

NO. 34114-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

VICTOR EVENSON,
Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

AMENDED BRIEF OF RESPONDENT

H. STEWARD MENEFFEE
Prosecuting Attorney
for Grays Harbor County

BY: 

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

The State believes that the appellant does have four prior convictions for Malicious Mischief in the Second Degree under Pacific County Cause No. 95-1-00031-1 as set forth in the Plea Agreement (CP 20-24) and that it was only a scrivener's error that resulted in those four counts not being reflected in the defendant's criminal history on the Judgment and Sentence. However, it is clear that the criminal history as contained in the Judgment and Sentence does not agree with the criminal history as set forth in the Plea Agreement and that the offender score of 9 is clearly incorrect; the State believes the appellant has an offender score of 8.

ARGUMENT

Contrary to appellant's argument, the sentencing court is not required in each case to make a determination as to whether or not multiple prior convictions should count as one offense or separate offenses (Appellant's Brief page 6):

A sentencing court may rely on a stipulation or acknowledgment of prior convictions without further proof. See RCW 9.94A.530(2). Acknowledgment includes not objecting to information included in presentence reports. If the defendant disputes material facts, the sentencing court either must not consider the facts, or it must grant an evidentiary hearing on the matter.

In Re Personal Restraint of Cadwallader, 155 Wn.2d 867, 873-874, 123 P.3d 456 (2005).

The remedy for a miscalculated offender score is a remand for resentencing using a correct offender score, whether that be 5 or some other score. *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). In *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997) the court concluded that the petitioner was sentenced based on an incorrect calculation of his offender score. The court held as follows:

Johnson should have another sentencing hearing for the trial court to consider his sentence, with a proper calculation of his offender score.⁶

⁶We do not suggest by this opinion the trial court is foreclosed from imposing a sentence of 261 months or, for that matter, any lawful sentence within the trial court's discretion. The sentence must be predicated on an accurate offender score.

Johnson at 569 (emphasis added).

CONCLUSION

Given the foregoing, it is clear that appellant was not denied effective assistance of counsel. Appellant is not entitled to an offender score of his choosing. This case should be remanded for resentencing using a correct offender score as determined by the trial court.

DATED this 8 day of February, 2007.

Respectfully Submitted,

By: 
WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA #15489

WAL/jfa

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 9th day of February, 2007, I mailed a copy of the Motion for Order Permitting State to Supplement Record and Amended Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501 and to Victor Evenson, #735528; Stafford Creek Corrections Center; 191 Constantine Way; Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman