

68907-0

68907-0

NO. 68907-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

NAPOLEON HAYES, JR.,

Appellant.

REC'D  
NOV 28 2012  
King County Prosecutor  
Appellate Unit

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

The Honorable Beth M. Andrus, Judge

BRIEF OF APPELLANT

DAVID B. KOCH  
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

The trial court erred when it failed to resolve a dispute concerning appellant's offender score and calculated his score as 12.

Issue Pertaining to Assignment of Error

The State believed appellant's offender score was 12. Appellant, however, argued that two of his prior offenses involved the same criminal conduct, resulting in a score of 11. By statute, the sentencing court was required to resolve the dispute and, absent an evidentiary hearing on the matter, could not treat the offenses as separate. Did the court err when it calculated a score of 12?

B. STATEMENT OF THE CASE

As part of a negotiated plea agreement with the King County Prosecutor's Office, Napoleon Hayes, Jr. pled guilty to three counts of Robbery in the First Degree. CP 59-84; RP (5/11/12) 5-29. The parties agreed that, although the State calculated Hayes' offender score as 12, the defense was free to contest that calculation at sentencing. CP 60, 63; RP (5/11/12) 9, 13-14, 27.

In a sentencing memorandum filed prior to the sentencing hearing, the defense argued that Hayes' offender score was 6 because several of his prior convictions had washed under RCW 9.94A.525(2)(c), the State was collaterally estopped from using certain prior convictions, and two of his current offenses involved the same criminal conduct. CP 87-95.

The State argued against these positions in a written memorandum and at the sentencing hearing. Supp. CP \_\_\_\_ (sub no. 109, State's Sentencing Memorandum); RP (6/11/12) 5-10, 13-14. The Honorable Beth Andrus agreed with the State and found that Hayes' offender score was 12. RP (6/11/12) 14-17. After the prosecutor provided his sentence recommendation, but before Judge Andrus had imposed sentence, defense counsel lodged an additional objection to the offender score – that Hayes' 1992 juvenile convictions for forgery and possession of stolen property “merge as they are in the same criminal action.”<sup>1</sup> RP (6/11/12) 20. Judge Andrus did not acknowledge, discuss, or resolve this particular dispute. Instead, using an offender score of 12 and a standard range of 129 to 171 months, she imposed concurrent 144-month terms. RP (6/11/12) 27-29; CP 97, 99.

Hayes timely filed his Notice of Appeal. CP 107-108.

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<sup>1</sup> By “merge,” defense counsel meant the two offenses involved the same criminal conduct and should count as one crime in the offender score. He used similar terminology regarding two of Hayes' current offenses. See RP (6/11/12) 13 (arguing two of the robberies “merged because the same criminal conduct”); CP 89 (arguing that crimes involving same criminal conduct “merge”); see also State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008) (“merge” sometimes used to refer to “same criminal conduct” analysis).

C. ARGUMENT

THE SENTENCING COURT ERRED WHEN IT FAILED TO RESOLVE THE SCORING DISPUTE AND CALCULATED APPELLANT'S OFFENDER SCORE AS 12.

The State bears the burden to prove a defendant's criminal history by a preponderance of the evidence. State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). At sentencing, Hayes argued that his 1992 juvenile convictions for forgery and possession of stolen property should be treated as a single offense because they involved the same criminal conduct. "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." RCW 9.94A.589(1)(a).

Where, as here, the defendant has multiple prior convictions, the sentencing court is obligated to determine whether they meet the test for same criminal conduct. RCW 9.94A.525 provides, in pertinent part:

Prior offenses which were found, under RCW 9.94A.589(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 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.589(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 sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

RCW 9.94A.525(5)(a)(i) (emphasis added).

Judge Andrus erred when she failed to decide whether the 1992 offenses involved the same criminal conduct and, instead, simply treated them as separate crimes. Where a defendant disputes his offender score calculation at sentencing by arguing that prior offenses involved the same criminal conduct, it is error for the sentencing court not to hold an evidentiary hearing on the issue. Bergstrom, 162 Wn.2d at 96-97 (citing State v. Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005) and RCW 9.94A.530(2)<sup>2</sup>); see also Torngren, 147 Wn. App. at 562-563 (under RCW 9.94A.525(5)(a)(i), the sentencing court must determine whether prior offenses involved the same criminal conduct).

Judge Andrus also erred under RCW 9.94A.411. When a defendant pleads guilty, sentencing courts may not leave issues

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<sup>2</sup> RCW 9.94A.530(2) provides, "Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.")

concerning criminal history unresolved:

The prosecuting attorney and the defendant shall each provide the court with their understanding of what the defendant's criminal history is prior to a plea of guilty pursuant to a plea agreement. All disputed issues as to criminal history shall be decided at the sentencing hearing.

RCW 9.94A.411 (emphasis added).

The State submitted copies of documents from the 1992 case. See Supp. CP \_\_\_\_ (sub no. 109, State's Sentencing Memorandum).<sup>3</sup> These documents reveal that both the forgery and possession of stolen property offenses were charged in the same information. Moreover, both offenses occurred on or about May 27, 1992, at the Bon Marche, using a credit card belonging to Danielle Gehl. And Hayes was sentenced for both crimes on the same day in the same court. Id.

Thus, Judge Andrus had an obligation to determine whether these two crimes satisfied the test for same criminal conduct or, alternatively, an obligation not to consider them as separate offenses. And because Hayes specifically objected at sentencing, the State does not receive a new opportunity to present evidence on the issue. See State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609

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<sup>3</sup> The pertinent documents are attached to this brief as an appendix.

(2002) (“a 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.”).

When Hayes’ two offenses are counted as one, his offender score is 11½ instead of 12, resulting in a score of 11. See RP (6/11/12) 16 (court treats each offense as separate); RCW 9.94A.525 (offender score is rounded down to the nearest whole number); RCW 9.94A.525(8) (each prior juvenile nonviolent conviction treated as an additional ½ point).

“A correct offender score must be calculated before a presumptive or exceptional sentence is imposed.” State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). Typically, however, remand is unnecessary where it is apparent the sentencing court would simply impose the same sentence again. Id. (citing State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)). And, generally, where a standard range sentence was imposed and the error does not impact that range, remand is unnecessary. See State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996) (error harmless where range unaffected); see also State v. Fleming, 140 Wn. App. 132, 138, 170 P.3d 50 (2007) (failure to conduct same criminal conduct analysis harmless because range remains the same), review denied, 163

Wn.2d 1047 (2008).

Here, however, it is impossible to conclude that Judge Andrus would necessarily have imposed the same sentence. Hayes sought a low-end sentence. CP 91. At sentencing, the prosecuting attorney specifically relied on the fact Hayes' offender score was 12 in convincing Judge Andrus she should impose a mid-range sentence of 144 months as opposed to a low-end sentence of 129 months. RP (6/11/12) 19 ("the defendant has an offender score of 12. 9 is the maximum on the SRA, so he is several points above that top level and justifying going above the low end."); RP (6/11/12) 24 (Judge Andrus relies, in part, on Hayes' "extensive criminal history" in choosing 144 months). Thus, remand for reconsideration of the sentence in light of the reduced offender score is the proper course.

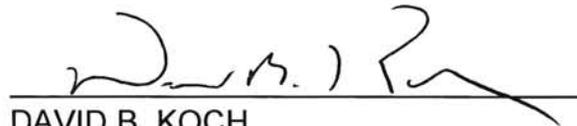
D. CONCLUSION

Hayes should receive a new sentencing hearing based on an offender score of 11.

DATED this 28<sup>th</sup> day of November, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "D.B. Koch", is written over a horizontal line.

DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

## **APPENDIX**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY  
JUVENILE DEPARTMENT

STATE OF WASHINGTON,

Plaintiff,

v.

NAPOLEON HAYES,  
B.D. 12-29-75,

Respondent.

92 8 05 127 5  
NO.

INFORMATION

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the state of Washington, do accuse Napoleon Hayes of the crime of FORGERY, committed as follows:

That the respondent, Napoleon Hayes, in King County, Washington, together with others, on or about 27 May 1992, with intent to injure or defraud, did falsely make, complete and alter a written instrument, to-wit: a Bon Marche Credit receipt, #438 75 913, in the amount of \$114.69 and in the name of Danielle Gehl, and knowing the same to be forged did possess, utter, offer, dispose of and put off as true to Noel Alcoba, such written instrument of the following tenor and effect: a Bon Marche Credit receipt, #438 75 913, in the amount of \$114.69 and in the name of Danielle Gehl;

Contrary to RCW 9A.60.020(1)(a) and (b), and against the peace and dignity of the state of Washington.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse Napoleon Hayes of the crime of POSSESSING STOLEN PROPERTY IN THE SECOND DEGREE, a crime, which with Count I, was part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

INFORMATION - 1

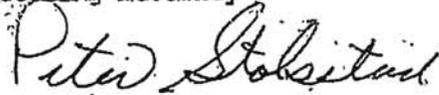
Norm Maleng  
Prosecuting Attorney  
Juvenile Court  
1211 E. Alder  
Seattle, Washington 98122  
(206) 296-9025, FAX 296-8869

92 8 25 127 5

1 That the respondent, Napoleon Hayes, in King County,  
 2 Washington, together with others, on or about 27 May 1992, did  
 3 knowingly receive, retain, possess, conceal and dispose of a  
 4 stolen credit card, to-wit: a Bon Marche credit card, issued to  
 Danielle Gehl, knowing that such property had been stolen and did  
 withhold and appropriate the same to the use of a person other  
 than Danielle Gehl, the true owner and person entitled thereto;

5 Contrary to RCW 9A.56.160(1)(c) and 9A.56.140(1), and against  
 6 the peace and dignity of the state of Washington.

7 NORM MALENG  
 Prosecuting Attorney



8 By  
 9 PETER J. STOKSTAD  
 10 Deputy Prosecuting Attorney (R)  
 11 W.S.B.A. #19515

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INFORMATION - 2

Norm Maleng  
 Prosecuting Attorney  
 Juvenile Court  
 1211 E. Alder  
 Seattle, Washington 98122  
 (206) 296-9025, FAX 296-8860

STATE OF WASHINGTON }  
County of King } ss.

I, BARBARA MINER, Clerk of the Superior Court of the State of Washington, for the County of King, do hereby certify that I have compared the foregoing copy with the original instrument as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Seattle this \_\_\_\_\_

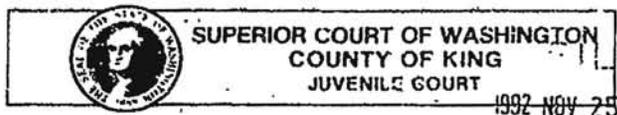
Day of MAY 18 2012 20

BARBARA MINER Superior Court Clerk

By \_\_\_\_\_  
Deputy Clerk



CERTIFIED COPY



PHOTOCOPY

State of Washington v

JUVENILE COURT  
SUPERIOR COURT CLERK  
SEATTLE, WA.

NO. 92-805127-5

*Napoleon Hayes*

ORDER OF DISPOSITION (INFORMATION)

I. BASIS

1.1 A dispositional hearing was held in this case on: November 25, 1992

1.2 Persons appearing at the hearing were:

- Juvenile *Stancher*
- Juvenile's lawyer *Stancher*
- (Deputy) Prosecuting Attorney *Ardu*
- Probation Counselor *Kuller for*
- Other *Mother Mastraro*

II. FINDINGS

Based on the testimony heard and the case record to date: the Court finds.

plea

2.1 The above named juvenile was found guilty by \_\_\_\_\_ of the offense(s) of \_\_\_\_\_

( ) the Court  
*( ) II Possession of stolen property 2<sup>nd</sup> Ct I Forgery*

2.2 RESTITUTION

- That damage was done to the victim in the amount of \_\_\_\_\_
- The amount of loss cannot be determined at this time
- That the juvenile has the present ability to pay restitution in the amount of \_\_\_\_\_
- That the juvenile does not have the present ability to pay restitution, however that the juvenile will develop the ability to pay restitution.
- That the juvenile does not have the present ability to pay restitution and cannot reasonably acquire the means to pay.

2.3 CATEGORY OF OFFENDER

The juvenile is:

- A minor or first offender
- A middle offender
- A serious offender

2.4 MANIFEST INJUSTICE

( ) A disposition within the standard range for this offense would effectuate a manifest injustice. Findings of fact and conclusions of law to be presented by \_\_\_\_\_ 19\_\_

DVR Ding 11-25-92

5127-5

25. The Court finds that the standard range of sentence for Count I 9-12 months of community supervision with 50-100 hours of community service, maximum \$10-50 fine 15-30 days of confinement or commitment for 1-2 weeks. The standard range(s) on count(s) II are found to be as stated on the record or in the statement of juvenile offender on plea of guilty form.

III ORDER

CONSECUTIVE TO \_\_\_\_\_

31 COMMUNITY SUPERVISION COUNT I 2 months COUNT II 2 months COUNT \_\_\_\_\_ months REMARKS TOTAL MONTHS 4

COMMUNITY SERVICE 10 hours 10 hours \_\_\_\_\_ hours Rate is \$ \_\_\_\_\_ hours per month For \_\_\_\_\_ hours of counseling, credit is given for \_\_\_\_\_ hours of community service. First due Within 30 days of Release

CONFINEMENT Days 15 Days 15 Days \_\_\_\_\_ To commence on 11/25 @ \_\_\_\_\_ ( ) passes authorized (X) Consecutive ( ) To be served on weekends (X) To be served at the Division of Juvenile Rehabilitation (X) Credit given for time served 15 days

(X) Counseling Drug, Alcohol Information/Evaluation (X) as directed by Probation Counselor (X) Regular School Attendance/Work Training Program/Employment or training program (X) as directed by Probation Counselor

(X) The juvenile shall abide by all rules of the home (X) as directed by Probation Counselor

(X) The Victim Paralty Assessment is ordered waived in the amount of \$ \_\_\_\_\_

( ) Restitution shall be paid prior to other financial obligations

RESTITUTION is ordered to be disbursed as follows TOTAL \$ \_\_\_\_\_

Table with columns: COUNT, AMOUNT, VICTIM. Row 1: \_\_\_\_\_, 16549, Danielle Gohl, 5th South Seattle, 98144

Co-Respondents

COUNT \_\_\_\_\_ = \_\_\_\_\_  
COUNT \_\_\_\_\_ = \_\_\_\_\_  
COUNT \_\_\_\_\_ = \_\_\_\_\_

There shall be a restitution hearing held within 30 days of release from DJR.

ATTORNEY FEES

- ( ) Respondent shall pay attorney's fee. \$ \_\_\_\_\_
- ( ) Respondent's responsibility for attorney's fee is waived
- ( ) This portion of the disposition is to be continued until parent has been screened financially.

TOTAL FINANCIAL OBLIGATION excluding clerk's fees is \_\_\_\_\_ to be paid at the rate of \_\_\_\_\_ per month, first payment due \_\_\_\_\_

ALL COUNTS WITHIN THIS NUMBER SHALL RUN CONSECUTIVELY. Restitution shall be paid

at 50% of earnings while respondent is at DJR.

5127-3

3.2 CONDITIONS OF PROBATION That while on community supervision the juvenile offender shall be under the charge of a probation counselor and comply with the following conditions: (1) must have parent/guardian's permission regarding whereabouts, hours, and activities; (2) must report any change in residence, school, or work state to probation counselor; (3) must have probation counselor's permission before changing residence; (4) must have probation counselor's permission for out of state travel and (5) must keep all appointments with probation counselor. Must further comply with any conditions set forth in writing, signed by parent/offender, lawyer, and filed herein, during the term of community supervision.

3.3 JURISDICTION  
 Jurisdiction is extended to \_\_\_\_\_ for purposes of restitution/community supervision.  
 Jurisdiction is transferred to \_\_\_\_\_ County for purposes of supervision.

3.4  The following courts are hereby dismissed \_\_\_\_\_

3.5 This order shall remain in full force and effect until further order of the Court or until the same is revoked, modified or changed, or terminated by an order of the Court or by law.

3.6 That while detained authorization is granted to provide necessary medical and dental examination and treatment as professionally prescribed.

3.7 NOTICE OF FEES  
All payments ordered above are payable through the registry of the Court. A cost of \$5.00 shall be collected in addition to each fee, penalty, fine or cost collected by juvenile courts. (There is no cost on payments under \$25.00.)

3.8 Other: TRUST ACCOUNT FEES WAIVED

Dated: 11/25/92

Richard M. Johnson  
Judge/Court Commissioner

BEST PRACTICE POSSIBLE

FINGERPRINT(S)  
Dated: 11/25/92  
Fingerprints of: Stephan Hayes  
Attested by: M. Janice Michels  
Clerk  
By: William J. Belton  
Deputy Clerk

CERTIFICATE  
I, \_\_\_\_\_ clerk of this Court, certify that the above is a true copy of the Order of Disposition in this action on record in my office.  
Dated: \_\_\_\_\_  
M. Janice Michels  
Clerk  
By: \_\_\_\_\_  
Deputy Clerk

STATE OF WASHINGTON ss.  
County of King

I, BARBARA MINER, Clerk of the Superior Court of the State of Washington, for the County of King, do hereby certify that I have compared the foregoing copy with the original instrument as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Seattle this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

MAY 10 2012

BARBARA MINER Superior Court Clerk  
By \_\_\_\_\_

Deputy Clerk



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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68907-0-1
	)	
NAPLEON HAYES,	)	
	)	
Appellant.	)	

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**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 28<sup>TH</sup> DAY OF NOVEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NAPLEON HAYES  
DOC NO. 799196  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 99326

K  
NOV 28 11 14:52  
CLALLAM BAY CORRECTIONS CENTER

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF NOVEMBER 2012.

x Patrick Mayovsky