

NO. 44332-5-II

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

STATE OF WASHINGTON, APPELLANT

v.

DWAYNE PAUL STEWART, RESPONDENT

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Appeal from the Superior Court of Pierce County  
The Honorable Linda CJ Lee

No. 12-1-03578-6

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**BRIEF OF APPELLANT**

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A. ASSIGNMENTS OF ERROR.

1. The sentencing court erred in its finding that RCW 9.94A.589(1)(a) does not require that the defendant's domestic violence assault in the fourth degree conviction be treated as a "prior" offense for purposes of offender score calculation in sentencing him on count I, third degree assault.
2. The sentencing court erred in finding "that under RCW 9.94A.525, the defendant's current domestic violence assault in the fourth degree conviction does not count as a point in his offender score calculation," in sentencing him on count I, third degree assault, because the former "is not a 'prior' offense."

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the sentencing court erred in finding that Defendant's fourth degree assault conviction should not contribute one point to his offender score under RCW 9.94A.525 because that court improperly found that this conviction need not be treated as a "prior" offense for

purposes of offender score calculation under RCW

9.94A.589(1)(a).

C. STATEMENT OF THE CASE.

1. Procedure

On September 21, 2012, Dwayne Paul Stewart, hereinafter referred to as “the defendant” or “Defendant,” was charged by information with second degree assault of R.J. in count I and fourth degree assault of C.D. in count II. CP 1-2. Count I alleged a deadly weapon sentence enhancement and both counts were alleged to be domestic violence offenses. CP 1-2. *See* CP 3-4.

On October 31, 2012, the defendant pleaded guilty to an amended information, which amended count I to third degree assault and eliminated its deadly weapon sentence enhancement. CP. 5-6. Count II remained unchanged, save for the description of the victim, and both counts retained allegations that they were domestic violence offenses. CP 5-6.

In his statement of defendant on plea of guilty on count I, the defendant indicated that he understood his offender score was 3, that his standard range on count I was 9 to 12 months in total confinement, and that the State would recommend 9 months. CP 8-17. He wrote that he was

pleading guilty to the amended information to “take advantage of the plea offer by the State. CP 8-17.

The defendant signed a stipulation on prior record and offender score, in which he also acknowledged that his offender score was 3 and his standard range 9 to 12 months on count I. CP 18-20. That stipulation indicated that a 2008 second degree unlawful possession of a firearm conviction and a 1997 unlawful possession of marihuana with intent to deliver conviction would each contribute one point towards the defendant’s offender score. CP 18-20.

The court stated that is would “honor the plea agreement,” and sentenced the defendant to 9 months in total confinement on count I, CP 21-34, and 364 days with 94 days suspended and credit for 41 days served on count II. CP 95-99; 10/31/2012 RP 17-18.

On December 21, 2012, the defendant moved to correct the judgment and sentence, arguing that his offender score for sentencing of the third degree assault should not have included a point from the fourth degree assault conviction. 12/21/2012 RP 2-17; CP 44-48, 62-69. *See* CP 49-61. The court agreed and re-sentenced the defendant using an offender score of 2 rather than 3, though it again imposed 9 months in total confinement on count I. 12/21/2012 RP 17-21. CP 76-88.

On December 24, 2012, the State filed a timely notice of appeal.  
CP 91-92.

2. Facts

On October 31, 2012, the defendant pleaded guilty to fourth degree assault, stating, *inter alia*, that “[o]n 9-20-12, [he] assaulted C.L.D. by grabbing her,” and that “[s]he was [his] wife.” CP 100-04. He also pleaded guilty to third degree assault of C.L.D.’s son, R.J., CP 8-17, arising from an incident in which he was alleged to have cut R.J.’s hand, after R.J. came to the defense of his mother. CP 3-4.

After the defendant was sentenced, his attorney noted that he had two prior felony convictions, but that the deputy prosecutor “scored him as a three because she was counting the Assault 4 as one additional point.” 10/31/2012 RP 19. The defense attorney then asked to set the matter for motion to correct the sentence. 10/31/2012 RP 21.

On December 7, 2012, the defendant filed a “motion to correct judgment and sentence” in which he argued that his fourth degree assault conviction was not a “prior conviction” under RCW 9.94A.525(21)(c), and thus, that his offender score was 2, and his standard range only 4 to 12 months. CP 44-48.

The State filed a reply, which noted that RCW 9.94A.589(1) generally requires that “whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score,” and argued that the fourth degree assault conviction was therefore properly considered a prior conviction for purposes of determining Defendant’s offender score for his third degree assault conviction. CP 49-61.

On December 21, 2012, the court heard the defendant’s motion to correct judgment and sentence, 12/21/2012 RP 2-17, and granted that motion, holding that

[u]nder RCW 9.94A.525, the defendant’s current domestic violence assault in the fourth degree conviction does not count as a point in his offender score calculation, as it is not a “prior” offense. Th[e] court further f[ound] that RCW 9.94A.589(1)(a) does not require that the defendant’s current domestic violence assault in the fourth degree conviction be treated as a “prior” offense for purposes of offender score calculation.

CP 72; Appendix A; 12/21/2012 RP 17-18.

D. ARGUMENT.

1. THE SENTENCING COURT ERRED IN FINDING THAT DEFENDANT’S FOURTH DEGREE ASSAULT CONVICTION SHOULD NOT CONTRIBUTE ONE POINT TO HIS OFFENDER SCORE UNDER RCW 9.94A.525 BECAUSE IT IMPROPERLY FOUND THAT THIS CONVICTION NEED NOT BE TREATED AS A “PRIOR” OFFENSE FOR PURPOSES OF OFFENDER SCORE CALCULATION UNDER RCW 9.94A.589(1)(a).

The sentencing court found that the defendant’s fourth degree domestic violence assault conviction did not count as a point towards his offender score in sentencing his third degree assault conviction under RCW 9.94A.525 because it held that RCW 9.94A.589(1)(a) did not require that it be treated as a “prior” offense for purposes of calculating that offender score. CP 721; Appendix A. The law, however, requires otherwise.

RCW 9.94A.525 provides, in relevant part, that

***If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:***

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking offense, a

domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;

(b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(c) ***Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.***

RCW 9.94A.525(21) (emphasis added) (section 21 was added to RCW 9.94A.525 by Laws of 2010, ch. 274, §403, and became effective June 10, 2010). See Appendix B.

RCW 9.94A.030 defines “***[r]epetitive domestic violence offense***”  
***as any***

(a)(i) ***Domestic violence assault that is not a felony offense under RCW 9A.36.041;***

(ii) Domestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense;

(iii) Domestic violence violation of a protection order under chapter 26.09, 26.10, 26.26, or 26.50 RCW that is not a felony offense;

(iv) Domestic violence harassment offense under RCW 9A.46.020 that is not a felony offense; or

(v) Domestic violence stalking offense under RCW 9A.46.110 that is not a felony offense; or

(b) Any federal, out-of-state, tribal court, military, county, or municipal conviction for an offense that under the laws of this state would be classified as a repetitive domestic violence offense under (a) of this subsection.

RCW 9.94A.030(41) (emphasis added).

Finally, RCW 9.94A.589(1)(a) specifically provides that with the exception of serious violent offenses and certain firearms offences, “whenever a person is to be sentenced for two or more current offenses,” which do not “encompass the same criminal conduct, “the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score.” *See* Appendix C.

In the present case, the defendant was being sentenced for one count of third degree domestic violence assault and one count of fourth degree domestic violence assault. CP 5-6, 21-34, 95-99. In sentencing the third degree assault conviction, there was no dispute below that two points should be added to the defendant’s offender score, one for each of his two prior felony convictions. CP 18-20. However, the court should have added one additional point for the fourth degree assault conviction, as well.

RCW 9.94A.525(21) provides that “[i]f the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven.... [c]ount one point for each

adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.” RCW 9.94A.525(21)(c).

RCW 9.94A.030(20) provides, in relevant, part that “‘domestic violence’ has the same meaning as defined in RCW 10.99.020.” Both counts I and II, were filed after August 1, 2011, and included allegations that they were “domestic violence incident[s] as defined in RCW 10.99.020.” CP 5-6. Because the defendant pleaded guilty to both counts as charged on October 31, 2012, CP 8-17, 100-04, both the third and fourth degree assault convictions were “domestic violence offense[s] where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011.” RCW 9.94A.525(21).

Thus, in sentencing the defendant on the count I third degree assault conviction, RCW 9.94A.525(21)(c) required the court to “[c]ount one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.” Because the fourth degree assault was an offense “where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011,” it should have counted as one point towards the

defendant's offender score as long as that fourth degree assault was an "adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030." RCW 9.94A.525(21)(c).

Given that the defendant was 34 years of age when he committed and pleaded guilty to the fourth degree assault, CP 5-6, 100-04, there can be no dispute that the conviction was an adult conviction.

Moreover, because RCW 9.94A.030 defines "[r]epetitive domestic violence offense" as, *inter alia*, any "[d]omestic violence assault that is not a felony offense under RCW 9A.36.041," fourth degree assault, under RCW 9A.36.041, is a "[r]epetitive domestic violence offense." *Compare* CP 5-6, 100-04.

Hence, the fourth degree assault was an adult conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030.

Finally, RCW 9.94A.589(1)(a) also required that this conviction be treated as a "prior" offense for purposes of determining the defendant's offender score for the count I third degree assault.

Under RCW 9.94A.525(1), "[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589." Because the third degree assault was against R.J.J. and the fourth degree assault against C.L.D., CP 5-6, they did not "involve the

same victim,” and, hence, under RCW 9.94A.589(1)(a), could not have been the “[s]ame criminal conduct.

Therefore, RCW 9.94A.589(1)(a) required that “the sentence range” for the third degree assault count “be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score.”

In other words, under RCW 9.94A.589(1)(a), the fourth degree assault conviction should have been used as if it were a prior conviction for purposes of determining the offender score for sentencing of the third degree assault count.

As a result, that conviction should have been considered an adult prior conviction for a repetitive domestic violence offense and, under RCW 9.94A.525(21)(c), should have added one point to the defendant’s offender score for purposes of sentencing the third degree assault count.

Thus, the sentencing court erred in its finding that “RCW 9.94A.589(1)(a) does not require that the defendant’s current domestic violence assault in the fourth degree conviction be treated as a ‘prior’ offense for purposes of offender score calculation.” CP 72.

It also erred in its consequent finding “that under RCW 9.94A.525, the defendant’s current domestic violence assault in the fourth degree

conviction does not count as a point in his offender score calculation, as it is not a 'prior' offense." CP 72.

Therefore, the sentencing court's order granting the defendant's motion to correct his offender score should be reversed, and the original count I sentence reinstated or the matter remanded for resentencing of count I with an offender score of 3.

E. CONCLUSION.

The sentencing court erred in finding that Defendant's fourth degree assault conviction should not contribute one point to his count I offender score because it improperly found that this conviction need not be treated as a "prior" offense for purposes of offender score calculation under RCW 9.94A.589(1)(a).

Because the fourth degree assault conviction was an adult prior conviction for a repetitive domestic violence offense, it should have added one point to the defendant's offender score for purposes of sentencing the third degree assault count under RCW 9.94A.525(21)(c).

Therefore, the sentencing court's order granting the defendant's motion to correct his offender score should be reversed, and the original

count I sentence reinstated or the matter remanded for resentencing of  
count I with an offender score of 3.

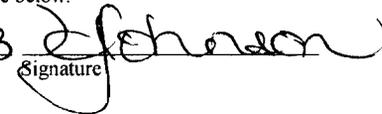
DATED: May 28, 2013

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Certificate of Service:

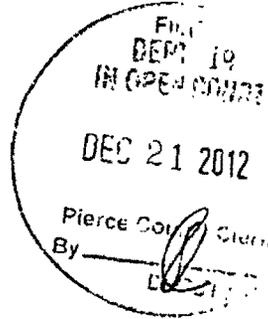
The undersigned certifies that on this day she delivered by <sup>efile</sup> ~~U.S. mail~~ or  
ABC-LMI delivery to the attorney of record for the appellant and appellant  
c/o his attorney true and correct copies of the document to which this certificate  
is attached. This statement is certified to be true and correct under penalty of  
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,  
on the date below.

5/28/13   
Date Signature

## **APPENDIX A**



12-1-03578-6 39725636 ORMD 12-24-12



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,  
Plaintiff,  
vs.  
DWAYNE PAUL STEWART,  
Defendant.

CAUSE NO. 12-1-03578-6

ORDER GRANTING DEFENSE  
MOTION TO MODIFY THE  
DEFENDANT'S OFFENDER SCORE  
AND RESENTENCE THE  
DEFENDANT

This court grants the defense motion to correct the defendant's offender score. The court finds that under RCW 9.94A.525, the defendant's current domestic violence assault in the fourth degree conviction does not count as a point in his offender score calculation, as it is not a "prior" offense. This court further finds that RCW 9.94A.589(1)(a) does not require that the defendant's current domestic violence assault in the fourth degree conviction be treated as a "prior" offense for purposes of offender score calculation.

Judge Linda CJ Lee  
Dept 19

*State objects to resentencing and offender score calculation*  
*Michelle [Signature]*  
*3-27-24*

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## **APPENDIX B**

#### 9.94A.525. Offender score

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B 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 ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(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 a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions 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 spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

(f) Prior convictions for a repetitive domestic violence offense, as defined in RCW 9.94A.030, shall not be included in the offender score if, since the last date of release from confinement or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(g) This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), “served concurrently” means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by 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 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46. 61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(12) If the present conviction is for homicide by watercraft or assault by watercraft count two points for each adult or juvenile prior conviction for homicide by watercraft or assault by watercraft; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for driving under the influence of intoxicating liquor or any drug, actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, or operation of a vessel while under the influence of intoxicating liquor or any drug.

(13) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, 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.

(18) If the present conviction is for failure to register as a sex offender under RCW \*9A.44.130 or 9A.44.132, 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 \*9A.44.130 or 9A.44.132, which shall count as one point.

(19) If the present conviction is for an offense committed while the offender was under community custody, add one point. For purposes of this subsection, community custody includes community placement or postrelease supervision, as defined in chapter 9.94B RCW.

(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count one point for prior convictions of Vehicle Prowling 2, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a

Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.

(21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;

(b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

(22) 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.

## **APPENDIX C**

9.94A.589. Consecutive or concurrent sentences

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

# PIERCE COUNTY PROSECUTOR

**May 28, 2013 - 1:56 PM**

## Transmittal Letter

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Case Name: State v. Dwayne Stewart

Court of Appeals Case Number: 44332-5

**Is this a Personal Restraint Petition?** Yes  No

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Answer/Reply to Motion: \_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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