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NO. 67728-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ERIC LOWE,

Appellant.

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

The Honorable Anita Farris, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. LOWE DID NOT INVITE THE COURT'S ERROR AT SENTENCING.

Rather than invite the court's error, Lowe attempted to prevent it by objecting at sentencing to the court's consideration of his vacated 2000 juvenile offense. Both defense counsel and Lowe placed Lowe's objection on the record. 3RP 21-23, 25. In fact, the record reveals that Lowe had raised this same objection with his attorney prior to the plea hearing, but counsel failed to bring it to the court's attention at that time. 3RP 21-23.

The court believed there might be a statute or case law pertinent to the issue, but indicated it was going to count the 2000 offense as part of Lowe's offender score and proceed with sentencing anyway. 3RP 23-24. This was not the proper course. Once Lowe objected to use of the vacated offense, the sentencing court was obligated to either not consider the offense or grant an evidentiary hearing on the point. See RCW 9.94A.530(2); see also State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007) (the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence).

Following the court's decision to proceed, Lowe mentioned a continuance. After a brief discussion with defense counsel, however, counsel indicated the defense was ready to proceed.<sup>1</sup> 3RP 25-26. But given that a proper objection had been placed on the record, and that the court had already indicated it was proceeding, this is neither surprising nor relevant to whether any error was invited. It was not.

## 2. LOWE'S CONVICTION WAS VACATED.

The State attempts to draw a distinction between a juvenile court's dismissal of the deferred disposition and the related act of vacating the juvenile's conviction. See Brief of Respondent, at 7-9.

In support, the State cites to State v. Cervantes, \_\_\_ Wn. App. \_\_\_, 273 P.3d 484, 487 (2012), in which Division 3 stated, "a vacation is procedurally different than a dismissal." Brief of Respondent, at 7. While Division 3 did, indeed, make this statement, Cervantes has nothing to do with deferred dispositions. The quote is aimed at federal immigration law – the fact a conviction vacated for rehabilitative purposes under RCW

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<sup>1</sup> The State's assertion that "Lowe declined the opportunity when it was offered to continue sentencing and pursue the challenge to his offender score" is incorrect. See Brief of Respondent, at 6.

9.94A.640 (vacation once an offender fulfills all sentence requirements) is not considered “dismissed” for immigration purposes, which requires an order vacating the conviction based on statutory or constitutional invalidity. Id. at 486-487. Thus, Cervantes is well off point.

On point is RCW 13.40.127, which provides:

At the conclusion of the period set forth in the order of deferral and upon a finding by the court of full compliance with conditions of supervision and payment of full restitution, the respondent’s conviction shall be vacated and the court shall dismiss the case with prejudice, except that a conviction under RCW 16.52.205 shall not be vacated.

RCW 13.40.127(9).

Sentencing courts have no inherent authority beyond that set forth by statute. Statutes granting authority to suspend sentences are mandatory and “carefully and comprehensively spell out” the court’s only options. State v. Clark, 91 Wn. App. 581, 585-586, 958 P.2d 1028 (1998) (quoting State v. Bird, 95 Wn.2d 83, 93, 622 P.2d 1262 (1980) (Dolliver, J. dissenting)).

Under RCW 13.40.127(9), there is no authority to dismiss the case but not vacate the conviction. The court’s only option is spelled out quite clearly: “respondent’s conviction shall be vacated and the court shall dismiss the case with prejudice.” (emphasis

added). And that is exactly what occurred in Lowe's case. Although the court's order only mentions dismissal of the deferred disposition, vacation was necessarily a consequence of the dismissal.<sup>2</sup>

The State nonetheless argues that the juvenile court did not vacate Lowe's assault conviction because Lowe committed new offenses – in violation of the conditions of his deferred disposition – during the deferral period. See Brief of Respondent, at 8. But as the State itself acknowledges, it failed to move for revocation on this basis in a timely manner, filing its motion after Lowe's deferral period had already run. Id. at 8; see also CP 21 ("The State should have instituted proceedings to revoke the deferred disposition prior to the end of the period of deferral. The motion to revoke is denied.").

It is the State's burden to prove noncompliance with conditions of a deferred disposition. RCW 13.40.127(6). Juvenile courts are afforded the discretion to determine whether a juvenile has complied sufficiently with those conditions. State v. J.A., 105

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<sup>2</sup> Alternatively – had circumstances warranted – prior to completion of the deferral period, the juvenile court could have continued the case for another year or entered an order of

Wn. App. 879, 881, 887-888, 20 P.3d 487 (2001). "Further, once a court enters an order finding no lack of compliance, that order carries through to the determination of full compliance under [RCW 13.40.127] section 9." Id. at 888.

In Lowe's case, the State failed to prove noncompliance. By denying the State's untimely motion to revoke his deferred disposition, the juvenile court found compliance with the conditions of his deferred disposition, a decision that carried through to the court's ultimate decision to dismiss and vacate under RCW 13.40.127(9). Because Lowe's juvenile assault conviction was vacated, it could not count in his adult offender score.

Finally, citing In re Carrier, 173 Wn.2d 791, 272 P.3d 209 (2012) and former RCW 9.94A.030(14)(b), the State argues – as it did below – that a conviction can only be removed from a defendant's criminal history if it is vacated pursuant to RCW 9.96.060, 9.94.640, 9.95.240, a similar out-of-state statute, or a Governor's pardon. Brief of Respondent, at 9-11.

The exclusive language of former RCW 9.94A.030(14)(b) notwithstanding, that provision is not in fact the sole means of

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disposition. See RCW 13.34.127(7)-(8). In Lowe's case, the court did neither.

avoiding criminal history. For example, a juvenile adjudication can be vacated under RCW 13.50.050(11).<sup>3</sup> Once vacated, it is treated as if it never occurred. RCW 13.50.050(14). There is no need to rely on the SRA for exclusion.

Similarly, as argued in Lowe's opening brief, when the juvenile court dismissed and vacated Lowe's assault conviction under RCW 13.40.127(9), it ceased to exist separate and apart from any procedures under the SRA to remove a conviction from the defendant's criminal history. Therefore, it should not have been included in his offender score.

B. CONCLUSION

For the reasons discussed in Lowe's opening brief and above, this Court should remand for a new sentencing hearing using the correct offender score.

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<sup>3</sup> RCW 13.50.050(11) provides:

In any case in which an information has been filed pursuant to RCW 13.40.100 or a complaint has been filed with the prosecutor and referred for diversion . . . the person the subject of the information or complaint may file a motion with the court to have the court vacate its order and findings, if any, and, subject to subsection (23) of this section, order the sealing of the official juvenile court file, the social file, and records of the court and of any other agency in the case.

DATED this 6<sup>th</sup> day of June, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6<sup>TH</sup> DAY OF JUNE 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 6<sup>TH</sup> DAY OF JUNE 2012.

x *Patrick Mayovsky*