

71033-8

71033-8

NO. 71033-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND ELLIOTT,

Appellant.

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

The Honorable Eric Lucas, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
JAN 12 2011 10:29

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	1
C. <u>ARGUMENT</u>	4
THE COURT MISCALCULATED THE OFFENDER SCORE.....	4
D. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Pers. Restraint of Carle</u> 93 Wn.2d 31, 604 P.2d 1293 (1980).....	5
<u>In re Pers. Restraint of Goodwin</u> 146 Wn.2d 861, 50 P.3d 618 (2002).....	4, 6
<u>In re Pers. Restraint of LaChapelle</u> 153 Wn.2d 1, 100 P.3d 805 (2004).....	4
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	5
<u>State v. Barnett</u> 139 Wn.2d 462, 987 P.2d 626 (1999).....	5
<u>State v. Crawford</u> 164 Wn. App. 617, 267 P.3d 365 (2011).....	4, 6
<u>State v. Roche</u> 75 Wn. App. 500, 878 P.2d 497 (1994).....	6
<u>State v. Ross</u> 152 Wn.2d 220, 95 P.3d 1225 (2004).....	6
<u>State v. Thomas</u> 150 Wn.2d 666, 80 P.3d 168 (2003).....	4
<u>State v. Tili</u> 148 Wn.2d 350, 60 P.3d 1192 (2003).....	4
<u>State v. Wilson</u> 170 Wn.2d 682, 244 P.3d 950 (2010).....	6

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9.94A.500	5
RCW 9.94A.510	4
RCW 9.94A.525	5
Sentencing Reform Act.....	4, 6

A. ASSIGNMENT OF ERROR

The court erred in calculating appellant's offender score.

Issue Pertaining to Assignment of Error

Did the court commit legal error in miscalculating appellant's offender score, requiring remand for resentencing under the correct score?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County prosecutor charged appellant Raymond Elliott with one count of second-degree burglary. CP 71. The jury found Elliott guilty, and the court imposed a standard range sentence. CP 16-17, 36. Notice of appeal was timely filed. CP 1.

2. Substantive Facts

Elliott's girlfriend Jennifer Grichuhin testified she and Elliott found what they believed to be scrap metal in the parking lot of the Eagles Lodge. 4RP¹ 52-54. After enlisting some help, they loaded it into Elliott's car. 4RP 57, 67. Officer Alan Correa noticed them leaving the parking lot. 3RP 6.

Correa testified they were coming not from the Eagles parking lot, but from the lot belonging to Central Welding Supply, located next door. 3RP 6. The two premises share a parking lot and are separated only by a

¹ There are six volumes of Verbatim Report of Proceedings, referenced as follows: 1RP – Feb. 28, 2013; 2RP – Sept. 16, 2013; 3RP – Sept. 16, 2013 (Supplemental); 4RP – Sept. 17, 2013; 5RP – Sept. 18, 2013; 6RP – Oct. 4, 2013.

narrow alley. 3RP 33-34. Correa found their presence unusual because in his time working in that area, he had never seen activity at Central Welding at such an early hour. 3RP 7. He also noticed the car was visibly weighed down by a large piece of machinery sticking out of the trunk. 3RP 7.

Correa stopped the car to inquire. 3RP 8. Elliott explained he had taken what he believed to be scrap metal from the Eagles parking lot. 3RP 10. After Correa spoke to the other passengers, Elliott admitted he had asked them to lie and say that he had had the equipment for a couple of days. 3RP 11.

Officer Mau noticed a hole in the fence at Central Welding and contacted employee Jeremy Millett. 4RP 38, 39. Millett identified the item in Elliott's trunk as Central Welding's pressure washer. 3RP 39. The previous day, it had been on its rack inside the completely fenced area behind Central Welding, and Elliott had not been given permission to enter the premises or remove any items. 3RP 40, 42-43. Millett testified the pressure washer was never left in the Eagles parking lot or anywhere outside the fenced area, and the gate was locked the previous evening. 3RP 41, 43-44.

Crime scene tech Officer Ryan Hoirup collected pieces of fencing that had been cut and took photographs of the scene. 4RP 14-15, 21-25. Richard Wyant, from the Washington State Patrol Crime Lab testified he

was confident the fence pieces had been cut with the red diagonal cutters found under the front seat of Elliott's car. 4RP 94-96, 112-16.

Hoirup also found a footprint near the pressure washer's rack, but it bore no similarities to the shoes of Elliott or his companions. 4RP 25, 31, 34. Officer Mau also noticed what appeared to be drag-marks where the ground had been scraped just outside the hole in the fence. 4RP 38-39. They appeared to be recent because the scraped area was dry, while the surrounding ground was wet from recent rain. 4RP 39, 51. Grichuhin testified she was with Elliott the entire time, and neither of them went inside the fenced area. 4RP 58-59.

Elliott's offender score was based on the following criminal history:

Crime	Date of Sentence	Sentencing Court
VUCSA-Possession	1/13/05	Cowlitz County, WA
2 nd Deg. Burglary	1/13/05	Cowlitz County, WA
VUCSA – Possession (2 Counts)	1/13/05	Cowlitz County, WA
2 nd Deg. Possession of Stolen Property	5/6/05	Cowlitz County, WA
3 rd Deg. Rape of a Child	9/1/05	Cowlitz County, WA
VUCSA- Possession	9/8/05	Cowlitz County, WA
2 nd Deg. Burglary (2 Counts)		Columbia County, OR

CP 15. Elliott's attorney acknowledged receipt of certified copies of the prior convictions and agreed his offender score was 13. 2RP 22; 6RP 4. The certified copies do not appear to have been filed as part of the court's record.

C. ARGUMENT

THE COURT MISCALCULATED THE OFFENDER SCORE.

Based on the scoring rules under the Sentencing Reform Act, Elliott's offender score should be 12 points. The court committed legal error in calculating the offender score for each offense as 13 points. Elliott agreed to the offender score below, but the issue is not waived for appeal because waiver does not apply where a legal error results in a miscalculated offender score. State v. Crawford, 164 Wn. App. 617, 624, 267 P.3d 365 (2011). The case must be remanded for resentencing based on a correct score. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002).

The Sentencing Reform Act defines the standard sentence range based on the individual's offender score and the seriousness level of the offense. State v. Thomas, 150 Wn.2d 666, 670-71, 80 P.3d 168 (2003); RCW 9.94A.510. "The sentencing judge must calculate, in a mathematical fashion, an offender score for each offense. This score determines the sentencing range applicable to the offender." In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 6, 100 P.3d 805 (2004). Offender scores are reviewed de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

Elliott has only one current offense. The judgment and sentence lists six prior non-violent felonies that are not burglaries. CP 15. Each of these prior felonies contributes one point to the offender score. RCW 9.94A.525(7). Also listed are three prior convictions for second-degree burglary, each of which contributes two points to his offender score. RCW 9.94A.525(16). These are presumably the prior convictions the court found to exist, as required by RCW 9.94A.500: "If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist." The six non-violent felonies and three burglaries found by the court in the judgment and sentence add up to a total of 12 points, not 13.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). When a sentence has been imposed for which there is no authority in law, appellate courts have the power and the duty to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980).

Elliott did not waive the legal error in by agreeing to the offender score below. In general, a defendant cannot waive a challenge to a miscalculated offender score. State v. Wilson, 170 Wn.2d 682, 688, 244

P.3d 950 (2010) (citing Goodwin, 146 Wn.2d 861). A defendant can waive a challenge to an offender score only where the challenge is based on a factual issue within the trial court's discretion. Wilson, 170 Wn.2d at 689. "Waiver does not apply where the alleged sentencing error is a legal error." Crawford, 164 Wn. App. at 624.

Here, the question is purely legal/mathematical and is not based on any factual matter within the trial court's discretion. There was no factual dispute about the existence of prior convictions. This issue requires only a mathematically correct application of the scoring rules of the Sentencing Reform Act to the prior convictions found by the sentencing court.

"It is axiomatic that a sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score." State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). "[T]he remedy for a miscalculated offender score is resentencing using the correct offender score." State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). This case should be remanded for resentencing based on a score of 12.

Although the standard range is the same whether Elliott's score is 12 or 13, resentencing is still required. "[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. This is true even where the sentence imposed is actually within the correct standard range." Goodwin, 146 Wn.2d at 868

(internal citations omitted). Moreover, the court sentenced Elliott to 63 months, slightly more than the middle of the standard range of 51-68 months. CP 16-17. At sentencing, Elliott argued for the low end of the standard range. 6RP 5. Although the standard range does not change, the actual score may well affect the court's decision of where to sentence Elliott within that range. A lower score may have resulted in the court imposing significantly less than 63 months. Elliott is entitled to resentencing based on the correct offender score. Goodwin, 146 Wn.2d at 868.

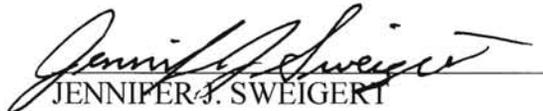
D. CONCLUSION

For the foregoing reasons, Elliott's sentence should be vacated and the case remanded for resentencing.

DATED this 12th day of May, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 71033-8-1
)	
RAYMOND ELLIOT,)	
)	
Appellant.)	

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 12TH DAY OF MAY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] RAYMOND ELLIOT
4822 S 252nd PL, #210
KENT, WA 98052

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF MAY 2014.

x *Patrick Mayovsky*

2014 MAY 12 PM 4:29
FILED
COURT OF APPEALS DIV 1
SEATTLE WASHINGTON