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NO. 23698-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

ALYSSA KNIGHT,

Appellant.

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

The Honorable Jerome J. Leveque, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in calculating appellant's offender score as four points for counts II and III: CP 63.

2. The sentencing court erred in calculating appellant's count III standard range as 165-225 months. CP 63.

3. The sentencing court erred in sentencing appellant to 225 months on count III when it erred in calculating the standard range. CP 67.

4. The sentencing court erred in calculating appellant's count II standard range as 27-36 months. CP 63.

5. The sentencing court erred in sentencing appellant to 30 months on count II when it erred in calculating the standard range. CP 67.

Issues Related to Assignments of Error

1. Count III is a "serious violent offense," and count II is a "violent offense." By statute, other "violent offenses" add two points in determining the counts II and III offender scores. Where count I is not a "violent offense," however, did the sentencing court erroneously add two points for it in the counts II and III offender scores?

2. If the offender score is erroneous, does settled law require the vacation of appellant's sentences for counts II and III, the recalculation

of appellant's offender score as three points, and resentencing within the properly calculated standard ranges for counts II and III?

3. Where Division One's decision in State v. Becker, *infra*, conflicts with case law from the Washington Supreme Court, fails to apply the rule of lenity, and is poorly reasoned, should this Court decline to follow it?

4. Would the refusal to apply the rule of lenity deny appellant her federal and state constitutional right to due process of law?

B. STATEMENT OF THE CASE

On October 24, 2003, the Spokane County prosecutor charged appellant Alyssa Knight with multiple counts arising from an incident occurring September 25, 2003. CP 1-3. The facts showed that Knight was involved with others in planning to rob Arren Cole, but that the others ended up killing Cole. Knight did not intend Cole's death. CP 4-7, 18; 1RP 15-16; 35-36.

On April 29, 2004, the state and Knight entered a plea agreement. CP 35-37.¹ On May 3, 2004, Knight pled guilty to a second amended information charging her with three counts:

¹ At the state's request, the plea agreement including the prosecutor's recommendation was initially sealed, for reasons not stated in the record.

I - Conspiracy to Commit Second Degree Robbery (RCW 9A.56.210; RCW 9A.28.040(1));

II - Conspiracy to Commit First Degree Burglary (RCW 9A.56.020(1); RCW 9A.28.040(1)); and

III - Second Degree Murder, while armed with a firearm (RCW 9A.32.050(1)(a); RCW 9.94A.602; RCW 9.94A.510(3)).

CP 11-20; 1RP 2-18.²

The state and Knight both agreed that she had no prior felony offenses that would count in her offender score. CP 14, 21-22. The plea form informed Knight that her offender score was 0 points and that her standard range was 165-265 months, plus a 60-month firearm enhancement, for a total of 225-325 months. CP 14; 1RP 7-8.³ The plea agreement stated "[t]he parties will be free to argue for any sentence allowed by law."

CP 35.

1RP 10-12; CP 15.

² This brief refers to the transcripts as follows: 1RP - 5/3/04 & 12/14/04; 2RP - 7/7/04; 3RP - 11/5/04.

³ Although the offender score on the plea form was erroneous, Knight did not move to withdraw her plea in the trial court, nor does she seek that relief in this appeal.

As part of the plea agreement, Knight provided the state substantial assistance in prosecuting several co-defendants. Knight testified at two trials and put herself and her family at significant risk. There is no question that she fulfilled her side of the plea bargain. CP 33-34; 1RP 32-35; 2RP 4-5, 10-12, 15-16; 3RP 5-10.

Sentencing occurred December 14, 2004. At sentencing, the state and the defense both asked the court to impose a standard range sentence. 1RP 32, 35. The court first repeated and clarified its understanding that the count III standard range with the enhancement was 225-325 months, then stated that it would not impose the top of the range, but that it wanted to find a balance. 1RP 40. It then imposed 285 months, exactly 10 months above the midpoint. 1RP 40; CP 67. The court similarly referred to the erroneous count II range before imposing a 30-month sentence. 1RP 40.

This appeal timely followed. CP 74. Knight's appointed counsel initially filed a brief and motion to withdraw pursuant to Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967). By ruling dated October 17, 2005, Commissioner McCown of this Court granted the motion to withdraw and appointed new counsel to brief a potential issue regarding Knight's offender score and standard range sentence.

C. ARGUMENT

1. THE OFFENDER SCORES AND STANDARD RANGES ON COUNTS II AND III ARE ERRONEOUS. REMAND FOR RESENTENCING IS REQUIRED.

The trial court erred in calculating the offender scores and standard ranges on counts II and III. Instead of four points, the scores should be three. The correct count II range is 23.25-30.75 months, and the correct count III range is 154-254 months. With the 60-month enhancement, the total count III range is 214-314 months. The remedy for this error is vacation of the counts II and III sentences and remand for resentencing within the correctly calculated standard ranges.

Washington's Sentencing Reform Act (SRA) requires trial courts to impose sentences within a presumptive standard range. See generally, RCW 9.94A.505(2)(a)(1); State v. Parker, 132 Wn.2d 182, 186-188, 937 P.2d 585 (1997); State v. Freitag, 127 Wn.2d 141, 144, 896 P.2d 1254 (1995).⁴ The range is listed in a table as the number of months in

⁴ The SRA also permitted a court to impose an exceptional sentence outside the range for substantial and compelling reasons. E.g., RCW 9.94A.535. That section has since been determined to be unconstitutional, at least to the extent it permitted trial courts to find the facts supporting an exceptional sentence. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, rehearing denied, 125 S. Ct. 21, 159 L. Ed. 2d 851 (2004); State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

confinement that can be imposed. It is calculated by determining the seriousness level of the current offense, RCW 9.94A.515, and an "offender score" based on prior and other current felony convictions. RCW 9.94A.525. The specific range for an offense and offender is found at the intersection of the offender score column and the seriousness level row. RCW 9.94A.510(1); State v. Haddock, 141 Wn.2d 103, 108, 3 P.3d 733 (2000).

The offender score is calculated under statutes in effect when the offense was committed. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). This brief therefore cites to statutes in effect in September, 2003.

This Court owes no deference to a trial court's offender score calculation. Parker, at 189 (citing State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995)). Because a legally erroneous offender score results in an unlawful sentence, the challenge may be raised for the first time on appeal, and even for the first time in a personal restraint petition. In re Restraint of Cadwallader, ___ Wn.2d ___, ___ P.3d ___ (No. 76070-5, 11/23/05); In re Restraint of Goodwin, 146 Wn.2d 861, 866-76, 50 P.3d 618 (2002); In re Restraint of Call, 144 Wn. 2d 315, 332, 28 P.2d 709 (2001); State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

Knight had no prior felony convictions. CP 21-22. The question therefore turns on how to score Knight's "other current offenses," which are considered "prior convictions" in the offender score calculation. RCW 9.94A.525(1), 9.94A.589(1)(a).

a. The Count III Score is Wrong; It Should be Three Points.

The count III murder conviction is a "serious violent offense." RCW 9.94A.030(37)(a)(iii). In determining the score for "serious violent offenses," other violent felonies add two points, but nonviolent felonies add only one point. RCW 9.94A.525(9).⁵ The narrow question boils down to this: are counts I and II both "violent offenses" that each add two points in the offender score? The short answer is no, because count I is not a "violent offense."

⁵ RCW 9.94A.525(9) provides (emphasis added):

If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

The full text of RCW 9.94A.525 and RCW 9.94A.030(45) is attached in the appendix.

The state charged count I as conspiracy to commit second degree robbery, and count II as conspiracy to commit first degree burglary. CP 11. The definition of "violent offense" includes all class A felonies and a "criminal conspiracy to commit a class A felony." RCW 9.94A.030(45)(a)(i) & (ii). Because first degree burglary is a class A felony, the count II conspiracy also is a "violent offense" and adds two points. RCW 9A.52.020(2).

But the same is not true of count I, conspiracy to commit second degree robbery. Although second degree robbery is listed as a "violent offense" (RCW 9.94A.030(45)(a)(xi)), it is only a class B felony. RCW 9A.56.210(2). The conspiracy offense for class B felonies is not included in the definition of "violent offense," unlike the conspiracy offense for class A felonies. RCW 9.94A.030(45)(a).

Under the statute's plain terms, the count I conviction is not a "violent offense." It therefore should add only one point in the count III offender score. RCW 9.94A.525(9). Knight's offender score is three points, not four, and the correct range is 154-254 months. RCW 9.94A.510(1). The sentencing court erred in entering an offender score of four, and a range of 165-265 months. CP 63, 67.

b. The Count II Score is Wrong; It Also Should be Three Points.

Although slightly different statutory sections govern the count II calculation, the same conclusion follows. Because the conspiracy to commit first degree burglary is a violent offense, other violent offenses (like the count III murder conviction) add two points to the score. RCW 9.94A.030(37) ("'Serious violent offense' is a subcategory of violent offense"), (45)(a)(ii); 9.94A.525(4), (6), (8), (10). But because conspiracy to commit second degree robbery is not a violent offense, it only adds one point. See section 1a, supra.

The count II score therefore should be three points, and the range should be 23.25-30.75 months. RCW 9.94A.515 (first degree burglary is a level VII offense); RCW 9.94A.510(1) (the range is 31-41 months); RCW 9.94A.510(2) (conspiracy is 75% of the range for the completed offense). The sentencing court therefore erred in imposing the 30-month sentence on count II. CP 67.

c. The Errors Are Prejudicial.

In response, the state may suggest that the errors are harmless, because the 285-month count III sentence is within the correct 214-314 month range, and because the 30-month count II sentence is within the

23.25-30.75-month range. If the argument is raised, this Court should reject it.

The Washington Supreme Court has held that a correct standard range calculation is the fundamental starting point in determining felony sentences. State v. Parker, 132 Wn.2d at 190-91. "Remand is necessary when the offender score has been miscalculated unless the record makes clear that the trial court would impose the same sentence." State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (citing Parker, at 189); see also State v. Brooks, 107 Wn. App. 925, 933-34, 29 P.3d 45 (2001) (sentencing court must correctly calculate standard range before imposing a DOSA sentence). Sentencing errors may be harmless only if they are trivial or academic. Cf. State v. Argo, 81 Wn.App. 552, 569, 915 P.2d 1103 (1996) (where Argo's correct offender score was 13, not 16, remand for resentencing was not required because the erroneous score did not affect the correct range); State v. Gonzales, 90 Wn. App. 852, 854-55, 954 P.2d 360 (allocution error may be harmless where the court imposed a sentence at the low end of the correctly calculated standard range and no grounds existed for an exceptional sentence below the range), rev. denied, 136 Wn.2d 1024 (1998).

In Parker, the court addressed the length of an exceptional sentence when the trial court erred in calculating the standard range. The Parker court reasoned:

We stress the SRA's requirement that the end sentence be the result of "principled discretion." We are hesitant to affirm an exceptional sentence where the standard range has been incorrectly calculated because of the great likelihood that the judge relied, at least in part, on the incorrect standard ranges in his calculus. Affirming such would uphold a sentence which the sentencing judge might not have imposed given correct information and would defeat the purpose of the SRA.

Parker, 132 Wn.2d at 190. In reversing the Court of Appeals, the Parker court concluded that the sentencing judge had referred to the erroneous ranges and that nothing in the judge's remarks indicated that the same sentence would have been imposed absent the offender score error. Parker, at 192.

Although Parker addressed the length of an exceptional sentence, its holding and rationale are at least as important when applied to the facts of Knight's case. The offender score and standard ranges were clearly wrong. At sentencing, neither party recommended a particular sentence, but instead asked the court to impose a standard range sentence. 1RP 32, 35. As to count III, the court specifically repeated the erroneous range, then imposed a sentence exactly 10 months above the midpoint. Similarly, the

court repeated the erroneous count II range, then imposed a sentence six months below the top of the range. Nothing in the court's oral remarks suggests that the standard ranges did not influence its sentencing decisions, or that the court would have imposed the same sentences had it been informed of the correct ranges. 1RP 39-41. Because the state cannot meet the strict Parker standard, resentencing is required. Parker, at 192-93; see also, Brooks, 107 Wn. App. at 933-34 (offender score error was not harmless even though court imposed DOSA sentence).

2. THIS COURT SHOULD DECLINE TO FOLLOW
STATE v. BECKER.

In response, the state can be expected to rely on Division One's decision in State v. Becker, 59 Wn. App. 848, 801 P.2d 1015 (1990). In Becker, Division One held, under former versions of the SRA's "violent offense" definition and offender score statute, that an attempted second degree robbery should count two points as a "violent offense." Becker, at 851-54.⁶ Knight respectfully asks this Court not to follow Becker for the following reasons.⁷

⁶ The versions of the statutes in effect in Becker, and in effect now, are attached in the appendix.

⁷ At time this brief is filed, Knight's counsel has found no published case in which Division Three has followed the rule in Becker.

a. Becker Conflicts With Substantial Supreme Court Authority and Settled Rules of Statutory Construction.

First, although the two statutes are clear in themselves, the definition of "violent offense" and the general scoring statute appear to conflict. Becker, at 851. When statutes governing the same subject matter appear to conflict, the courts must construe them together and give effect to each as well as the statutory scheme. State v. Breazale, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001).

A key to statutory interpretation requires giving effect to legislative definitions. The legislature specifically defined "violent offense" and provided that the definition would apply throughout the SRA unless the context clearly required otherwise. RCW 9.94A.030. The Legislature's definition normally controls the use of the term throughout the act. Regional Disposal Co. v. City of Centralia, 147 Wn.2d 69, 77, 51 P.3d 81 (2002); Senate Republican Campaign Committee v. Public Disclosure Commission, 133 Wn.2d 452, 458, 832 P.2d 1303 (1002); 2A Norman J. Singer, Statutes and Statutory Construction § 47:07 at 227-28 (6th ed. 2002 rev.). The definition is essentially "embedded" in later statutes utilizing the term. State v. J.P., 149 Wn.2d 444, 453, 69 P.3d 318 (2003).

Definitions are integral to the statutory scheme and of the highest value in determining legislative intent. To ignore a definition is to refuse to give legal effect to a part of the statutory law of the state.

State v. Taylor, 30 Wn. App. 89, 95, 632 P.2d 892, rev. denied, 96 Wn.2d 1012 (1981).

RCW 9.94A.030 begins by explaining that the statutory definitions control throughout the chapter. ("Unless the context clearly requires otherwise, the definitions in this section apply through this chapter.") It then states what the term violent conviction "means." RCW 9.94A.030(45). When the Legislature states what a term "means," it excludes any definition not stated. Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 359, 20 P.3d 921 (2001); Singer, § 47:07 at 232-33. Thus, because attempted second degree robbery is not included in the definition of "violent offense," it is not a violent offense for purposes of the SRA. The Becker court erred in overlooking these rules of construction.

Second, the Becker court failed to even discuss the rule of lenity, let alone apply it. Although the court conceded an apparent conflict between the two statutes,⁸ it did not recognize that this conflict rendered the statutory scheme ambiguous.⁹

⁸ Becker, at 851 ("Two different provisions of the SRA can be read in

On numerous occasions since Becker, the Washington Supreme Court has applied the rule of lenity to similar statutory ambiguities. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005) (where sentence enhancement statute permitted two interpretations regarding consecutive or concurrent sentences, the rule of lenity required construction against the state); In re Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (noting ambiguity between the definition of "drug offense" and refusing to conclude that solicitation to commit delivery was an offense "under" RCW 69.50 that would permit doubling the statutory maximum sentence); In re Post Sentencing Review of Charles, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998) (applying rule of lenity to require enhancements to run concurrently, not consecutively, where Legislature had not made plain an intent for consecutive effect). The rule of lenity is based in large part on basic notions of due process -- the Legislature must enact statutes that give fair notice of prohibited acts, as well as the punishment to be imposed.

conjunction with RCW 9.94A.360(9) to reach apparently conflicting conclusions.").

⁹ Ironically, in a decision issued four months after Becker, a different panel of Division One recognized the need to apply the rule of lenity to ambiguities resulting from the 1986 amendment to the offender score statute, former RCW 9.94A.360(5). State v. Jackson, 61 Wn. App. 86, 91, 93, 809 P.2d 221 (1991).

U.S. Const. amend. 14; Const. art. 1, § 3; State v. Coria, 146 Wn.2d 631, 651-56, 48 P.3d 980 (2002) (Sanders, J., dissenting) (discussing at length the connection between constitutional due process requirements and the rule of lenity).¹⁰ This Court also has recognized that the rule of lenity requires ambiguous statutes and court rules to be construed against the state. See e.g., State v. Hamilton, 121 Wn. App. 633, 639-40, 90 P.3d 69 (2004). Application of the rule of lenity, rather than Becker, would avoid conflicts with Jacobs, Hopkins, and Charles, and would prevent a due process violation.

Third, the Washington Supreme Court has also held on numerous occasions that the Legislature's use of different language in the same context indicates a different intent. State v. Jacobs, 154 Wn.2d at 596 (citing, inter alia, In re Det. of Swanson, 115 Wn.2d 21, 27, 804 P.2d 1 (1990)). Here the Legislature specifically included attempts, solicitations, and conspiracies for class A felonies as "violent offenses," but did not use the same language for the other listed felonies or classes of felonies. This difference in language indicates a different intent. Jacobs, at 596; accord, United Parcel Serv., Inc. v. Department of Rev., 102 Wn.2d 355, 362, 687

¹⁰ See also, United States v. R.L.C., 503 U.S. 291, 305, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992); and at 307-08 (Scalia, J., concurring); United States v. Bass, 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

P.2d 186 (1984). By failing to give effect to this different language, Becker conflicts with these decisions, as well.

Fourth, the Becker court failed to apply the rule of expressio unius est exclusio alterius --"specific inclusions exclude implication." In re Restraint of Hopkins, 137 Wn.2d at 901 (citation omitted).

In other words, "[w]here a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions." Queets Band of Indians v. State, 102 Wn.2d 1, 5, 682 P.2d 909 (1984).

Hopkins, at 901. Here the definition statute specifically designated some types of attempts and excluded others. The Becker result erred in failing to give effect to this distinction.

Finally, the "violent offense" definition has been amended since Becker. The amendment of the "violent offense" definition is particularly telling, as the Legislature separated out each type of offense. See appendix. In so doing, the statute is now even more plain that attempts, conspiracies and solicitations may be considered "violent offenses" only if they are class A felonies.¹¹

¹¹ Because the statute has been amended, the state should not contend that the Legislature has acquiesced in the Becker court's construction. See generally, Wash. Indep. Tel. Ass'n v. WUTC, 148 Wn.2d 887, 905 n.14, 64 P.3d 606 (2003) ("The rule of statutory construction involving legislative acquiescence is that '[t]he Legislature is deemed to acquiesce in

Because Becker conflicts with these more recent Supreme Court decisions, with the rule of lenity as applied by this Court, and with other important rules of construction, this Court should decline to follow Becker.

b. Becker is Poorly Reasoned.

This Court also should decline to follow Becker because it is poorly reasoned.

The Becker court suggested that the definition section was a "general" section that should yield to the more "specific" offender score section, Becker, at 853, but the analysis does not withstand scrutiny. In determining legislative intent, statutory definitions generally control. American Legion Post No. 32 v. Walla Walla, 116 Wn.2d 1, 8, 802 P.2d 784 (1991) (citing Seattle v. Shepherd, 93 Wn.2d 861, 866, 613 P.2d 1158 (1980)); accord, Morgan v. Johnson, 137 Wn.2d 887, 893-94 & n.2., 976 P.2d 619 (1999). In addition, as argued supra, a legislative definition is essentially "embedded" in other parts of the same chapter. State v. J.P., 149 Wn.2d at 453.

the interpretation of the court if no change is made for a substantial time after the decision.'" (quoting State v. Coe, 109 Wn.2d 832, 846, 750 P.2d 208 (1988)).

The priority of the specific definitional section over the general offender score section is apparent from this Court's decision in State v. Hern, 111 Wn. App. 649, 45 P.3d 1116 (2002). In Hern, the question was whether a 1980 attempted second degree robbery conviction washed out of Hern's criminal history. A completed second degree robbery is a class B felony, but an attempted offense is a class C felony. RCW 9A.56.210(2); 9A.28.020(3)(c); Hern, at 653. This Court applied the 5-year class C washout period, rather than the 10-year class B washout period, and held that the prior conviction washed out. Hern, at 654-56.¹²

¹² Hern's 1980 attempted robbery would not have washed out if it was treated as a class B felony, because there was no 10-year period between his 1983 release date and his 1989 conviction for second degree robbery. Hern, at 653. The precise issue in Hern was whether 1995 amendments to the the washout provisions could be applied to revive the 1980 conviction after it had washed out. This Court held that the 1995 amendments could not be retroactively applied, and that the 1990 conviction could not count in Hern's offender score. Hern, at 654-56.

If Division One was correct in Becker, however, then this Court was necessarily wrong in Hern. But the Hern court concluded, and correctly, that a class C felony washed out after 5 years. RCW 9.94A.525(2); former RCW 9.94A.360(2) (as cited in Hern). In Hern, it appears that neither this Court, nor highly experienced counsel for the state, even contemplated harnessing the offender score statute to reclassify Hern's class C attempted offense to a class B completed offense.¹³ But under Division One's Becker analysis, that would be the required result; Becker essentially held that the offender score statute trumps other definitional statutes and requires attempts to be scored as completed offenses. Under Becker, Hern would still be serving a POAA sentence of life without parole, because the offender score statute magically reclassified

¹³ The state's decision not to make the argument in Hern is not surprising; it would not naturally occur to anyone reading these statutes that a felony could be silently reclassified by operation of the offender score statute. See e.g., State v. Miller, noted at 121 Wn. App. 1054, note 11 (No. 29326-9-II, May 25, 2004) (where the state conceded that an attempted class C felony is a gross misdemeanor and cannot count in an offender score despite RCW 9.94A.525(4)). Knight does not cite the unpublished decision in Miller as "authority" -- Knight only notes it as a factual example of how other counsel views this statutory scheme. See RAP 10.4(h) (prohibiting the citation of unpublished decisions as authority).

his 1980 attempt from a class C felony into a class B felony and changed the washout period from five to 10 years.

But there is no support for the proposition that the Legislature intended this consequence. This is yet another reason to conclude that the statutory scheme is at least ambiguous as applied to prior attempted offenses that are expressly excluded from the "violent offense" definition and to conclude that Becker was wrongly decided.

The Becker court also reasoned that the offender score statute was the later-enacted statute and therefore should be given precedence. Becker, at 852-53 (citing, *inter alia*, Citizens for Clean Air v. Spokane, 114 Wn.2d 20, 36, 785 P.2d 447 (1990)). But this rule of construction simply has no persuasive value in the SRA context. If the last 20 years of SRA history has revealed anything about Washington's legislative sentencing policy, it is that no deliberate legislative priority guides the timing of SRA amendments. In re Restraint of LaChapelle, 151 Wn.2d 1, 7 & n.4, 100 P.3d 805 (2004) (noting 181 amendments to the SRA through the 2004 legislative session). Given the near-constancy of SRA amendments, it would be sheer folly to attach minimal significance -- let alone priority -- to the date of any individual amendment. This part of the Becker analysis therefore lacks persuasive value.

Viewed from a broader policy perspective, Becker also overlooks the obvious differences between attempted and completed offenses. In Washington, a person may be found guilty of an attempted offense merely by taking a "substantial step" toward the completed offense. RCW 9A.28.020(1). The "substantial step" may involve no significant risk of violence, however, because the act has not occurred and only the intent is being punished. Accordingly, the federal courts have recognized that attempted crimes under Washington law are not necessarily included as prior "violent" crimes because the "substantial step" element of an attempt under Washington law includes too broad a category of crimes. United States v. Weekley, 24 F.3d 1125, 1127 (9th Cir. 1994). Weekley did not base its ruling simply on interpretation of the federal armed career criminal statute; instead, it directly recognized that Washington's attempt statute "allows . . . convictions for relatively unrisky 'substantial step' conduct." 24 F.3d at 1127. For this reason, there is no reason to assume, as the Becker court assumed, that the Legislature would treat an offense constituting a mere "substantial step" the same as a violent offense. Such treatment instead conflicts with the SRA's stated goal of punishment that is proportionate to the seriousness of the offense and the offender's criminal history. RCW 9.94A.010(1).

Finally, Becker relied in large part on the 1986 amendment to the offender score statute. Becker, at 853-54 (citing Laws of 1986, ch. 257, § 25). But this ignored the context of the 1986 amendment. Prior to that amendment, the SRA was silent on how to score prior anticipatory offenses. Becker, at 853; Jackson, 61 Wn. App. at 91. That general amendment was therefore necessary to at least allow the counting of prior anticipatory offenses as even one full point in an offender score. But the amendment did not express an intent to allow such offenses to also be included within otherwise inapplicable statutory definitions or to change the felony class of the prior offense as in Hern.

This gap-filling function of the 1986 amendment also negates the Becker court's analysis that the 1986 amendment to former RCW 9.94A.360(5) would be rendered meaningless if it rejected the state's argument. Becker, at 854. In fact, the 1986 amendment remains meaningful, in that it permits otherwise unreferenced inchoate crimes -- attempt, solicitation, and conspiracy -- to be counted at all.

In the final analysis, there are more reasons to reject Becker than to follow it. The when viewed together, the two statutes are at least ambiguous. The rule of lenity requires strict construction against the state.

The statute should be construed as set forth in argument 1, supra, and this Court should not follow Becker for the reasons stated in this argument. This Court should vacate the sentences on counts II and III and remand for resentencing based on the correct offender score of three points.

D. CONCLUSION

This Court should vacate the erroneous count II and III sentences and remand for resentencing within the correctly calculated standard ranges.

DATED this 30th day of November, 2005.

Respectfully Submitted,

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COURT OF APPEALS DIV. #1
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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent/appellant/plaintiff~~ containing a copy of the document to which this declaration is attached.

Kevin Karsmo Spokane, WA
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.
Alyssa Knight client

Name Done in Seattle, WA Date

Kevin Karsmo
1100 W. Mallon
Spokane, WA 99260-2043

Alyssa Knight
c/o WCCW, DOC
Gig Harbor, WA

APPENDIX

No. 23698-6-III

RCW 9.94A.030(45), in effect at the time of this offense:

(45) "Violent offense" means:

(a) Any of the following felonies:

(i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;

(ii) Criminal solicitation of or criminal conspiracy to commit a class A felony;

(iii) Manslaughter in the first degree;

(iv) Manslaughter in the second degree;

(v) Indecent liberties if committed by forcible compulsion;

(vi) Kidnapping in the second degree;

(vii) Arson in the second degree;

(viii) Assault in the second degree;

(ix) Assault of a child in the second degree;

(x) Extortion in the first degree;

(xi) Robbery in the second degree;

(xii) Drive-by shooting;

(xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; and

(xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.

Former RCW 9.94A.030(29), as quoted in State v. Becker:

(a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent **1017 liberties if committed by forcible compulsion, child molestation in the first degree, rape in the second degree, kidnapping in the second degree, arson in the second degree, assault in the second degree, extortion in the first degree, robbery in the second degree, vehicular assault, and vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner[.]

Former RCW 9.94A.360 (5), as quoted in State v. Becker:

Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

Former RCW 9.94A.360 (9), as quoted in State v. Becker:

If the present conviction is for a violent offense and not covered in subsection (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

RCW 9.94A.525, in effect at the time of the current offense:

9.94A.518

CRIMES AND PUNISHMENTS

Manufacture, deliver, or possess with intent to deliver marijuana (RCW 69.50.401(a)(1)(iii))
Possess Controlled Substance that is a Narcotic from Schedule III, IV, or V or Non-narcotic from Schedule I-V (RCW 69.50.401(d))
Possession of Controlled Substance that is either heroin or narcotics from Schedule I or II (RCW 69.50.401(d))
Unlawful Use of Building for Drug Purposes (RCW 69.53.010)

[2002 c 290 § 9.]

Historical and Statutory Notes

* Reviser's note: cf. 2002 c 134 § 1. Intent—2002 c 290: See note following RCW 9.94A.517.
Effective date—2002 c 290 §§ 7-11 and 14-23: See note following RCW 9.94A.515.

Library References

Sentencing and Punishment Ⓒ686. C.J.S. Criminal Law § 1479.
Westlaw Topic No. 350H.
C.J.S. Controlled Substances §§ 268 to 273, 282.

9.94A.520. Offense seriousness level

The offense seriousness level is determined by the offense of conviction.

[1990 c 3 § 703; 1983 c 115 § 6. Formerly RCW 9.94A.350.]

Historical and Statutory Notes

Index, part headings not law—Severability—Effective dates—Application—1990 c 3: See RCW 18.155.900 through 18.155.902. "Felony offenses are divided into fourteen levels of seriousness, ranging from low (seriousness level I) to high (seriousness level XIV)—see RCW 9.94A.320 (Table 2)."
Laws 1990, ch. 3, § 703, deleted, a former second sentence, which read:

Library References

Sentencing and Punishment Ⓒ666. Presumptive sentence, see Wash.Prac. vol. 13, Ferguson, § 4311.
Westlaw Topic No. 350H.
C.J.S. Criminal Law § 1479.

9.94A.525. Offender score

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

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SENTENCING REFORM ACT OF 1981

9.94A.525

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of *RCW 9:94A.589.

(2) Class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction. Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction. Serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction. This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under *RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in *RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11) or (12) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and $\frac{1}{2}$ point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), or (12) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and $\frac{1}{2}$ point for each prior juvenile nonviolent felony conviction.

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SENTENCING REFORM ACT OF 1981

9.94A.525

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction.

(12) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(13) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(14) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.

(15) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residen-

9.94A.525

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tial burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(16) If the present conviction is for a sex offense, count priors as in subsections (7) through (15) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(17) If the present conviction is for an offense committed while the offender was under community placement, add one point.

(18) 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. Accordingly, 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.

[2002 c 290 § 3; 2002 c 107 § 3; 2001 c 264 § 5; 2000 c 28 § 15. Prior: 1999 c 352 § 10; 1999 c 331 § 1; 1998 c 211 § 4; 1997 c 338 § 5; prior: 1995 c 316 § 1; 1995 c 101 § 1; prior: 1992 c 145 § 10; 1992 c 75 § 4; 1990 c 3 § 706; 1989 c 271 § 103; prior: 1988 c 157 § 3; 1988 c 153 § 12; 1987 c 456 § 4; 1986 c 257 § 25; 1984 c 209 § 19; 1983 c 115 § 7. Formerly RCW 9.94A.360.]

Historical and Statutory Notes

Reviser's note: *(1) This RCW reference has been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

(2) This section was amended by 2002 c 107 § 3 and by 2002 c 290 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date—2002 c 290 §§ 2 and 3: See note following RCW 9.94A.515.

Intent—2002 c 290: See note following RCW 9.94A.517.

Finding—Application—2002 c 107: See notes following RCW 9.94A.030.

Effective date—2001 c 264: See note following RCW 9A.76.110.

Technical correction bill—2000 c 28: See note following RCW 9.94A.015.

Effective date—1999 c 331: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 14, 1999]." [1999 c 331 § 5.]

Effective date—1998 c 211: See note following RCW 46.61.5055.

Finding—Evaluation—Report—1997 c 338: See note following RCW 13.40.0357.

Severability—Effective dates—1997 c 338: See notes following RCW 5.60.060.

Index, part headings not law—Severability—Effective dates—Application—1990 c 3: See RCW 18.155.900 through 18.155.902.