No. 45393-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Cody Johnson,

Appellant.

Thurston County Superior Court Cause No. 13-1-00225-0

The Honorable Judge Gary R. Tabor

Appellant's Reply Brief

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ARGUMENT

I. THE STATE CONCEDES THAT THE COURT VIOLATED MR. JOHNSON'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

The state concedes that the court violated Mr. Johnson's right to be free from double jeopardy by entering convictions for four counts of harassment when the facts supported only a single unit of prosecution. Brief of Respondent, pp. 2-4; *State v. Morales*, 174 Wn. App. 370, 387, 298 P.3d 791 (2013). The court should accept the state's concession.[1]

II. THE COURT ERRED BY INCLUDING NON-COMPARABLE AND WASHED-OUT CONVICTIONS IN MR. JOHNSON'S OFFENDER SCORE.

A. Mr. Johnson did not agree to the state's calculation of his offender score.

An accused person's failure to object to the state's calculation of his/her offender score does not constitute agreement or waiver of the issue for appeal. *State v. Mendoza*, 165 Wn.2d 913, 928, 205 P.3d 113 (2009). Indeed, even agreement with the state's ultimate sentencing recommendation does not rise to the level of the affirmative acknowledgement necessary to waive the issue. *Id.*

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[1] Because the state concedes that the alleged threats should have been charged as a single course of conduct constituting one count of harassment, Mr. Johnson does not address the unanimity issues in this reply brief.

Here, Mr. Johnson agreed that he was the person who had been convicted of the offenses listed on the state's criminal history sheet. CP 41. The state argues that defense counsel's acknowledgement of the criminal history sheet qualifies as agreement to the state's calculation of Mr. Johnson's offender score. Brief of Respondent, pp. 6-8. Respondent claims this is so because defense counsel "affirmatively agreed to the state's list of prior convictions." Brief of Respondent, p. 7.

But agreement that Mr. Johnson was the person who had been convicted of the listed offenses is not the same thing as agreement that each offense should add a point to the offender score. The criminal history sheet did not purport to calculate his offender score. CP 41. Nor did it allege that the Oregon convictions were comparable to Washington felonies. CP 41. Nor did it state when Mr. Johnson was released from custody on his 1990 convictions, in order to determine whether they had "washed out". CP 41. The criminal history sheet was a starting point from which the state was required to prove additional facts in order to include each conviction in Mr. Johnson's offender score. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

Indeed, the state concedes that Mr. Johnson did not "specifically acknowledge comparability" of his out-of-state convictions. Brief of Respondent, p. 8. Instead, respondent claims that such an agreement was

implied because the out-of-state convictions were listed on the criminal history sheet. Brief of Respondent, p. 8. But the Supreme Court has explicitly held that nothing short of "affirmative acknowledgement" can waive a sentencing error for appeal. *Mendoza*, 165 Wn.2d at 928.

Mr. Johnson did not acknowledge either that his out-of-state convictions were comparable or that they had not "washed out." The sentencing errors are not waived for appeal. *Id.*

B. Five of Mr. Johnson's out-of-state convictions should not have added points to his offender score because they are not comparable to Washington felonies.

Mr. Johnson relies on the argument in his Opening Brief.

C. Mr. Johnson's sentence must be vacated because five of his prior convictions should have "washed out."

Mr. Johnson relies on the argument in his Opening Brief.

D. If the sentencing errors are not preserved, Mr. Johnson received ineffective assistance of counsel.

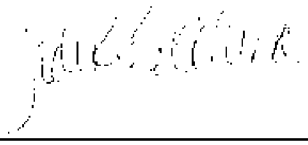
Mr. Johnson relies on the argument in his Opening Brief.

CONCLUSION

For the reasons set forth above and in Mr. Johnson's Opening Brief, Mr. Johnson's convictions must be reversed. In the alternative, his case must be remanded for resentencing.

Respectfully submitted on June 16, 2014,

BACKLUND AND MISTRY



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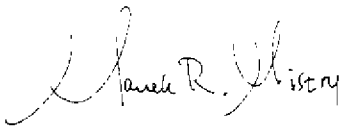

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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PO Box 777
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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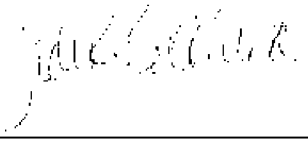
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 16, 2014.



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