

72406-1

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NO. 72406-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHELLE BACKSTROM,

Appellant.

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

The Honorable Bill Bowman, Judge
The Honorable Elizabeth Berns, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Related to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
THE ERRONEOUS OFFENDER SCORE REQUIRES REVERSAL AND REMAND FOR RESENTENCING.	2
D. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Postsentence Review of Leach</u> 161 Wn.2d 180, 163 P.3d 782 (2007).....	3
<u>In re Postsentence Review of Smith</u> 139 Wn. App. 600, 161 P.3d 483 (2007).....	4
<u>In re Restraint of Goodwin</u> 146 Wn.2d 861, 50 P.3d 618 (2002).....	3
<u>State v. Kier</u> 164 Wn.2d 798, 194 P.3d 212 (2008).....	4
<u>State v. Moeurn</u> 170 Wn. 2d 169, 240 P.3d 1158 (2010).....	3
<u>State v. Parker</u> 132 Wn.2d 182, 937 P.2d 575 (1997).....	5
<u>State v. Stately</u> 152 Wn. App. 604, 216 P.3d 1102 (2009) <u>rev. denied</u> , 168 Wn.2d 1015 (2010).....	4

RULES, STATUTES AND OTHER AUTHORITIES

RCW 46.61.502.....	3, 4
RCW 46.61.520.....	3
RCW 9.94.030(54) (2012).....	4
RCW 9.94A.030	3, 4
RCW 9.94A.345	2
RCW 9.94A.510 (2012).....	5

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9.94A.525	3
RCW 9A.32.050	1

A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in calculating appellant's offender score as two points. CP 44.

2. The sentencing court erred in determining the standard range was 144-244 months. CP 44.

Issue Related to Assignments of Error

Appellant had previously been convicted of one offense which counts as one point under the controlling statute and this Court's prior decisional law. The parties and the sentencing court wrongly believed the prior offense counted as two points. The result is an erroneous offender score and standard range. Because the state cannot show the court would have imposed the same sentence despite the error, should this Court reverse and remand for resentencing?

B. STATEMENT OF THE CASE

On May 16, 2012, the state charged appellant Michelle Backstrom with two counts, including second degree felony murder. CP 1-11; RCW 9A.32.050(1)(a), (b). As part of a plea agreement, the state dismissed count 2 and Backstrom pled guilty to second degree felony murder, based on the underlying felony of second degree assault. CP 12-26, 36; 1RP 7-10. Backstrom provided substantial consideration for her part of the bargain. CP 40-41; 1RP 5.

Backstrom had one prior adult felony conviction, identified in the plea paperwork and judgment as “vehicular homicide-disregard.” CP 38, 49. The plea calculated the offender score as two points, with a standard range of 144-244 months. CP 13-14, 37; 1RP 4-5. The state agreed to recommend a 180-month sentence. CP 16, 36; 1RP 5-6.

At the sentencing hearing, the state and the court confirmed that Backstrom had complied with her part of the bargain. 2RP 4-5, 14-15. The state made the agreed upon 180-month recommendation. 2RP 5. Defense counsel recommended an exceptional sentence below the range. 2RP 7-13.

After noting Washington sentences follow “very specific guidelines,” the trial court discussed several mitigating factors and Backstrom’s accomplishments. The court then imposed a 150-month sentence. CP 46; 2RP 14-16. This appeal timely follows. CP 53-54.

C. ARGUMENT

THE ERRONEOUS OFFENDER SCORE REQUIRES REVERSAL AND REMAND FOR RESENTENCING.

A sentencing court’s authority is limited to that provided by statute at the time of the offense. RCW 9.94A.345; In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782

(2007). A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. In re Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). An offender score calculation is reviewed de novo. State v. Moeurn, 170 Wn. 2d 169, 172, 240 P.3d 1158, 1160 (2010).

Backstrom's current conviction is for second degree murder, a serious violent offense. RCW 9.94A.030(45)(a)(iii). When calculating the offender score for a serious violent offense, prior nonviolent adult offenses count as one point. RCW 9.94A.525(8).¹

Vehicular homicide may be committed in one of three alternative ways. RCW 46.61.520(1)(a)-(c).² This Court has held that vehicular homicide, when committed under the "disregard" prong, is a

¹ RCW 9.94A.525(8) provides: "If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction."

² RCW 46.61.520(1) provides:
"(1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:

- (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or
- (b) In a reckless manner; or
- (c) With disregard for the safety of others."

nonviolent offense. State v. Stately, 152 Wn. App. 604, 609, 216 P.3d 1102 (2009) (construing former RCW 9.94A.030(50)(xiv)), rev. denied, 168 Wn.2d 1015 (2010). That subsection has since been renumbered, but the Legislature has not changed its language in the five years since Stately was decided. RCW 9.94A.030(54)(xiv) (2012) (continuing to exclude the “disregard” prong from the definition of “violent offense”).³ The Legislature is therefore presumed to have acquiesced in this Court’s construction of the statute. In re Postsentence Review of Smith, 139 Wn. App. 600, 605, 161 P.3d 483 (2007).⁴

³ RCW 9.94.030(54) (2012) “‘Violent offense’ means: . . . (xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner[.]”

⁴ The Stately court engaged in a thorough and well-reasoned analysis. Backstrom therefore anticipates the state will concede the offender score is incorrect, and will make no effort to meet its burden to show that Stately was wrongly decided. See State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (party asserting that prior decision was wrongly decided bears burden to “show that it is both incorrect and harmful”).

Backstrom's prior "disregard" prong conviction therefore counts as one point in her offender score. That score results in a standard range of 134-234 months. When an offender score is miscalculated, the state cannot show the error is harmless unless it is clear the sentencing court would have imposed the same sentence with the proper score. See generally, State v. Parker, 132 Wn.2d 182, 192, 937 P.2d 575 (1997). Where the sentencing court imposed a sentence only 6 months above the low end of the range, and where the court's oral remarks show it gave significant consideration to mitigation and the defense recommendation, the state cannot meet its burden. 2RP 14-15. This Court therefore should remand the case for resentencing with a correct offender score of one point, and a standard range of 134-234 months. CP 37; RCW 9.94A.510 (2012).

D. CONCLUSION

This Court should remand the case for resentencing with a correct offender score and standard range.

DATED this 12th day of February, 2015.

Respectfully Submitted,

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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 72406-1-1
)	
MICHELLE BACKSTROM,)	
)	
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 12TH DAY OF FEBRUARY, 2015, 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 BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF FEBRUARY, 2015.

x *Patrick Mayovsky*