

FILED
COURT OF APPEALS
DIVISION II
09 OCT -6 AM 11:15
STATE OF WASHINGTON
BY 

NO. 37392-1-II
Cowlitz Co. Cause NO. 07-1-01250-5

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS LEE COMBS,

Appellant.

BRIEF OF RESPONDENT

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I. FACTS

On February 26, 2008, the appellant pleaded guilty to Escape in the First Degree. CP 16. This charge stemmed from an incident occurring on July 10, 2007, where the appellant failed to appear at work while participating in the Longview Work /Training Release (LWTR), a Department of Corrections owned and contracted institution. CP 10.

On July 11, 2007, Community Corrections Officers were alerted that the appellant was hiding out in a house in Kelso, Washington. When apprehended, the appellant admitted he made the decision not to return to work release because he had used drugs.

On November 19, 2007, the appellant entered a contract with Cowlitz-Wahkiakum Narcotics Task Force. In exchange for his cooperation and completion of that contract, the State would recommend an exceptional sentence downward for a total of 36 months. The appellant failed to perform the contract and the offer was revoked.

At sentencing, defense counsel argued for the exceptional sentence, claiming that even though the prosecutor's signature did not appear on the contract the state should still be held to the agreement. RP 2. Further, defense counsel then argued that the sentencing range for the appellant was too excessive for the crime he committed. RP 2. Defense counsel further claimed the appellant did not attempt to flee, even though

the appellant admitted to choosing not to return to LWTR, and this would not justify the standard range of 63 to 84 months incarceration. RP 3-4. Though providing the Trial Court a sentencing memorandum arguing the issue on calculation of the offender score under RCW 9.94A.525(15), CP 14, at sentencing, defense counsel did not dispute his criminal history or his sentencing range. Rather, appellant only argued for an exceptional sentence down. RP 1-6; CP 5-13.

After finding the appellant's offender score was beyond 9, the trial court followed the statute and sentenced the appellant to the low end of the sentencing range, 63 months. CP 16.

II. ISSUE

Did the trial court error by considering each of the appellant's felony convictions separately when calculating the offender score under RCW 9.94A.525(15)?

III. ANSWER

No. It was not error for the sentencing court to consider separate convictions in the calculation of the defendant's offender score for an escape conviction. RCW 9.94A.525(5)(a) and RCW 9.94A.525(7) make it clear that the offender's score shall be calculated by adding one point for each prior non-violent felony conviction.

IV. ARGUMENT

Statutory interpretation is a question of law, which is reviewed de novo. *State v. Keller*, 143 Wn. 2d 267, 276, 19 P.3d 1030 (2000). Courts do not engage in statutory interpretation of a statute that is not ambiguous. *Id.*, citing *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). A statute is not ambiguous simply because different interpretations are conceivable; it is only ambiguous when it can reasonably be interpreted in two or more ways. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

1. RCW 9.94A.525(15) is not ambiguous.

RCW 9.94A.525(15) clearly states that prior adult felony convictions count as one point when calculating a defendant's offender score for Escape in the first and second degrees. Further, when read in conjunction with RCW 9.94A.525(5)(a) and RCW 9.94A.525(7), it is obvious that each felony conviction shall be counted separately under RCW 9.94A.525(15) for purposes of calculating an offender score. RCW 9.94A.525(5)(a) states that "in the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately," while RCW 9.94A.525(7) sets out that

"if the present conviction is for a nonviolent offense and not covered in subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each

juvenile prior violent felony conviction and ½ point for each juvenile prior nonviolent felony conviction.”

RCW 9.94A.030(30) describes a “nonviolent offense” as “an offense which is not a violent offense.” Violent offenses are defined under RCW 9.94A.030(50). Escape in the First degree is not listed as a “violent offense,” RCW 9.94A.030(5); therefore, RCW 9.94A.525(15) should be read in conjunction with RCW 9.94A.525(7).

The Division 1 Court of Appeals recently decided the issue at hand in *State v. Lofton*. 142 Wn.App. 412, 174 P.3d 703 (2008). In that case, the defendant pleaded guilty to second degree escape and, based on the sentencing court’s calculation of his offender score of 14, was sentenced to 51 months of confinement. The defendant filed a personal restraint petition, which appealed the calculation on the limited theory “that other subsections of the offender score statute use the word “each” to modify “prior conviction,” while the subsection governing escape does not.” 142 Wash.App. at 414-415. The defendant argued that the absence of the word “each” demonstrated the “legislative intent that all prior adult convictions count as a single point when calculating the offender score for escape.” *Id.* The Court denied the petition, ruling that the sentencing court did not error in its calculation of the offender’s score and that the “prior convictions are to be counted individually when calculating the offender

score for escape.” Id. at 417. The Court reasoned, first, the controlling statement of legislative intent is held within RCW 9.94A.525(5)(a); and, second, if the petitioner’s theory of calculation was to be followed, only two standard range sentences for escape would be possible and this was clearly not the legislature’s intent. Id. at 416.

Similar to *Lofton*, the appellant’s sole basis for his appeal is the absence of the word “each” from the language in RCW 9.94A.525(15). The appellant argues that had the legislature intended for each prior conviction to be given a point for calculating the offender score, it would have included the word “each” within its language. However, what appellant fails to admit is, regardless of the exclusion of the word “each”, RCW 9.94A.525(5)(a) and RCW 9.94A.525(7) clearly state that all non-violent felony convictions are to be counted separately. Moreover, in RCW 9.94A.525(14), even though only prior convictions for escape shall be counted against the offender, when following the prescription of RCW 9.94A.525(5)(a), those convictions are still counted separately.

Even though appellant points out a possible ambiguity, and the court might also be able to imagine any number of possible alternative interpretations, those imagined interpretations and ambiguities are not binding on the Court. *Keller*, 143 Wn.2d at 277, citing *W.Telepage, Inc. v. Tacoma Dep’t of Financing*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000).

Clearly the legislature did not intend to give convicted criminals a break from their bad behavior. This is evident in the governing statute, RCW 9.94A.525(5)(a), RCW 9.94A.525(7), and in the fact each subsection following the governing statute requires the designated convictions to be counted separately, though at times scored differently¹.

V. CONCLUSION

For the above reasons, the State respectfully requests the Court to deny appellant's Petition.

Respectfully submitted this 3rd day of October, 2008.

SUSAN I. BAUR
Prosecuting Attorney

By:



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Deputy Prosecuting Attorney
Representing Respondent

¹ See RCW 9.94A.525(16), (17), (18).

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MICHELLE SASSER, being first duly sworn, on oath deposes and says: That on October 3, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

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ATTORNEY AT LAW
1402 BROADWAY, SUITE 103
LONGVIEW, WA 98632

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950 BROADWAY, SUITE 300
TACOMA, WA 98402

each envelope containing a copy of the following documents:

- 1. BRIEF OF RESPONDENT
- 2. Affidavit of Mailing.

Michelle Sasser
MICHELLE SASSER

SUBSCRIBED AND SWORN to before me this October 3, 2008.

[Signature]
Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: 4-27-09

