

NO. 36917-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

ARTHUR D. WATSON, III,

Appellant.

FILED
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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Anne Hirsch, Judge

Cause No. 07-1-00142-9

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in sentencing Watson as his proper offender score cannot be ascertained based on this record and it appears to be lower than that found by the court.
2. The trial court trial court erred in sentencing Watson based on an offender score of nine calculated pursuant to RCW 9.94A.525(18) where the rule of lenity requires a lower offender score because RCW 9.94A.525(1)(c) and RCW 9.94A.030(42)(a)(i) indicate that two of Watson's prior convictions for failure to register "wash out" thus rendering the statute ambiguous as to how to properly calculate Watson's offender score.
3. The trial court erred in entering findings and conclusions following the bench trial Finding No. 20; and Conclusion No. 3. [CP 28-30].
4. The trial court erred in allowing Watson to be represented by counsel who provided ineffective assistance in failing to properly argue at sentencing that his offender score was miscalculated for the reasons given in the preceding sections of this brief.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in sentencing Watson as his proper offender score cannot be ascertained based on this record and it appears to be lower than that found by the court? [Assignments of Error Nos. 1 and 3].
2. Whether the trial court erred in sentencing Watson based on an offender score of nine calculated pursuant to RCW 9.94A.525(18) where the rule of lenity requires a lower offender score because RCW 9.94A.525(1)(c) and RCW 9.94A.030(42)(a)(i) indicate that two of Watson's prior convictions for failure to register "wash out" thus rendering the statute ambiguous as to how to properly calculate Watson's offender score? [Assignments of Error Nos. 2 and 3].

3. Whether the trial court erred in allowing Watson to be represented by counsel who provided ineffective assistance in failing to properly argue at sentencing that his offender score was miscalculated for the reasons given in the preceding sections of this brief? [Assignments of Error Nos. 3 and 4].

C. STATEMENT OF THE CASE

Arthur D. Watson, III (Watson) was charged by information filed in Thurston County Superior Court with one count of violation of sex offender registration. [CP 2].

Prior to trial, no motions regarding 3.5 or 3.6 were made or heard. Watson was tried at a bench trial, the Honorable Anne Hirsch presiding. [Supp. CP 32; 10-25-07 RP 4-98]. Watson did not testify at the bench trial. The court found Watson guilty as charged and entered the following required written findings and conclusions after the bench trial:

FINDINGS OF FACT

1. The defendant is a registered sex offender who has been classified as a Level II sex offender by the Thurston County Sheriff (See admitted exhibits 1 and 2 for judgment and sentences for two underlying sex offense convictions)
2. The Court found the testimony of Detective Leischner of the Thurston County Sheriff's Office (TCSO) Sex Offender Registration Unit very credible
3. Detective Leischner explained the procedure that the TCSO adopted to implement the new 90 day reporting requirement for Level II and III sex offenders per RCW 9A.44.130

4. Detective Leischner explained the forms and notifications that the TCSO sent to the defendant and that the defendant signed (See admitted exhibit 3)
5. Detective Leischner testified that the defendant correctly reported as directed for the first 90 day quarterly report date on 10/9/06
6. The defense stipulated to admission of both of the judgments for the defendant's underlying sex offense convictions
7. The defense stipulated that the defendant was and is a Level II sex offender who is required to quarterly report in person as directed by the Thurston County Sheriff
8. The defense stipulated that the defendant was provided written notice of the 1/8/07 quarterly report date and that he signed acknowledging knowledge of the 1/8/07 report date (See admitted exhibit 3)
9. The defendant failed to report as directed by the Thurston County Sheriff on 1/8/07, he had previously been notified of this report date and the consequences of failing to report
10. Detective Leischner testified that the defendant did not appear at the 1/8/07 quarterly report and that the defendant did not contact Detective Leischner regarding the defendant's failure to report
11. On January 22, 2007, the defendant was subsequently arrested by the TCSO for felony violation of sex offender registration
12. Detective Leischner testified that he subsequently interviewed the defendant after the defendant was advised of his Miranda warnings and waived them on January 31, 2007
13. The defendant told the detectives that he knew that he needed to report on 1/8/07 and that he had received written

notice from the Thurston County Sheriff notifying him of the 1/8/07 quarterly report date

14. The defendant told the detective that he failed to report on 1/8/07
15. The defendant told the detective that he mistakenly got the wrong dates because he was supposed to be in court (on another matter) on 1/11/07
16. The Court heard testimony from Dr LeCompte, a doctor from Western State Hospital who performed a mental health evaluation on the defendant specifically looking for the possibility of “diminished capacity”
17. The Court found the Dr LeCompte’s testimony very credible
18. Dr LeCompte found that the defendant “most likely had the capacity to form the mental state of knowledge at the time of the offense” citing among other factors that the defendant was able to perform a job where he supervised eight employees, has been able to register as a sex offender appropriately at times, and that the defendant had no diagnosed mental conditions that would impede his ability to form the mental state required for this offense (knowledge)
19. The defendant exercised his constitutional right to not testify
20. The Court, based on the defendant’s three prior convictions for violation of sex offender registration laws, found that the defendant understood all his requirements to report as a sex offender
21. The Court found that the defendant had notice and knowledge of the report date of 1/8/07 and that the defendant failed to report as directed by the Thurston County Sheriff as required by law

CONCLUSIONS OF LAW

1. The State has proven all elements of the crime of felony violation of sex offender registration beyond a reasonable doubt as charged in the Information as to the offense date of 1/8/07
2. The defendant is guilty beyond a reasonable doubt of the crime of felony violation of sex offender registration
3. The Court sentenced the defendant to a standard range sentence

[CP 28-30].

The court sentenced Watson to a low end standard range sentence of 43-months based on an offender score of nine—Watson’s counsel, inexplicably based on this record, agreed to this offender score. [CP 10-21, 22-24, 26-27; 10-29-07 RP 4-5, 9-10]. According to the forms provided by the State, Watson has the following prior convictions that count towards his offender score:

1977	Indecent Liberties	(sex offense)
1989	Rape in the second degree	(sex offense)
1993	Failure to Register	(Class C Felony)
1994	Failure to Register	(Class C Felony)

(9-year lapse)¹

¹ It must be noted that according to the “confidential clerk’s papers,” [CP 31-38], that Watson self-reported during a mental health evaluation to determine his capacity to commit the crime alleged/competency to stand trial/diminished capacity defense evaluation to allegedly having DUI convictions in 1999 and 2006. However, neither of these convictions were confirmed or substantiated based on this record. More importantly, the lack of a record of the alleged 1999 DUI conviction has significant impact on Watson’s offender score as set forth herein.

2003 Failure to Register (Class C Felony)

[CP 22-24, 26-27].

Timely notice of appeal was filed on October 31, 2007. [CP 25].

This appeal follows.

D. ARGUMENT

- (1) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE IT APPEARS BASED ON THE RECORD THAT WATSON'S OFFENDER SCORE WAS MISCALCULATED.

A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. State v. McCraw, 127 Wn. 2d 281, 289, 898 P.2d 838 (1995). A challenge to the calculation of an offender score may be raised for the first time on appeal. 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).

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.

In the instant case at issue here, Watson has two prior convictions for “failure to register” occurring in 1993 and 1994 both of which are class C felonies pursuant to former RCW 9.94A.030(42). [CP 22-24, 26-27]. According to the record, between these convictions and Watson’s next conviction (a 2003 “failure to register”) there was a nine-year gap requiring these convictions to “wash out” from Watson’s offender score pursuant to former RCW 9.94A.525(1)(c), which requires prior class C felonies to “wash out” “if, since the last date of release from confinement...the offender had spent five consecutive years in the community without committing any crime....” giving Watson a standard range sentence of 22-29 months based on an offender score of seven. [CP 22-24, 26-27]. There is no explanation based on this record as to how the

State included these two additional prior convictions for “failure to register” for purposes of calculating Watson’s offender score. Watson’s counsel did not object to his criminal history at sentencing, [10-29-07 RP 4-5], and even without such an objection, this matter should be remanded for resentencing as this court cannot tell based on this record what Watson’s proper offender score in fact is. *See State v. Mendoza*, 139 Wn. App. 693, 162 P.3d 439 (2007) (State’s assertions as to a defendant’s criminal history insufficient to meet its burden and a defendant’s failure to object does not relieve the State of its burden when calculating an offender score).

This court should remand for resentencing.

- (2) FORMER RCW 9.94A.525, APPLICABLE IN THIS CASE, IS AMBIGUOUS AS TO WHETHER PRIOR FAILURE TO REGISTER COVICITIONS “WASH OUT” WITH THE RESULT THAT WATSON’S OFFENDER SCORE IS LOWER THAN THAT FOUND BY THE COURT AND THE MATTER MUST BE REMANDED FOR RESENTENCING.

When interpreting a statute, the court must give effect to the plain meaning of the statutory language. *State v. Radan*, 98 Wn. App. 652, 657, 990 P.2d 962 (1999). A court may not engage in statutory construction if the statute is unambiguous, *State v. Bolar*, 129 Wn.2d 361, 366, 917 P.2d 125 (1996), and should resist the temptation of rewriting an unambiguous statute to suit the court’s notions of what is good policy, recognizing the

principle that “drafting of a statute is a legislative, not judicial function.” State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). While the court’s goal in statutory interpretation is to identify and give effect to the Legislature’s intent, State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), *review denied*, 145 Wn.2d 1013 (2001); if the language of a statute is unambiguous, the language of the statute is not subject to judicial interpretation. Id. When the legislature omits language from a statute, intentionally or inadvertently, the court will not read into the statute the language it believes was omitted. State v. Moses, 145 Wn.2d 370, 374, 37 P.2d 1216 (2002). Under the rule of lenity, any ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App. at 358.

Former RCW 9.94A.525, applicable to this case, provides in pertinent part:

(18) If the present conviction is for failure to register as a sex offender under RCW 9A.44.130(11)², count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior convictions for failure to register as a sex offender under RCW 9.94A.130(11), which shall count as one point.

However RCW 9.94A.525(1)(c) provides in pertinent part:

² In 2007 the legislature corrected a “scrivener’s error” in this statute by changing the number of subsection (10) to (11) and making this change to all other references in other related statutes. For purposes of clarity, only the correct statutory cite of subsection (11) will be made in this brief.

...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 has spent five consecutive years in the community with committing any crime that subsequently results in a conviction.

There is nothing in former RCW 9.94A.525(18) that precludes the “wash out” provisions of RCW 9.94A.525(1)(c) from applying to any class C felony including a prior class C felony for “failure to register” as this crime was not a “sex offense” under former RCW 9.94A.030(42)(a)(i) applicable in the instant case.

Here, Watson has two prior class C felonies (a 1993 failure to register and a 1994 failure to register) and between these two convictions, based on the record before this court, Watson did not have another conviction until his 2003 conviction for failure to register—a nine-year lapse. Applying the applicable statutes, the court apparently interpreted the “plain language” of RCW 9.94A.525(18) to require the inclusion of Watson’s prior 1993 and 1994 failure to register convictions—all prior failure to register convictions count towards the offender score and are not subject to the “wash out” provision of former RCW 9.94A.525(1)(c)—resulting in Watson’s offender score of nine. However, again based a “plain reading” of the appropriate statutes, the same can also reasonably be read to mean that the crimes at issue (both being class C felonies and

not “sex offenses” per former RCW 9.94A.030(42)(a)(i)) should have “washed out,” and not have been included in Watson’s offender score given the nine year lapse between 1994 and 2003—the next crime for which Watson was convicted according the record—meaning that Watson’s offender score was actually seven. Given the two reasonable interpretations of the appropriate statutes, an ambiguity exists and under the rule of lenity the result is that Watson should be resentenced under a lower offender score (seven—“washing out” his two prior convictions in 1993 and 1994 for failure to register resulting in a sentence range of 22-29 months).

(3) WATSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO ARGUE THAT HIS OFFENDER SCORE WAS MISCALCULATED.

Should this court find that trial counsel waived or invited the errors claimed and argued in the preceding sections of this brief by failing to properly object to the calculation of Watson’s offender score or by agreeing to the miscalculation of his offender score, then both elements of ineffective assistance of counsel have been established.

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 errors claimed and argued above by failing to object to Watson's offender score,³ then

³ While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

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 the calculation of Watson's offender score for the reasons set forth in the preceding sections of this brief, and had counsel done so, the trial court would not have miscalculated Watson's offender score by including his 1993 and 1994 convictions for "failure to register" in his offender score with the result that Watson's offender score would be two points lower (seven) with a corresponding offender score of 22-29 months.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent—again for the reasons set forth in the preceding sections, had counsel properly objected to the calculation of Watson's offender score, the trial court would not have found an improper offender score and would have been compelled to sentence Watson within a much lower standard range. *See* State v. Mendoza, 139 Wn. App. 693, 702-704, 162 P.3d 439 (2007). This court should remand for resentencing.

E. CONCLUSION

Based on the above, Watson respectfully requests this court to reverse and remand for resentencing.

DATED this 10th day of April 2008.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 10th day of April 2008, I delivered a true and correct copy of the Petition for Review to which this certificate is attached by United States Mail, to the following:

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(and the transcript)

Signed at Tacoma, Washington this 10th day of April 2008.

Patricia A. Pethick
Patricia A. Pethick

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