

No. 36917-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ARTHUR D. WATSON, III,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
08 JUL -3 PM 12:23  
STATE OF WASHINGTON  
BY 

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

The Honorable Anne Hirsch, Judge  
Cause No. 07-1-00142-9

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Watson's 1993 and 1994 convictions for failure to register as a sex offender washed out and were improperly included in his offender score.

2. Whether Watson's offender score was, or can be, properly calculated based on the record before this court.

3. Whether Watson received ineffective assistance of counsel because his trial counsel did not raise the wash out issue.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.

C. ARGUMENT.

1. The record contains facts that permit a reasonable inference that Watson's 1993 and 1994 convictions did not wash out.

Watson correctly cites the law regarding the calculation of a defendant's offender score and his ability to challenge that score when a legal error results in an excessive sentence.

As defined in RCW 9.94A.030(42)(a)(i), failure to register as a sex offender is not a "sex offense." It is a class C felony. RCW 9A.44.130(11). A conviction for a class C felony other than a sex offense washes out, or cannot be counted in the offender score for a current offense, when certain time conditions have been met. These are specified in RCW 9.94A.525(2)(c):

Except as provided in (e) of this subsection, 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 conviction.

Watson is correct that if there is a gap of at least five years between his release from confinement on the 1994 conviction for violation of the sex offender registration statute and the date he committed the 2003 violation of the registration statute, his 1993 and 1994 convictions would wash out and not be counted in his offender score. The convictions for indecent liberties in 1977 and second degree rape in 1989 will never wash out because they are sex offenses. RCW 9.94A.525(2)(a).

The criminal history as provided by the prosecutor at sentencing [CP 22] listed only felony convictions. However, also before the court was the Forensic Mental Health Report [CP 32-38] which included Watson's self-reported history. That history included two convictions for DUI, one in 1999 and another in 2006. [CP 34] Depending on when Watson was released from confinement on the 1994 conviction for the registration violation, and the offense date of the 1999 DUI, it is quite likely that he did not spend five years in

the community crime-free. Under RCW 9.94A.525(2)(c), any crime resulting in a conviction will interrupt the wash out period; it does not have to be a felony. A DUI is a gross misdemeanor. RCW 46.61.502. If the 1999 DUI interrupted the wash out period, Watson's 1993 and 1994 felony convictions would correctly be counted in his current offender score.

2. Because the record before this court does not permit a determination regarding wash out, the matter should be remanded to the Superior Court for resentencing, and the State should be allowed to introduce evidence of any intervening convictions that interrupt the wash out period.

The fact that the defense counsel agreed to the criminal history as presented by the prosecution [10/29/07 RP 5] supports the inference that the 1999 DUI interrupted the wash out period. If the defense attorney were aware of that conviction, she would have no reason to argue that the 1993 and 1994 convictions did not count. Similarly, the prosecutor would have had no reason to include the DUI in the criminal history presented to the court, since the gross misdemeanor would not count in Watson's offender score. The most logical conclusion from the record is that both parties were aware that the 1993 and 1994 convictions did not wash out and did not see it as an issue about which they needed to make a record.

On remand, the State should be allowed to produce evidence of any intervening convictions that interrupt the wash out period. This situation can be analogized to that in State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007). In Bergstrom, the defendant raised an untimely pro se argument that some of the prior crimes included by the State in his criminal history constituted the same criminal conduct and should count as one point. His attorney did not join him in that objection, and his own presentence report agreed with the State's standard range calculation. He received a standard range sentence based upon the score as calculated by the State. The Supreme Court found that the State has reasonably relied on the attorney's acknowledgment of the offender score and was not on notice that it needed to provide additional sentencing evidence. The court set forth the following approach:

First, if the State alleges the existence of prior convictions at sentencing and the defense fails to "specifically object" before the imposition of sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence.

. . . .

Second, if the defense does specifically object during the sentencing hearing but the State fails to produce *any* evidence of the defendant's prior convictions,

then the State may not present new evidence at resentencing.

. . . .

Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed.

Bergstrom, *supra*, at 93-94.

Arguably, Watson could be precluded from challenging his criminal history now, since he agreed to it at sentencing. He is, however, specifically claiming not that the history is incorrect, but that some of it should not count. However, the goal of the criminal justice system is just that—justice—and fairness requires that the matter be remanded for the State to produce evidence that the wash out period was interrupted.

A case that might seem to hold the opposite result is In re the Pers. Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005). That case had rather convoluted facts. Cadwallader pled guilty in 1998 to a second degree robbery committed in 1997. He was found to be a persistent offender under the “three strikes” statute, based upon a 1978 conviction for third degree rape and a 1993 robbery conviction. At the time, the law was understood to say

that sex offenses would never wash out. In 1999, the Supreme Court decided State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999), which held that the 1990 amendment to the Sentencing Reform Act that prohibited sex offenses from washing out applied prospectively only and did not revive those offenses that had already washed out. In 2000, Cadwallader filed a personal restraint petition arguing that since the rape conviction had washed out, he was not actually a third time persistent offender. The State responded that it could produce evidence of a 1985 Kansas conviction that interrupted the wash out period, and moved to vacate the sentence on the assertion that Cadwallader had committed fraud by misrepresenting his criminal history by not revealing that Kansas conviction. Proceedings were stayed while Cadwallader brought a PRP in the Court of Appeals; the PRP was dismissed, he sought review in the Supreme Court, which reversed. The Supreme Court held that Cadwallader could not agree to a sentence based upon a miscalculated offender score, and remanded for resentencing. The court refused to allow the State to present evidence of the Kansas conviction because it had not done so at the original sentencing, finding that Cadwallader had no obligation to disclose his criminal

history or to object to the fact that it had been left out, and it was the State's obligation to include the Kansas conviction.

In Watson's case, the situation is different. It is a logical inference from the record that both parties were aware of the 1999 DUI conviction and did not find a need to put it in the criminal history because it would not count in the offender score. Further, Watson did not just fail to object, his attorney affirmatively agreed that the history was correct. Because of that, Bergstrom rather than Cadwallader should control, and the matter should be remanded for resentencing. At resentencing, the State should be allowed to introduce evidence that the 1999 DUI interrupted the wash out period, and if it cannot do so, then Watson should be resentenced under a score calculated without the 1993 and 1994 convictions.

3. Watson did not receive ineffective assistance of counsel.

It is reasonable to infer that defense counsel was aware of the 1999 DUI and that it does interrupt the wash out period. Her failure to object would be because she knew the history was accurate and the offender score correctly calculated. Nothing about her representation of the defendant fell below an objective standard of reasonableness.

D. CONCLUSION.

Because the record before this court does not permit a determination of the question whether two of Watson's prior convictions washed out, the matter should be remanded to the trial court for resentencing, at which time the State should be allowed to produce evidence that the appellant's 1999 DUI conviction prevented wash out of the 1993 and 1994 convictions for violation of the sex offender registration statute. If the State is unable to do so, then Watson should be resentenced with an offender score of seven rather than nine.

Respectfully submitted this 2d of July, 2008.



\_\_\_\_\_  
Carol La Verne, WSBA# 19229  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, No. 36917-6-II,  
on all parties or their counsel of record on the date below as follows:

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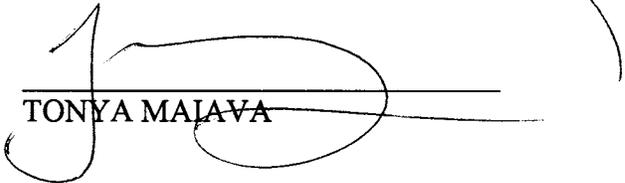
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I certify under penalty of perjury under laws of the State of  
Washington that the foregoing is true and correct.

Dated this 2<sup>nd</sup> day of July, 2008, at Olympia, Washington.

  
TONYA MAJAVA