

70951-8 REC'D

MAY 21 2014

King County Prosecutor
Appellate Unit

70951-8

NO. 70951-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES TUCKER,

Appellant.

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

The Honorable Gregory Canova, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
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A. ASSIGNMENT OF ERROR

The court exceeded its statutory authority in sentencing appellant on counts I and II under cause number 10-1-04247-1.

Issue Pertaining to Assignment of Error

Whether the court exceeded its authority in sentencing appellant to a standard range term of 60 months confinement for the attempted delivery of cocaine offenses because they are unranked felonies subject to no more than 12 months confinement?

B. STATEMENT OF THE CASE

The State charged Michael Tucker with drug offenses under two superior court cause numbers, 10-1-03654-3 and 10-1-04247-1. 1CP¹ 1; 2CP 1-3. Tucker entered into Drug Court under both cause numbers. 1CP 39, 45. Tucker was later terminated from Drug Court. 1CP 112; 2CP 10. A bench trial was held on stipulated facts and the court found Tucker guilty of two counts of attempted delivery of cocaine under 10-1-04247-1 and one count of cocaine possession under 10-1-03654-3. 1CP 152; 2CP 75; RP² 2.

¹ The clerk's papers under cause number 10-1-03654-3 are referenced as 1CP. The clerk's papers under cause number 10-1-04247-1 are referenced as 2CP.

² The verbatim report of proceedings is referenced as follows: RP - 9/10/13.

The court imposed a standard range sentence consisting of concurrent terms of 60 months confinement on each count of attempted delivery of cocaine under 10-1-04247-1 and a 24-month term of confinement for cocaine possession under 10-1-03654-3. 1CP 155; 2CP 78; RP 12. Tucker appealed under both cause numbers. 1CP 161; 2CP 83. The two appeals were subsequently consolidated.

C. ARGUMENT

THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING SENTENCE ON THE ATTEMPTED DELIVERY OF COCAINE CONVICTIONS.

A trial court may only impose a sentence that is 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. Soto, 177 Wn. App. 706, 713, 309 P.3d 596 (2013). Whether a court exceeded its statutory authority under the Sentencing Reform Act is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Under cause number 10-1-04247-1, the court imposed 60 month terms of confinement on each count of Attempted Delivery of Cocaine, a Violation of the Uniformed Controlled Substances Act (VUCSA) under chapter 69.50 RCW. 2CP 78. The court exceeded its statutory authority in so doing.

Anticipatory VUCSA offenses under chapter 69.50 RCW such as attempt or conspiracy are sentenced as unranked felonies. State v. Mendoza, 63 Wn. App. 373, 376-78, 819 P.2d 387 (1991), review denied, 841 P.2d 1232 (1992); State v. Wojtyna, 70 Wn. App. 689, 697, 855 P.2d 315 (1993), review denied, 123 Wn.2d 1007, 869 P.2d 1084 (1994); see also 2013 Washington State Adult Sentencing Guidelines Manual at 64-65 (same).³ The standard range sentence for an unranked felony cannot exceed 12 months confinement. RCW 9.94A.505(2)(b); State v. Steen, 155 Wn. App. 243, 249, 228 P.3d 1285 (2010). The standard range sentence for Tucker's attempted delivery of cocaine convictions therefore cannot exceed 12 months confinement.

Defense counsel did not raise this challenge below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The case must be remanded for resentencing. Mendoza, 63 Wn. App. at 378.

D. CONCLUSION

Tucker requests that this Court remand for resentencing.

³ Attached as appendix A.

DATED this 21~~st~~ day of May 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
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Attorneys for Appellant

APPENDIX A

2. It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired:
 - a. Has not been prosecuted or convicted; or
 - b. Has been convicted of a different offense; or
 - c. Is not amenable to justice; or
 - d. Has been acquitted; or
 - e. Lacked the capacity to commit an offense; or
 - f. Is a law enforcement officer or other government agent who did not intend that a crime be committed.

3. Criminal conspiracy is a:
 - a. Class A felony when an object of the conspiratorial agreement is Murder in the First Degree;
 - b. Class B felony when an object of the conspiratorial agreement is a Class A felony other than Murder in the First Degree;
 - c. Class C felony when an object of the conspiratorial agreement is a Class B felony;
 - d. Gross misdemeanor when an object of the conspiratorial agreement is a Class C felony;
 - e. Misdemeanor when an object of the conspiratorial agreement is a gross misdemeanor or misdemeanor.

Anticipatory Offenses (RCW 9.94A.595)

For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under Chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent.

In calculating an offender score, count each prior conviction as if the present conviction were for the completed offense. When these convictions are used as criminal history, score them the same as a completed offense.

Anticipatory Offenses (VUCSA Attempts, Conspiracies, and Solicitations)

The calculation of sentences stemming from anticipatory VUCSA offenses (Chapter 69.50 RCW) presents different challenges than calculating sentences for anticipatory offenses arising under the criminal code.

An attempt or conspiracy to commit a VUCSA offense is specifically addressed in RCW 69.50.407, which provides that such offenses are punishable by "...imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense..." The appellate courts have consistently held that for VUCSA offenses, RCW 69.50.407 takes precedence over Chapter 9A.28 RCW. Although current statute and case law should be reviewed for definitive guidance in this area, the following summarizes current sentencing practices.

The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's or court's reliance on the manual, or for any other written or verbal information related to adult or juvenile sentencing. The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Caseload Forecast Council.

An attempt or conspiracy to commit a VUCSA offense is typically sentenced as an “unranked” offense (0-12 months). In *State v. Mendoza*, the Court of Appeals held that since “a conspiracy conviction under RCW 69.50.407 has no sentencing directions from the Legislature, it is punished under the unspecified crimes provisions of RCW 9.94A.505(2)(b).” 63 Wn. App. 373 (1991).

A *solicitation* to commit a VUCSA offense is not specifically addressed in Chapter 69.50 RCW. It is usually charged under Chapter 9A.28 RCW and sentenced under RCW 9.94A.510 at 75 percent of the standard range. Solicitations to commit VUCSA offenses are not considered “drug offenses”, but do score as such and are subject to the multiple “scoring” requirement. See RCW 9.94A.525(4), (6) and *State v. Howell*, 102 Wn. App. 288, 6 P. 3d 1201 (2000).

Table 1 presents the current status of statute and case law on appropriate sentence ranges for anticipatory VUCSA offenses.

Table 1. Sentence Ranges for Anticipatory VUCSA Offenses

Offense Type	Sentence Range	Statute
Attempt**	Unranked (0 to 12)	RCW 69.50.407
Conspiracy**	Unranked (0 to 12)	RCW 69.50.407
Solicitation*	75% of Standard Range	RCW 9A.28.030

Relevant Statutes for VUCSA Offenses

Delivery Definition (RCW 69.50.101(f))

“Deliver” or “delivery” means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.

Criminal Conspiracy (RCW 69.50.407)

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

[1971 ex.s. c 308 § 69.50.407.]

****Sentences (RCW 9.94A.505(2)(b))**

If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; a term of community custody under RCW 9.94A.702 not to exceed one year; and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement and a community custody term under 9.94A.701 if the court finds reasons justifying an exceptional sentence as provided in RCW 9.94A.535.

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STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 70951-8-1
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JAMES TUCKER,)	
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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 21ST DAY OF MAY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AMES TUCKER
DOC NO. 273874
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF MAY, 2014.

x Patrick Mayovsky

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