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Dec 07, 2015
Court of Appeals
Division III
State of Washington

NO. 32696-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JONATHAN KUHLMAN, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 13-1-00820-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. RESPONSE TO COURT'S INQUIRIES

In response to the Court's inquiries of November 18, 2015, the State submits the following:

- 1. Question: Please indicate the sentencing score used by the trial court when sentencing Jonathan Kuhlman. Also, please provide the calculation that supports that score, including the convictions and score assigned to each conviction. When answering each question, please provide the citation to each statute and statute's subsection that supports your answer.**

The court sentenced the defendant with an offender score of 14 on Counts I and V and an offender score of 11 on Counts III and IV. This was incorrect; the defendant has an offender score of 14 on all counts. Ultimately, this error makes no difference in the defendant's standard range.

A. Count I: Rape in the Second Degree

On Count I, the defendant has five prior felonies and three concurrent sex offenses. The State admitted certified copies of the prior convictions at sentencing. Report of Proceedings 08/05/2014 (hereinafter "RP") at 6; Sentencing Hearing Exhibit A – "Judgment Documents from the Criminal/Circuit Court of Bradle County, Tennessee"¹. The State counted these as nonviolent felonies, so each counted as one point toward

¹ Designated via Designation of Clerk's Exhibits, filed in this Court December 7, 2015.

his offender score. RCW 9.94A.525(17).² Counts III, IV, and V are all concurrent sex offenses, so they count as three points each. The State took this position at sentencing. RP at 6-7.

Counts III and IV are sex offenses because they are felonies with findings of sexual motivation. RCW 9.94A.030(47)(c). Count V is a sex offense. RCW 9.94A.030(47)(a)(iii). Pursuant to RCW 9.94A.589(1)(a) and RCW 9.94A.525(1), all concurrent sex offenses count as three points each toward the offender score. RCW 9.94A.589(1)(a) provides in relevant part that in a case involving multiple current convictions, when imposing a sentence for each conviction, all other current convictions shall be treated as if they were prior convictions and added to the offender score:

[W]henver a person is to be sentenced to two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offense shall be counted as one crime.

When the present conviction is for a sex offense, RCW 9.94A.525(17) directs the sentencing court to “count three points for each adult and

² An argument could have been made that some of the defendant’s prior felonies were violent offenses and should have counted as two points each. RCW 9.94A.525(17). Given the ultimate outcome of the defendant’s offender score, doing a comparison analysis was unnecessary.

juvenile prior sex offense conviction.” Read together, these statutes plainly mean that current sex convictions, as well as prior sex convictions, count as three points each, as long as they do not involve the same criminal conduct. *In Re Toledo-Sotelo*, 176 Wn.2d 759, 766, 297 P.3d 51 (2013). Counts III, IV, and V did not involve the same criminal conduct, so they counted as three points each, totaling nine points. $5 + 9 = 14$.

B. Count III and IV: Distribution of a Controlled Substance to a Minor with a finding of Sexual Motivation

On Counts III and IV, the defendant has five prior felonies that are counted as one point each and three concurrent sex offenses that are counted as three points each. This puts the offender score at 14.

C. Count V: Communication with a Minor for Immoral Purposes

On Count V, the defendant has five prior felonies that are counted as one point each, and three concurrent sex offenses that are counted as three points each. This puts the offender score at 14.

2. Question: Did the trial court use the correct sentencing score when sentencing Johnathan Kuhlman? If not, please indicate the correct score and how you arrived at the score. When answering this question, please provide the citation to each statute and statute’s subsection that supports your answer.

The trial court used the correct offender score of 14 on Counts I and V, and the incorrect offender score of 11 on Counts III and IV. The defendant’s offender score is 14 on all counts. *See* answer to question (1).

3. **Question: When arriving at its sentencing score, did the trial court consider each conviction for distribution of a controlled substance to a minor to be a sexual offense? If so, was this consideration correct?**

Yes, Counts III and IV are sex offenses. This was correct because the jury found that both counts were done with sexual motivation. CP 55-56; RCW 9.94A.030; RCW 9.94A.533(8). Once a jury finds that a felony is committed with sexual motivation, it is a sex offense. RCW 9.94A.030(47)(c).

4. **Question: When sentencing Jonathan Kuhlman did the trial court impose a sexual motivation sentence enhancement for each conviction for distribution of a controlled substance to a minor? If so, was this imposition correct?**

Yes, the trial court imposed a sexual motivation sentence enhancement to Counts III and IV. This was correct. Both Counts III and IV are class B felonies. RCW 69.50.406. The sexual motivation enhancement for a class B felony is 18 months. CP 63 at § 4.4(a); RCW 9.94A.533(8).

5. **Question: Does the law permit the trial court, for sentencing purposes, to consider convictions for distribution of a controlled substance to a minor to be sexual offenses and, in addition, impose sentence enhancements for the same convictions? In answering this question, please provide the citation to each statute and statute's subsection that supports your answer.**

Yes, Counts III and IV are sex offenses because of the finding of sexual motivation enhancements. RCW 9.94A.533(8). The jury found

Counts III and IV were sexually motivated beyond a reasonable doubt by special verdict. CP 55-56; RCW 9.94A.834. Since the finding was made, the court is mandated by RCW 9.9A.533(8) to impose the 18-month enhancement for each count. Pursuant to RCW 9.94A.533(8)(b), all sexual motivation enhancements shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements. Since Counts III and IV were not the same criminal conduct, the enhancements run consecutively. This resulted in a 36-month enhancement (18 months + 18 months).

6. **Question: If the trial court, when sentencing Jonathan Kuhlman, considered convictions for distribution of a controlled substance to a minor to be sexual offenses and, in addition, imposed sentence enhancements for the same convictions, and if the trial court lacked authority to do both, what is the correct sentence for Johnathan Kuhlman? In answering this question, please provide the citation to each statute and statute's subsection that supports your answer.**

The trial court did consider Counts III and IV to be sex offenses as presented by the State. RP at 6-7. Furthermore, by statute, the court correctly imposed the enhancements to run consecutively. RCW 9.94A.533(8)(b). The court followed the State's recommendation and correctly sentenced the defendant to the bottom of the range of 210 months with 36 months of enhancements, for a minimum term of 246

months and a maximum term of life. CP 63 at § 4.4(a) and (b); RP at 26-27.

II. CONCLUSION

Based on the aforementioned rationale, the defendant's offender score calculation of 14, and subsequent sentencing based on this offender score, was correct, and the State respectfully requests this Court affirm the defendant's convictions and sentence.

RESPECTFULLY SUBMITTED this 7th day of December, 2015.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "Anita Petra", written over the typed name.

Anita I. Petra, Deputy

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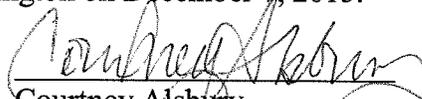
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on December 7, 2015.



Courtney Alsbury
Appellate Secretary