

FILED

SEP 06 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29819-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MARIO JAY UPHAM,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in calculating the offender score as six.
2. The trial court erred in imposing a sentence using the wrong standard range.

Issue Pertaining to Assignment of Error

Is re-sentencing required where the offender score is miscalculated by unlawfully including a prior misdemeanor conviction of possession of marijuana?

B. STATEMENT OF THE CASE

Mario Upham pled guilty to possession of over 40 grams of marijuana. CP 6-14. He was sentenced to 18 months based an offender score of six resulting in a standard range of 12+ to 24 months. CP 15-27. The offender score was calculated pursuant to his criminal history consisting of four adult felony convictions counting one point each, and four non-violent juvenile felony convictions counting a half point each. *Id.* One of the prior juvenile convictions was originally listed as possession of methamphetamine. The parties informed the court at the guilty plea hearing that the prior meth conviction should instead read possession of marijuana. The court made the correction in the guilty plea

statement. CP 14, RP 6. The judgment and sentence correctly lists this juvenile prior conviction as possession of marijuana. CP 17.

This appeal followed. CP 30.

C. ARGUMENT

Re-sentencing is required where the offender score is miscalculated by unlawfully including a prior misdemeanor conviction of possession of marijuana. (Assignments of Error 1 and 2)

A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *State v. Roche*, 75 Wn.App. 500, 513, 878 P.2d 497 (1994). A sentencing error may be raised for the first time on appeal. *Id.*; *State v. Paine*, 69 Wn.App. 873, 884, 850 P.2d 1369 (1993); *see also State v. Hardesty*, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996) (permitting the State to bring a motion to amend an erroneous sentence nearly two years after sentencing under CrR 7.8). The appropriate standard of review of the sentencing court's calculation of an offender score is *de novo*. *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995).

Here, the offender score of six was calculated from a criminal history consisting of four adult felony convictions counting one point each, and four non-violent juvenile felony convictions counting a half point

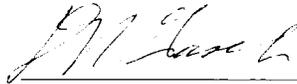
each. See RCW 9.94A.518. However, the prior juvenile conviction sentenced on 11/14/96, was incorrectly listed as possession of methamphetamine. The parties informed the court at the guilty plea hearing that it should instead read possession of marijuana, and the court made the correction in the guilty plea statement. CP 14, RP 6. However, no adjustment was made to the offender score.

Possession of forty grams or less of marihuana is a misdemeanor. RCW 69.50.4014. Nowhere in the record is it even suggested that the prior juvenile conviction for possession of marijuana was a felony, i.e. over 40 grams. See RP 1-20; CP 14, 17. Except in the case of felony traffic offenses, prior misdemeanors are not included in the offender score. *State v. Wiley*, 124 Wn.2d 679, 683, 880 P.2d 983 (1994). Without the prior juvenile conviction for possession of marijuana, the correct offender score would have been five not six. See RCW 9.94A.525. This lower offender score would result in a lowered standard range of 6+ to 18 months. RCW 9.94A.517. Due to the miscalculated offender score, the remedy is remand for resentencing using a correct offender score. *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

D. CONCLUSION

For the reasons stated, this Court should remand the matter for resentencing using a correct offender score and standard range.

Respectfully submitted September 6, 2011.



David N. Gasch, WSBA #18270
Attorney for Appellant