103992-1

Supreme Court No. _____
Court of Appeals No. 58233-3-II

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

JAKE WALTERS KOSKI,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND DECISION BELOW

Jake Walters Koski, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review, entered on December 24, 2025. The Court of Appeals denied Mr. Koski's motion to reconsider on February 18, 2025. Copies are attached.

II. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. A person who enters a guilty plea retains the right to be sentenced on the correct offender score. Because an erroneous sentence is unlawful, courts have an obligation to correct an erroneous offender score. But contrary to settled law, the Court of Appeals ruled that Mr. Koski waived his right to challenge his offender score when he entered a guilty plea and refused to ensure Mr. Koski was sentenced under a correct offender score. This Court should grant review to correct the Court of Appeals misunderstanding of the law and as a matter of substantial public interest.

2. Offenses that have the same victim, same intent, and were part of a continuous scheme over a short period of time are considered the same criminal conduct for sentencing purposes. In 2016, Mr. Koski used the same credit card, belonging to the same person, to make four small purchases within 30 hours at Home Depot and, through an *in re Barr* plea, was found guilty of four counts of criminal impersonation. When he was sentenced for a different crime in 2021, the sentencing court failed to conduct the same criminal conduct analysis of his prior offense. When he was sentenced again, the 2023 sentencing court erred by concluding that a prior determination had been made by the 2021 sentencing court that the 2017 charges were not the same criminal conduct. The Court of Appeals declined to reach this issue after erroneously finding Mr. Koski waived the issue by entering a guilty plea and failed to raise the issue at sentencing. This Court should grant review to address a sentencing court's obligation to

conduct a same criminal conduct analysis and as a matter of substantial public interest.

III. STATEMENT OF THE CASE

Mr. Koski suffered from severe back pain from working as a brick layer and carpenter. CP 22, RP 69. His pain was so severe it was apparent in his posture. RP 69. He was self-medicating when he was arrested and charged with possession with intent to deliver heroin. CP 3, 20. He immediately confessed and pleaded guilty. *Id*.

Mr. Koski is a loving father of two children. RP 30; CP 46. Because he was his children's primary caretaker, and incarcerating him for this offense would have devastated his children and family, the court entered a family sentencing alternative ("FOSA"). RP 28-29; CP 46-47, 49. Mr. Koski successfully complied with the terms of the FOSA from about September-December 2021, but he later had a positive drug test and the court revoked the FOSA. RP 65-66; CP 60, 64-71.

The court sentenced Mr. Koski to a prison-based drug offender sentencing alternative ("DOSA"). RP 81; CP 73. It imposed a prison sentence of 45 months and 45 months of community custody based on an offender score of seven. CP 73. Four of the seven points in Mr. Koski's offender score were from four 2017 convictions for criminal impersonation. CP 51-52, 76. The State had originally charged the criminal impersonation charges as a single count of second-degree possession of stolen property for his use of a person's credit card and three counts of third-degree theft from Home Depot. CP 76. As part of a *in re Barr* plea deal, the State dismissed these four charges and amended the information to charge four counts of criminal impersonation. CP 76.

In 2023, Mr. Koski filed a motion for resentencing. CP 75-81. He argued four points from his 2017 convictions were the same criminal conduct and should have counted as a single point when the court was calculating his DOSA revocation. *Id.* He argued the criminal impersonation offenses had the same

intent, the same victim, and were committed at the same location. CP 78-79. The four purchases also occurred at the same time and were part of a continuous scheme to use a person's credit card at Home Depot over a brief period of time which made it the same criminal conduct under RCW 9.94A.589(1)(a). CP 78-79.

The 2023 sentencing court disagreed, believing it was the parties' intent in 2017 to treat these as "separate and distinct acts" and scored each criminal impersonation conviction separately as four points in his offender score. CP 75; RP 90.

On appeal, Mr. Koski argued that the 2023 sentencing court erred in finding the offenses were not the same criminal conduct. The prosecution argued that he waived his right to challenge his offender score by entering a plea deal. The Court of Appeals agreed with the prosecution and held that Mr. Koski "waived his argument on appeal about his prior convictions being the same criminal conduct because he affirmatively acknowledged his offender score when he pleaded guilty to

possession with intent to distribute and did not raise the same criminal conduct issue at sentencing." Slip op. at 1. Mr. Koski moved for reconsideration but the court denied Mr. Koski's motion to reconsider without comment.

IV. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should accept review to decide whether a person who enters a guilty plea is prohibited from challenging their offender score even if it is erroneous.

The Court of Appeals concluded that Mr. Koski "waived the challenge to his sentence by affirmatively agreeing to his offender score and failing to raise the issue at sentencing." Slip op. at 4. This is incorrect.

a. *Mr. Koski's did not affirmatively agree to his offender score and did not waive his right to challenge a miscalculated offender score.*

A sentence is without authority of the Sentencing Reform Act if it is based on a miscalculated offender score. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). A defendant does not waive a challenge to a

miscalculated offender score unless the defense "affirmatively acknowledge[s] the criminal history." *State v. Cate*, 194 Wn.2d 909, 913, 453 P.3d 990 (2019). "[A] defendant's mere failure to object to the State's assertion of criminal history is not an affirmative acknowledgment amounting to a waiver of criminal history sentencing error." *State v. Lucero*, 168 Wn.2d 785, 788, 230 P.3d 165 (2010). Instead, a "waiver can be found where the alleged error involves an agreement to facts . . . or where the alleged error involves a matter of trial court discretion." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

Mr. Koski did not agree to his offender score simply by entering a guilty plea. Mr. Koski's lack of waiver is similar to *State v. Harris*, where the guilty plea form stated: "The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete." 148 Wn. App. 22, 29, 197 P.3d 1206

(2008). The Court of Appeals found that "the prosecuting attorney did *not* attach a statement of criminal history and Harris, therefore, did not waive his right to contest his criminal history by signing the plea agreement containing this clause." *Id.* Like *Harris*, the guilty plea form alleged that the State's statement of criminal history would be attached and that unless Mr. Koski attached a different statement, he "agree[d] that the prosecuting attorney's statement is correct and complete." CP 4. However, there was no statement of criminal history attached to the statement of defendant on plea of guilty. CP 3-13. Therefore, like *Harris*, Mr. Koski did not waive his right to contest his criminal history.

This case is unlike *State v. Nitsch*, in which the defendant argued the trial court should have "sua sponte, found his two crimes to be the same criminal conduct." 100 Wn. App. 512, 520, 997 P.2d 1000 (2000). In *Nitsch*, the defendant did not "merely remain silent" but "[r]ather filed a presentence report wherein he affirmatively alleged his standard range" based on

his own calculation of his offender score. *Id.* at 522. Here, Mr. Koski did not file a presentence report. He did not affirmatively calculate his offender score. Rather, he simply acknowledged that he understood the State was alleging his offender score was a 7 by signing the statement of defendant on plea of guilty. CP 4.

Similarly, during his colloquy with the trial court, Mr. Koski did not affirmatively acknowledge his offender score, but only affirmed his understanding of the allegations made by the State. The court told Mr. Koski:

> This says your offender score is 7. Your standard range is 60 months to 120 months in prison. It also carries 12 months of community custody with a – and has a statutory maximum penalty of 10 years in prison and a $3,000 fine. Do you understand those things?

RP 16. Mr. Koski responded "Yes," indicating that he understood the allegations written in the plea form; not that he agreed with them or that they were correct. RP 16.

Therefore, while Mr. Koski did enter a guilty plea, he did not affirmatively acknowledge his offender score and did not waive his right to challenge a miscalculated offender score.

b. Mr. Koski challenged his miscalculated offender score; and the trial court erroneously denied his request to be sentenced under a correct score.

Mr. Koski argued his offender score was incorrect. CP 75-81, 86; RP 89. He alerted the court to the miscalculated offender score through a motion for resentencing. *Id.* The court considered the evidence and arguments regarding the miscalculated offender score, ultimately ruling the four criminal convictions should count independently. CP 86, RP 89-90.

Mr. Koski explained the four charges for criminal impersonation had originally been charged as a single count of second-degree possession of stolen property for his use of a person's credit card and three counts of third-degree theft. CP 76. Because they involved the same victim, the same location, over a small window of time, they were part of a single scheme in furtherance of the same intent. This satisfies the definition of

same criminal conduct. The trial court denied Mr. Koski's request to treat these offenses as same criminal conduct by surmising that perhaps the parties had intended them to be counted separately. But no such agreement appears anywhere in the record. The court had an obligation to consider whether the prior convictions should be treated as the same criminal conduct when a request is made at any sentencing hearing. RCW 9.94A.525(5)(a)(i).

Therefore, the trial court's analysis and application of the laws to Mr. Koski's situation is squarely at issue on appeal and should have been reviewed by the Court of Appeals. This Court should accept review and correct this misapplication of the law as this is an issue of substantial public interest.

2. This Court should grant review because the trial court applied an incorrect same criminal conduct analysis resulting in a miscalculated offender score.

The Court of Appeals declined to reach the issue of whether Mr. Koski's use of the same person's credit card at the same store to make four purchases in a 30 hour period constitute same criminal conduct. Slip op. at 8. However, this Court should accept review as this case raises a serious question about the plain language interpretation of RCW 9.94A.589(1)(a) and a sentencing court's obligation under RCW 9.94A.525(5)(a)(i).

"When a trial court in a subsequent case calculates a defendant's offender score, it must address whether the prior offenses constitute the same criminal conduct." *State v. Valencia*, 2 Wn. App. 2d 121, 125, 416 P.3d 1275 (2018). A sentencing court is required to **"**determine with respect to other prior adult offenses for which sentences were served concurrently . . . 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)." *Valencia*, 2 Wn. App. 2d at 125 (citing RCW 9.94A.525(5)(a)(i)). If a previous sentencing court found they encompassed the same criminal conduct, that decision is binding. *Id.*

If the prior sentencing court did not make the finding that the two offenses were the same criminal conduct, "but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must independently evaluate whether those prior convictions 'encompass the same criminal conduct' and, if they do, must count them as one offense." *State v. Williams*, 176 Wn. App. 138, 141, 307 P.3d 819 (2013), *aff'd,* 181 Wn.2d 795, 336 P.3d 1152 (2014).

When offenses are "part of a continuous, uninterrupted sequence of conduct over a very short period of time" they occur at the same time for sentencing purposes. *Valencia*, 2 Wn. App. 2d at 126 (citing *Porter*, 133 Wn.2d at 183). When the conduct was part of the "same scheme, with the same criminal objective" independent actions over the course of time

can be considered the same criminal conduct. *State v. Calvert*, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995).

Here, Mr. Koski used the same credit card, belonging to the same person, to make several small transactions at the same location. They were part of the same scheme with the same criminal objective. Despite this, the 2023 sentencing court scored these four offenses as four points in Mr. Koski's offender score calculation. RP 89-90. The 2023 sentencing court considered three primary considerations in this determination: (1) that the amended the information charged the acts as "separate and distinct from" each other, (2) the amended information "listed four crimes with a specified date and time" with a sentencing recommendation for each count, and (3) that in the 2017 *in re Barr* plea, the State noted his offender score was a seven. RP 89. The sentencing court found these notations showed an "intent" for the crimes to be "treated, at all times, as separate and distinct from each other." RP 90. This was a mistaken application of the law.

Rather than attempt to discern the "intent" of the previous courts, the sentencing court had an obligation to "independently evaluate whether those prior convictions 'encompass the same criminal conduct' and, [if it determined that they do], must count them as one offense." *Williams*, 176 Wn. App. at 141.

The Court of Appeals refused to address the issue. Slip op. at 8. This Court should accept review to correct this misapplication of the same criminal conduct analysis, which resulted in a miscalculated offender score.

V. CONCLUSION

The trial court failed to recognize its discretion and, while failing to conduct an independent same criminal conduct analysis, sentenced Mr. Koski based on a miscalculated offender score. The Court of Appeals then erred in refusing to address this issue by improperly finding that Mr. Koski waived this right. Review should be granted to correct this incorrect

application of the law, which is also a matter of substantial public interest. RAP 13.4(b)(1), (4).

This document contains 2497 words and complies with RAP 18.17.

Respectfully submitted this 20th day of March, 2025.

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Filed
Washington State
Court of Appeals
Division Two

December 24, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAKE WALTERS KOSKI, Appellant.	No.58233-3-II UNPUBLISHED OPINION

MAXA, J. – Jacob Koski appeals his sentence for a 2021 conviction of possession of heroin with intent to deliver, imposed after the trial court revoked his family offender sentencing alternative (FOSA). He claims that the trial court should have treated his four 2017 first degree criminal impersonation convictions as the same criminal conduct when calculating his offender score. Counting those convictions separately resulted in an offender score of 7 instead of 4. Koski also raises two issues in a statement of additional grounds (SAG). Finally, Koski argues that the $500 crime victim penalty assessment (VPA) must be stricken from the judgment and sentence.

We hold that (1) Koski waived his argument on appeal about his prior convictions being the same criminal conduct because he affirmatively acknowledged his offender score when he pleaded guilty to possession with intent to distribute and did not raise the same criminal conduct issue at sentencing; (2) we cannot consider Koski's SAG claims because they rely on matters

outside the record; and (3) as the State concedes, this case should be remanded to allow Koski to file a motion under RCW 7.68.035(4) to strike the VPA.

Accordingly, we affirm Koski's sentence, but we remand to allow Koski to file a motion under RCW 7.68.035(4) to strike the VPA.

FACTS

2017 Convictions

On April 25, 2016, Koski used another person's credit card for purchases at Home Depot at 12:47 PM and 4:32 PM. On April 26, 2016, he used the same credit card at Home Depot again for purchases at 6:15 PM and 6:19 PM.

In 2016, Koski was charged with second degree possession of stolen property and three counts of third degree theft. Koski subsequently entered into a plea agreement in which he agreed to plead guilty to four counts of first degree criminal impersonation. He also agreed that his offender score was 7. The related amended information expressly stated that the first two purchases were separate and distinct from each other and the third and fourth purchases were separate and distinct from each other.

Koski then signed a guilty plea statement in which he pleaded guilty to all four counts of first degree criminal impersonation, and acknowledged that his offender score was 7. The trial court entered a judgment and sentence stating that the offender score for each count was 7, which included points for three prior convictions and the three other current offenses.[1] Koski did not raise any issue regarding calculation of his offender score. The trial court sentenced Koski to 45 days confinement for each count, to run concurrently.

[1] An additional point was added because Koski was on community custody when the offenses were committed.

2021 Conviction

In 2021, Koski pleaded guilty to possession of a controlled substance with intent to deliver. In his guilty plea statement, Koski stated that he understood that his offender score was 7 with a standard sentencing range of 60+ to 120 months. During his guilty plea hearing, Koski affirmed orally that his offender score was 7.

The trial court entered a judgment and sentence stating that the offender score was 7, which included points for the four first degree criminal impersonation offenses, with a standard sentencing range of 60+ to 120 months. Koski did not raise any issue regarding calculation of his offender score. The court sentenced Koski to 12 months of community custody under a FOSA. The trial court also imposed a $500 VPA. The trial court did not identify Koski as indigent in the judgment and sentence.

In February 2022, the Department of Corrections (DOC) filed a notice of a FOSA violation in which Koski stipulated that he had consumed methamphetamine and heroin. In April 2022, DOC filed another notice of a FOSA violation, alleging that Koski had consumed various controlled substances. DOC recommended that the trial court revoke his FOSA sentence.

In May 2022, the trial court entered an order revoking Koski's FOSA. The court stated that it would sentence Koski to a prison-based drug offender sentencing alternative. The prosecutor stated that Koski's sentence would be based on half of the midpoint of the standard sentencing range, which was 90 months. Koski agreed with that calculation. Therefore, the court sentenced Koski to 45 months in confinement and 45 months of community custody. Koski did not raise any issue regarding calculation of his offender score.

Motion for Resentencing

In March 2023, Koski moved the trial court for resentencing to correct an error in the calculation of his offender score. He argued that the trial court improperly calculated his offender score because his four first degree criminal impersonation convictions were the same criminal conduct under RCW 9.94A.525(5)(a)(i) and should count as one offense for sentencing. Therefore, he claimed that his offender score should have been calculated as 4 with a standard sentencing range of 20+ to 60 months. With that standard sentencing range, his DOSA sentence should have been half of the 40 month midpoint or 20 months.

The trial court denied the motion. The court stated, "Everything by the Court shows it was the intent of the State and the intent of the Defense and the intent of the Court that these crimes were treated, at all times, as separate and distinct from each other." Rep. of Proc. at 90. Therefore, the court concluded that Koski had not met his burden of showing that the four first degree criminal impersonation convictions constituted the same criminal conduct.

Koski appeals the trial court's denial of his motion for resentencing and the imposition of the $500 VPA.

ANALYSIS

A. SAME CRIMINAL CONDUCT UNDER RCW 9.94A.525(5)(a)(i)

Koski argues that the trial court should have granted his motion for resentencing because his four first degree criminal impersonation convictions constituted the same criminal conduct. The State argues that Koski waived the challenge to his sentence by affirmatively agreeing to his offender score and failing to raise the issue at sentencing. We agree with the State.

1. Legal Principles

Inherent in the sentencing scheme of the Sentencing Reform Act of 1981, chapter 9.94A RCW, "is a presumption that two or more current offenses and all prior offenses are counted separately in calculating an offender score." *State v. Jackson*, 28 Wn. App. 2d 654, 662, 538 P.3d 284 (2023), *review denied*, 2 Wn.3d 1027 (2024).

However, if the trial court "enters a finding that some or all of the current offenses encompass the same criminal conduct," those current offenses are counted as one offense for purposes of calculating a defendant's offender score. RCW 9.94A.589(1)(a). Similarly, prior offenses that were found to encompass the same criminal conduct must be counted as one offense. RCW 9.94A.525(5)(a)(i).[2] "The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently . . . 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)." RCW 9.94A.525(5)(a)(i).

Under RCW 9.94A.589(1)(a), two or more offenses constitute the same criminal conduct when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Unless all three elements are present, the offenses are not the same criminal conduct. *State v. Canter*, 17 Wn. App. 2d 728, 741, 487 P.3d 916 (2021). The defendant has the burden of showing that the offenses constitute the same criminal conduct. *Id.*

We review the trial court's same criminal conduct determination for an abuse of discretion or misapplication of law. *Id.* Under this standard, a trial court abuses its discretion if the record supports only one conclusion regarding same criminal conduct and the court makes a

[2] RCW 9.94A.525 has been amended since the events of this case transpired. Because these amendments do not impact the statutory language we rely on, we refer to the current statute.

contrary ruling. *Id.* at 742. But where "the record adequately supports either conclusion, the matter lies in the court's discretion." *Id.*

2. Waiver

The State argues that Koski waived his argument about the calculation of his offender score. We agree.

a. Legal Principles

The general rule is that "a defendant cannot waive a challenge to a miscalculated offender score." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). However, there is a significant exception to this rule: "While waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *Id.*

In *State v. Nitsch*, the court held that a defendant's affirmative acknowledgement that the offender score was correctly calculated and the failure to raise a factual dispute regarding same criminal conduct issue constitutes a waiver of a challenge to the offender score on appeal. 100 Wn. App. 512, 522-23, 997 P.2d 1000 (2000). The court noted that "[a]pplication of the same criminal conduct statute involves both factual determinations and the exercise of discretion." *Id.* at 523. Waiver was appropriate because of the defendant's "failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion." *Id.* at 520.

The Supreme Court adopted the rule and reasoning of *Nitsch* both in *Goodwin*, 146 Wn.2d at 875, and in *In re Personal Restraint of Shale*, 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007). The court in *Shale* stated,

> The statement of defendant on plea of guilty is signed by Shale in each of the seven cases, and those documents acknowledge the calculation of the offender score. Further, the record shows that Shale failed to ask the court to make a discretionary call of any factual dispute regarding the issue of "same criminal conduct" and he did not contest the issue at the trial level. Accordingly, we hold that Shale's offender scores are not now subject to challenge.

160 Wn.2d at 496.

Nitsch, *Goodwin*, and *Shale* all involved appeals regarding whether *current* convictions constituted the same criminal conduct under RCW 9.94A.589(1)(a). The issue here is whether then trial court should have found that the four *prior* first degree criminal impersonation convictions constituted the same criminal conduct under RCW 9.94A.525(5)(a)(i).

In *Jackson*, 28 Wn. App. 2d 654, Division One of this court addressed that issue. In that case, the defendant claimed that the trial court erred by sentencing him without conducting a same criminal conduct analysis of his prior convictions. *Id.* at 657. However, the defendant did not argue at sentencing that any of his prior offenses constituted the same criminal conduct. *Id.*

The court emphasized that there is a presumption that all prior offenses should be counted separately in calculating the offender score. *Id.* at 662. Therefore, the defendant has the burden of establishing that any prior convictions encompassed the same criminal conduct. *Id.* at 663. The court held that when the defendant makes no attempt to meet that burden and fails to request that the trial court exercise its discretion to find same criminal conduct, the trial court does not err by giving effect to the presumption that all prior offenses are counted separately. *Id.* The court expressly rejected the argument that RCW 9.94A.525(5)(a)(i) requires the trial court to sua sponte address same criminal conduct even when the defendant does not raise the issue. *Id.* at 663.

The court noted that its holding was consistent with the rule stated in *Nitsch* and *Shale* for current offenses. *Id.* at 664-65. The court stated, "Pursuant to that authority, a defendant may

not assert for the first time on appeal that a sentencing court erred by not considering whether two or more current convictions encompass the same criminal conduct." *Id.* at 665.

b. Analysis

Here, the trial court based Koski's initial FOSA sentence on his offender score of 7. Koski affirmatively acknowledged his offender score and the standard range sentence both in writing and in his oral plea colloquy with the trial court. And Koski did not assert that his prior first degree criminal impersonation convictions constituted the same criminal conduct.

Koski then violated the terms of his FOSA sentence, and was resentenced based on the offender score and standard sentencing range to which he agreed in his initial guilty plea. And his counsel agreed at resentencing that the DOSA sentence would be based on that same standard sentencing range. Again, Koski did not assert that his prior first degree criminal impersonation convictions constituted the same criminal conduct.

Koski argued for the first time in his motion for resentencing that his prior first degree criminal impersonation convictions constituted the same criminal conduct. But that motion came 10 months after his FOSA sentence was revoked and a prison-based DOSA sentence was imposed. By that time, he already had waived his same criminal conduct argument.

We note that the trial court addressed and rejected Koski's same criminal conduct argument on the merits. However, we can affirm on any basis supported by the record. *State v. Gudgell*, 20 Wn. App. 2d 162, 183, 499 P.3d 229 (2021).

Accordingly, we hold that Koski waived the argument that the trial court improperly calculated his offender score because his prior convictions allegedly were the same criminal conduct.

B. SAG CLAIMS

Koski asserts in his SAG that (1) his trial counsel was ineffective for failing to communicate what his sentence would be after violating his FOSA conditions; and (2) DOC officers responsible for supervising his FOSA sentence improperly showed bias against him, resulting in his FOSA revocation.

But Koski's assertions rely entirely on matters outside the record. As a result, we cannot consider them in this direct appeal. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). These assertions are more properly raised in a personal restraint petition. *Id.*

C. CRIME VICTIM PENALTY ASSESSMENT

Koski argues that the $500 VPA should be stricken from the judgment and sentence under the recently amended RCW 7.68.035(4). The State does not agree that the VPA should be stricken but concedes that this case should be remanded for the trial court to reassess imposition of the VPA under RCW 7.68.035(4). We agree with the State.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). RCW 7.68.035(4) states that upon a defendant's motion, the trial court shall strike any VPA imposed before July 1, 2023 if the defendant is indigent as defined in RCW 10.01.160(3).

We remand to allow Koski to file a motion pursuant to RCW 7.68.035(4) to have the trial court to determine whether the VPA should be stricken.

CONCLUSION

We affirm Koski's sentence, but we remand to allow Koski to file a motion under RCW 7.68.035(4) to strike the VPA.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

VELJACIC, A.C.J.

LEE, J.

Filed
Washington State
Court of Appeals
Division Two

February 18, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAKE WALTERS KOSKI, Appellant.	No. 58233-3-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the court's December 24, 2024 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Veljacic, Lee

FOR THE COURT:

Maxa, J.

MAXA, J.

WASHINGTON APPELLATE PROJECT

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