

72246-8

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No. 72246-8

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MANUEL RAMIREZ,

Appellant.

FILED
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CLERK OF COURT
KING COUNTY

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The trial court miscalculated Manuel Ramirez's offender score.

2. The trial court exceeded its statutory authority in imposing a term of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A sentencing court must specify those offenses which it determines make up a defendant's criminal history. The trial court's calculation of the person's offender score is in turn based upon that criminal history. RCW 9.94A.525(2) provides that prior Class C felonies "shall not be included" in an individual's offender score unless the court finds the person did not spend five or more years in the community without a criminal offense. Where the court's finding of criminal history does not include any offense in the more than eleven year period following a juvenile adjudication of a Class C felony, can that offense be included in the offender score calculation?

2. In calculating any offender score a sentencing court undertakes a three step analysis: (1) identify the criminal history; (2) exclude any offense which have washed out; and (3) apply the scoring rules of RCW 9.94A.525 to the identified criminal history. Here the

sentencing court determined Mr. Ramirez's criminal history included only 4 prior offenses. Did the court erroneously determine those offenses yield a score of 7?

3. RCW 9.94A.701 requires a trial court impose one of three determinate terms of community custody set forth in that statute depending upon the seriousness of the offense. RCW 9.94A.701(9) provides that where the combined standard range term of confinement and community custody exceed the statutory maximum for an offense, the trial court must reduce the term of community custody. Where the combination of Mr. Ramirez's standard range and community custody exceeded the statutory maximum did the court exceed its authority?

C. STATEMENT OF THE CASE

A protection order prohibited Mr. Ramirez from being within 1000 feet of his mother's residence. CP 39. Police officers responded to a call that Mr. Ramirez was outside the home of his mother, Josefina Franco. CP 39-40. The officer saw Mr. Ramirez exiting the driveway of the home, well within 1000 feet. *Id.*

Mr. Ramirez waived his right to counsel and his right to a jury trial. 4/17/14 RP 11; 6/16/14 RP 2. After determining Mr. Ramirez was

competent, and following a bench trial, Mr. Ramirez was convicted of violation of a no contact order. CP 35-36, 40, 46.

At sentencing, the court determined Mr. Ramirez's criminal history included four offenses. CP 52. Without any explanation of how it reached its conclusion, the court found that history yielded an offender score of 7. CP 47.

D. ARGUMENT

1. The Court miscalculated Mr. Ramirez's offender score.

a. A sentencing court must base its offender score calculation on the criminal history it determines exists at the time of sentencing.

Sentencing authority derives strictly from statute. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). A sentencing court's failure to follow the dictates of the SRA may be raised on appeal even if no objection was raised below. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999); *In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

In broad terms, when a court undertakes to calculate an offender score under RCW 9.94A.525 it takes "three steps: (1) identify all prior convictions; (2) eliminate those that wash out; (3) "count" the prior convictions that remain in order to arrive at an offender score." *State v.*

Moern, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). With respect to the first step, RCW 9.94A.500(1) requires in relevant part

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

“Criminal history”

means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere . . . The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration

RCW 9.94A.030(11).

“Bare assertions, unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction.” *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). Instead, due process requires the State bear the “ultimate burden of ensuring the record” supports the individual’s criminal history and offender score. *Ford*, 137 Wn.2d at 480-81.

b. The trial court’s findings do not support the offender score.

The Supreme Court has said “[i]n the absence of a finding on a factual issue we must indulge the presumption that the party with the

burden of proof failed to sustain their burden on this issue.” *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (citing *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); and *State v. Cass*, 62 Wn. App. 793, 795, 816 P.2d 57 (1991), *review denied*, 118 Wn.2d 1012 (1992)).

RCW 9.94A.525(2)(c) provides in relevant part:

. . . class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2) does not require inclusion of a prior offenses in the offender score “unless” they are shown to have washed out. Instead, the statute provides they “shall not be included” unless they have been shown to have not washed out. The term “shall” indicates a mandatory duty on the trial court. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Thus before a court can include a Class C felony in an offender score the court must determine the person has not spent five crime-free years from the date of release from confinement to the date of the next offense. RCW 9.94A.525(2)(c). To permit such a determination, the trial court must find the dates of the offense,

sentencing, and release, for any intervening misdemeanor convictions which may have prevented the listed offenses from washing out.

The judgment and sentence in this case contains a section entitled “II. FINDINGS.” CP 47. Within this section, is paragraph 2.3 entitled “Criminal History,” which references Appendix B, which contains the court’s finding of criminal history. CP 61. “Appendix B” in turn provides

“The defendant has the following criminal history used in calculating the offender score . . .

Sentencing Crime	Date	Adult or Juv. Crime
Protection order viol-prev co	12/07/2012	AF	...
Firearm Possession unl-2	12/28/2007	AF	...
Protection order violation felony	12/28/2007	AF	...
Taking Vehicle W/O Permission	3/13/1996	JF	...

CP 52.

That history establishes an offender score of 3.

- i. The court could not include Mr. Ramirez’s 18 year-old juvenile offense in his offender score.

Pursuant to RCW 9.94A.525(2)(c), a Class C felony cannot be included in the offender score unless the court finds the person has not spent five consecutive years in the community without committing a new offense. At the time he committed the offense, taking a motor

vehicle was a Class C felony. Former RCW 9A.56.070.¹ the trial court's findings do not include any offense within a more than 11- year period after the juvenile offense. Thus, pursuant to RCW 9.94A.525(2)(c) that offense cannot be included in Mr. Ramirez's offender score.

The Court's findings do not include any offenses in Mr. Ramirez's criminal history intervening between the juvenile offense and the offenses sentenced in 2007. Pursuant to *Armenta* the absence of such a finding requires this Court to presume the court found insufficient proof of such offenses. In the absence of such a finding, Mr. Ramirez's juvenile offense cannot be included in his offender score.

ii. The remaining convictions yield a score of 3.

Because violation of a no contact order is a nonviolent offense, RCW 9.94A.525(21) initially governs the calculation of the offender score. That section provides:

(21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as

¹ Prior to 2002, the crime of taking a motor vehicle was single degree offense and was always a Class C Felony. Subsequent to 2002 the crime has been divided into two degrees with the higher degree classified as a Class B felony. Laws 2002, ch. 324 § 1. Mr. Ramirez's committed the offense in 1995 and it was thus a Class C felony.

in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense . . .

(b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

The 2007 offense was obviously sentenced prior to August 2011, and thus cannot be subject to a multiplier. The 2012 offense does appear to have occurred after 2011. However, there is nothing in the court's findings to support a conclusion that domestic violence was pleaded and proven. The finding with respect to that offense provides only:

“Protection order viol-prev co 12/07/2012 AF ...”

There is nothing in that finding to suggest the prior offense was alleged and proved to include domestic violence. In the absence of such a finding, the offense is not subject to a multiplier.

The court's criminal history finding does not include any additional offenses which could even arguably be subject to the multipliers in RCW 9.94A.525(21). In the absence of any identified prior conviction there is nothing to "count" as the third step identified in *Moearn* requires. *Moearn*, 170 Wn.2d at 175. Simply put, if the court does not identify a prior conviction as part of the criminal history, it cannot count in the offender score.

Thus, RCW 9.94A.525(7) alone dictates how to score Mr. Ramirez's criminal history. That statute provides:

If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

Id. "Subsection[s] (11), (12), [and] (13)" pertain to felony traffic offenses, watercraft offenses, and manufacturing methamphetamine and do not apply here. RCW 9.94A.525. Thus, each of Mr. Ramirez's three prior adult offense count as a single point and yield an offender score of 3.²

² Even if the Court concluded Mr. Ramirez's juvenile offense did not wash out, it is counted as only 1/2 point resulting in his score of 3 1/2 which is then rounded down to 3. "The offender score is the sum of points accrued under this section rounded down to the nearest whole number." RCW 9.94A.525.

2. The trial court erred in imposing a 12-month term of community custody.

“A trial court only possesses the power to impose sentences provided by law.” *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). RCW 9.94A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Following 2009 amendments to RCW 9.94A.701, and elimination of former RCW 9.94A.715, a trial court no longer has the authority to impose a variable term of community custody. *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). Instead, *Franklin* recognized,

[u]nder the amended statute, a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing. RCW 9.94A.701(1)- (3); *cf.* former RCW 9.94A.715(1).

Franklin, 172 Wn.2d at 836.

The Court more recently clarified that for persons sentenced after August 2009, the trial court and not the Department of Corrections is responsible for fixing the appropriate term of community custody. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

Violation of a court order is a Class C felony if the person has two prior convictions for violating a court order. RCW 26.50.110(5). The court found Mr. Ramirez had two prior convictions. CP 40. The statutory maximum for Mr. Ramirez's offense is 60 months confinement. RCW 9A.20.021(1)(c).

Based upon an offender score of 7, Mr. Ramirez's standard range was 51-60 months. CP 31. Pursuant to RCW 9.94A.701(9) the court could not impose any term of community custody in excess of 9 months. The statute's plain language says the court must reduce term of community custody "whenever [the] **standard range term** of confinement in combination with the term of community custody exceeds the statutory maximum." Here, there is no question that Mr. Ramirez's standard range, 51-60 months, combined with his term of community custody, 12 months, exceeded the statutory maximum for the offense, 60 months. Therefore, the plain terms of RCW 9.94A.701(9) precluded the imposition of community custody in excess of 9 months.

Statutory construction begins by reading the text of the statute or statutes involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language.

State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). If the language is unambiguous, the inquiry ends with the plain language and the court must assume the statute means exactly what it says. *State v. Salavea*, 151 Wn.2d 133, 142, 86 P.3d 125 (2004). A court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003). Instead, a court must assume the “the legislature ‘means exactly what it says.’” *Id.* (citing *Davis v. Dep’t of Licensing*, 137 Wash.2d 957, 964, 977 P.2d 554 (1999)).

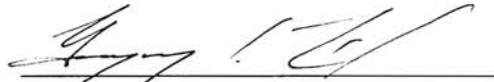
The statute does not focus on the term of confinement actually imposed. The statute does not say the term of community custody must be reduced “whenever [the] term of confinement [**imposed**] in combination with the term of community custody exceeds the statutory maximum.” Instead its plain terms require a reduction in the community custody when the “standard range term of confinement in combination with the term of community custody exceeds the statutory maximum.” Thus, it does not matter for purposes of the statute that the court imposed a lesser term of confinement, the court could not impose a term of community custody in excess of 9 months.

The Court must strike the term of community custody.

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Ramirez's sentence.

Respectfully submitted this 16th day of January, 2015.



GRÉGOR Y C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 72246-8-I
v.)	
)	
MANUEL RAMIREZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JANUARY, 2015, 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:

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KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] MANUEL RAMIREZ	(X)	U.S. MAIL
312529	()	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	()	_____
1313 N 13 TH AVE		
WALLA WALLA, WA 99362		

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF JANUARY, 2015.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710