

No. 39023-0-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

VINH QUANG LAM,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 06-1-05830-7  
The Honorable Brian Tollefson, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The Superior Court erred when it sentenced Appellant using an offender score of eight.
2. The Superior Court exceeded its statutory authority when it considered additional evidence at a hearing to resentence Appellant held after the Court of Appeals vacated one of his convictions.
3. The separation of powers doctrine was violated when the Superior Court considered additional evidence at a hearing to resentence Appellant held after the Court of Appeals vacated one of his convictions.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the Superior Court err when it sentenced Appellant using an offender score of eight where the State failed to timely file a collateral attack challenging the offender score calculation, and where the State failed to cross-appeal the trial court's original offender score calculation? (Assignment of Error 1)
2. Did the Superior Court exceed its statutory authority when it considered additional evidence at a hearing to resentence Appellant held after the Court of Appeals vacated one of his convictions but did not vacate his sentence? (Assignment of

Error 2)

3. Did the Superior Court's application of a recent amendment to the Sentencing Reform Act to a final judgment entered by the original trial court violate the separation of powers doctrine? (Assignment of Error 3)

### **III. STATEMENT OF THE CASE**

By Amended Information filed April 26, 2007, the State charged Vinh Quang Lam with one count of possession of a stolen firearm (RCW 9A.56.140, .310); one count of second degree unlawful possession of a firearm (RCW 9.41.010, .040); one count of first degree possession of stolen property (RCW 9A.56.140, .150) while armed with a firearm (RCW 9.94A.510, .530); one count of attempting to elude a police vehicle (RCW 46.61.024) while armed with a firearm (RCW 9.94A.510, .530); and one count of driving with a suspended license (RCW 46.20.342). (CP 7-10) A jury found Lam not guilty of possessing a stolen firearm, but found him guilty on the remaining counts, and found he was armed with a firearm. (CP 45-53)

At the sentencing hearing held on July 13, 2007, the defense disputed two juvenile adjudications included in the State's offender score calculation. (CP 178) The State asserted that the

documents showed adjudications of guilt for the crime of taking a motor vehicle without permission. (CP 151, 178) The defense argued that the documents provided by the State did not establish that Lam was convicted of that (or any) crime because the adjudications listed the crime simply as "TMV." (CP 179-82; Exhs. P11, P17) The trial court agreed with the defense, and sentenced Lam to a total of 111 months of confinement using an offender score of eight. (CP 103, 106, 183, 195-96)

Lam appealed his convictions, arguing that he received ineffective assistance of counsel and that the jury instructions for unlawful possession of a firearm were improper. (CP 102, 118) The State did not cross-appeal the offender score calculation. (CP 118-25) The Court of Appeals agreed with Lam's instructional argument and reversed the unlawful possession of a firearm conviction, but affirmed the remainder of his convictions. (CP 118-25) The court concluded its opinion by stating: "we vacate [Lam's] conviction for second degree unlawful possession of a firearm and remand." (CP 125)

On remand, the State chose not to retry Lam on the unlawful possession charge. (03/13/09 RP 1-2; CP 141-43) The State requested that it be allowed to present additional evidence relating

to the two "TMV" adjudications, and asked the court to include those adjudications in Lam's offender score at resentencing on the affirmed convictions. (CP 144-49; Exhs. P8-P17) The defense objected, arguing that the court did not have authority to consider the new documents, and that Lam should be sentenced with an adjusted offender score of seven. (CP 150-62; 03/13/09 RP 2-5)

The Superior Court disagreed with the defense, considered the new documents presented by the State, and found that Lam had two additional juvenile adjudications for taking a motor vehicle without permission. (03/13/09 RP 5-6; 03/20/09 RP 17, 19) Using an offender score of eight, the court sentenced Lam to a total of 97 months of confinement. (CP 237, 240) This appeal timely follows. (CP 236)

#### **IV. ARGUMENT & AUTHORITIES**

The portion of the Sentencing Reform Act (SRA) that addresses offender score calculations, currently states, in relevant part:

The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions

of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

RCW 9.94A.525(21) (emphasis added). This highlighted language was added by Laws of 2008 ch. 231, §§ 2-4, in response to the Supreme Court's rulings in *In re Cadwallader*, 155 Wn.2d 867 (2005); *State v. Lopez*, 147 Wn.2d 515 (2002); *State v. Ford*, 137 Wn.2d 472 (1999); and *State v. McCorkle*, 137 Wn.2d 490 (1999). See Laws of 2008 ch. 231, § 1. These cases held that, in certain circumstances, the State was not allowed to present new evidence to prove additional convictions.

For example, in *Ford*, the defendant appealed the trial court's inclusion of three California convictions in his offender score when the State failed to offer any proof of their existence. 137 Wn.2d at 475. Ford did not dispute their existence, but argued they were not "convictions" because they resulted in civil commitment only. *Id.* The California statutes were not offered into evidence and no comparable Washington statutes were identified. *Id.* The *Ford* Court reversed the trial court's finding but allowed the State to

prove the classification of the disputed convictions, because the defendant did not specifically put the trial court on notice as to the apparent defects. 137 Wn.2d at 487. The Supreme Court also reaffirmed the rule that where the disputed issues have been fully argued to the sentencing court, the unlawful portion must be excised, and the matter remanded to the sentencing court without allowing further evidence to be adduced. 137 Wn.2d at 485.

In *McCorkle*, the Court of Appeals initially found that, although a sentencing error did occur, McCorkle did not adequately object, and the State could therefore introduce new evidence upon remand for resentencing. 137 Wn. 2d at 493. The Supreme Court disagreed, and found that McCorkle did adequately object to the issue of whether out-of-state convictions should be calculated in his offender score. 137 Wn.2d at 498.

In *Lopez*, the State alleged prior convictions but failed to provide any supporting evidence for one of them. The defendant objected to his life sentence as a persistent offender absent proof of the prior offense. 147 Wn.2d at 521. The Supreme Court remanded for resentencing, and held that the State could not provide further evidence because the defendant had specifically objected to the lack of proof below. 147 Wn.2d at 520.

Finally, in *Cadwallader*, the petitioner filed a personal restraint petition arguing that a 1978 rape conviction washed out under new case law, and that his persistent offender status should be overturned. 155 Wn.2d at 871-72. The State tried to present new evidence of a 1985 Kansas conviction that prevented the wash out of the rape conviction. 155 Wn.2d at 871-72. The Supreme Court held that the State could not introduce new evidence to prove the out-of-state conviction that it failed to introduce at the original sentencing hearing. 155 Wn.2d at 880.

It is clear from a review of *Cadwallader*, *Ford*, *Lopez*, and *McCorkle*, that the 2008 amendment to the SRA was meant to address a particular situation: one where the defendant appeals his sentence or offender score and the appellate court remands for resentencing. Here, unlike in the cases discussed above, the need to resentence Lam does not arise from a defect in his offender score, but instead because one of his convictions was reversed. Neither Lam nor the State appealed the trial court's ruling and calculation of his offender score. With the exception of the unlawful possession of a firearm conviction, his convictions were affirmed. Lam's offender score only decreased because he has one less "other current" offense. The existence or lack of existence of prior

convictions was not at issue on appeal or at resentencing.

The Court of Appeals specifically remanded Lam's case to the Superior Court for action consistent with its opinion. (CP 125) Nowhere in its opinion is Lam's offender score discussed. The Superior Court therefore did not have authority to revisit Lam's offender score calculation, or to consider additional evidence concerning Lam's prior criminal history.

Furthermore, the State waived its right to challenge Lam's offender score when it failed to cross-appeal the trial court's original ruling on the juvenile offenses and its original offender score calculation. The State was also time-barred from raising such a challenge under CrR 7.8 and RCW 10.73.090, which both limit the time for seeking relief from a judgment to one year.

Finally, by ruling in the State's favor, the Superior Court violated the separation of powers doctrine. This doctrine comes from the constitutional distribution of governmental authority into three branches: legislative, judicial, and executive. *State v. Mann*, 146 Wn. App. 349, 358, 189 P.3d 843 (2008). A violation of the separation of powers occurs when one branch of government invades the province of another, and certainly arises when the legislature attempts to perform judicial functions. *Id.*

For example, in *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 143, 744 P.2d 1032, 750 P.2d 254 (1987), the Court found that a retroactive statutory amendment that prescribes new rules to be applied to pending cases violates the separation of powers when such application would impede upon the court's right and duty to apply new law to the facts of a case, dictate how the court should decide a factual issue, or affect a final judgment. *Haberman*, 109 Wn.2d at 144. Here, the Legislature has specified that sections two and three of chapter 231 "apply to all sentencings and resentencings commenced before, on, or after June 12, 2008." Laws of 2008 ch. 231, § 5. This language seems to imply that the amendment in question is retroactive.

In this case, the trial court's original offender score decision, made and entered on July 13, 2007, is a final judgment. In contrast, a judgment concerning a prior offender score that has been remanded for an evidentiary hearing is not a final judgment because the offender score issue is again before the court. Similarly, there would be no final judgment in a situation where a charge was vacated and a defendant was facing sentencing after being convicted a second time. The 2008 amendment applies to these types of situations. But neither situation is present in this

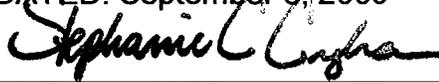
case.

The Superior Court erred when it granted the State's request to present new evidence regarding the two disputed juvenile convictions. Lam should have been sentenced using the offender score as calculated originally by the trial court, less one point for the vacated unlawful possession of a firearm conviction.

**V. CONCLUSION**

For the reasons argued above, this Court should reverse Lam's sentence, and remand this case with a specific directive to resentence Lam using an offender score of seven.

DATED: September 8, 2009



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**CERTIFICATE OF MAILING**

I certify that on 09/08/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Vinh Quang Lam, DOC# 813413, Stafford Creek Corrections Center, 191 Constanline Way, Aberdeen, WA 98520.



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