

No. 47859-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD PINKNEY, III,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 14-1-01049-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court correctly calculated Pinkney's offender score.
2. Whether defense counsel rendered ineffective assistance of counsel by stipulating to the State's calculation of the offender score.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.

C. ARGUMENT.

1. The prior conviction for conspiracy to commit a controlled substance violation is a class B felony. Pinkney received a gross misdemeanor conviction which prevented the class B felony from washing out. The offender score was correctly calculated.

Pinkney is correct that an appellate court reviews an offender score calculation de novo. State v. Hernandez, 185 Wn. App. 680, 684, 342 P.3d 820 (2015), *review denied*, 185 Wn.2d 1002 (2016).

Offender scores are calculated in 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 the offender score."

Id., quoting State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010).

Pinkney agrees that, as to the violation of a no-contact order (VNCO) conviction, the court properly counted the prior convictions

for (1) the current offense of bail jumping; (2) the controlled substance violation sentenced on July 29, 2015, the same date as sentencing occurred in this cause number; (3) the felony VNCO-DV conviction sentenced on January 16, 2014, which counted as two points;¹ and (4) the gross misdemeanor conviction for fourth degree assault, domestic violence. Appellant's Opening Brief at 2-3; CP 118. He argues, however, that three other class C felonies washed out; the criminal history in the judgment and sentence does indicate that three felony convictions washed out. CP 118. However, it is apparent that the prior conviction listed as number 6, the conspiracy to commit a controlled substance violation, is a class B felony and did not wash out. This was apparently discovered after the certified judgments and sentences were received from Pierce County, and the "washes out" notation was not removed from that entry in the judgment and sentence. 07/29/15 RP 5. Sentencing was originally set on February 18, 2015. 02/18/15 RP 178. It was continued to March 11, 2015. 3/11/15 RP 3. It was again reset to April 23, 2015. 04/23/15 RP 182. It finally occurred on July 29, 2015. 07/29/15 RP 3-27. It is likely that the judgment and sentence was prepared long before July 29, and when the State

¹ RCW 9.94A.525(21)(a).

obtained the documentation showing that the conspiracy conviction did not wash out, the notation on the judgment and sentence was overlooked and not removed.

The Pierce County conviction for conspiracy to deliver a schedule II controlled substance was sentenced on November 27, 2000. CP 99. It was an unranked felony with a standard range of zero to twelve months, but the maximum term was ten years. CP 101. That means that it was a B felony and would not wash out for ten years. An unranked felony is classified according to the maximum sentence prescribed by the legislature. RCW 9A.20.040. Delivery of a schedule II substance is a class B felony. RCW 69.50.401(2)(a). The penalty for conspiracy is not greater than the maximum punishment for the offense which was the object of the conspiracy. RCW 69.50.407. A class B felony conviction does not wash out until the offender has spent ten crime-free years in the community. RCW 9.94A.525(2)(b).

The 2000 conviction for controlled substance conspiracy conviction, being a B felony, would not have washed out until sometime in 2011, since Pinkney was sentenced to 12 months on that charge and would have been released from custody in 2001. CP 105. The State produced a certified judgment and sentence

from Lakewood Municipal Court for fourth degree assault, domestic violence, issued on December 28, 2005. CP 116. That conviction reset the ten-year washout time for the conspiracy conviction to late 2015. On March 20, 2013, Pinkney was sentenced in Lakewood Municipal Court for fourth degree assault and third degree malicious mischief, both domestic violence. CP 115. Therefore, the controlled substance conspiracy conviction never washed out, regardless of the erroneous notation on the judgment and sentence that it did. CP 118. Because of this, it counted as one point and the offender score agreed upon by the parties and accepted by the court was correct.

The conspiracy to deliver a schedule II controlled substance applied similarly to the offender score for the bail jumping conviction. Pinkney's offender score for that charge was correctly calculated as five.

2. Because there was no error in the offender score, there was no ineffective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient;

and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

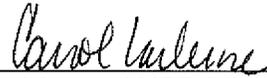
Here there was no substandard performance by defense counsel because the offender score to which he agreed was correct. Even if he had objected, the outcome of the sentencing would have been the same.

D. CONCLUSION.

Pinkney's offender score was correctly calculated. If there was any error, it was the failure to remove the notation "washes out" from the conspiracy to commit a controlled substance violation

that was included in the criminal history on the judgment and sentence. The State respectfully asks this court to affirm Pinkney's sentence. In its discretion it may direct the trial court to amend the judgment and sentence to remove that notation so that there will be no further confusion in the event that Pinkney acquires more criminal convictions. RAP 12.2.

Respectfully submitted this 29th day of March, 2016.



Carol La Verne, WSBA# 19229
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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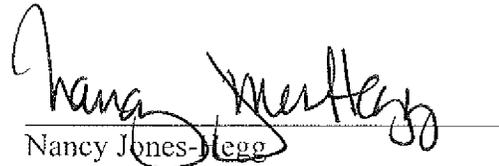
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of March, 2016, at Olympia, Washington.


Nancy Jones-Hegg

THURSTON COUNTY PROSECUTOR

March 29, 2016 - 8:44 AM

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