

70535-1

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NO. 70535-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MARION COLEMAN,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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KATHLEEN A. SHEA



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A. SUMMARY OF ARGUMENT

A jury found Marion Coleman guilty of possession of cocaine. At sentencing, the State incorrectly identified Mr. Coleman's offender score as 4, which the court used to impose Mr. Coleman's sentence. This offender score included one point for a 1999 possession of cocaine conviction, which is a class C felony. Because Mr. Coleman subsequently spent over five years in the community without reoffending, this conviction should not have been used in calculating Mr. Coleman's offender score. Although the corrected offender score does not change the sentencing range, resentencing is required using the correctly calculated score.

B. ASSIGNMENT OF ERROR

The court erred by using the incorrect offender score when imposing Mr. Coleman's sentence.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A trial court must use the correct offender score when sentencing a defendant. Here, Mr. Coleman's offender score was calculated at 4, when in fact his offender score was only 3. Is Mr. Coleman entitled to a resentencing hearing given this error?

D. STATEMENT OF THE CASE

Mr. Coleman was charged with delivery of cocaine and possession with intent to deliver cocaine. CP 1. At the start of trial, the State dismissed the delivery charge and proceeded only on the charge of possession with intent. 5/21/13 RP 4. At trial, the jury was unable to reach a verdict on possession with intent, and found Mr. Coleman guilty of the lesser included charge of possession. CP 88-89.

In preparation for sentencing, the State submitted a sentencing memorandum which discussed Mr. Coleman's prior offenses and included an appendix outlining its understanding of Mr. Coleman's criminal history. Supp. CP 101, 117-18 (Appendix B to Plea Agreement). The State calculated Mr. Coleman's offender score at 4 based on this criminal history. Supp. CP 116; 6/14/13 RP 3-4. The defense agreed with this offender score. 6/14/13 RP 4.

At sentencing the State requested the court impose the high end of the standard sentencing range, which was 18 months confinement. Supp. CP 102; 6/14/13 RP 4. Mr. Coleman requested the low end of the sentencing range, which was six months and one day. 6/14/13 RP 7. Mr. Coleman also requested that it be served as electronic home

detention and that 30 days of his confinement be converted to community service. 6/14/13 RP 7, 9.

Using the offender score of 4, the court imposed eight months confinement and granted Mr. Coleman's request for electronic home detention and a conversion of 30 days to community service. CP 93; 6/14/13 RP 19.

E. ARGUMENT

**Mr. Coleman is entitled to a new sentencing hearing because the court relied on an incorrect offender score when imposing Mr. Coleman's sentence.**

- a. Because the court relied on an incorrect offender score, Mr. Coleman's sentence lacks statutory authority and cannot stand.

An erroneous or illegal sentence may be challenged for the first time on appeal. In re Pers. Restraint of Call, 144 Wn.2d 315, 331, 28 P.3d 709 (2001) (citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)); see also State v. Moen, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996) (when a trial court acts beyond its statutory sentencing authority, the issue can be heard for the first time on appeal).

The law is "well settled" that a sentence based on an improperly calculated offender score lacks statutory authority and is a "fundamental defect that inherently results in a miscarriage of justice."

State v. Wilson, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010) (quoting In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002)). “A sentence that lacks statutory authority cannot stand.” Wilson, 170 Wn.2d at 688. A trial court’s calculation of an offender score is reviewed de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003); see also State v. Jackson, 150 Wn.App. 877, 891, 209 P.3d 553 (2009) (citing State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007)).

In this case, the State calculated Mr. Coleman’s offender score as 4, and the defense agreed. Supp. CP 116; 6/14/13 RP 3-4. However, in calculating the offender score of 4, the State included one point for a conviction in 1999 for possession of cocaine. Supp. CP 101, 117 (Appendix B to Plea Agreement). Including this offense was an error.

Possession of cocaine is a class C felony. RCW 69.50.4013(2). Class C felonies are not included in offender scores if the individual subsequently spends five years in the community without reoffending. RCW 9.94A.525(2)(c). The State’s review of Mr. Coleman’s criminal history shows Mr. Coleman was convicted of possession of marijuana in 2004 and did not reoffend until 2012, over eight years later. Supp. CP 118 (Appendix B to Plea Agreement). Because Mr. Coleman was

in the community for over five years without any new convictions, the possession of cocaine conviction “washes out,” and may not be included in the offender score. Mr. Coleman’s offender score is therefore correctly calculated as 3.

- b. A new sentencing hearing using the correct offender score is required.

The applicable sentencing range remains the same for offender scores 3 through 5, so the corrected offender score does not change the sentencing range. RCW 9.94A.517. However, there is no clear basis in the record upon which to conclude the trial court would have imposed the same sentence if it had used the correct offender score. See State v. Rowland, 160 Wn.App. 316, 332, 249 P.3d 635 (2011), aff’d 174 Wn.2d 150, 272 P.3d 242 (2012). When the court imposed a sentence that was lower than the State’s request and higher than Mr. Coleman’s request, it used an offender score that fell in the middle of the scores applicable to that sentencing range. Had it known Mr. Coleman’s offender score was actually the lowest possible score in that range, it may have imposed a lower sentence.

Resentencing using the correct offender score is the appropriate remedy for a miscalculated offender score. Wilson, 170 Wn.2d at 691.

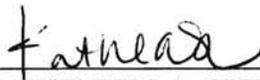
Here, the court used the incorrect offender score when sentencing Mr. Coleman, and this Court is obligated to correct this error. Mr. Coleman is entitled to a resentencing hearing so that the court may consider the correct offender score when imposing his sentence.

F. CONCLUSION

For the reasons stated above, Mr. Coleman respectfully asks this Court to reverse his sentence and remand this case for a new sentencing hearing.

DATED this 10<sup>th</sup> day of January 2014.

Respectfully submitted,

  
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DIVISION ONE**

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STATE OF WASHINGTON,	)	
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	)	
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Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, NINA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] MARION COLEMAN 3749 SW 332 PLACE FEDERAL WAY, WA 98023</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF JANUARY, 2014.

x \_\_\_\_\_  


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