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NO. 66306-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON  
2011 JUL 26 PM 12:59

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STATE OF WASHINGTON,

Respondent,

v.

John Stanley,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

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**BRIEF OF RESPONDENT**

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A. **ISSUES PRESENTED**

When an offender's offender score is miscalculated, and this information is shared with the defendant at sentencing by the sentencing judge, as well as noted in sentencing paperwork, is it proper to remand the sentencing to correct this error?

B. **STATEMENT OF THE CASE**

**PROCEDURAL FACTS**

John Stanley was charged with Robbery First Degree, Possession of Cocaine and Attempted Bribery of a Witness. CP 8-10. He was found guilty of all three counts by a jury. CP 46-48. The court imposed a standard range sentence of 144 months on count I (Robbery). CP 53. Mr. Stanley filed a notice of appeal. CP 59.

**SUBSTANTIVE FACTS**

Abdiquhar Adan was dropped off near 23<sup>rd</sup> and Jefferson in Seattle on May 28, 2010. RP 25, 151-152. As he was walking him, he passed two men on the sidewalk, one of whom was John Stanley, and neither of whom had Mr. Adan met or had contact with before. RP 155-156. Stanely grabbed Mr. Adan from behind, and took him to the ground, and the two men then worked together to

"pocket check" Mr. Adan and take his debit card, cell phone, student identification and \$20 in US currency. RP 157-160.

Both men walked away after Mr. Adan refused to tell them his PIN number for his debit card. RP 161, 164. Mr. Adan heard a phone ring and recovered a phone which he believed belonged to one of the men. RP 162-163. He yelled at the men before he ran to an AM/PM store and asked the clerk to call 9-1-1, which the clerk did. RP 164-166.

Appellant Stanley entered the store, attempting to get back his cellular phone, and both men were in the store when Seattle Police Department officers responded. RP 45-46. They were interviewed. RP 45. Officers noted injuries on Mr. Adan. RP 33.

Stanley was placed under arrest, taken to the precinct, and search incident to arrest, it was determined that he was hiding crack cocaine in his anal cavity. RP 51-52, 78-79.

While in custody Mr. Stanley attempted to pass a note via an inmate which was intended for another inmate that was due to get released that had information pertaining to Mr. Adan and a desire that he not testify, indicating that there might be money in it for him if he did not. RP 99-104. An Officer retrieved the note. RP 106, 181.

The note, and phone calls made from the jail, indicate that the nick name "Doeloe" is one which Mr. Stanley goes by. RP 109-113, 122-126.

### **SENTENCING FACTS**

Parties originally incorrectly scored Mr. Stanley as a "10" for the robbery, "8" for the possession and "8" for the attempted bribery. At the sentencing hearing, however, parties determined that a prior juvenile conviction for attempted robbery was not a "violent felony offense" and should score as a half point as opposed to a point, making his scores an "8, 7 and 7" respectively. CP 53. The Court imposed a standard range sentence for each count. Id.

### **C. ARGUMENT**

#### **COUNTS I and II**

While parties corrected the original scrivener's error with regard to counts I and II orally and both sentences were within the standard range, the Judgment and Sentence should be amended accordingly to capture this decision and pronouncement by the Court. This failure to modify the Judgment and Sentence was an oversight, and can easily be corrected. Under the Rules of

Appellate Procedure, specifically rule 7.2(e) discusses post judgment motions and actions to modify court decisions.

Rule 7.2(e) indicates that a trial court has the authority to hear post judgment motions authorized by civil and criminal rules or statutes, but, that if an appellate court is the one before which a motion pertaining to the issue is raised, that the trial court must get permission to listen to the matter prior to any formal entry of the trial court decision. "A party should seek the required permission by motion." RAP 7.2(e).

With regard to counts I and II of Mr. Stanley's Judgment and Sentence, the Respondent seeks this court's permission to do so. Having spoken with Appellant Counsel David Koch, and having read his brief, the Respondent can fairly represent to this Court that he is in agreement with this motion.

### **COUNT III**

With regards to count III, an issue is raised by counsel with regard to "community custody" point calculation for Mr. Stanley in count III. He committed this crime while he was in custody in the King County Jail. The State concedes this issue raised for the first time on appeal.

Serious criminal sentences often include a period of community custody. "By design, the whole 'period' of community custody must be served in the community. With an exception ... any time an offender spends in jail does not count toward serving a community custody sentence. In the language of the statute, the 'period' is 'tolled.'" RCW 9.94A.625(3), In re Personal Restraint of Dalluge, 162 Wash.2d 814, 177 P.3d 675 at 815 (2008).

According to RCW 9.94A.171(3), Mr. Stanley was in custody and hence not technically under community custody when he committed this offense, which means that one point should be subtracted from his offender store, making his range be 75 percent of the appropriate standard range, or 24.75 - 30.10 months.

The Respondent seeks this Court's permission to allow Judge Hayden to resentence on the issue, noting that no matter what sentence the Court might impose, if allowed, Mr. Stanley's original sentence of 144 months, which was inside the correct standard range for Count I (Robbery) will still dictate his length of sentence, as it is a higher ranked crime and hence, a longer sentence, than this count.

**D. CONCLUSION**

Respondent counsel, who was also trial counsel in this case, talked with Appellant counsel David Koch, with regard to issues raised in this case in June, 2011. He agreed that resentencing by Judge Hayden on the issue of the scrivener's error and "community custody" point for count III could easily be corrected by a resentencing. Accordingly, Respondent counsel arranged to have Mr. Stanley transported from DOC for this issue.

Mr. Koch was informed of the hearing and chose to have trial counsel cover the issue, which was a viable and appropriate option. He was apprised of what occurred at the hearing, and sent a copy of a resentencing Judge and Sentence on these issues.

Respondent counsel formally seeks this Court's permission to enter a revised, corrected Judgment and Sentence, correcting the scrivener's error with regard to counts I and II and allowing resentencing with a one point lower offender score on count III.

Should this Court grant permission for that, the revised Judgment and Sentence can be entered within two business days of such a permission being granted.

DATED this 25 day of July, 2011.

RESPECTFULLY submitted,

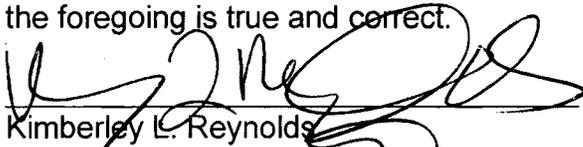
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By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JOHN STANLEY, Cause No. 66306-2-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Kimberley L. Reynolds  
Done in Seattle, Washington

7/26/11  
Date

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