that may form the basis for an exceptional sentence, substantively changing the law as it existed at the time they committed their crimes. Whether or not this is true in the abstract, defendants have not shown any relevant change. Accordingly, this issue is not ripe for our review and we await a case that better presents it." Pillatos, 159 Wn.2d at 478.

Parmelee's case is that case. It presents the issue of whether ex post facto would be violated if an exceptional sentence were imposed on remand based on an aggravating factor that did not exist until the 2005 amendments were enacted.

Application of a statutory aggravating factor to justify an exceptional sentence for a crime committed before the statute was enacted violates the ex post facto clauses. State v. Stewart, 72 Wn. App. 885, 893-94, 866 P.2d 677 (1994), aff'd, 125 Wn.2d 893, 890 P.2d 457 (1995). RCW 9.94A.535(2)(c) therefore cannot be applied to Parmelee's sentence without violating the ex post facto prohibition.

In Stewart, the trial court imposed an exceptional sentence pursuant to former RCW 9.94A.390(2)(e) which lists as an aggravating factor that "[t]he current offense included a finding of sexual motivation pursuant to RCW 9.94A.127." Stewart, 72 Wn. App. at 893. This Court held the trial court violated the ex post facto clause by applying the sexual motivation statute, RCW 9.94A.390(2)(e), to impose an exceptional sentence. Id. at 890.

Stewart's offenses took place in 1989 and he pled guilty that same year. Id. at 895. In 1990, the legislature amended the SRA, adding "sexual motivation" to the list of aggravating factors that enable a court to impose an exceptional sentence. Id. at 896-97; see Former RCW 9.94A.390(2)(e) (Laws of 1990, ch. 3 § 603, eff. July 1, 1990). RCW 9.94A.127, the sexual motivation statute upon which the aggravator was based, was enacted in 1990 as well. RCW 9.94A.127 (Laws of 1990, ch. 3 § 601, eff. July 1, 1990). This Court reasoned application of the statute violated the ex post facto clauses because "[r]etroactive application of the subsequently enacted statute to Stewart's crimes made the punishment more burdensome after the crimes were committed by permitting use of a finding of sexual motivation pursuant to the statute to justify an exceptional sentence." Stewart, 72 Wn. App. at 894.

The reasoning of Stewart applies here. Application of the aggravating factor codified at RCW 9.94A.535(2)(c) would violate the constitutional prohibition against ex post facto laws because it did not exist when Parmelee committed his offenses. Prohibited ex post facto laws include "[e]very law that aggravates a crime, or makes it greater than it was, when committed." Ludvigsen v. City of Seattle, 162 Wn.2d 660, 669, 174 P.3d 43 (2007).

The State may argue RCW 9.94A.535(2)(c) is simply a modification of former RCW 9.94A.535(2)(i). The nature of that modification, however, has ex post facto implications.

As set forth in section 1. d., supra, the two aggravators are different in a dispositive way. The current aggravator does not require a "clearly too lenient" finding. Alvarado, 164 Wn.2d at 566-67. RCW 9.94A.535(2)(c) makes it easier to obtain an exceptional sentence because the "clearly too lenient" requirement has been written out of the equation. Newlun, 142 Wn. App. at 742-43. An offender is disadvantaged for ex post facto purposes when "the statute alters the standard of punishment which existed under the prior law." State v. Schmidt, 143 Wn.2d 658, 673, 23 P.3d 462 (2001).

RCW 9.94A.535(2)(c) decreases the proof required for imposition of an exceptional sentence. Ex post facto laws include laws that reduce

the quantum of evidence necessary to punish. See Ludvigsen, 162 Wn.2d at 674 (application of the 2004 DWI amendments, redefining a "valid" breath test, to Ludvigsen's 2002 criminal conduct violates the ex post facto clause because they reduced quantum of evidence necessary for conviction); State v. Edwards, 104 Wn.2d 63, 72, 701 P.2d 508 (1985) (application of amendment to murder statute modifying element of crime violated ex post facto because amendment altered rules of evidence by permitting the State to prove different facts than it had to prove when the crime was committed).

In State v. Hylton, the court determined there was no ex post facto violation in allowing the trial court to impose an exceptional sentence based on the "abuse of trust" aggravating factor codified in the 2005 amendments. State v. Hylton, 154 Wn. App. 945, 957-58, 226 P.3d 246, review denied, 169 Wn.2d 1025, 238 P.3d 504 (2010). The "abuse of trust" factor existed at common law at the time of the defendant's offenses and therefore its inclusion in the 2005 amended statute did not "increase the punishment for Hylton's crime" upon his later resentencing. Hylton, 154 Wn. App. at 952-53, 957-58. Indeed, the common law factor was actually broader than the statutory factor. Id. at 953.

Parmelee's case presents a different scenario. RCW 9.94A.535(2)(c) did not import the former statutory aggravating factor

without change. Alvarado held RCW 9.94A.535(2)(c) and former RCW 9.94A.535(2)(i) were decisively different as to what facts needed to be found to support the aggravator. Alvarado, 164 Wn.2d at 566-67.

Parmelee's case cannot be remanded to allow imposition of an exceptional sentence based on RCW 9.94A.535(2)(c) without violating the ex post facto clause. The only lawful remedy is to remand for imposition of a standard range sentence.

2. THE STATE FAILED TO MEET ITS BURDEN OF PROVING PRIOR FEDERAL CONVICTIONS SHOULD BE SEPARATELY COUNTED IN COMPUTING THE OFFENDER SCORE.

The court erred in failing to treat Parmelee's prior federal convictions as the same criminal conduct in computing his offender score. These federal convictions should count as one point total instead of eight because the State failed to prove through competent evidence that they should be counted separately. In addition, the court erred in failing to hold an evidentiary hearing on disputed facts related to the same criminal conduct issue. The sentence should be reversed with direction to count the federal conviction as one point total for purposes of the offender score.

- a. The Same Criminal Conduct Issue Is A Proper Part of This Appeal.

The "law of the case" doctrine does not apply here. That doctrine generally "refers to the binding effect of determinations made by the

appellate court on further proceedings in the trial court on remand" or to "the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case." State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (quoting Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992)).

The doctrine does not apply when a prior appellate decision does not decide an issue on its merits. Harrison, 148 Wn.2d at 562. The Supreme Court order granted Parmelee's personal restraint petition "only on the exceptional sentence issue," vacated "the sentence," and remanded the matter for resentencing. CP 636. Nothing in that order shows the Supreme Court decided Parmelee's offender score argument on its merits.

In response to Parmelee's petition, the State argued the offender score issue could not be raised in a personal restraint petition because it was time barred under RCW 10.73.090. CP 658. It framed the issue as "Should petitioner's claims regarding the offender score, fees, restitution and recoupment be addressed to the trial court at that hearing if they aren't time barred?" CP 656. The State contended Parmelee's arguments related to the offender score, if not time barred, "can and should be presented to the trial court at the resentencing hearing[.]" CP 663. The Supreme Court took the State up on its invitation to pass on the merits of the offender

score issue on the basis that it could not be heard as part of the petition and was a proper subject for remand.

On remand for resentencing, Parmelee did precisely what the State said he should do by raising the offender score issue. CP 411, 425-29; RP 27, 31-34. After considering argument from both sides, the trial court ruled on Parmelee's arguments and counted the 17 prior federal convictions as eight points instead of one, resulting in a total offender score of "13." RP 27-34; CP 549, 554. Cf. State v. Kilgore, 167 Wn.2d 28, 38-39, 216 P.3d 393 (2009) (RAP 2.5(c)(1) allows trial court exercises discretion to revisit an issue on remand that was not the subject of earlier appeal and its decision may be subject of later appeal). The trial court's same criminal conduct determination is properly part of this appeal.

- b. The Federal Convictions Should Be Counted As One Point Total In Computing The Offender Score Because The State Did Not Prove They Should Be Counted Separately In The Face Of Parmelee's Specific Objection.

A sentencing court's calculation of an offender score is reviewed de novo. State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995). The offender score establishes the range a sentencing court may use in determining the sentence. Former RCW 9.94A.530(1).⁵ The court

⁵ Laws of 1996, ch. 248 § 1 (eff. June 6, 1996); Laws of 2000, ch. 28 § 12 (eff. July 1, 2001).

includes all current and prior convictions in calculating the offender score. Former RCW 9.94A.400(1)(a).⁶ Federal offenses usually considered subject to exclusive federal jurisdiction are scored as a class C felony equivalent if it was a felony under the relevant federal statute. Former RCW 9.94A.360(3).⁷ Prior class C felonies, are non-violent offenses.⁸ Non-violent offenses contribute one point to the offender score. Former RCW 9.94A.360(8).

Former RCW 9.94A.360(5)(a) provides:

In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.400(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. *The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.400(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from*

⁶ Laws of 1996, ch. 199 § 3 (eff. June 6, 1996); Laws of 2000, ch. 28 § 14 (eff. July 1, 2001).

⁷ Laws of 1997, ch. 338 § 5 (eff. July 1, 1997); Laws of 2001, ch. 264 § 5; (eff. July 1, 2001).

⁸ Former RCW 9.94A.030(24) (Laws of 1997 ch. 365 § 1, eff. July 27, 1997); Former RCW 9.94A.030(29) (Laws of 2001 2nd sp.s. c 12 § 301, eff. Sept. 1, 2001).

sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations[.]

(emphasis added).

"Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Former RCW 9.94A.400(1)(a).

Former RCW 9.94A.360(5)(a)(i) provides for a presumption *against* same criminal conduct, but only when the prior offenses were sentenced on separate dates, arose in separate jurisdictions, or were charged in separate complaints, indictments, or informations. In the federal case, Parmelee pled guilty to 17 counts in a superseding indictment. CP 722. Those counts consisted of eight counts of alien smuggling, eight counts of transporting illegal aliens, and one count of conspiracy. CP 722. The federal sentences were imposed on the same date (Sept. 30, 1992) and in the same jurisdiction (federal district court) based on the same superseding indictment. CP 722-26. The sentences were imposed concurrently. CP 723. The statutory presumption of separate criminal conduct under former RCW 9.94A.360(5)(a)(i) does not apply.

The sentencing court has an affirmative duty to determine whether prior offenses served concurrently shall be counted as one offense or as separate offenses using the same criminal conduct analysis. McCraw, 127

Wn.2d at 287; State v. Reinhart, 77 Wn. App. 454, 459, 892 P.2d 110, review denied, 127 Wn.2d 1014 (1995). Because the previous sentencing court did not make a finding of same criminal conduct for all 17 offenses,⁹ the current sentencing court needed to make an independent determination about whether all those offenses encompassed the same criminal conduct. State v. Mehaffey, 125 Wn. App. 595, 600, 105 P.3d 447 (2005) ("The current court is required to determine independently whether other concurrently sentenced prior convictions, not previously determined to be same criminal conduct . . . are nevertheless same criminal conduct").

"In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." Former RCW 9.94A.370(2).¹⁰ The State has the burden of proving prior criminal history, including the burden of proving prior convictions do not constitute same criminal conduct when disputed by the defendant. State v. Bergstrom, 162 Wn.2d 87, 89, 169 P.3d 816 (2007). The State's burden of proof is by a preponderance of the evidence. Former RCW 9.94A.530; Ford, 137 Wn.2d at 479–80.

⁹ The original sentencing court scored the 17 federal offenses as 8 points total. CP 40.

¹⁰ Laws of 1996 ch. 248 § 1 (effective June 6, 1996); Laws of 2000, ch. 28 § 12 (effective July 1, 2001).

The State claimed the prior federal offenses added up to eight points rather than one point. CP 637-38. It repeatedly contended, and the trial court echoed, that the offender score of eight was "conservatively scored," as if both were doing Parmelee a favor in not seeking to increase the score even higher. CP 638; RP 29, 33. The court, however, had no authority to increase the offender score beyond eight because the original sentencing court had already found some of those offenses were same criminal conduct in originally scoring the 17 offenses as a total of eight points. CP 40. For prior offenses determined to be same criminal conduct, "the previous court's same criminal conduct determination is final." Mehaffey, 125 Wn. App. at 600.

The State relied on two things in support of its argument that the offender score for the federal offenses should be eight instead of one: the federal judgment and United States v. Parmelee, 42 F.3d 387 (7th Cir. 1994). CP 663, 722-26; RP 32-33.

The federal judgment, however, only shows an end date of "4/21/91" for all seventeen offenses. CP 722. It does not show separate offense dates. The judgment does not show different victims, different places, or different objective intent. The judgment does not establish separate offenses for offender score purposes.

The State contended the trial court could properly rely on the facts recited in United States v. Parmelee, 42 F.3d 387 (7th Cir. 1994) — a federal appellate decision reversing Parmelee's sentencing enhancement and affirming his co-defendant's convictions. The State claimed that decision showed eight different dates of smuggling, "requiring separate intent." RP 32-33.

There are fatal problems with that argument. First, "facts" gleaned from an appellate decision issued in another case are not evidence for sentencing purposes. Undersigned counsel is unaware of any Washington case where facts taken from a prior judicial appellate decision have been used to establish lack of same criminal conduct for prior offenses. But one relevant proposition is established: "courts of this state cannot, while trying one cause, take judicial notice of records of other independent and separate judicial proceedings even though they be between the same parties. The record, though public, must be proved." Swak v. Dep't of Labor & Indus., 40 Wn.2d 51, 54, 240 P.2d 560 (1952); accord In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003). The sentencing court could not take judicial notice of facts related in the separate federal appellate proceeding.

Additional barriers preclude that source of information from establishing separate offenses in Parmelee's case. The concurrence/dissent

in the federal decision indicates eight instances of smuggling formed the basis of "the indictment." Parmelee, 42 F.3d at 396, 396 n.1, 397 n.4. The date of the offenses related in the federal decision cannot be reconciled with the single date of offense set forth in the federal judgment. Again, the federal judgment lists an end date of "4/21/91" for all seventeen offenses to which Parmelee pled guilty. CP 722. The judgment conflicts with the discrete offense dates listed in the federal decision. The State cannot use a federal appellate decision to impeach the facts set forth in the federal judgment.

Moreover, Parmelee pled guilty. CP 722. His co-defendants were convicted following trial. Parmelee, 42 F.3d at 389. The federal decision does not make clear which facts were admitted by Parmelee as part of his guilty plea, including facts regarding the dates of the crimes. Id. at 389, 395-97. The federal decision does not show Parmelee specifically admitted to committing eight offenses on eight different dates. The indictment here was not presented to the trial court. It is not in the record. The trial court did not know what facts Parmelee admitted as part of his plea agreement. See State v. Bunting, 115 Wn. App. 135, 141, 61 P.3d 375 (2003) (where facts alleged in charging document are not directly related to the elements, courts may not assume those facts have been proved or admitted).

At one point, the trial court indicated at resentencing that the eight smuggled aliens were each "victims." RP 31. Neither the court nor the State provided any authority for the proposition. The "fact" of eight smuggled aliens comes from the federal appellate decision and for the reasons set forth above cannot form the basis for a separate offense finding.

Moreover, there is only one victim of federal immigration offenses: the public at large. See United States v. Gastelum-Almeida, 298 F.3d 1167, 1175 (9th Cir. 2002) (United States was victim of alien smuggling for purpose of grouping counts under pursuant to U.S.S.G. § 3D1.2) (citing U.S.S.G. § 3D1.2 cmt. n. 2. (society at large is victim of immigration offenses)). And there is no evidence that the aliens were harmed in any way cognizable under the Washington definition of a "victim." See Former RCW 9.94A.030(37)¹¹ ("Victim" means "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.").

The court also erred in failing to hold an evidentiary hearing on the matter. "Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point." Former RCW 9.94A.530(2). The rule applies where the defense disputes material facts related to same criminal conduct. Bergstrom, 162 Wn.2d at 97.

¹¹ Laws of 1997, ch. 365 § 1 (eff. July 27, 1997).

Parmelee vociferously disputed the "facts" set forth in the federal decision and those alleged at sentencing in support of a total offender score of eight for the federal convictions. RP 31-32; CP 411, 427-29. The court did not hold an evidentiary hearing to resolve the dispute. It therefore violated former RCW 9.94A.530(2) in relying on the disputed facts in determining whether the federal offenses counted separately.

- c. The Remedy Is Reversal Of The Sentence And Remand For Resentencing With Direction To Count The Federal Offenses One Point Total In Computing The Offender Score.

The State did not meet its burden of showing the prior federal offenses should not all be counted as the same criminal conduct for a total of one point. The sentence must be reversed. The State does not receive a second opportunity to prove the prior offenses add up to an offender score of eight.

Remand for an evidentiary hearing is only appropriate when the defendant has failed to specifically object to the State's evidence of the existence or classification of a prior conviction. State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002). When a defendant specifically objects to criminal history and the disputed issues have been fully argued at sentencing, the State is held to the record as it existed at the sentencing hearing and does not get a second opportunity to meet its burden of proof.

In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 877-78, 123 P.3d 456 (2005); State v. Mendoza, 165 Wn.2d 913, 930, 205 P.3d 113 (2009).

Parmelee specifically objected to not counting the federal conviction as one point total for offender score purposes. CP 411, 425, 427-29; RP 27, 31-34. The parties argued the issue at the sentencing hearing. RP 27-34. The State did not meet its burden of showing the federal convictions should not be counted as one point. The existing record requires the federal convictions be counted as one point total.

RCW 9.94A.530(2), as amended in 2008, provides, "On remand for resentencing . . . the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." Laws of 2008, ch. 231 § 4. This amendment was intended to overrule the lines of cases holding the State to the existing record on remand (i.e., Lopez and Cadwallader). Laws of 2008, ch. 231 § 1.

The amended statute is inapplicable here. Absent legislative intent to the contrary, "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. Parmelee committed the current offenses prior to the statute's enactment. The legislature specified which sections of the 2008 amendments would apply to resentencings

commenced after the effective date of June 12, 2008: "Sections 2 and 3 of this act apply to all sentencings and resentencings commenced before, on, or after the effective date of sections 1 through 4 of this act." Laws of 2008, ch. 231 § 5. The amendment to RCW 9.94A.530(2) (i.e., "Section 4") is not among them.

"Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies." Washington State Republican Party v. Washington State Public Disclosure Comm'n, 141 Wn.2d 245, 280, 4 P.3d 808 (2000). "[S]pecific inclusions exclude implication." In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999).

Laws of 2008, ch. 231 § 5 specifies sections 2 and 3 "apply to all sentencings and resentencings commenced before, on, or after the effective date of sections 1 through 4 of this act." Under the rule of *expressio unius est exclusio alterius*, the amendment to RCW 9.94A.530(2) in "Section 4" cannot be deemed to have the same effect.

Division Two in State v. Calhoun recently held the 2008 amendment to RCW 9.94A.530(2) applied to all resentencings, regardless of the date of offense. State v. Calhoun, 163 Wn. App. 153, 161-62, 257

P.3d 693 (2011).¹² That holding is infirm because Division Two failed to acknowledge the effect of RCW 9.94A.345 and Laws of 2008, ch. 231 § 5.

Even if there is some ambiguity regarding applicability of the 2008 amendment, the rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979). "[I]n criminal cases the rule of lenity is a basic and required limitation on a court's power of statutory interpretation whenever the meaning of a criminal statute is not plain." Hopkins, 137 Wn.2d at 901. To the extent there is any ambiguity about the matter, the rule of lenity requires the statute be interpreted in Parmelee's favor.

Depending on the comparability of the Illinois convictions (addressed below), Parmelee's offender score will be three or five points. The exceptional sentences predicated on an offender score of greater than nine for both counts must necessarily be vacated. In the absence of any valid aggravating factor supporting an exceptional sentence, Parmelee is entitled to be resentenced within the standard range.

¹² A petition for review has been filed and is pending under Supreme Court No. 866538.

3. THE STATE DID NOT PROVE PRIOR ILLINOIS CONVICTIONS WERE COMPARABLE TO A WASHINGTON OFFENSE FOR THE PURPOSE OF COMPUTING THE OFFENDER SCORE.

The court at resentencing counted two prior Illinois offenses as contributing a total of two points to Parmelee's offender score. CP 554. This was error. The State did not prove the Illinois offenses were comparable to a Washington offense. The Illinois offenses should therefore have been omitted from the offender score.

a. The Comparability Issue Is A Proper Part of This Appeal.

The law of the case doctrine did not prohibit Parmelee from raising the comparability issue because the record does not show the Supreme Court rejected that issue on its merits in granting his personal restraint petition "only on the exceptional sentence issue." CP 636; Harrison, 148 Wn.2d at 562 (law of case doctrine does not apply where prior appellate decision did not decide sentencing issue on its merits). Parmelee raised the comparability issue on remand and the trial court exercised its discretion by ruling on it. RP 27-29, 34; CP 425-27. Review of the trial court's comparability determination is properly before this court.

b. The Illinois Offenses Are Not Legally Comparable.

In computing the offender score, "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." Former RCW 9.94A.360(3). The prosecution bears the burden of proving the existence and comparability of a defendant's out-of-state convictions. Cadwallader, 155 Wn.2d at 876. "Absent a sufficient record, the sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score." Ford, 137 Wn.2d at 480-81.

The comparability of out-of-state convictions to Washington crimes is a question of law reviewed de novo. State v. Beals, 100 Wn. App. 189, 196, 97 P.2d 941 (2000). When determining comparability, the trial court must compare the elements of the out-of-state crime with the elements of potentially comparable Washington crimes as defined on the date the out-of-state crime was committed. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Offenses are not legally comparable if the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute. Ford, 137 Wn.2d at 479; Lavery, 154 Wn.2d at 255-56.

Two separate Illinois judgment and sentences were entered, each indicating Parmelee pled guilty to one count of deceptive practices under "17-1 B(d)." CP 704-05. Former IL ST CH 720 § 5/17-1(B)(d) (P.A. 84-897, § 1, eff. Sept. 23, 1985) provides:

A person commits a deceptive practice when, with intent to defraud: . . . With intent to obtain control over property or to pay for property, labor or services of another, or in satisfaction of an obligation for payment of tax under the Retailers' Occupation Tax Act 1 or any other tax due to the State of Illinois, he issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository. Failure to have sufficient funds or credit with the depository when the check or other order is issued or delivered, or when such check or other order is presented for payment and dishonored on each of 2 occasions at least 7 days apart, is prima facie evidence that the offender knows that it will not be paid by the depository, and that he has the intent to defraud.

The prosecutor maintained the Illinois deceptive practice offenses were comparable to the Washington offenses of forgery and second degree theft. RP 28-29. Neither Washington offense is legally comparable to the Illinois deceptive practice offense.

A person is guilty of forgery under Washington law "if, with intent to injure or defraud: (a) He falsely makes, completes, or alters a written instrument; or (b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged." Former RCW 9A.60.020(1) (Laws of 1975-76, 2nd ex.s. c 38 § 13).

The intent to defraud element is the same for a Washington forgery and an Illinois deceptive practice. But the forgery element of "falsely makes, completes, or alters a written instrument" is nowhere to be found in the Illinois deceptive practice statute. The alternative forgery element of "possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged" is likewise missing from the Illinois statute. There is no requirement under the Illinois deceptive practice statute that the "check or other order" be falsely made, completed, or altered, as is required under the Washington statute to constitute a forgery. The Illinois deceptive practice offenses and the Washington forgery are therefore legally incomparable.

Contrary to the prosecutor's assertion, the Illinois offenses are not legally comparable to a Washington theft offense either. RP 28-29. Counts III and IV in the Illinois indictment charged Parmelee with theft. CP 702-03. But Parmelee did not plead guilty to those theft counts and they were not included in the judgment and sentence. He only pled guilty to counts I and II, which comprised the deceptive practice offense. CP 704-05. It therefore does not make any sense for the prosecutor to claim that counts III and IV establish convictions for theft.

In any event, the deceptive practice offenses to which Parmelee in fact pled guilty are legally incomparable to a Washington theft. Theft under Washington law means:

- (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

Former RCW 9A.56.020 (Laws of 1975-76, 2nd ex.s. c 38 § 9).

A theft in Washington requires a person to obtain or exert unauthorized control over the property or services of another under subsection (a) and (b). That element is lacking in the Illinois deceptive practice statute, which provides there must be an intent to defraud "[w]ith intent to obtain control over property or to pay for property, labor or services of another[.]" Former IL ST CH 720 § 5/17-1(B)(d). The Illinois statute criminalizes intent to obtain control over the property or services of another, whereas the Washington theft statute requires a person to actually obtain control of the property or services of another.

Furthermore, the Illinois deceptive practice statute does not contain the alternative Washington theft element of "appropriate lost or

misdelayed property or services of another, or the value thereof" under former RCW 9A.56.020(c). The Illinois offenses are not legally comparable to a Washington theft offense.

c. The State Did Not Prove The Illinois Convictions Were Factually Comparable.

If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, the court then determines whether the offenses are factually comparable. Ford, 137 Wn.2d at 479; Lavery, 154 Wn.2d at 255-56. In assessing factual comparability, the trial court may look at the facts underlying the prior conviction to determine if the defendant's conduct would have resulted in a conviction in Washington. Lavery, 154 Wn.2d at 255.

"In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580, 583 (2007). An admission in a plea statement, a plea colloquy where a defendant admits facts, the to-convict instruction and jury verdict in a jury trial, or the trial court's findings of facts in a bench trial can establish such facts. Shepard v. United States, 544 U.S. 13, 16, 125 S. Ct. 1254, 1262, 161 L. Ed. 2d 205 (2005). The State carries the burden of providing a certified copy of the judgment or comparable documents of

record or transcripts of prior proceedings. State v. Wilson, 113 Wn. App. 122, 136, 52 P.3d 545 (2002).

Courts "cannot assume the existence of facts that are not in the record." State v. Werneth, 147 Wn. App. 549, 555, 197 P.3d 1195 (2008). Charging document alleging facts underlying the elements of the crime are not admitted by a plea of guilty as charged unless the law of the foreign state provides otherwise. State v. Thomas, 135 Wn. App. 474, 486–87, 144 P.3d 1178, 1184–85 (2006), review denied, 166 P.3d 1218 (2007); State v. Releford, 148 Wn. App. 478, 483, 200 P.3d 729, review denied, 166 Wn.2d 1028, 217 P.3d 336 (2009).

Under Illinois law, "[a] defendant who pleads guilty admits the elements of the offense charged." People v. Gray, 406 Ill. App.3d 466, 473, 941 N.E.2d 338 (Ill. Ct. App. 2010) (citing People v. Henderson, 95 Ill. App.3d 291, 296, 419 N.E.2d 1262 (Ill. Ct. App. 1981)). The plea, however, "does not constitute an admission of collateral matters." Gray, 406 Ill.App.3d at 473 (citing Henderson, 95 Ill. App.3d at 296). "The rule that a guilty plea constitutes an admission of every fact alleged in an indictment is limited to facts which constitute an ingredient of the offense charged." Henderson, 95 Ill. App.3d at 296 (citing People v. Langford, 392 Ill. 584, 588, 65 N.E.2d 440 (Ill. 1946)).

In arguing the Illinois offenses were comparable to a Washington forgery, the State pointed to the indictment allegation in counts I and II that Parmelee "delivered a certain bank check . . . signed as maker Johnathon Marx." CP 700-01; RP 28-29. From this allegation, the prosecutor drew a factual inference that Parmelee forged someone else's name on the check. RP 29.

The name signed on the checks does not constitute an element of the offense. Under Illinois law, Parmelee cannot be deemed to have admitted that fact. Gray, 406 Ill.App.3d at 473; Henderson, 95 Ill. App.3d at 296; Langford, 392 Ill. at 588. The factual allegations in the Illinois indictment are not facts admitted by Parmelee in his plea, and thus the sentencing court's finding of factual comparability was incorrect. Bunting, 115 Wn. App. at 142.

Even if Parmelee's guilty plea admitted the factual allegations contained in the indictments, the State still failed to prove factual comparability by a preponderance of the evidence. The State's inference that Parmelee forged the name on the check amounts to nothing more than speculation. Other inferences can just as easily be drawn. For example, one inference is that Parmelee delivered the checks that were *actually* signed by Johnathon Marx, in which case the basis for forgery does not exist. Moreover, even where the record shows a defendant admitted to all

the underlying facts in the indictment, the court is prohibited from drawing inferences drawn from those facts in determining comparability. State v. Larkins, 147 Wn. App. 858, 865-66, 199 P.3d 441 (2008).

d. The Remedy Is Reversal Of The Sentence And Remand For Resentencing With Direction To Omit The Illinois Offenses From The Offender Score.

Parmelee specifically objected to including the Illinois convictions on the basis that they did not compare to an equivalent Washington felony. RP 27-29; CP 411, 425-27. The State did not meet its burden of establishing comparability and should not get yet another opportunity to meet its burden of proof on remand. See section C. 2. c., supra. The existing record requires the two Illinois convictions be removed from Parmelee's offender score and the case remanded for resentencing. See Ford, 137 Wn.2d at 485 ("In this case, the sentencing judge specifically included the potentially incorrect offender score of '9 or more' as an aggravating factor supporting the exceptional sentence. Resentencing, therefore, is required."); State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) ("A correct offender score must be calculated before a presumptive or exceptional sentence is imposed.").

D. CONCLUSION

Parmelee requests that this Court vacate the exceptional sentence and remand for entry of a non-consecutive, standard range sentence on both counts.

DATED this 21st day of December 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON, DSHS,)	
)	
Respondent,)	
)	
v.)	COA NO. 66918-4-I
)	
ALLAN PARMELEE,)	
)	
Appellant.)	

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 23RD DAY OF DECEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALLAN PARMELEE
DOC NO. 793782
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF DECEMBER, 2011.

x *Patrick Mayovsky*