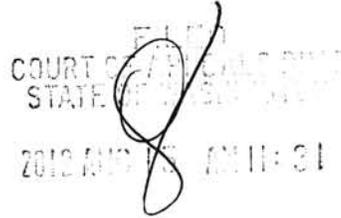


67727-6

67727-6



NO. 67727-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC L. LOWE,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

JOHN J. JUHL
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE..... 1

 A. FACTS OF THE CRIMES. 1

 B. PROCEDURAL HISTORY. 2

III. ARGUMENT 6

 A. LOWE’S JUVENILE CONVICTION WAS NOT VACATED. 6

 B. LOWE’S FAILURE TO COMPLY WITH THE CONDITIONS OF HIS DEFERRED DISPOSITION DOES NOT ENTITLE HIM TO HAVE THE ADJUDICATION VACATED. 10

 C. LOWE’S PRIOR JUVENILE ADJUDICATION WAS PROPERLY INCLUDED IN HIS CRIMINAL HISTORY..... 13

 D. THERE IS NO AMBIGUITY IN THE STATUTORY INCLUSION OF JUVENILE ADJUDICATION IN AN OFFENDERS CRIMINAL HISTORY. 16

IV. CONCLUSION 18

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Carrier</u> , 173 Wn.2d 791, 272 P.3d 209 (2012)	13, 14
<u>In re Jones</u> , 121 Wn. App. 859, 88 P.3d 424 (2004)	16
<u>In re Personal Restraint Petition of Williams</u> , 111 Wn.2d 353, 759 P.2d 436 (1988).....	17
<u>In re Sietz</u> , 124 Wn.2d 645, 880 P.2d 34 (1994)	18
<u>State v. Bird</u> , 95 Wn.2d 83, 622 P.2d 1262 (1980).....	10
<u>State v. C.R.H.</u> , 107 Wn. App. 591, 27 P.3d 660 (2001)	9
<u>State v. Cervantes</u> , ____ P.3d ____, 2012 WL 2870174 (Wn. App. Div. 3).....	7
<u>State v. Clark</u> , 91 Wn. App. 581, 958 P.2d 1028 (1998).....	10
<u>State v. Cooper</u> , 164 Wn. App. 407, 263 P.3d 1283 (2011)	16
<u>State v. Cruz</u> , 139 Wn.2d 186, 985 P.2d 384 (1999).....	17
<u>State v. D.P.G.</u> , ____ P.3d ____, 2012 WL 2510849 (Wn. App. Div. 1).....	9
<u>State v. Delgado</u> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	13
<u>State v. Hall</u> , 35 Wn. App. 302, 666 P.2d 930 (1983).....	10
<u>State v. Harper</u> , 50 Wn. App. 578, 749 P.2d 722 (1988).....	14
<u>State v. Hayes</u> , 164 Wn. App. 459, 262 P.3d 538 (2011).....	18
<u>State v. J.A.</u> , 105 Wn. App. 879, 20 P.3d 487, 491 (2001).....	11
<u>State v. J.H.</u> , 96 Wn. App. 167, 978 P.2d 1121 (1999).....	9
<u>State v. Johnson</u> , 118 Wn. App. 259, 76 P.3d 265 (2003)	9
<u>State v. M.C.</u> , 148 Wn. App. 968, 201 P.3d 413 (2009)	14, 15
<u>State v. May</u> , 80 Wn. App. 711, 911 P.2d 399 (1996)	8, 12
<u>State v. Mohamoud</u> , 159 Wn. App. 753, 246 P.3d 849 (2011)	10
<u>State v. Smith</u> , 158 Wn. App. 501, 246 P.3d 812 (2010).....	15, 17
<u>State v. Todd</u> , 103 Wn. App. 783, 14 P.3d 850 (2000).....	8, 12
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	13
<u>State v. Y.I.</u> , 94 Wn. App. 919, 973 P.2d 503 (1999).....	12

WASHINGTON STATUTES

Laws of 2002 ch. 107, § 1	17
Laws of 2012 ch. 177, § 1	7
RCW 7.68.035(1)(b).....	15
RCW 10.....	14
RCW 13.....	14
RCW 13.40.020(4)	8
RCW 13.40.127	7, 8, 11
RCW 13.40.127(6)	11

RCW 13.40.127(7)	11
RCW 13.40.127(9)	8, 9, 11
RCW 13.50.050(11)	15
RCW 13.50.050(12)	15
RCW 16.52.205	8
RCW 9.94A	17
RCW 9.94A.030(9)	14
RCW 9.94A.030(11)	14, 16, 17
RCW 9.94A.030(11)(b)	15
RCW 9.94A.030(11)(c)	17
RCW 9.94A.030(12)	15
RCW 9.94A.030(14)	17
RCW 9.94A.345	13, 14
RCW 9.94A.525	16, 17
RCW 9.94A.640	14
RCW 9.95.240	14
RCW 9.96.060	14

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (9 th ed. 2009)	7
---	---

I. ISSUES

As a juvenile, defendant was given a deferred disposition in 2000. Defendant did not comply with the conditions of the deferred disposition. In 2002 the court entered an order dismissing the case; the order did not vacate the adjudication. Was defendant's prior juvenile adjudication properly included in his criminal history for calculating his offender score?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

On August 13, 2010, two masked men forced their way into the apartment of Alonzo Lopez-Gonzalez and Victor Hugo-Ortega located on Casino Road, Everett, WA. The two masked men immediately began beating Hugo-Ortega in the head with a handgun and demanding money. The attackers then turned their attention to Lopez-Gonzalez and began beating him, yelling that he had sold them "bad dope" and demanding money. Lopez-Gonzalez was severely beaten by both attackers. Lopez-Gonzalez told the assailants that he had money in his truck located in the parking lot. The two masked assailants took a safe containing cash from inside the apartment and dragged Lopez-Gonzalez out onto the second floor balcony where Lopez-Gonzalez either jumped or was pushed

off. When he was on the ground Lopez-Gonzalez was shot in the back with a .40 caliber handgun. After being shot he managed to get up and run a short distance, but then collapsed. Lopez-Gonzalez died from his injuries soon thereafter in a local hospital. The police arrived and interviewed witnesses. The apartment was very bloody. The police learned that Lopez-Gonzalez was a heroin dealer known to carry a large amount of cash and that Eric Lowe had announced to others shortly before the attack on Lopez-Gonzalez and Hugo-Ortega that he knew Lopez-Gonzalez had \$10,000 and that Lowe was going to rob him. Hugo-Ortega knew Lowe and recognized Lowe's voice during the attack. Another witness told police that on the night of the attack Lowe and another individual came to the witness' apartment; Lowe was covered in blood and was carrying a gun in a bag. Lowe asked the witness to dispose of the gun for him. CP 158-159.

B. PROCEDURAL HISTORY.

The State charge Eric Lee Lowe with 1st degree murder (count 1); 1st degree burglary (count 2); attempted 1st degree robbery (count 3); 2nd degree assault (count 4); and 2nd degree unlawful possession of a firearm (count 5). Counts 1, 2, 3 and 4 all contained firearm allegations. CP 154-155.

The case proceeded to trial. On July 18, 2011, the jury found Lowe guilty on all five counts and found that he was armed with a firearm on counts 1, 2, 3 and 4. Sentencing was set for August 23, 2011. The State conceded that Lowe's convictions for Attempted 1st Degree Robbery and 1st Degree Murder merged. CP 67-75, 276; RP 2-3; 3RP 78-101.¹

On June 8, 2011, Lowe pleaded guilty to residential burglary in cause number 10-1-00390-2.² Sentencing was continued to August 23, 2011, to coincide with sentencing in the present case. On August 23, 2011, the court inquired whether Lowe wanted to proceed with sentencing on each cause number separately. Lowe agreed to proceed with sentencing on both cases so that his sentences would run concurrent. RP 18.

At sentencing Lowe questioned whether his 2000 juvenile conviction for 3rd degree assault should be included in his criminal history. The court asked if defense had seen the documents in the juvenile case. Defense counsel affirmed that he had looked at the

¹ The verbatim report of proceedings is referenced as follows: RP – 7/18/11 sentencing; 1RP – 7/11/11 – 7/15/11 consecutively paginated five volumes; 2RP – 7/15/11 discussion on instructions; 3RP – 7/18/11 closing arguments and verdict.

² Lowe appealed his sentence in the residential burglary also challenging the inclusion of his juvenile conviction in his offender score. That appeal is being considered in case number 67728-4-l.

juvenile court file to make sure what had happened on the case. Nevertheless, at sentencing Lowe did not provide the court a copy of the order dismissing the deferred disposition.³ RP 21-24.

The court stated that it intended to run Lowe's sentence on the residential burglary concurrent with this matter and pointed out that since Lowe had an offender score of ten on the 1st degree murder one point would not change his standard range. Defense counsel stated that it could make a difference if an appellate court found that more of the counts in this case merged.⁴ The court inquired whether Lowe wanted to discuss the issue with counsel. Lowe indicated he wanted to continue sentencing on the residential burglary. The court took a recess to allow Lowe the opportunity to discuss the matter with counsel. Following the recess, the court inquired whether Lowe was requesting a continuance. Defense counsel replied, "Well we talked about it, and no, we want to go forward today." RP 24-26.

³ A copy of the order was attached to Lowe's motion to withdraw his plea to residential burglary in case number 10-1-00390-2 that was filed six days after sentencing. CP 88-89. The motion was transferred to the Court of Appeals for consideration as a personal restraint petition and is being considered in case number 68389-6-I.

⁴ Lowe has not appealed the trial court's finding that none of the other counts merged. RP 3-18.

For sentencing the court was provided certified copies of Lowe's prior convictions—including a copy of his 2000 juvenile deferred disposition for 3rd degree assault; the prosecutor's understanding of defendant's criminal history; and Lowe's offender score for each count. Lowe did not object, nor did he provide the court an alternate statement of his criminal history. Lowe's offender scores were as follows:

- 10 on count 1—1st Degree Murder with a standard sentence range of 411-548 months plus 60 months on the firearm enhancement;
- 11 on count 2—1st Degree Burglary with a standard sentence range of 87-116 months plus 60 months on the firearm enhancement;
- 8 on count 4—2nd Degree Assault with a standard sentence range of 63-84 months plus 36 months on the firearm enhancement;
- 7 on count 5—Unlawful Possession of a Firearm in the 2nd Degree with a standard sentence range of 33-43 months; and
- 8 on Residential Burglary in 10-1-00390-2 with a standard sentence range of 53-70 months.

CP 14-80, 275-287; RP 2-3, 20.

The court sentenced Lowe to total of 644 months: 488 months plus 60 month firearm enhancement on 1st Degree Murder, count 1; 116 months plus 60 month firearm enhancement on 1st Degree Burglary, count 2; 84 months plus 36 month firearm enhancement on 2nd Degree Assault, count 4; and 57 months on

Unlawful Possession of a Firearm in the 2nd Degree, count 5; all counts to be served concurrently, but with the firearm enhancements to run consecutive to each other and consecutive to all other sentencing provisions. Lowe was sentenced to 53 months on the residential burglary in 10-1-00390-2 to run concurrent with his sentence in this matter. The court vacated count 3, Attempted 1st Degree Robbery. Lowe timely appealed. CP 1-13, 91, 93; RP 15-17, 26-27.

On August 29, 2011, Lowe filed a Motion to Amend Judgment and Sentence to Indicate Correct Offender Score and to Resentence Defendant. The State moved to transfer the motion to the Court of Appeals for consideration as a personal restraint petition.⁵ CP 162-163, 164-274.

III. ARGUMENT

A. LOWE'S JUVENILE CONVICTION WAS NOT VACATED.

Lowe's argument is based on his misconception that the court vacated his 2000 juvenile adjudication for 3rd degree assault. In fact, Lowe's juvenile conviction was not vacated. The order stated the case was dismissed; it did not state Lowe's conviction was vacated. The two words have different meanings. "Vacate"

⁵ The PRP is being considered in case number 68388-8-I.

means: “To nullify or cancel; make void; invalidate.” BLACK’S LAW DICTIONARY (9th ed. 2009), vacate. See also Appellant’s Brief 5. “Dismiss” means: “To send (something) away; specif., to terminate (an action or claim) without further hearing, esp. before the trial of the issues involved.” BLACK’S LAW DICTIONARY (9th ed. 2009), dismiss. Further, “a vacation is procedurally different than a dismissal.” State v. Cervantes, _____ P.3d _____, 2012 WL 2870174 (Wn. App. Div. 3) at *2.

On November 27, 2000, Lowe was found guilty of 3rd degree assault in juvenile court and given a deferred disposition under former RCW 13.40.127.⁶ On July 23, 2002, the State moved to revoke Lowe’s deferred disposition based on his non-compliance with the conditions of supervision. State’s Supp. CP ____ (sub. no. 22, Motion to Revoke Deferred Sentence). The State’s motion to revoke Lowe’s deferred disposition was based on his commission of new offenses during the period of supervision. Lowe committed Harassment on October 31, 2001, and 4th Degree Assault on November 27, 2001. He pled guilty to both offenses on February 11, 2002. Refraining from committing new offenses is a mandatory condition of community supervision under a deferred disposition.

⁶ This statute was amended by Laws of 2012 ch. 177, § 1, eff. June 7, 2012.

RCW 13.40.020(4); State v. Todd, 103 Wn. App. at 787 n.3; CP 214-216, ¶3.5, ¶3.7.7 and ¶3.13.

On September 17, 2002, the court denied the State's motion to revoke the deferred disposition finding the State had failed to institute revocation proceedings prior to the end of the period of deferral. (See State v. Todd, 103 Wn. App. 783, 790-791, 14 P.3d 850 (2000); State v. May, 80 Wn. App. 711, 716-717, 911 P.2d 399 (1996).) Without making a finding "of full compliance of the conditions of supervision" the court dismissed Lowe's deferred disposition. CP 88-89, 212-217. In light of Lowe's new criminal violations the court could not find full compliance with the conditions of supervision.

A deferred disposition is vacated upon the occurrence of three conditions:

At the conclusion of the period set forth in the order of deferral and upon a finding by the court of full compliance with conditions of supervision and payment of full restitution, the respondent's conviction shall be vacated and the court shall dismiss the case with prejudice, except that a conviction under RCW 16.52.205 shall not be vacated.

Former RCW 13.40.127(9). All three conditions; 1) the conclusion of the period of deferral; 2) *the court finding full compliance with the*

conditions of supervision; and 3) the full payment of any restitution;⁷ must be satisfied for the conviction to be vacated. State v. D.P.G., ____ P.3d ____, 2012 WL 2510849 (Wn. App. Div. 1) at *2-3; State v. C.R.H., 107 Wn. App. 591, 593 n.1, 27 P.3d 660 (2001). RCW 13.40.127(9) requires that the court to make a finding of full compliance before vacating the conviction and dismissing the case. D.P.G., 2012 WL 2510849 at *3 (the legislature's intent in subsection 9 requires a "finding by the court of 'full compliance with conditions' before dismissal of a case); C.R.H., 107 Wn. App. at 593 n.1. Requiring full compliance with conditions of supervision comports with the juvenile system's focus on both rehabilitation and punishment. D.P.G., 2012 WL 2510849 at *3; State v. Johnson, 118 Wn. App. 259, 263, 76 P.3d 265 (2003); State v. J.H., 96 Wn. App. 167, 172, 978 P.2d 1121 (1999). The necessary finding of full compliance was not made by the court in Lowe's deferred disposition. Vacating Lowe's 3rd degree assault conviction without a finding of full compliance with the conditions of the deferred disposition clearly would have violated this statutory provision. D.P.G., 2012 WL 2510849 at *3.

⁷ Lowe was not ordered to pay restitution under the deferred disposition.

The court's authority to suspend or defer the imposition or execution of a disposition is granted by statute. State v. Clark, 91 Wn. App. 581, 585, 958 P.2d 1028 (1998) (citing State v. Bird, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980)). The Juvenile Justice Act carefully and comprehensively spells out the proper parameters of the court's authority. Clark, 91 Wn. App. at 585-586. Thus, it is evident that if the court vacated Lowe's juvenile 3rd degree assault conviction it acted without statutory authority. "[W]hen a court fails to follow the statutory provisions, its actions are void." Clark, 91 Wn. App. at 585 (citing State v. Hall, 35 Wn. App. 302, 305, 666 P.2d 930 (1983)); State v. Mohamoud, 159 Wn. App. 753, 762, 246 P.3d 849, 854 (2011) (any court action that fails to comply with statutory terms is void). An order vacating Lowe's conviction without a finding of full compliance would, therefore, be void.

B. LOWE'S FAILURE TO COMPLY WITH THE CONDITIONS OF HIS DEFERRED DISPOSITION DOES NOT ENTITLE HIM TO HAVE THE ADJUDICATION VACATED.

Lowe claims that the court's denial of the State's motion to revoke his deferred disposition as untimely was equivalent to the court finding that Lowe fully complied with the conditions of supervision. Appellant's Brief 14. Lowe cites no authority for this proposition. Lowe's argument fails to take into account that it was

his duty to comply with the conditions of supervision in the first place.

A deferred disposition enables a juvenile to avoid an adjudication altogether by fully complying with the conditions of supervision. RCW 13.40.127(9). Before the court can find full compliance, the juvenile must first comply with the conditions. Lowe did not comply with the mandatory condition of community supervision to refrain from committing new offenses. Lowe's argument would nevertheless give him the same benefit as other juveniles who did fully comply with the conditions of their deferred disposition.

The state's burden to prove that the juvenile failed to comply with the terms of community supervision only comes into play when the court has been notified of non-compliance. RCW 13.40.127(6). When a motion to revoke the deferred disposition is heard the court then determines whether the juvenile failed to comply with the conditions of supervision. RCW 13.40.127(7). Based on the information presented the court makes findings and enters an order of either non-compliance or no lack of compliance. State v. J.A., 105 Wn. App. 879, 887, 20 P.3d 487, 491 (2001). Here, the court denied the motion to revoke Lowe's deferred disposition because

the State failed to institute revocation proceedings prior to the end of the community supervision period. The court did not reach the issue of Lowe's compliance. The court's jurisdiction to enforce a juvenile disposition order terminates when the community supervision period expires. State v. Y.I., 94 Wn. App. 919, 924, 973 P.2d 503 (1999); State v. May, 80 Wn. App. 711, 717, 911 P.2d 399, 402 (1996). Since Lowe's deferred disposition terminated with the period of supervision the court had no need to address Lowe's non-compliance.

Terminating a deferred disposition for unsatisfactory compliance still gives the juvenile assurance that he or she will "not be under a constant threat of incarceration until his or her 18th birthday."⁸ State v. Todd, 103 Wn. App. 783, 790, 14 P.3d 850 (2000) (quoting State v. Y.I., 94 Wn. App. 919, 924, 973 P.2d 503 (1999)). It does not leave the juvenile "at the mercy of the State's administrative bureaucracy." Todd, 103 Wash. App. at 790 (quoting May, 80 Wn. App. at 716).

⁸ Lowe turned 18 years old on 01/16/2006.

C. LOWE'S PRIOR JUVENILE ADJUDICATION WAS PROPERLY INCLUDED IN HIS CRIMINAL HISTORY.

“Under the Sentencing Reform Act of 1981 (SRA), vacation of a conviction provides the sole mechanism for removing the conviction from a defendant's criminal history.” In re Carrier, 173 Wn.2d 791, 804, 272 P.3d 209 (2012). Since Lowe's 2000 juvenile adjudication for 3rd degree assault was not vacated it was properly included in his criminal history for calculating his offender score.

For purposes of sentencing, courts look to the law in effect at the time the defendant committed the current offense. RCW 9.94A.345; Carrier, 173 Wn.2d at 808-809 (citing State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) (“We have repeatedly held that sentencing courts must ‘look to the statute in effect at the time [the defendant] committed the [current] crimes’ when determining defendants' sentences.” (alterations in original) (quoting State v. Delgado, 148 Wn.2d 723, 726, 63 P.3d 792 (2003)))).

Under the SRA, the term “[c]riminal history” means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere. Former RCW

9.94A.030(11)⁹. “Adjudication’ has the same meaning as ‘conviction.’” State v. M.C., 148 Wn. App. 968, 971, 201 P.3d 413 (2009). “Conviction’ means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.” Former RCW 9.94A.030(9). The focus of the SRA is on the initial finding of guilt, not what occurs later. Carrier, 173 Wn.2d at 802 (citing State v. Harper, 50 Wn. App. 578, 580, 749 P.2d 722 (1988) (“The focus of the SRA’s provisions for the determination of offender scores is on the fact of prior convictions and the nature of those convictions—not on the type of sentence imposed therefor [sic].”)). “A conviction may be removed from a defendant’s criminal history only if it is vacated pursuant to RCW 9.96.060¹⁰, RCW 9.94A.640¹¹, RCW 9.95.240¹², or a similar out-of-state statute, or if the conviction has

⁹ References to “former RCW” are to the law in effect at the time Lowe committed the offenses in the present case. RCW 9.94A.345.

¹⁰ RCW 9.96.060 sets out the procedure for vacating a misdemeanor conviction.

¹¹ RCW 9.94A.640 sets out the procedure for vacating felony convictions.

¹² RCW 9.95.240 is a provision of the probation act that allowed courts to dismiss convictions after a defendant completed a term of probation. The procedures for dismissal are under §§ (1) and the procedures for vacation are under §§ (2).

been vacated pursuant to a governor's pardon." Former RCW 9.94A.030(11)(b).¹³

Lowe's reliance on State v. Smith, 158 Wn. App. 501, 512-513, 246 P.3d 812 (2010) (vacated 1995 misdemeanor conviction did not disqualify Smith from obtaining an order vacating his 1989 felony conviction), is misplaced. Unlike Smith, Lowe's prior conviction has not been vacated.

Likewise, Lowe's reliance on State v. M.C., 148 Wn. App. 968, 201 P.3d 413 (2009) (addressing whether the statutory victim penalty assessment could be imposed upon a juvenile offender at the time a deferred disposition is entered) is also misplaced. The court in M.C. held that an order deferring disposition is not itself a *disposition* for purposes of imposing the victim penalty assessment under RCW 7.68.035(1)(b). Id., at 972. The court did not say that deferred dispositions are not *adjudications*. Rather, the court affirmed that "'Adjudication' has the same meaning as 'conviction.'" Id., at 971. "'Conviction' means ... a finding of guilty" Former RCW 9.94A.030(12). Lowe was found guilty of 3rd degree assault

¹³ A motion to vacate a juvenile adjudication can be filed under RCW 13.50.050(11), (12). However, since 2000 Lowe has not spent two consecutive years in the community without committing an offense or crime that subsequently resulted in conviction. Therefore, he has not been eligible to vacate his 2000 juvenile conviction under this statute.

on November 27, 2000. CP 212. Lowe's 2000 juvenile adjudication was properly included as a prior conviction in his criminal history.

The calculation of an offender score is based on the defendant's "criminal history." Former RCW 9.94A.525. "Criminal history" is a statutory definition of a list of the defendant's prior convictions and juvenile adjudications found in the SRA. Former RCW 9.94A.030(11). Prior juvenile adjudications are includable in computing the SRA offender scores for current adult offenses. In re Jones, 121 Wn. App. 859, 872, 88 P.3d 424 (2004). Prior deferred adjudications are properly included in an offender score. State v. Cooper, 164 Wn. App. 407, 413, 263 P.3d 1283 (2011). Lowe's 2000 juvenile adjudication was properly included in the calculation of his offender score.

D. THERE IS NO AMBIGUITY IN THE STATUTORY INCLUSION OF JUVENILE ADJUDICATION IN AN OFFENDERS CRIMINAL HISTORY.

Lowe argues that even though his juvenile adjudication falls within the definition of criminal history it should not count in his offender score. To support his argument Lowe quotes the first

sentence of RCW 9.94A.030(11)(c).¹⁴ Brief of Appellant at 11. In its entirety RCW 9.94A.030(11)(c) reads:

The determination of a defendant's criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.

The Legislature enacted RCW 9.94A.030(11)(c) to clarify its intent that prior convictions that have not been vacated are included in an offender's criminal history to calculate the offender score for the current offense. Wash. Laws 2002 ch. 107 § 1.¹⁵ "The primary

¹⁴ The language in RCW 9.94A.030(11) is identical to the language in former RCW 9.94A.030(14).

¹⁵ Finding--2002 c 107: "The legislature considers the majority opinions in State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999), and State v. Smith, Cause No. 70683-2 (September 6, 2001), to be wrongly decided, since neither properly interpreted legislative intent. When the legislature enacted the sentencing reform act, chapter 9.94A RCW, and each time the legislature has amended the act, the legislature intended that an offender's criminal history and offender score be determined using the statutory provisions that were in effect on the day the current offense was committed.

Although certain prior convictions previously were not counted in the offender score or included in the criminal history pursuant to former versions of RCW 9.94A.525, or RCW 9.94A.030, those prior convictions need not be "revived" because they were never vacated. As noted in the minority opinions in Cruz and Smith, such application of the law does not involve retroactive application or violate ex post facto prohibitions. Additionally, the Washington state supreme court has repeatedly held in the past that the provisions of the sentencing reform act act upon and punish only current conduct; the sentencing reform act does not act upon or alter the punishment for prior convictions. See In re Personal Restraint Petition of Williams, 111 Wn.2d 353, 759 P.2d 436 (1988). The legislature has never intended to create in an offender a vested right with respect to whether a prior conviction is excluded when calculating an offender score or with respect to how a prior conviction is counted in the offender score for a current offense."

objective of an inquiry into the construction of a statute is to ascertain and carry out the intent of the legislature.” State v. Hayes, 164 Wn. App. 459, 469, 262 P.3d 538 (2011). “[T]he rule of lenity applies to the SRA and operates to resolve statutory ambiguities, absent legislative intent to the contrary, in favor of a criminal defendant.” In re Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994). There is no ambiguity in the legislative intent that prior convictions and adjudications that have not been vacated are included in an offender’s criminal history to calculate the offender score.

IV. CONCLUSION

For the reasons stated above the appeal should be denied.

Respectfully submitted on August 14, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

JOHN J. JUHL, WSBA# 18951
Deputy Prosecuting Attorney
Attorney for Respondent