

No. 71029-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

VICHAJ SALY,

Appellant.

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

The Honorable James Cayce

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to consider Mr. Saly's additional grounds in his CrR 7.8 motion on why his offender score was miscalculated.

2. The trial court misinterpreted CrR 7.8.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A court has jurisdiction to correct an erroneous sentence pursuant to CrR 7.8. The court must hear the motion, unless it determines that the motion presents a legal issue, which in that scenario the court may transfer the matter to the Court of Appeals to be considered as a personal restraint petition. Here, Mr. Saly filed a CrR 7.8 motion challenging his miscalculated offender score which resulted in an erroneous sentence, but the trial court addressed only one of the three issues he raised. The trial court opined that it would transfer the remaining issues to the Court of Appeals, despite the need for an factual hearing. Is Mr. Saly entitled to remand for the trial court to address his remaining issues?

C. STATEMENT OF THE CASE

On July 5, 2005, Vichai Saly was sentenced to a term of 448 months in prison as a result of his conviction for one count of first degree murder with a firearm. CP 16-19. On May 26, 2011, Mr. Saly filed a Motion for Relief from Judgment Pursuant to CrR 7.8, alleging that he was entitled to be resentenced because several of his prior convictions had washed out. CP 115-18. The Supreme Court granted Mr. Saly's motion for discretionary review, remanded the matter to the superior court, and ordered him resentenced. CP 167.

On September 20, 2013, the trial court held a new sentencing hearing. Agreeing that Mr. Saly should be resentenced with an offender score of "6" as opposed to an offender score of "7", the court asked Mr. Saly if he had anything to add. RP 15. Mr. Saly indicated that if he had additional time, he could prove to the court that he had a lower offender score:

THE COURT: And sir, is there anything you'd like to add to that before I impose sentence?

THE DEFENDANT: I'm pretty sure that you know that – I'm pretty sure that you know if I had the opportunity to present more evidence, I probably could have and showed you that I think I have a lower score than 6. So I'm just going to let you know that I believe that I do have a score of like possibly 1, but until I've gotten more information and more evidence to prove it to you, but

overall I really don't want to go back to prison and then come back again and then go back to prison and then come back again, just on like appeal issues. I was wondering if I could try to get it done all at once with you because you have jurisdiction over me for my points on the juvenile, the Superior Court does, you do. It just has to do with sentencing purposes only, and if you're willing to hear it before or not, it's up to you.

RP 14-15. The court refused to hear any additional issues:

All right. Thank you, sir. And I always do those as transfers to the Court of Appeals. They have a lot more time and ability to look into those things. And I do appreciate the fact you were successful in your pro se appeal. That doesn't happen very often.

RP 15.

The court sentenced Mr. Saly to a term of 432 months. CP 172;

RP 15.

D. ARGUMENT

THE TRIAL COURT'S REFUSAL TO HEAR MR. SALY'S ADDITIONAL ISSUES REGARDING HIS PRIOR CONVICTIONS USED IN CALCULATING HIS OFFENDER SCORE WAS CONTRARY TO THE PLAIN LANGUAGE OF CrR 7.8

Under CrR 7.8:

The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

A court has jurisdiction to amend a judgment to correct an erroneous sentence, where justice requires, under CrR 7.8. *State v. Hardesty*, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996).

This Court reviews the decision on a CrR 7.8(b) motion for abuse of discretion. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2005). A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner, or when the exercise of discretion is based on untenable grounds or reasons. *State v. Aguirre*, 73 Wn.App. 682, 686, 871 P.2d 616 (1994).

Offender score computations are reviewed *de novo*. *State v. Roche*, 75 Wn.App. 500, 513, 878 P.2d 497 (1994). “It is axiomatic that a sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score.” *Id.*

“[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002), citing *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997); *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (emphasis omitted) (“[W]hen a sentence has been imposed for which there is no authority in law, the trial court

has the power and duty to correct the erroneous sentence, when the error is discovered.”), quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955).

This Court reviews whether a trial court applied an incorrect legal standard to the choice of law and its application to the facts in a particular case *de novo*. *State v. Haney*, 125 Wn.App. 118, 123, 104 P.3d 36 (2005); *State v. Welchel*, 97 Wn.App. 813, 817, 988 P.2d 20 (1999), review denied, 140 Wn.2d 1024 (2000).

“[T]he remedy for a miscalculated offender score is resentencing using the correct offender score.” *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004).

Here, Mr. Saly argued in his CrR 7.8 motion that three of his prior convictions had washed out prior to sentencing. CP 115-18. The trial court resentenced him based upon one of the prior convictions washing. Unaddressed were the other two prior convictions. Further, as Mr. Saly stated, if given the time he could prove that his offender score was a “1” not a “6”. RP 14-15

The trial court’s gratuitous comment that it normally transferred these motions to the Court of Appeals was an erroneous statement. Mr. Saly’s motion required a factual hearing, which by the plain language

of CrR 7.8 barred the trial court from transferring the matter to the Court of Appeals and required the trial court to hear and decide the motion. Mr. Saly is entitled to remand as the trial court abused its discretion in refusing to address the remaining issues.

E. CONCLUSION

For the reasons stated, Mr. Saly request this Court reverse the trial court's refusal to hear Mr. Saly's additional issues, and remand for a new hearing.

DATED this 23rd day of May 2014.

Respectfully submitted,



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DIVISION ONE**

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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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