

NO. 37496-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JASON WILSON,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
09 MAR -3 AM 11:44
STATE OF WASHINGTON
BY  DEPUTY

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

The Honorable Gordon Godfrey

APPELLANT'S REPLY BRIEF

VANESSA M. LEE
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT.....1

B. CONCLUSION.....5

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Ammons, 105 Wn.2d 175, 715 P.2d 719 (1986) 2, 3
State v. Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002). 3
State v. Jones, 110 Wn.2d 74, 750 P.2d 620 (1988) 3

Washington Court of Appeals

State v. Collins, 144 Wn. App. 547, 182 P.3d 1016 (2008)..... 3
State v. Gimarelli, 105 Wn. App. 370, 20 P.3d 430 (2001) 2

Revised Code of Washington

RCW 69.50.40 1
RCW 69.50.407 1, 4
RCW 9A.28.020..... 1

A. ARGUMENT

Appellant Jason Wilson appeals his sentence, arguing it was based on a miscalculated sentence because his offender score calculation included one point for a gross misdemeanor conviction entered in 2005. Whether the 2005 conviction was a valid misdemeanor or an invalid felony, Mr. Wilson's offender score in the instant case was overcalculated by one point, requiring remand.

Respondent argues the sentence is valid because the prior gross misdemeanor *could have been* charged as a class C felony under RCW 69.50.407. This is true. However, it does not change the fact that the King County Prosecutor chose to charge Mr. Wilson under RCW 69.50.401(d) and 9A.28.020(d).

RCW 69.50.407, the conspiracy and attempt statute specific to a Violation of the Uniform Controlled Substances Act (VUCSA), provides:

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

If the King County prosecutor had charged Mr. Wilson under this statute, the crime would indeed have been a class C felony.

Instead, the prosecutor chose to charge Mr. Wilson under RCW 69.50.401(d), providing that the manufacture, delivery, or possession with intent to deliver or manufacture any Schedule IV substance is a class C felony and RCW 9A.08.020(d), the general criminal attempt statute, providing that attempt to commit a class C felony is a gross misdemeanor. See CP 63-65.

The Judgment and Sentence for the 2005 conviction is valid on its face. This Court has held that a conviction is facially invalid only if it “affirmatively show[s] that the defendant's rights were violated.” *State v. Gimarelli*, 105 Wn. App. 370, 375, 20 P.3d 430 (2001), *citing State v. Ammons*, 105 Wn.2d 175, 189, 715 P.2d 719 (1986). The “constitutional infirmities” of the conviction must be apparent on its face, “without further elaboration.” *Gimarelli*, 105 Wn. App. at 375, *citing Ammons*, 105 Wn.2d at 188. Here, Mr. Wilson does not and cannot allege that his rights were violated by the 2005 conviction. On its face, the Judgment and Sentence is consistent and correct; the heading indicates a non-felony conviction, which comports with the filing statutes, RCW 69.50.401(d) and 9A.08.020(d). CP 63. Respondent cannot argue otherwise without the “further elaboration” of resorting to the VUCSA statute.

In the alternative, if the 2005 conviction is facially invalid as Respondent contends, then it should not have been considered by the sentencing court at all. The Supreme Court has repeatedly held that a “sentencing judge may not include in criminal history a prior conviction ‘which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face.’” *State v. Jones*, 110 Wn.2d 74, 77, 750 P.2d 620 (1988), quoting *Ammons*, 105 Wn.2d at 187.

Respondent’s reliance on *State v. Collins*, 144 Wn. App. 547, 182 P.3d 1016 (2008) is misplaced. *Collins* stands for the proposition that a defendant who affirmatively acknowledges his purported offender score in a guilty plea waives any challenge to that offender score based on *factual* error. But *Collins* does not disturb the Supreme Court’s holding that a sentence based on a miscalculated offender score which is based on *legal* error cannot stand. *State v. Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). Respondent argues that here, the miscalculated offender score is an error of fact, but provides no support for that assertion. There is no factual dispute here. Unlike *Collins*, which concerned the comparability of out-of-state convictions and therefore required a fact-intensive analysis, the error here is plainly presented on the

face of the 2005 Judgment and Sentence. The validity of that conviction is a wholly legal question. As discussed above, since the conviction is facially valid, the legal question is settled in Mr. Wilson's favor.

Respondent also asserts that "[b]y state law the appellant pleaded guilty to a felony," apparently because the King County Prosecutor should have charged Mr. Wilson with a felony under RCW 69.50.407. State's Response Brief at 4. This is incorrect. Mr. Wilson's 2005 Statement on Plea of Guilty is not of record in this case, but the Judgment and Sentence clearly indicates he was charged with and convicted of a gross misdemeanor, requiring the conclusion that Mr. Wilson entered into that plea with the understanding that he was pleading to a gross misdemeanor. CP 63. Despite what Respondent believes Mr. Wilson's conviction should have been, the conviction remains a gross misdemeanor.

In short, Respondent cannot have it both ways. There are only two options: either the 2005 conviction is valid as a misdemeanor (and should not have been included in Mr. Wilson's offender score), or else it is invalid (and should not have been included in the offender score). There is no mechanism or rule of

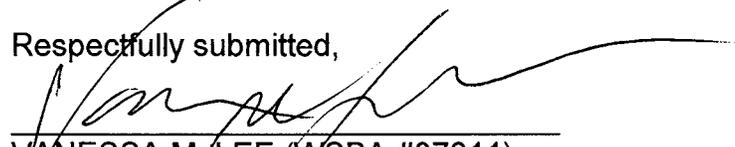
law by which Respondent can retroactively convert a misdemeanor into a felony.

B. CONCLUSION

Because the 2005 conviction should not have been included in Mr. Wilson's offender score calculation under any analysis, he respectfully requests this court vacate his sentence and remand for resentencing with a corrected offender score.

DATED this 2nd day of March, 2009

Respectfully submitted,



VANESSA M. LEE (WSBA #37611)
Washington Appellate Project
Attorneys for Appellant

