

67728-4

67728-4

NO. 67728-4-1

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

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STATE OF WASHINGTON,

Respondent,

v.

ERIC L. LOWE,

Appellant.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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## **I. ISSUES**

Whether defendant's prior juvenile adjudication was properly included in his criminal history for calculating his offender score?

## **II. STATEMENT OF THE CASE**

On June 8, 2011, Eric Lee Lowe pleaded guilty to residential burglary in cause number 10-1-00390-2, the present case. Lowe agreed that the "Prosecutor's Understanding of Defendant's Criminal History ('Appendix A') and the Sentencing Guidelines scoring form(s) are accurate and complete." Both documents were attached to his statement on plea of guilty. CP 44-45, 50-52.

Sentencing was continued to August 23, 2011, to coincide with sentencing in cause number 10-1-01378-9<sup>1</sup>. At sentencing, the court inquired whether Lowe wanted to proceed with sentencing on each cause number separately. Lowe replied he had pleaded guilty with an agreed recommendation that should run concurrent with whatever else is being sentenced. 3RP 18.

At sentencing for the first time Lowe questioned whether his 2000 juvenile conviction for 3<sup>rd</sup> degree assault should be included in his criminal history. The following colloquy ensued:

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<sup>1</sup> In cause number 10-1-01378-9, Lowe was found guilty of 1<sup>st</sup> degree murder, 1<sup>st</sup> degree burglary, attempted 1<sup>st</sup> degree robbery, 2<sup>nd</sup> degree assault, all with firearm enhancements, and 2<sup>nd</sup> degree unlawful possession of a firearm. Lowe had an offender score of 10 on the 1<sup>st</sup> degree murder. CP 115; 3RP 2.

[DEFENSE COUNSEL]: ... Mr. Lowe wanted me to bring up another aspect of this on one of those juvenile cases. He got a deferred disposition, which ended up causing it to be dismissed and he felt that his offender score should have been a one – I mean, a half a point at juvenile court, which would have rounded down to zero.

I couldn't find any authority for that in any case law that I looked at, so I didn't propose it to the Court, so I didn't put that on the record. But he believes it should round down to zero rather than one, the juvenile court score, because the deferred disposition was done on one of those cases and it was dismissed. I did look at the juvenile court record, but there is no case law that indicates that for sentencing purposes in future cases that that has any affect.

THE COURT: What was he convicted of?

[DEFENSE COUNSEL]: Third degree assault in juvenile court.

THE COURT: Does the State wish to be heard on that issue?

[PROSECUTOR]: I am not going to dispute [defense counsel]'s assertion that there is no authority that it does not count on his offender score. I haven't looked into it further.

THE COURT: I haven't looked into that issue either, you are saying the conviction was vacated. I am not looking through here – I'm assuming --

[DEFENSE COUNSEL]: That's the affect of juvenile court when deferred disposition is done, and it's completed satisfactorily, the charge is dismissed.

Whether it was actually vacated by an order or not at juvenile court, I don't know.

THE DEFENDANT: I was led to believe at the time under the deferred position [sic] is that it couldn't be used against me in a later cause when I completed

the deferred, isn't that how it works in superior court too, when you get a deferred disposition.<sup>2</sup>

THE COURT: There is no such thing in superior court, in adult court.

So you want to provide me some more on that one.

[DEFENSE COUNSEL]: I did some research on it. I could not find a case that talked about specifically a deferred disposition, what affect would be on any future sentence, so I didn't pursue it any further, but I think it should be made part of the record in case his appellate attorneys want to pursue that aspect of his offender score.

3RP 21-23. The court asked if defense had seen the documents in the juvenile case. Defense counsel reaffirmed that he had looked at the juvenile court file to make sure what had happened on the case. Nevertheless, at sentencing Lowe did not provide the court a copy of the order dismissing the deferred prosecution.<sup>3</sup> The court stated that it intended to run Lowe's sentence on the residential burglary concurrent with the other matter and pointed out that since Lowe had an offender score of ten on the 1<sup>st</sup> degree murder one point would not change his standard range. Defense counsel stated that it could make a difference if an appellate court found

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<sup>2</sup> Under the Juvenile Justice Act a deferred disposition is not considered part of a respondent's criminal history in subsequent juvenile adjudications. RCW 13.40.020(7)(b).

<sup>3</sup> A copy of the order was attached to Lowe's motion to withdraw his plea filed six days after sentencing. 3RP 22-24.

that more of his convictions in cause number 10-1-01378-9 merged. When the court inquired whether Lowe wanted discuss the issue with counsel Lowe indicated he wanted to continue sentencing on the residential burglary. The court took a recess to allow Lowe the opportunity to discuss the matter with counsel. Following the recess, the court inquired whether Lowe was requesting a continuance. Defense counsel replied, "Well we talked about it, and no, we want to go forward today. 3RP 24-26.

Including Lowe's convictions in cause number 10-1-01378-9, Lowe's offender score on the residential burglary was 8 giving him a standard range of 53-70 months. The court sentenced Lowe to 53 months on the residential burglary, to run concurrent with his 488 month sentence on 1<sup>st</sup> degree murder. CP 24-26, 146-148; 3RP 20, 24, 26.

### **III. ARGUMENT**

#### **A. LOWE'S ACTIONS INVITED THE ERROR HE RAISES ON APPEAL.**

The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. Kenneth W. Brooks Trust A. v. Pac. Media, LLC, 111 Wn. App. 393, 400, 44 P.3d 938 (2002); State v. Armstrong, 69 Wn. App. 430, 434, 848 P.2d 1322 (1993). The doctrine applies when a party takes

affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal. In re Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000); Lavigne v. Chase, Haskell, Hayes & Kalamon, PS, 112 Wn. App. 677, 681, 50 P.3d 306 (2002). “Even where constitutional rights are involved, invited error precludes appellate review.” City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002); State v. Alger, 31 Wn. App. 244, 249, 640 P.2d 44, review denied, 97 Wn.2d 1018 (1982); State v. Wingard, 92 Wn. 219, 226, 158 P. 725 (1916).

In the present case, at the time of his guilty plea Lowe agreed that the Prosecutor's understanding of his criminal history used to calculate his standard sentence range was accurate and complete. Documents showing his criminal history and standard range were attached to his statement on plea of guilty. The documents included his 2000 juvenile adjudication for 3<sup>rd</sup> degree assault. CP 44-45, 50.

Lowe's sentencing on the residential burglary was set to coincide with his sentencing following trial in another case. Lowe was given the option of being sentenced on each cause number separately. Lowe chose to proceed with sentencing on both cases so he could avail himself of the plea agreement recommendation

and have his sentence run concurrent with the sentence in the other case.

Having previously agreed that his criminal history and offender score were accurate and complete, Lowe denied both the Prosecutor and the court the opportunity to research the matter by raising the issue regarding whether his 2000 juvenile conviction for 3<sup>rd</sup> degree assault should be included in his criminal history for the first time at his sentencing. Lowe had neither briefed the issue nor provided the order dismissing his deferred disposition to the court at sentencing. After discussing the matter with counsel, Lowe declined the opportunity when it was offered to continue sentencing and pursue the challenge to his offender score. Lowe's action deprived the trial court of necessary facts regarding his juvenile deferred disposition and, thereby, denied the court the opportunity to fully address and resolve the issue.

Further, Lowe's position at sentencing was that his juvenile deferred disposition had been dismissed, but that there was no authority that a dismissed deferred disposition does not count as criminal history for future sentencing. Lowe's affirmative and voluntary action invited the trial court to take the action that he now

challenges on appeal. Lowe's choice of action is prohibited by the invited error doctrine.

**B. LOWE'S JUVENILE CONVICTION WAS NOT VACATED.**

Lowe's argument is based on his misconception that the court vacated his 2000 juvenile adjudication for 3<sup>rd</sup> degree assault. In fact, Lowe's juvenile conviction was not vacated; it was dismissed. CP 21-22. "[A] vacation is procedurally different than a dismissal." State v. Cervantes, \_\_\_\_\_ P.3d \_\_\_\_\_, 2012 WL 1059391(Wn. App. Div. 3) at \*2.

On November 27, 2000, Lowe was found guilty of 3<sup>rd</sup> degree assault, the court imposed a deferred disposition under RCW 13.40.127. CP 149-154. The conviction in a deferred disposition is vacated upon the occurrence of three conditions:

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). All three conditions; 1) the conclusion of the period of deferral; 2) *the court finding full compliance with the conditions of supervision*; and 3) the full payment of any restitution; must be satisfied for the conviction to be vacated. The juvenile

system's focus is on rehabilitation. State v Johnson, 118 Wn. App. 259, 263, 76 P.3d 265 (2003); State v. J.H., 96 Wn. App. 167, 172, 978 P.2d 1121 (1999). Requiring full compliance with conditions of supervision comports with rehabilitation. Lowe did not fully comply with the conditions of his deferred disposition.

During the period of deferral, Lowe committed Harassment on October 31, 2001, and committed 4<sup>th</sup> Degree Assault on November 27, 2001; Lowe pled guilty to both offenses on February 11, 2002. On July 23, 2002, the State moved to revoke Lowe's deferred disposition based on his non-compliance with the condition that he commit no new crimes during the period of deferral. CP 151 at ¶3.5, 152 at ¶3.7.7, 213.

The court denied the motion to revoke the deferred disposition because the State had failed to institute revocation proceedings prior to the end of the period of deferral. CP 21-22; See State v. Todd, 103 Wn. App. 783, 790-791, 14 P.3d 850 (2000); State v. May, 80 Wn. App. 711, 716-717, 911 P.2d 399 (1996). The court dismissed Lowe's deferred disposition.<sup>4</sup> In light

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<sup>4</sup> Dismissal of a deferred disposition gives a juvenile assurance that he or she will "not be under a constant threat of incarceration until his or her 18<sup>th</sup> birthday." State v. Todd, 103 Wn. App. 783, 790, 14 P.3d 850 (2000) (quoting State v. Y.L., 94 Wn. App. 919, 924, 973 P.2d 503 (1999)).

of Lowe's new criminal violations the court could not find full compliance with the conditions of supervision. The court's order did not vacate Lowe's conviction.

"Under the Sentencing Reform Act of 1981 (SRA), vacation of a conviction provides the sole mechanism for removing the conviction from a defendant's criminal history." In re Carrier, \_\_\_\_ P.3d \_\_\_\_, 2012 WL 579705 (Wash.) at \*6. Since Lowe's 2000 juvenile adjudication for 3<sup>rd</sup> Degree Assault was not vacated; it was properly included in his criminal history for calculating his offender score.

**C. LOWE'S PRIOR JUVENILE ADJUDICATION WAS PROPERLY INCLUDED IN HIS CRIMINAL HISTORY.**

For purposes of sentencing, courts look to the law in effect at the time the defendant committed the current offense. RCW 9.94A.345; Carrier, 2012 WL 579705 (2012) at \*8, citing State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) ("We have repeatedly held that sentencing courts must look to the statute in effect at the time the defendant committed the current crimes when determining defendants' sentences.")

Under the SRA, the term "[c]riminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether

in this state, in federal court, or elsewhere. Former RCW 9.94A.030(14)<sup>5</sup>. “Adjudication’ has the same meaning as ‘conviction.’” State v. M.C., 148 Wn. App. 968, 971, 201 P.3d 413 (2009). “Conviction’ means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.” Former RCW 9.94A.030(12). The focus of the SRA is on the initial finding of guilt, not what occurs later. Carrier, 2012 WL 579705 (2012) at \*5 (citing State v. Harper, 50 Wn. App. 578, 580, 749 P.2d 722 (1988) (“The focus of the SRA’s provisions for the determination of offender scores is on the fact of prior convictions and the nature of those convictions—not on the type of sentence imposed therefor [sic.]”). “A conviction may be removed from a defendant’s criminal history only if it is vacated pursuant to RCW 9.96.060<sup>6</sup>, 9.94A.640<sup>7</sup>, 9.95.240<sup>8</sup>, or a similar out-of-state statute, or if the conviction has

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<sup>5</sup> References to “former RCW” are to the law in effect at the time Lowe committed the residential burglary, his current offense. RCW 9.94A.345.

<sup>6</sup> RCW 9.96.060 sets out the procedure for vacating a misdemeanor conviction.

<sup>7</sup> RCW 9.94A.640 sets out the procedure for vacating felony convictions.

<sup>8</sup> RCW 9.95.240 is a provision of the probation act that allowed courts to dismiss convictions after a defendant completed a term of probation. The procedures for dismissal are under § (1) and the procedures for vacation are under § (2).

been vacated pursuant to a governor's pardon." Former RCW 9.94A.030(14)(b).<sup>9</sup>

Lowe's reliance on State v. Smith, 158 Wn. App. 501, 246 P.3d 812 (2010), is misplaced. The court held that Smith's 1995 vacated misdemeanor conviction did not disqualify him from obtaining an order vacating his 1989 felony conviction. Id., at 512-513. Unlike Smith, where the prior conviction in question had been vacated, Lowe's prior conviction has not been vacated. Lowe's misconstruing the dismissal of his deferred disposition as being vacated does not make it so.

Likewise, Lowe's reliance on State v. M.C., 148 Wn. App. 968, 201 P.3d 413 (2009) (addressing whether the statutory victim penalty assessment could be imposed upon a juvenile offender at the time a deferring a disposition is entered) is also misplaced. The court in M.C. held that an order deferring disposition is not itself a *disposition*. Id., at 972. The court did not say that deferred dispositions are not *adjudications*. "Adjudication' has the same meaning as 'conviction.'" Id., at 971. "'Conviction' means ... a

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<sup>9</sup> A motion to vacate a juvenile adjudication can be filed under RCW 13.50.050(11), (12). However, since 2000 Lowe has not spent two consecutive years in the community without committing an offense or crime that subsequently resulted in conviction. Therefore, he has not been eligible to vacate his 2000 juvenile conviction.

finding of guilty ....” Former RCW 9.94A.030(12). Lowe was found guilty of 3<sup>rd</sup> degree assault on November 27, 2000. CP 149. Lowe’s 2000 juvenile adjudication was properly included as a prior conviction in his criminal history.

**D. LOWE’S OFFENDER SCORE WAS CORRECTLY CALCULATED.**

The calculation of an offender score is based on the defendant’s “criminal history.” Former RCW 9.94A.525. “Criminal history” is a statutory definition of a list of the defendant’s prior convictions and juvenile adjudications found in the SRA. Former RCW 9.94A.030(14). Prior juvenile adjudications are includable in computing the SRA offender scores for current adult offenses. In re Jones, 121 Wn. App. 859, 872, 88 P.3d 424 (2004). Prior deferred adjudications are properly included in an offender score. State v. Cooper, 164 Wn. App. 407, 413, 263 P.3d 1283 (2011).

Lowe’s conviction in the present case was for residential burglary, therefore, his 1<sup>st</sup> degree burglary conviction counts as two points. Former RCW 9.94A.525(16). Because residential burglary is a non-violent offense, Lowe’s five other adult felony convictions count as one point each, and his two prior juvenile non-violent felony convictions count as half a point each. Former RCW

9.94A.525(7). Lowe's offender score of 8 was correctly calculated.  
CP 146-148.

**E. THERE IS NO AMBIGUITY IN THE STATUTORY INCLUSION OF JUVENILE ADJUDICATION IN AN OFFENDERS CRIMINAL HISTORY.**

Lowe argues that even though his juvenile adjudication falls within the definition of criminal history it should not count in his offender score under the rule of lenity because RCW 9.94A.030(11)<sup>10</sup> is ambiguous. "[T]he rule of lenity applies to the SRA and operates to resolve statutory ambiguities, absent legislative intent to the contrary, in favor of a criminal defendant." In re Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994).

To support his argument Lowe quotes the first sentence of RCW 9.94A.030(11)(c). Brief of Appellant at 9-10. In its entirety RCW 9.94A.030(11)(c) reads:

The determination of a defendant's criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.

The Legislature enacted RCW 9.94A.030(11)(c) to clarify its intent that prior convictions that have not been vacated are included

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<sup>10</sup> The language in RCW 9.94A.030(11) is identical to the language in former RCW 9.94A.030(14).

in an offender's criminal history to calculate the offender score for the current offense. Wash. Laws 2002 ch. 107 § 1.<sup>11</sup> "The primary objective of an inquiry into the construction of a statute is to ascertain and carry out the intent of the legislature." State v. Hayes, 164 Wn. App. 459, 469, 262 P.3d 538 (2011). There is no ambiguity in the legislative intent that prior convictions and adjudications that have not been vacated are included in an offender's criminal history to calculate the offender score.

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<sup>11</sup> Finding--2002 c 107: "The legislature considers the majority opinions in State v. Cruz, 139 Wn.2d 186 (1999), and State v. Smith, Cause No. 70683-2 (September 6, 2001), to be wrongly decided, since neither properly interpreted legislative intent. When the legislature enacted the sentencing reform act, chapter 9.94A RCW, and each time the legislature has amended the act, the legislature intended that an offender's criminal history and offender score be determined using the statutory provisions that were in effect on the day the current offense was committed.

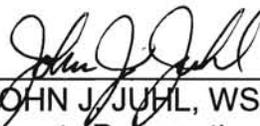
Although certain prior convictions previously were not counted in the offender score or included in the criminal history pursuant to former versions of RCW 9.94A.525, or RCW 9.94A.030, those prior convictions need not be "revived" because they were never vacated. As noted in the minority opinions in Cruz and Smith, such application of the law does not involve retroactive application or violate ex post facto prohibitions. Additionally, the Washington state supreme court has repeatedly held in the past that the provisions of the sentencing reform act act upon and punish only current conduct; the sentencing reform act does not act upon or alter the punishment for prior convictions. See In re Personal Restraint Petition of Williams, 111 Wn.2d 353, (1988). The legislature has never intended to create in an offender a vested right with respect to whether a prior conviction is excluded when calculating an offender score or with respect to how a prior conviction is counted in the offender score for a current offense."

**IV. CONCLUSION**

For the reasons stated above the appeal should be denied.

Respectfully submitted on April 13, 2012.

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