

NO. 295079-III  
COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**  
JUN 07 2011  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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THE STATE OF WASHINGTON, Respondent

v.

JIMMY GEORGE BUCKMAN, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 05-1-01261-1

---

BRIEF OF RESPONDENT

---

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

COUNTER STATEMENT OF THE CASE ..... 1

ARGUMENT ..... 6

1. The defendant's case is moot because his term of confinement and state supervision ended on August 30, 2007, and the defendant has been convicted of the new felony of Burglary in the Second Degree in Yakima County Superior Court Cause No. 09-1-02144-4, and thus his standard range would only increase ..... 6

2. If this Court finds the defendant's appeal is not moot, the State contends the defendant was properly sentenced with an offender score of eight, which was proved by a preponderance of the evidence and supported by certified copies of eight Judgment and Sentences, and the State has proven that none of the convictions wash due to the defendant's inability to remain in the community for five years without committing any new offenses. .... 7

CONCLUSION ..... 13

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

*State v. Ammons*,  
105 Wn.2d 175, 718 P.2d 796 (1986) ..... 8

*State v. Blilie*,  
132 Wn.2d 484, 939 P.2d 691 (1997) ..... 6

*State v. Danforth*,  
97 Wn.2d 255, 643 P.2d 882 (1982) ..... 8

*State v. Descoteaux*,  
94 Wn.2d 31, 614 P.2d 179 (1980) ..... 8

*State v. Ford*,  
137 Wn.2d 472, 973 P.2d 452 (1999). ..... 8

*State v. Gentry*,  
125 Wn.2d 570, 888 P.2d 1105 (1995) ..... 6

*State v. Herzog*,  
48 Wn. App. 831, 740 P.2d 380 (1987) ..... 8

*State v. McCraw*,  
127 Wn.2d 281, 898 P.2d 838 (1995) ..... 8

*State v. Reinhart*,  
77 Wn. App. 454, 891 P.2d 735, review denied,  
127 Wn.2d 1014, 902 P.2d 164 (1995) ..... 8

**WASHINGTON STATUTES**

RCW 9.94A.525(21) ..... 12  
RCW 9.94A.525(22) ..... 12, 13

### COUNTER STATEMENT OF THE CASE

The defendant, Jimmy George Buckman, Sr., was charged by information with one count of Theft in the First Degree on October 4, 2005. (CP 1-2). Pursuant to plea negotiations, the State amended the information to Attempted Theft in the First Degree on February 8, 2006, and the defendant pled guilty to said charge on that same date. (CP 11). The State determined that the defendant's offender score was eight based upon his prior convictions, and that the standard sentencing range was 24.75 months to 32.25 months. (CP 13). The State recommended the bottom of the standard range of 24.75 months in prison, and the defendant was sentenced to 24.75 months in prison on February 8, 2006. (CP 5, 15).

On April 19, 2006, the defendant filed a Note for Motion to withdraw his guilty plea based upon an incorrect offender score, and requested a hearing on May 17, 2006. (CP 23). On May 17, 2006, the hearing was stricken at the defendant's

request. On June 9, 2006, the defendant filed another Note for Motion to withdraw his guilty plea based upon an incorrect offender score and requested a hearing date of June 14, 2006. (CP 34). At the June 14, 2006, hearing date, after discussions between the State and counsel for the defendant, the defendant acknowledge his offender score was correct and moved to withdraw his request to withdraw his guilty plea based upon an incorrect offender score. (CP 23).

At the December 13, 2006, hearing, the State provided to the court eight certified copies of Judgment and Sentences to support the fact that the defendant had an offender score of eight at the time of sentencing. (RP 3-4).

On January 13, 2007, counsel for defendant and the defendant stipulated to the fact that the defendant's offender score was eight based upon the certified copies of judgments the State had provided to counsel for the defendant and to the court. (CP 23). The court also held that the

defendant's offender score was eight and that he was properly sentenced within the standard range for his offender score. (CP 23). The defendant then filed an appeal on January 18, 2007, claiming once again that his offender score was calculated incorrectly. (CP 23). The defendant completed his original sentence of 24.75 months of confinement and was released from the Department of Correction on August 30, 2007. (CP 24, FN 1).

After hearing oral argument on the appeal, a Commissioner's Ruling dated April 17, 2008, was entered remanding the case back to the superior court. On remand, the court was to (1) enter into the record the certified copies of Mr. Buckman's prior judgment and sentences that the State offered at the January 10, 2007, hearing on Mr. Buckman's motion to withdraw his guilty plea, and (2) consider counsel's specific arguments as to whether the priors listed in Mr. Buckman's

sentence an/or any other convictions support an offender score of eight. (CP 23).

On October 3, 2008, a hearing was held before the Honorable Cameron Mitchell. (CP 24). During the hearing, the court addressed the two issues before the court based upon the Commissioner's ruling for remand. (CP 24-25). The State entered into evidence the eight judgment and sentences to support the defendant's offender score of eight. (CP 24). Additionally, the State had the defendant's FBI rap sheet and DCH available to refute the fact that any of the eight convictions had washed. (CP 25).

The court found that the defendant's offender score was eight and that he was properly sentenced within the standard range. (CP 24-25). Additionally, the court found there was no evidence that any of the defendant's eight prior convictions had washed. (CP 25).

Despite the trial court's ruling, the defendant once again appealed claiming his

offender score was calculated incorrectly. (CP 22-31). The Court of Appeals in an unpublished opinion remanded the case back to the trial court for resentencing and held that pursuant to 9.94A.525(21) 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. (CP 10).

At the resentencing hearing on November 4, 2010, the State, for at least the fourth time, presented certified copies of the defendant's eight felony conviction Judgment and Sentences as well as his DCH and NCSIS and certified copies of defendant's misdemeanor convictions proving once again that the defendant had an offender score of eight and that none of the defendant's felony convictions washed because he had been unable to remain in the community for a period of five years without committing any crimes. (RP 15-23).

Surprisingly, the defendant filed this appeal contending his offender score was calculated incorrectly despite the trial court finding otherwise on numerous occasions. (CP 44).

#### ARGUMENT

1. The defendant's case is moot because his term of confinement and state supervision ended on August 30, 2007, and the defendant has been convicted of the new felony of Burglary in the Second Degree in Yakima County Superior Court Cause No. 09-1-02144-4, and thus his standard range would only increase.

A case is moot if a court can no longer provide effective relief. *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995). The Court has held that it will not consider a question that is purely academic. *Id.* However, if a case presents an issue of continuing and substantial public interest and that issue will likely reoccur, the Court may still reach a determination on the merits to provide guidance to lower courts. *State v. Blilie*, 132 Wn.2d 484, 488 FN1, 939 P.2d 691 (1997).

The defendant contends that the sentencing court miscalculated his offender score. However, the remedy for a miscalculated offender score is resentencing using a correct offender score. Because the defendant's confinement and supervision ended on August 30, 2007, it is uncontested that this Court cannot provide him with any effective relief. Additionally, the defendant has failed to raise the claim that his case presents an issue of continuing and substantial public interest, and that issue will likely reoccur. Therefore, the defendant's appeal is moot.

2. If this Court finds the defendant's appeal is not moot, the State contends the defendant was properly sentenced with an offender score of eight, which was proved by a preponderance of the evidence and supported by certified copies of eight Judgment and Sentences, and the State has proven that none of the convictions wash due to the defendant's inability to remain in the community for five years without committing any new offenses.

Calculation of an offender score is reviewed de novo. *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). To establish a defendant's criminal history for sentencing purposes, the State must prove the existence of prior convictions by a preponderance of the evidence. *State v. Ammons*, 105 Wn.2d 175, 186, 718 P.2d 796 (1986).

The best evidence of a prior conviction is a certified copy of a judgment. *State v. Descoteaux*, 94 Wn.2d 31, 36, 614 P.2d 179 (1980), overruled on other grounds by *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). However, the State may introduce other documents of record in a prior proceeding to establish the defendant's criminal history. *State v. Herzog*, 48 Wn. App. 831, 834, 740 P.2d 380 (1987). The court may also consider a FBI rap sheet, in conjunction with other evidence, for purposes of determining

a defendant's offender score. *State v. Reinhart*, 77 Wn. App. 454, 891 P.2d 735, review denied, 127 Wn.2d 1014, 902 P.2d 164 (1995).

In the instant case, the State calculated the defendant's offender score as eight and the defendant was sentenced accordingly. (RP 21-23). The State submitted certified copies of the eight judgments it relied upon in calculating the offender score. (Ex E; RP 6). The sentencing court and counsel for the defendant reviewed the certified copies and found the offender score to be eight as well. (RP 21-22).

Furthermore, none of the defendant's felony convictions wash because the defendant has been unable to remain in the community for a period of five years. The defendant's argument to the contrary has been debated ad nauseam. The State properly calculated the defendant's offender score five years ago and the score is still correct. The defendant has an offender score of eight. The State has gone above and beyond in

proving so. The State provided the court with certified copies of the defendant's eight felony convictions as well as his DCH and NCSIS and certified copies of the defendant's misdemeanor convictions to show that none of the convictions wash at the hearing on October 3, 2008, as well as the hearing on November 4, 2010. (RP 7, 16-17).

Specifically, the FBI Rap Sheet showed that the defendant had been convicted of the following offenses:

1. Assault in the Fourth Degree in 1991;
2. Theft in the Third Degree in 1991;
3. Driving While Under the Influence in 1992;
4. Driving While License Suspended in 1992;
5. Driving While License Suspended in 1997;
6. Driving While License Suspended in 1998;

7. Possession of Marijuana Less than 40 grams in 1998;
8. Making a False or Misleading Statement to a Public Servant in 1998;
9. Driving While License Suspended in 2000;
10. Possession of Marijuana Less than 40 grams in 2002;
11. Driving While License Suspended in 2002;
13. Possession of Drug Paraphernalia in 2002; and
14. Driving While License Suspended in 2003.

(Ex. E).

This FBI Rap Sheet has previously been given to counsel for defendant at the trial level before the defendant pled guilty to the underlying offense. Additionally, trial counsel for defendant thoroughly went over the certified copies of the Judgment and Sentences as well as the FBI Rap Sheet to confirm with the State that the defendant's offender score was in fact eight.

The defendant acknowledged the score, pled guilty, and served his time many years ago. (CP 3-10). This appeal needs to be the conclusion to this case.

RCW 9.94A.525 (22) states:

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.

9.94A.525(21) is the controlling authority to ensure that a defendant is sentenced with a correct offender score. The State contends that it had proven the defendant's offender score beyond a preponderance of the evidence well

before the Court of Appeals ruling in Cause No. 25835-1-III. However, pursuant to RCW 9.94A.525(22), the State presented the court, once again, documentation supporting its calculation of the defendant's offender score, and the trial court found the defendant was sentenced with the correct offender score of eight and that none of the defendant's convictions wash.

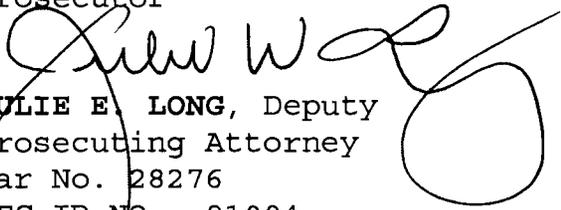
#### CONCLUSION

The defendant's offender score was calculated correctly five years ago at eight, and remains correctly calculated at the time of this writing. The State has proven beyond any shadow of a doubt that it correctly calculated the defendant's offender score and that the defendant has failed to remain in the community for a period of five years without committing any criminal offense by providing the trial court with certified copies of the defendant's Judgment and Sentences, both felony and misdemeanor, and

his DCH and NCSIS documents. Therefore, the defendant's appeal should be denied and the case finally concluded.

**RESPECTFULLY SUBMITTED** this 6th day of June  
2011.

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