

FILED

MAY 17 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 301150

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TROY DEAN STUBBS

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PEND OREILLE COUNTY
The Honorable Rebecca M. Baker

APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it found that a person must be crime free, not just felony free, in order to trigger washout provisions under RCW 9.94A.525(2).

2. The sentencing court miscalculated Mr. Stubbs's offender score when it included prior adult class B and class C felony convictions that should have washed-out of his criminal history.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the sentencing court misinterpret RCW 9.94A.525(2) when it included washed-out class B and class C adult felony convictions in Mr. Stubbs's offender score? (Assignments of Error 1 & 2)

C. STATEMENT OF THE CASE

A jury convicted Mr. Stubbs of first-degree assault in 2005. CP 115-125. The trial court calculated his offender score as 6 based on the following criminal history and sentenced him to 480 months confinement:

Juvenile Felony Convictions	Date of Crime	
Burglary 2	4/17/1980	
Arson 2	5/9/1980	

Adult Felony Convictions	Date of Crime	Class
Burglary 2	7/22/1985	B Felony
Burglary 2	8/20/1985	B Felony
TMVWOP	8/20/1985	B Felony
Burglary 2	7/30/1986	B Felony
Forgery	5/31/1988	C Felony

Misdemeanor Convictions	Date of Crime
Possession of Marijuana	5/14/1985
Simple Assault	10/15/1985
Littering	10/5/1987
Drinking in Public	5/21/1988
Drinking in Public	6/17/1989
DWLS	3/16/1990
DUI	3/16/1990
DWLS and DUI	2/16/1991
Assault 4	5/14/1991
DWLS/revoked 2	8/29/1991
DWLS/revoked 2	9/11/1992
Reckless Driving, DWLS 2	4/8/1992
DWLS 1	12/21/1992
Theft 3	1/2/1994
DV Assault 4 & Malicious Mischief 3	10/5/1995
DWLS 1 Habitual Offender	11/3/1995
DUI	11/3/1995
DWLS 1	5/11/1998
Assault DV	10/1 6/199
Attempted Poss of Controlled Substance	2/8/2002
DWLS 3	1/2/2002
DWLS 3	10/24/2002

Mr. Stubbs moved the court to vacate his sentence.¹ He argued because he spent over 10 consecutive years in the community, from 1989, when he was released from confinement for forgery, to 2005, without a felony conviction, his adult class B and class C felony convictions should have washed out of his offender score. CP 11-12; CP 14-47.

The court denied the motion. 6/30/11 RP 37. It found Mr. Stubbs must be crime free, not just felony free for 10 years before prior felony convictions could be washed out of his offender score. 6/30/11 RP 34. The court went on to find that Mr. Stubbs managed to keep his offender score alive

¹ Mr. Stubbs also argued that his offender score should have been zero because the juvenile offenses he committed before age 15 washed out of his offender score. I did not raise this issue on appeal.

with intervening misdemeanor convictions. As a consequence, adult felony convictions could not be removed from his score, even though his last felony conviction occurred more than 10 years before. 6/30/11 RP 34. Mr. Stubbs timely appealed this ruling. CP 128.

D. ARGUMENT

THE WASH-OUT PROVISIONS IN RCW 9.94A.525(2) REQUIRE A PERSON TO BE FELONY FREE, NOT JUST CRIME FREE.

1. Misdemeanor convictions do not interrupt washout periods under RCW 9.94A.525(2). This Court reviews issues of statutory interpretation de novo. AgriLink Foods, Inc. v. Dep't of Revenue, 153 Wash.2d 392, 396, 103 P.3d 1226 (2005).

When interpreting a statute, “the court’s objective is to determine the Legislature’s intent.” State v. Ervin, 169 Wash.2d 815, 820, 239 P.3d 354 (2010) *citing* State v. Jacobs, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). The surest indication of legislative intent is the language enacted by the Legislature, so if the meaning of a statute is plain on its face, courts must “‘give effect to that plain meaning.’” Id. (*quoting* Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 9, 43 P.3d 4 (2002)). In determining the plain meaning of a provision, courts look to the text of the statutory provision in question, as well as “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” Id. An undefined term is “given its plain and ordinary meaning unless a contrary legislative intent is indicated.” Ravenscroft v. Wash. Water

Power Co., 136 Wash.2d 911, 920–21, 969 P.2d 75 (1998). If, after this inquiry, the statute is susceptible to more than one reasonable interpretation, it is ambiguous and the court “may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” Christensen v. Ellsworth, 162 Wash.2d 365, 373, 173 P.3d 228 (2007).

Under RCW 9.94A.525(2), a sentencing court may not count certain prior convictions in an offender score if sufficient time has lapsed between the date of release from confinement and a subsequent conviction. For prior class A felonies, there is no wash-out period. RCW 9.94A.525(2). However, prior class B felony convictions, other than sex offenses, may washout of an offender score if the offender had spent 10 consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.94A.525(2)(b). The same holds true for class C felony convictions, other than sex offenses. These convictions may also wash out, if the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.94A.525(2)(c) (Emphasis added.)

The 10-year rule applicable to class B felonies and the five-year rule applicable to class C felonies were recodified as RCW 9.94A.525(2)(b) and (c), respectively in 1995 when the Legislature amended the statute. Prior to 1995, under the former statute, RCW 9.94A.360(2), class B and class C felony convictions washed out if, since release from confinement, pursuant to a

felony conviction, the offender had spent sufficient time in the community without being convicted of any felonies. RCW 9.94A.360(2) (Emphasis added.)

Our courts have recognized the differences between former RCW 9.94A.360(2) and its current version RCW 9.94A.525(2). And they have found the plain meaning of RCW 9.94A.525(2) to be rather ambiguous and subject to varying interpretations. State v. Ervin, 169 Wash.2d 815, 833, 239 P.3d 354 (2010).

Our Supreme Court clarified the plain meaning of RCW 9.94A.525 in State v. Ervin, 169 Wash.2d 818, 239 P.3d 354 (2010). In that case, the Court adopted this Court's "trigger" clause and "continuity/interruption" clause analysis from In re Pers. Restraint of Nichols, 120 Wash.App. 425, 432, 85 P.3d 955 (2004) to determine whether the 17 days a defendant spent in jail for violating a term of his probation for a misdemeanor conviction interrupted the 5-year washout period under RCW 9.94A.525(2)(c). Ervin, 169 Wash.2d at 818. Because the defendant was confined under a misdemeanor conviction and not a felony conviction, the Court specifically found the confinement did not interrupt the washout period and the defendant's prior class C felonies should not have been included in his offender score. Ervin, 169 Wash.2d at 825-27; RCW 9.94A.525(2)(c). It reasoned the statute's continuity/interruption clause plainly means that class C felonies will washout so long as a person spends five consecutive years free of felony convictions

following the start of the “trigger period.” Id. citing, In re Pers. Restraint of Nichols, 120 Wash.App. at 432.

Here, the sentencing court found the way the Legislature arranged the statute as of 1995, to include the phrase *any crime*, meant that a person must be crime free, not just felony free in order to trigger washout provisions.

6/30/11 RP 34. But that was not the Legislature’s intent.

The SRA applies only to felony convictions. RCW 9.94A.010; State v. Snedden, 149 Wash.2d 914, 922, 73 P.3d 995 (2003). With limited exceptions like serious misdemeanor traffic or watercraft offenses, the offender score includes only prior convictions for felony offenses. RCW 9.94A.525; RCW 9.94A.525(11), (12); State v. Wiley, 124 Wash.2d 679, 683, 880 P.2d 983 (1994). This emphasis on felony convictions is reflected in SRA’s washout provisions. A new washout period is triggered on the date the offender is released from confinement pursuant to a felony conviction, not a misdemeanor offense. RCW 9.94A.525(2)(b) and (c).

Although Mr. Stubbs served time on a variety of misdemeanor convictions, those offenses did not interrupt the washout period he established from 1989 to 2005. For that reason, his adult class B and class C felony convictions should have been removed from his offender score.

2. Mr. Stubbs’s correct offender score is 1. This Court will review a sentencing court’s calculation of an offender score de novo. State v. Bergstrom, 162 Wash.2d 87, 92, 169 P.3d 816 (2007).

Based on the criminal history that included the adult class B and class C felony convictions, Mr. Stubbs had acquired an offender score of 6. However, because those convictions should have been washed out, Mr. Stubbs correct score is 1.

The difference of a single point may add or subtract three years to an offender's sentence. Therefore, the accurate interpretation and application of the SRA is of great importance to both the State and the offender. In re LaChappelle, 153 Wash.2d 1, 7, 100 P.3d 805 (2004).

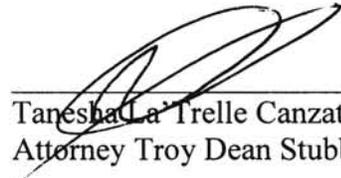
The point difference, here, subtracts more than three years from Mr. Stubbs's sentence; it ultimately cuts his sentence in half. Instead of 480 months confinement based on an offender score of 6, Mr. Stubbs's confinement would be between 93 to 123 months. CP 115-125.

Because his sentence is in excess of statutory authority, Mr. Stubbs must be resentenced. "[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." See In re Goodwin, 146 Wash.2d 861, 869, 50 P.3d 618 (2002); *see also State v. Wilson*, 170 Wash.2d 682, 689, 244 P.3d 950 (2010).

E. CONCLUSION

For the reasons set forth above, Mr. Stubbs respectfully asks this Court to reverse the sentencing court's ruling and to remand the case for resentencing.

Respectfully submitted this 14th day of MAY, 2012.



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