

NO. 47589-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL L. ROUSE,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR.

The court imposed an unlawful sentence premised on an incorrect offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

A sentencing court's calculation of the offender score is strictly controlled by the governing statutes. RCW 9.94A.525(21) only allows the court to count misdemeanor domestic violence convictions as one additional point in the offender score, if properly pled and proven. Did the court impose an unauthorized sentence when it increased Mr. Rouse's offender score by mistakenly double-counting the points allotted to a prior domestic violence conviction?

C. STATEMENT OF THE CASE.

After a jury trial, Daniel Rouse was convicted of one count of felony violation of a no-contact order premised on having contact with his then-wife in violation of a no-contact order and the existence of two prior convictions for violating a court order. 12/19/14RP 2-3; CP 61-62. Although Mr. Rouse explained that he did not purposefully violate the no-contact order, the underlying factual allegations are not relevant to the issues raised on appeal. 12/19/14RP 71.

At sentencing, the prosecution informed the court that Mr. Rouse's offender score was "8," which it reached by double counting of two misdemeanor convictions for violation of a court order as two points each, in addition to four prior felony convictions. 3/20/15RP 4-5, 9. Mr. Rouse contested the validity of the prior misdemeanor convictions and asked for more time to challenge those convictions, but the court denied the request. *Id.* at 8, 10-12.

Finding that "the points that were recited by Mr. Enright [the prosecutor] are correct at '8,'" the court found the available sentencing range was 60 months, which was both the high and low end of the standard range because it was the statutory maximum sentence. 3/20/15RP 18. Based on this understanding of the standard range, the court sentenced Mr. Rouse to 60 months. *Id.*; CP 147. It refused the State's request to order the imposition of any non-mandatory legal financial obligations. 3/20/15RP 5-6, 18

D. ARGUMENT.

**The court unlawfully increased Mr. Rouse’s sentence by miscalculating the points for prior misdemeanor domestic violence convictions.**

*1. A sentencing court’s authority to calculate the offender score stems solely from the governing statute.*

Sentencing authority derives strictly from statute. *State v.*

*Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). A sentencing court’s failure to follow the dictates of the Sentencing Reform Act may be raised on appeal even if no objection was raised below. *State v.*

*Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999); *In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

In broad terms, when a court undertakes to calculate an offender score under RCW 9.94A.525 it takes “three steps: (1) identify all prior convictions; (2) eliminate those that wash out; (3) “count” the prior convictions that remain in order to arrive at an offender score.” *State v.*

*Moearn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). With respect to the first step, RCW 9.94A.500(1) requires in relevant part

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

“Criminal history”

means the list of a defendant’s prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere . . . The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration . . . .

RCW 9.94A.030(11).

“Bare assertions, unsupported by evidence do not satisfy the State’s burden to prove the existence of a prior conviction.” *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). Instead, due process requires the State bear the “ultimate burden of ensuring the record” supports the person’s criminal history and offender score. *Ford*, 137 Wn.2d at 480-81. This court reviews the trial court’s offender score calculation de novo. *State v. Ortega*, 120 Wn.App. 165, 171, 84 P.3d 935 (2004).

“[A] defendant cannot waive a challenge to a miscalculated offender score.” *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950 (2010). A sentence “based on an improperly calculated score lack[s] statutory authority” and “cannot stand.” *Id.* Such a sentence “is a fundamental defect that inherently results in a miscarriage of justice.” *Id.* at 688-89, quoting *Goodwin*, 146 Wn.2d at 867-68.

2. *The court improperly counted two misdemeanor convictions as “two points” each when the controlling statute only permits one point added for a qualifying conviction.*

In 2011, the legislature added a provision to the offender score calculation statute directing the court to add points for prior domestic violence convictions in certain, limited circumstances. RCW 9.94A.525(21). When a person is convicted of a felony domestic violence offense, where “domestic violence as defined in RCW 9.94A.030 was plead and proven,” one or two points is added to the offender score depending on the nature of the prior conviction. *Id.*

RCW 9.94A.525(21) provides in relevant part:

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;

....

(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.

A “repetitive domestic violence offense” includes a “[d]omestic violence violation of a protection order under chapter 26.09, 26.10, 26.26, or 26.50 RCW that is not a felony offense.” RCW 9.94A.030(42)(a)(iii).

According to the prosecution, Mr. Rouse had two prior misdemeanor convictions for violating a no contact order. 3/20/15RP 4, 8. These two convictions were the subject of the underlying prosecution and Mr. Rouse stipulated as part of trial to the existence of these two misdemeanor convictions from municipal court. Ex. 1.

At the State’s urging, the court inexplicably counted each offense as two points, not one. 3/20/15RP 18. By statute, two points are reserved only for prior felony domestic violence convictions and only for particular offenses listed in the statute. RCW 9.94A.525(21)(a). Qualifying misdemeanor convictions are awarded only one point per conviction. RCW 9.94A.525(21)(c).

The 2014 Washington State Adult Sentencing Guidelines Manual illustrates the proper calculation criteria for prior domestic violence convictions, a copy of which is attached as Appendix A. As the Guidelines Manual demonstrates, certain “domestic violence felony convictions” are scored at two points per prior conviction while other domestic violence convictions, including certain misdemeanor offenses, are allotted one point. App. A.

Mr. Rouse had four prior felony convictions, each of which counted for a single point each, as the prosecution explained at sentencing, giving him four points for his offender score. CP 146. But the court mistakenly treated Mr. Rouse as having an offender score of “8” by doubling the two misdemeanor convictions. *Id.*

The court’s incorrect calculation of the offender score is a fundamental defect in the sentence. Mr. Rouse did not agree to this incorrect offender score and cannot be ordered to serve an unlawful sentence solely because he did not object to the offender score miscalculation at sentencing. 3/20/15RP 22-23; *see Wilson*, 170 Wn.2d at 690. By reducing his offender score two points, the controlling standard range would be 41-54 months. App. A. The imposition of a 60-month sentence exceeds the standard range.

3. *Resentencing is required.*

“[T]he remedy for a miscalculated offender score is resentencing using the correct offender score.” *Wilson*, 170 Wn.2d at 691 (internal citations omitted). Due to the improper inflation of Mr. Rouse’s offender score, his sentence must be vacated and his case remanded for a new sentencing hearing premised on the reduced standard range available under RCW 9.94A.525.

E. CONCLUSION.

Daniel Rouse’s sentence exceeded the applicable standard range and remand for resentencing is required.

DATED this 25th day of January 2016.

Respectfully submitted,

S/ NANCY P. COLLINS (28806)  
Washington Appellate Project (91052)  
Attorneys for Appellant

## **APPENDIX A**

# Domestic Violence Court Order Violation

RCW 26.50.110  
CLASS C\* – NONVIOLENT

OFFENDER SCORING RCW 9.94A.525(21)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Nonviolent/Sex Offense where domestic violence has been plead and proven scoring form on page 258.

**ADULT HISTORY:**

Enter number of domestic violence felony convictions as listed below\* ..... x 2 = \_\_\_\_\_  
 Enter number of repetitive domestic violence offense convictions (RCW 9.94A.030(41))  
 plead and proven after 8/1/11 ..... x 1 = \_\_\_\_\_  
 Enter number of other felony convictions ..... x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of subsequent domestic violence felony dispositions as listed below\* ..... x 1 = \_\_\_\_\_  
 Enter number of serious violent and violent felony dispositions ..... x 1 = \_\_\_\_\_  
 Enter number of nonviolent felony dispositions ..... x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:**

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of other domestic violence felony convictions as listed below\* ..... x 2 = \_\_\_\_\_  
 Enter number of other repetitive domestic violence offense convictions plead and  
 proven after 8/1/11 ..... x 1 = \_\_\_\_\_  
 Enter number of other felony convictions ..... x 1 = \_\_\_\_\_

**STATUS:**

Was the offender on community custody on the date the current offense was committed? (if yes) ..... - 1 = \_\_\_\_\_

\*If domestic violence was plead and proven after 8/1/2011 for the following felony offenses:

Violation of a No-Contact Order, Violation of a Protection Order, Domestic Violence Harassment, Domestic Violence Stalking, Domestic Violence Burglary 1, Domestic Violence Kidnapping 1, Domestic Violence Kidnapping 2, Domestic Violence Unlawful Imprisonment, Domestic Violence Robbery 1, Domestic Violence Robbery 2, Domestic Violence Assault 1, Domestic Violence Assault 2, Domestic Violence Assault 3, Domestic Violence Arson 1, Domestic Violence Arson 2.

Total the last column to get the **Offender Score** (Round down to the nearest whole number)

SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL V	9m 6 - 12	13m 12+ - 14	15m 13 - 17	17.5m 15 - 20	25.5m 22 - 29	38m 33 - 43	47.5m 41 - 54	55.5m 51 - 60*	60 - 60*	60 - 60*

- ✓ For gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 252 for standard range adjustment.
- ✓ For deadly weapon enhancement, see page 256.
- ✓ For sentencing alternatives, see page 243.
- ✓ For community custody eligibility, see page 253.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 249.

The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's or court's reliance on the manual, or for any other written or verbal information related to adult or juvenile sentencing. The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Caseload Forecast Council.

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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v.	)	NO. 47589-8-II
	)	
DANIEL ROUSE,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF JANUARY, 2016.

X \_\_\_\_\_  
*[Handwritten Signature]*

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# WASHINGTON APPELLATE PROJECT

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