

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

NO. 35542-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CALVIN D. OTT,

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Wm. Thomas McPhee,
Cause No. 04-1-01523-9

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in imposing the school bus stop enhancement where the evidence was insufficient to establish that a bus stop designated by a school district existed within 1,000 feet of the site of the delivery of methamphetamine in count I at the time of the delivery.
02. The trial court erred in calculating Ott's offender score.
03. The trial court erred in permitting Ott to be represented by counsel who provided ineffective assistance by failing to argue that Ott's offender score was incorrect.
04. The trial court erred in entering a judgment and sentenced that contains an obvious scrivener's error.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in imposing the school bus stop enhancement where the evidence was insufficient to establish that a bus stop designated by a school district existed within 1,000 feet of the site of the delivery of methamphetamine in count I at the time of the delivery? [Assignment of Error No. 1].
02. Whether the trial court erred in counting Ott's current convictions for simultaneous possession of a controlled substance (counts III-IV) as separate offenses for purposes of calculating Ott's offender score? [Assignment of Error No. 2].

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03. Whether Ott's was prejudiced by his counsel's failure to argue that his offender score was incorrect? [Assignment of Error No. 3].
04. Whether the case should be remanded to correct an obvious scrivener's error in the judgment and sentence? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Calvin D. Ott (Ott) was charged by second amended information filed in Thurston County Superior Court on June 23, 2005, with two counts of delivery of a controlled substance, counts I and II, including school-bus-route enhancement on count I, two counts of possession of a controlled substance with intent to deliver, counts III and IV, and bail jumping, count V, contrary to RCWs 69.50.401(2)(a) and (b), 69.50.435 and 9A.76.170. [CP 14-15].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on October 10, 2006, the Honorable Wm. Thomas McPhee presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 10/11/06 252, 264].

The jury returned verdicts of guilty as charged for counts I and II, including enhancement, guilty of the lesser offense of possession of a controlled substance for counts III and IV and not guilty of count V. [CP

51-53, 55, 57-58]. Ott was sentenced within his standard range, including enhancement, and timely notice of this appeal followed. [CP 83-94].

03. Substantive Facts: Trial¹

03.1 Count I: Delivery of Methamphetamine
Within 1,000 Feet of School Bus Route/
August 17, 2004

On August 17, 2004, Tami Page, acting as an informant, conducted a controlled buy² of methamphetamine from Ott at a gas station in Thurston County, paying \$60 in prerecorded money [RP 10/10/06 26-33, 38, 45, 58-59, 115-16]. Ron McCarty, the Director of Transportation for school buses in Thurston County, testified that in February 2005 the school-bus-route stop closest to the gas station was at a location, which was subsequently measured to be within a 1,000 feet of the station. [RP 10/10/06 66, 68].

Ott admitted to receiving money from Page, explaining that it was payment for money she owed him and not for the exchange of drugs. [RP 10/11/06 203-05].

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¹ The facts are limited to the charges for which Ott was convicted.

² In a “controlled buy,” an informant is given marked money, searched for drugs, and observed while sent into the specified location. If the informant “goes in empty and comes out full,” his or her assertion that drugs were available is proven, and his or her reliability confirmed. State v. Lane, 56 Wn. App. 286, 293, 786 P.2d 277 (1989) (citing 1 W. LaFave, Search and Seizure SS 3.3(b), at 512 (1978)).

03.2 Count II: Delivery of Cocaine/ March 23, 2005

On March 23, 2005, Charlene Glimpse, acting as an informant, conducted a controlled buy of cocaine from Ott at his residence, paying \$60 in prerecorded money [RP 10/10/06 76, 83-90, 111-12, 121, 126-130, 137-140; RP 10/11/06 166-68]. Ott denied the transaction. [RP 10/11/06 22-13]

03.3 Counts III-IV: Possession of Cocaine and Methamphetamine/ March 23, 2005.

Pursuant to the execution of a search warrant on Ott's property on March 23, 2005, two pill bottles were seized from a vehicle on the property, one bottle containing methamphetamine and the other cocaine. [RP 10/10/06 91-99, 122-23]. Ott testified that the vehicle was "clear full of (other) people's possessions...." [RP 10/11/06 213].

D. ARGUMENT

01. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT A BUS STOP DESIGNATED BY A SCHOOL DISTRICT EXISTED WITHIN 1,000 FEET OF THE SITE OF THE DELIVERY OF METHAMPHETAMINE IN COUNT I AT THE TIME OF THE DELIVERY.

A defendant convicted of delivery of methamphetamine within 1,000 feet of a school bus route stop designated

by the school district is subject to a sentencing enhancement under RCW 69.50.435. The State must prove each element of the enhancement beyond a reasonable doubt. State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995). On review, the evidence is viewed in the light most favorable to the State, Id., drawing all reasonable inferences in favor of the State. State v. Salinas, 119 Wn.2d 192, 201-02, 829 P.2d 1068 (1992).

The trial testimony failed to establish that a school bus stop designated by a school district existed within 1,000 feet of the site of the delivery of the methamphetamine in count I at the time of the delivery. As previously set forth, Ron McCarty, the Director of Transportation for school buses in Thurston County, testified merely to the location of the school-bus-route stop closest to the gas station as of February 2005, some six months after the delivery in the summer of August 2004, and, perhaps equally important, at a time most likely following the commencement of a new school year the previous September, all of which explains the State's failure to even address the issue during closing argument. [RP 10/11/06 322].

What is more, no evidence was presented that the bus route stop was designated by a school district. McCarty simply confirmed that he was "aware of the various bus stops in the North Thurston School

District(,)” never asserting they were designated by a school district. [RP 10/10/06 66].

The State needed McCarty to testify that the bus stop was designated by a school district and that it was there in August 2004. And because McCarty’s testimony did not so specify, the State failed to meet its burden of proof and the enhancement must be vacated.

02. OTT’S CONVICTIONS FOR TWO COUNTS OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (COUNTS III-IV) ENCOMPASSED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.

A challenge to the calculation of an offender score may be raised for the first time on appeal. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999). A sentencing court’s calculation of a defendant’s offender score is a question of law and is reviewed de novo.

State v. Mitchell, 81 Wn. App. 387, 390, 914 P.2d 771 (1996); State v. Allyn, 63 Wn. App. 592, 596, 821 P.2d 528 (1991) (citing Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), aff'd on rehearing, 113 Wn.2d 148 (1989)).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based on a miscalculated upward offender score, “that a defendant cannot agree to punishment in excess of that which the Legislature has established,” and that “in general a defendant cannot waive a challenge to a miscalculated offender score.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Since there was “simply no question that Goodwin’s offender score was miscalculated, and his sentence is as a matter of law in excess of what is statutorily permitted for his crimes given a correct offender score,”

the court held that Goodwin “cannot agree to a sentence in excess to that statutorily authorized.” In re Goodwin, 146 Wn.2d at 876.

In sentencing Ott, the trial court calculated his offender score on each count as five by including his two convictions in counts III and IV for possession of two different substances as separate offenses. [CP 78-82, 85].

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an offender score. State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

“RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant’s offender score.” State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), reviewed denied, 143 Wn.2d 1010 (2001) (quoting State v. Tili, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

Here, given, as previously set forth, that the evidence demonstrated that Ott's two other current convictions for possessions of two different controlled substances, count III (cocaine) and count IV (methamphetamine), occurred simultaneously, these offenses encompassed the same course of criminal conduct for purposes of calculating Ott's offender score, with the result that matter must be remanded for resentencing based on an offender score that does not include both convictions. State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994) (simultaneous possession of two different controlled substances encompasses the same criminal conduct for sentencing purposes).

03. OTT WAS PREJUDICED BY HIS
COUNSEL'S FAILURE TO ARGUE THAT HIS
OFFENDER SCORE WAS INCORRECT.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d

1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court find that trial counsel waived the issue relating to Ott's offender score, as fully set forth in the preceding section of this brief, by informing the court that he had no dispute with the State's sentencing calculations [RP 11/08/06 367], then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to Ott's offender score for the reasons set forth in the preceding section, and

had counsel done so, the trial court would not have miscalculated Ott's offender score by counting his two current offenses for unlawful possession of a controlled substance separately toward his offender score.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly objected to Ott's offender score, the trial court would not have imposed a sentence based on a miscalculated offender score.

04. THE CASE MUST BE REMANDED TO
CORRECT A SCRIVENER'S ERROR
IN THE JUDGMENT AND SENTENCE.

The judgment and sentence incorrectly lists Ott's current convictions in counts III and IV as unlawful possession of a controlled substance with intent to deliver rather than the correct designation of possession of a controlled substance. [CP 83]. An obvious scrivener's error on a judgment and sentence form is correctable on remand if the error does not prejudice the defendant. State v. Moten, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999). The case should be remanded to correct this deficiency.

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E. CONCLUSION

Based on the above, Ott respectfully requests this court to remand his case for resentencing consistent with the arguments presented herein.

Dated this 22nd day of May 2007.

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CERTIFICATE

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I certify that we mailed a copy of the above brief by depositing it
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