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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31168-6-III

STATE OF WASHINGTON, Respondent,

v.

ELVIS CAMILLO RENTERIA LOPEZ, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Elvis Lopez was incarcerated for nearly two years while his case awaited trial. He never executed a speedy trial waiver and repeatedly objected to multiple requests for continuances, primarily by his own counsel, throughout the case. The inordinate delays continued after the jury returned a verdict of guilty, when his attorney's personal and professional difficulties delayed the sentencing hearing 131 days after the verdict was returned and ultimately caused a conflict of interest to develop that required his attorney to withdraw. Lopez finally proceeded to sentencing with a new attorney who had only represented him in the case for approximately two weeks. At sentencing, the trial court erroneously included in his offender score a conviction for a class C felony that, based on the evidence presented by the State, should have washed out.

On appeal, Lopez contends that he was deprived of his rule-based and constitutional rights to speedy trial and sentencing, and that he received ineffective assistance of counsel when his attorney repeatedly delayed the case over his objection until the delays became so substantial that counsel was forced to withdraw due to the conflict of interest. The delays provided the State with an opportunity to generate additional evidence to be used against Lopez at trial. His convictions should be reversed on these grounds. Moreover, the sentence imposed by the trial

court is based upon an incorrectly calculated offender score based upon the evidence in the record, and exceeds the maximum term that could be imposed had the offender score been correctly calculated. Because the sentence exceeds the trial court's authority and is contrary to law, the sentence should be vacated.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in failing to set Lopez's case for trial within the time for trial under the speedy trial rule.

ASSIGNMENT OF ERROR 2: The trial court violated Lopez's constitutional right to a speedy trial.

ASSIGNMENT OF ERROR 3: The trial court violated Lopez's rights to speedy sentencing.

ASSIGNMENT OF ERROR 4: Lopez's trial counsel provided ineffective assistance of counsel by failing to act diligently in the conduct of the case and in creating a conflict of interest between counsel's personal and professional difficulties and his client's interest in a speedy trial.

ASSIGNMENT OF ERROR 5: The sentence imposed by the trial court lacks a sufficient factual basis and exceeds the range that can be imposed based on the evidence in the record.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When the trial court granted multiple continuances that extended the time for trial 227 days past the date Lopez was found competent and 281 days from his original commencement date (excluding time for competency hearings), does good cause exist for the continuances in light of the defendant's repeated objections, the reasons asserted, and the trial court's failure to ensure that Lopez was properly represented by counsel? NO.

ISSUE 2: When the trial court granted multiple continuances that resulted in Lopez being brought to trial nearly two years after his arrest, despite Lopez's repeated efforts to assert his speedy trial rights and his continual pretrial incarceration, is there sufficient evidence of oppressive delay that violates Lopez's constitutional right to a speedy trial? YES.

ISSUE 3: When the trial court continued Lopez's sentence for more than six months after the verdict was returned and the delays resulted in a conflict of interest developing between defense counsel and his client, was Lopez deprived of his right to a speedy sentencing? YES.

ISSUE 4: When defense counsel repeatedly requests continuances over his client's objection due to personal conflicts and to allegedly pursue

theories that never materialized in any way, and fails to timely obtain permission to substitute into the case and to clarify which members of his firm are providing representation to the defendant, and as a result of the repeated delays the defendant is brought to trial 281 days after the commencement date in the case, and as a result of the delay the State is able to develop additional evidence to present against the defendant at trial, is counsel's performance constitutionally ineffective? YES.

ISSUE 5: Where the record at sentencing fails to show the defendant's last date of release from custody on a prior Class C felony and more than five years have elapsed since the date of judgment, is it error for the trial court to include the conviction in Lopez's offender score instead of excluding it under the "washout" provisions of the Sentencing Reform Act? YES.

IV. STATEMENT OF THE CASE

Elvis Lopez was arrested and charged with multiple counts on April 16, 2010. CP 1. An order staying proceedings for a competency evaluation was entered on June 9, 2010. CP 10. At this time, 54 days had elapsed in the time for trial.

On August 5, 2010, the trial court received and filed the report of Dr. Nathan Henry of Eastern State Hospital, in which Dr. Henry

concluded that Lopez was competent to stand trial and sane at the time of the crime. CP 19, 20, 28.

Original defense counsel, Gary Metro, orally advised the court on August 28, 2010 that a defense expert would be hired. RP (Munoz) 10/25/10 at 4.¹ After a delay of two months, Lopez retained Matthew Rutt, who appeared on October 27, 2010; however, no order substituting counsel was entered. RP (McLaughlin) 10/27/10 at 6. After another five months elapsed with no apparent progress in the case, Rutt moved to withdraw and the court appointed Samuel Swanberg to represent Lopez. RP (Adams) 3/30/11 at 4, 9. Another two months elapsed before the defense expert eventually filed a report concurring in the findings of Dr. Henry. RP (Munoz) 5/25/11 at 10; CP 44-49. Nevertheless, an order finding Lopez competent to stand trial was not entered until over one year after the original stay was entered, on July 22, 2011. CP 43. Trial was set for September 12, 2011, 52 days after entry of the competency order. RP (McLaughlin) 7/22/11 at 30. Excluding the time tolled from entry of the stay order and entry of the competency order, the September trial date was 106 days after Lopez's commencement date.

¹ There are numerous verbatim reports of proceedings in the present case, prepared by different court reporters with non-consecutive dates included. For purposes of clarity, throughout this brief I will refer to volumes by the name of the court reporter who prepared the transcript, the date of the hearing cited and the page number of the volume containing that hearing date.

On August 17, 2011, Scott Etherton appeared as new counsel, but once again, no order substituting counsel was entered. RP (Lang) 8/17/11 at 2. Nevertheless, the trial date was continued to October 3, 2011 and again to October 17, 2011. RP (Lang) 8/17/11 at 4; RP (King) 9/7/11 at 6. On September 21, 2011, Etherton requested an extensive continuance of 45-60 days, over Lopez's objection. RP (McLaughlin) 9/21/11 at 5-6. The trial court granted the continuance and reset the trial for December 12, 2011. RP (McLaughlin) 9/21/11 at 6-7. As a result of the continuance, the new trial date was set 143 days from the entry of the competency order.

On October 19, 2011, Lopez objected to another request for continuance by his counsel and moved for dismissal for misconduct. The trial court did not entertain Lopez's motion. RP (Lang) 10/19/11 at 9-10.

On November 30, 2011, Etherton informed the court that he had surgery scheduled that conflicted with the December 12, 2011 trial date. Etherton stated that he would be unavailable for 4-6 weeks to recover. RP (King) 11/30/11 at 9. He requested another continuance, over Lopez's objection. RP (King) 11/30/11 at 10-11. The trial court initially denied Etherton's motion; however, on December 7, 2011, the trial court reversed itself and granted the continuance, resetting the trial to March 5, 2012. RP

(King) 11/30/11 at 15; RP (King) 12/7/11 at 15. The new trial date was 227 days after the competency order was entered, 281 days from the original commencement date (excluding the stay period for competency proceedings) and 84 days after the December trial date.

Also on December 7, 2011, the trial court raised concerns over who was representing Lopez in light of the fact that a substitution had never been filed in the case. RP (King) 12/7/11 at 10-12. Etherton filed a "Substitution of Counsel" that same date, signed by himself and Swanberg. CP 50. The substitution was not signed by the court and did not request leave of the court for the substitution.

On March 2, 2012, the trial court continued the trial date, over Lopez's objection, to March 19, 2011 due to sickness of the prosecuting attorney. RP (McLaughlin) 3/2/12 at 8-9. Trial originally proceeded on March 19, 2012, but a mistrial was declared the following day on Lopez's motion after one of the State's law enforcement witnesses testified in front of the jury that Lopez did not want to go back to prison at the time he was apprehended. RP (McLaughlin) 3/19/12 at 2, 3/20/12 at 83.

After the mistrial, the trial court set a new trial date of April 4, 2012 and continued that trial date, over Lopez's objection, to April 23, 2012 due to the unavailability of a State witness. RP (Munoz) 3/21/12 at

19; RP (King) 4/4/12 at 26-27. The jury convicted Lopez on all counts and found all of the enhancements to be true, with the exception of the domestic violence enhancements. CP 140-50.

The trial court scheduled sentencing for June 7, 2012, 42 days after the verdict was returned. RP (Munoz) 6/7/12 at 476. On June 7, Etherton requested a continuance of the sentencing over Lopez's objection and the sentencing hearing was stricken. RP (Munoz) 6/7/12 at 476-78. On the specially set date of July 9, Etherton did not appear due to car trouble and the trial court continued the sentencing, over Lopez's objection, to August 7, 2012. RP (King) 7/9/12 at 14-16. When Etherton did not appear at the July 9 hearing, Lopez filed a pro se motion to dismiss for speedy trial violations. RP (King) 7/9/12 at 16; CP 153. Lopez supplemented his motion on August 7, 2012. CP 157.

On August 7, 2012, Etherton again requested a continuance of the sentencing based on a variety of personal and professional issues. RP (Munoz) 8/7/12 at 484; CP 154-55. The trial court questioned whether Etherton had a potential conflict of interest with Lopez that would preclude his representation. RP (Munoz) 8/7/12 at 486-89. On August 15, 2012, Etherton moved to withdraw based on the conflict of interest and the trial court appointed Scott Johnson to represent Lopez. RP (McLaughlin)

8/15/12 at 32-33. The sentencing hearing was eventually held on September 4, 2012, 131 days after the verdict was returned. RP (Munoz) 9/4/12 at 495.

The trial court imposed 132 months' imprisonment based on an offender score of "8", which included a possession of a controlled substance charge and a robbery charge for which Lopez was sentenced on August 25, 2000 and no subsequent history. CP 164, 166, 169. The score also included a juvenile adjudication of theft in the first degree with a disposition date of August 26, 2000. CP 174. A note on the acknowledgment states, "Aslt 4 08/05/10 keeps Poss C.S. from washing." Lopez signed an acknowledgment of the convictions, which stated, "I agree that the above criminal history is true and accurate." CP 174. Lopez now appeals. CP 182.

V. ARGUMENT

A. The trial court violated Lopez's right to a speedy trial under the rules of court.

The determination of whether a defendant's time for trial has elapsed requires application of the court rules to the particular facts of the case and is, therefore, reviewed *de novo*. *State v. Swenson*, 150 Wn.2d 181, 186, 75 P.3d 513 (2003). CrR 3.3(h) provides that, subject to

specifically enumerated exceptions, an incarcerated defendant's trial must begin within 60 days of arraignment, or the case must be dismissed with prejudice. Among the rule-based exceptions to the speedy trial rule include competency proceedings, as to which the time from the order for the competency evaluation is ordered and the trial court enters a written order finding the defendant to be competent. CrR 3.3(e)(1). Likewise, periods during which the trial court has granted a continuance are excluded from the rule. CrR 3.3(e)(3). In addition, if any period of time is excluded under these exceptions, the time for trial does not expire sooner than thirty days after the end of the excluded period. CrR 3.3(b)(5).

The trial setting of September 12, 2011 was 106 days from Lopez's arraignment, excluding the period from the order for a competency evaluation on June 9, 2010 and the order finding Lopez competent to stand trial on July 22, 2011. But Lopez did not object to the September 12, 2011 trial setting within ten days and therefore lost his right to object to that trial date. CrR 3.3(d)(3). Nevertheless, the September 12, 2011 date is treated under the rule as the last allowable date for trial subject only to the rule's provisions for excluded periods and/or resetting the commencement date. CrR 3.3(d)(4).

On August 17, 2011, the trial court continued the trial to October 3, 2011 at Etherton's request. "The decision to grant or deny a motion for continuance rests within the sound discretion of the trial court," which discretion is abused when the trial court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Saunders*, 153 Wn. App. 209, 216, 220 P.3d 1238 (2009) (quoting *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)). A continuance may be granted upon a finding that additional time is required in the administration of justice and the defendant will not be substantially prejudiced. *State v. Williams*, 104 Wn. App. 516, 521-22, 17 P.3d 648 (2001) (citing CrR 3.3(h)(2)).

In itself, granting a continuance over a defendant's objection to allow defense counsel more time to prepare for trial is not an abuse of discretion. *Williams*, 104 Wn. App. at 523 (citing *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984)). But courts have acknowledged that continuance requests must be considered in light of counsel's duty to abide by the client's decision as to the objectives of representation. *Saunders*, 153 Wn. App. at 217-18. In *Saunders*, where three continuances were granted over the defendant's objections without an adequate basis or reason articulated, it was an abuse of discretion that required dismissal of the charges under the speedy trial rule. *Id.* at 220-21.

In the present case, after the trial date of September 12, 2011 was set, the trial court continued the trial over Lopez's objection four times, once due to the illness of the prosecuting attorney and three times at defense counsel's request. On September 21, 2011, defense counsel requested a 60 day continuance to review discovery and prepare for trial. RP (McLaughlin) 5/19/10 at 5. As early as November 2, 2011, the trial court observed that no formal appearance had been entered and there was a dispute as to who Lopez's attorney actually was. RP (King) 11/2/11 at 3. On November 30, 2011, defense counsel advised the court that since the trial date was set, he had a major surgery scheduled that would take place the same week as Lopez's trial and would require between four and eight weeks for recovery. RP (King) 4/21/10 at 9. At that time, defense counsel represented that both he and another attorney at his firm had signed the notice of appearance, but he had served as lead counsel. RP (King) 4/21/10 at 11-12. But no notice of appearance or substitution was entered in the case until December 7, 2011. CP 50.

As a result of the confusion over Lopez's representation, the trial court initially denied the continuance. RP (King) 4/21/10 at 12. But at the next hearing date on December 7, 2011, defense counsel argued that there was a need for additional psychological testing and evaluation and that

new discovery had recently been provided.² RP (King) 8/4/10 at 6-8. The State represented that if the trial proceeded as scheduled, it would not offer the newly discovered evidence. RP (King) 8/4/10 at 9. The trial court continued to question defense counsel as to who was actually representing Lopez and observed that no formal notice of appearance had been entered before that day. RP (King) 8/4/10 at 10-12. Nevertheless, the trial court granted the continuance “of a time reasonably necessary for you to explore the new discovery and get this case ready for trial.” RP (King) 8/4/10 at 14. The new trial date was set for March 5, 2012, an extension of 84 days. RP (King) 8/4/10 at 15.

The continuance was an abuse of discretion for two reasons. First, a continuance to explore mental health defenses when the case was already stayed for over one year for mental health evaluations is not convincing. Neither is a nearly three month continuance to evaluate new evidence that the State has stipulated will not be offered in light of the late discovery.

Second, and more substantial, is the fact that for nearly four months, the trial court abdicated its responsibility to ensure Lopez was represented by counsel. Under CrR 3.1(e), once a criminal matter is set

² It should be noted that no further competency proceedings were pursued and no diminished capacity defense was presented at trial. See RP (Munoz) 4-25-12 at 239.

for trial, “no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown.” No written consent of the court is set forth in the record permitting the withdrawal of Swanberg at any point. And while the retaining of private counsel is presumably good cause to permit withdrawal of an appointed attorney, the present case, where private counsel did not timely appear and where the failure to document counsel’s appearance resulted in ongoing confusion about who was actually represented Lopez, surely does not.

“[I]f ‘administration of justice’ can be invoked at any time to grant a continuance, then ‘there is little point in having the speedy trial rule at all.’” *State v. Nguyen*, 131 Wn. App. 815, 821, 129 P.3d 821 (2006) (quoting *State v. Adamski*, 111 Wn.2d 574, 580, 761 P.2d 321 (1988)). Here, the continuance cannot be sanctioned in light of the mismanagement of Lopez’s defense. While a scheduled surgery may be grounds for a continuance – although it is unclear when counsel became aware of the conflict – in the present case, where Lopez’s attorney was not even clearly identified and approved by the court, the continuance did not promote the efficient administration of justice but rather served as a reaction to poor organization and oversight and lack of compliance with the court rules.

Lopez consistently and repeatedly objected to further continuances of his trial. If the time for trial has passed and the defendant has properly objected, the court has no discretion but must dismiss the charges with prejudice. *Swenson*, 150 Wn.2d at 186-87. Because the trial court abused its discretion in granting the continuance to March 5, 2012, Lopez's time for trial expired on February 10, 2012. The State having failed to timely bring him to trial, under CrR 3.3(h), the charges must be dismissed with prejudice.

B. The trial court violated Lopez's constitutional right to a speedy trial.

A claim that a defendant has been denied constitutional rights is reviewed *de novo*. *State v. Iniguez*, 167 Wn.2d 276, 280, 217 P.3d 768 (2009). The Sixth Amendment to the U.S. Constitution and Article I, Section 22 of the Washington Constitution guarantee the defendant the right to a speedy public trial. *Iniguez*, 167 Wn.2d at 281-82. Violation of a defendant's constitutional right to a speedy trial requires dismissal of the charges with prejudice. *Id.* at 282 (citing *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972)).

The first inquiry is whether the length of the delay is presumptively prejudicial. *Barker*, 407 U.S. at 530. This inquiry is

necessarily dependent on the circumstances of each case. *Id.* at 530-31. Here, Lopez was imprisoned for nearly two years before his case was initially brought to trial. Over a year of that time was the result of mental health evaluations, which were continued from September 15, 2010 until June 1, 2011, solely for the purpose of obtaining a written report from a defense expert. There was extensive confusion about who was actually representing Lopez after August 17, 2011. And the grounds cited by the trial court for the trial continuance from December 12, 2011 to March 5, 2012 – namely, counsel’s stated need to further investigate competency and a diminished capacity defense – never materialized in any readily apparent way. Under the facts of this case, the delay was far longer than necessary and is presumptively prejudicial under *Barker*.

Once the delay is determined to be presumptively prejudicial, the court then considers a number of factors to determine if a constitutional violation has occurred. *Iniguez*, 167 Wn.2d at 283. The first factor evaluates the extent to which the delay stretches beyond the bare minimum needed to trigger judicial evaluation of the claim. *Doggett v. U.S.*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L.Ed.2d 520 (1992). Generally, delays of one year are generally sufficient to be presumptively prejudicial, thus warranting further inquiry. *Doggett*, 505 U.S. at 652 n. 1.

Here, Lopez's case was delayed nearly twice that long. The length of the delay weighs in Lopez's favor.

The second *Barker* factor considers the reason for the delay, assigning different weight to different reasons for delay. *Iniguez*, 167 Wn.2d at 284. Deliberate attempts to hamper the defense should be weighted heavily against the State; neutral reasons should be weighted less heavily but still against the State in light of the State's responsibility to bring the defendant to trial; and valid reasons, such as a missing witness, serve to justify appropriate delay. *Barker*, 407 U.S. at 531. Here, there is no indication of efforts by the State to sabotage the defense; the cause for the repeated delays instead is largely attributable to mismanagement. This factor should, accordingly, weigh slightly in favor of Lopez.

The third *Barker* factor is the strength of the defendant's assertion of his speedy trial right. 407 U.S. at 531. Here, Lopez began to object to the repeated continuances beginning on March 16, 2011 and continually and strongly objected to continuance requests on September 21, 2011, October 19, 2011, November 16, 2011, November 30, 2011, December 7, 2011, February 22, 2012, March 2, 2012, and April 4, 2012. He attempted to file motions on his own behalf in an effort to assert his right. Ultimately, after representing Lopez for just under one year, his attorney

was allowed to withdraw due to conflicts of interest arising from the repeated delays. RP (McLaughlin) 6/9/10 at 32-33. The vigor of Lopez's efforts to assert his right and proceed to trial causes this factor to weigh strongly in his favor.

Lastly, the fourth *Barker* factor evaluates the prejudice to the defense, recognizing that there is a threefold purpose to the speedy trial rule: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired, recognizing that some impairments necessarily cannot be established in the record. 407 U.S. at 532. Lopez was incarcerated for the entire pretrial period in his case and his multiple objections evidence his anxiety and distress over the repeated delays. Moreover, the delay beyond December 12, 2011 hindered the defense because it allowed the State to discover, develop and present video evidence against Lopez at trial that would not have been available had the trial timely proceeded. RP (King) 8/4/10 at 9. In sum, this factor favors Lopez.

In light of the *Barker* factors, the excessive delay in this case is unreasonable and unconstitutional. The trial court failed in its responsibility to protect Lopez's right to counsel by continuing the trial

multiple times on the request of an attorney that it had not authorized to substitute for appointed counsel. Trial counsel failed in his responsibility to act diligently to achieve his client's stated objectives. As a result of these failures, the State was afforded time to obtain and introduce additional evidence against Lopez at trial, despite Lopez's repeated and ongoing attempts to assert his speedy trial rights. Because the delay in this case was inexcusable and prejudicial, the case should be dismissed for violating Lopez's constitutional right to a speedy trial.

C. The trial court violated Lopez's right to speedy sentencing.

After the verdict was returned, 131 days elapsed before Lopez was brought before the court for sentencing. Under the Sixth Amendment to the U.S. Constitution and the Washington Constitution, a defendant has a right to a speedy sentencing that is free from purposeful or oppressive delay. *State v. Ellis*, 76 Wn. App. 391, 394, 884 P.2d 1860 (1994). By statute, the defendant is required to be sentenced within forty days of the verdict, unless the time is extended for good cause. RCW 9.94A.500(1). In considering whether delay in sentencing is purposeful or oppressive, the court considers the length and reason for the delay, the defendant's assertion of his right, and any prejudice to the defendant. *Ellis*, 76 Wn. App. at 394 (citing *Barker*, 407 U.S. at 533; *State v. Johnson*, 100 Wn.2d

607, 629, 674 P.2d 145 (1983), *overruled on other grounds in State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985)).

Again, as with the trial delays, the sentencing delays were extensive and not supported by reasonable grounds. Defense counsel simply pleaded “business” repeatedly to justify multiple continuances that extended the time before sentencing more than three times the length of time set forth by statute. Again, Lopez repeatedly objected to the delays and asserted his right to be promptly sentenced. And the delays prejudiced Lopez by ultimately leading to the withdrawal of his trial counsel due to a conflict of interest resulting from the delays. As a result, Lopez proceeded to sentencing with an attorney who had represented him for only a little more than two weeks and who expressed concern about facing a disadvantage at sentencing due to the fact he was not present at trial and could not make sentencing arguments. RP Munoz (9/4/12) at 498-500.

Again, application of the *Barker* factors supports a conclusion that Lopez’s right to speedy sentencing was violated. His counsel’s excessive lack of diligence ultimately led to the recognition that a conflict of interest had arisen that precluded him from continuing to represent Lopez. As a result, Lopez was left with the choice to assert his right to speedy

sentencing, or proceed with counsel who could not be adequately prepared for the hearing. A defendant may not be compelled to choose between his right to a speedy trial and his right to effective representation by a prepared counsel – he is entitled to both. *See State v. Earl*, 97 Wn. App. 408, 410-11, 984 P.2d 487 (1999). The trial court having failed to timely sentence Lopez, the case should be dismissed.

D. Lopez received ineffective assistance of counsel that deprived him of his rights to a speedy trial and speedy sentencing.

Under the facts presented in the present case, Lopez’s trial counsel rendered ineffective assistance. Counsel’s performance was deficient because of the inexcusable lack of diligence in proceeding, which ultimately resulted in the development of a conflict of interest that precluded further representation. As a result of counsel’s lack of diligence, Lopez was denied a speedy trial and sentencing.

Under the Sixth Amendment to the U.S. Constitution, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009).

“To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense.” *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel’s deficient representation. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Although apparently unreasonable decisions can be excused on tactical grounds, where the record shows an absence of conceivable legitimate trial tactics or theories explaining counsel’s performance, such performance falls “below an objective standard of reasonableness” and is deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

In the present case, trial counsel failed to prepare for trial and sentencing in a timely fashion. Although counsel suggested that the delays were needed for a variety of tactical reasons – for example, to pursue additional competency and/or diminished capacity evaluations, or to file motions prior to sentencing – nothing in the record indicates that counsel actually followed through on any of these purported justifications.

Counsel further failed to properly appear in the case for several months, resulting in substantial confusion over the status of his representation as well as the availability of Lopez's counsel for trial in December 2011. Counsel's unreasonable performance in failing to proceed diligently with the case, particularly in light of Lopez's repeatedly stated desire for a speedy trial and sentence, prejudiced Lopez by depriving him of his speedy trial rights and by depriving him of effective representation at sentencing as a result of the development of the conflict of interest.

A Sixth Amendment violation is established when the defendant shows that his attorney has an actual conflict of interest that adversely affected his performance. *State v. Regan*, 143 Wn. App. 419, 427, 177 P.3d 783 (2008). In such cases, prejudice is presumed. *Id.* In *Regan*, as in the present case, defense counsel placed her own interests in agreeing to a continuance over the interests of her client in having a speedy trial. *Id.* at 428-29. The court held unequivocally that the choice created an actual conflict of interest, of which the trial court had notice, and that the conflict adversely affected Regan's representation. *Id.* at 429. Under the *Regan* precedent, counsel's repeated requests for continuances over Lopez's objections put the court on notice of the conflict of interest, which should have precluded further representation by Etherton.

E. The trial court imposed an illegal sentence based upon charges that should have “washed out” when the State failed to present evidence that would support including those charges in the score.

The judgment and sentence entered in this case reflects an offender score of 8, including a prior robbery conviction showing a date of sentence of August 25, 2000 and a prior controlled substance conviction, showing the same date of sentence. CP 166. Lopez signed an acknowledgment of his prior offenses which set forth a first degree theft adjudication on August 26, 2000, a first degree Robbery conviction on August 25, 2000 and a possession of controlled substance conviction on August 25, 2000. CP 174.

The court of appeals reviews the calculation of an offender score de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). “In determining any sentence . . . the trial court may rely on no more information that is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530. The miscalculation of an offender score is a sentencing error that may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). When a court imposes a sentence based on a

miscalculated offender score, it acts without statutory authority. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). Remand is required when the offender score has been miscalculated. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

In *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012), the Washington Supreme Court considered the State's burden of proof to establish the offender score, stating:

It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. Bare assertions, unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction. While the preponderance of the evidence standard is "not overly difficult to meet," the State must at least introduce "evidence of some kind to support the alleged criminal history." Further, unless convicted pursuant to a plea agreement, the defendant has "no obligation to present the court with evidence of his criminal history." (Internal citations omitted.)

While evidence of prior convictions need not be substantial, there must be some evidence beyond the assertions of the prosecutor, which are not evidence but mere argument. *Hunley*, 175 Wn.2d at 911-12. A defendant's failure to object to the State's assertions of criminal history does not constitute an affirmative acknowledgment of the history sufficient to satisfy the State's burden. *Id.* at 913 (*citing State v. Mendoza*,

165 Wn.2d 913, 925, 205 P.3d 113 (2009); *State v. Weaver*, 171 Wn.2d 256, 260, 251 P.3d 876 (2001)).

At issue in the present case is the inclusion of the controlled substance charge in Lopez's offender score. Although the State at no point cited to the statute under which Lopez was convicted, it can be assumed that Lopez was convicted of violating RCW 69.50.4013, a Class C felony, for possessing a controlled substance other than marijuana. Under RCW 9.94A.525(2)(c), Class C felonies are not included in the offender score if the defendant has spent five consecutive years in the community without committing a new crime since the last date of release from confinement or entry of judgment and sentence.

In the present case, the State presented no evidence concerning Lopez's release from confinement and Lopez did not acknowledge or admit any such information. For washout purposes, the only information available to the trial court was Lopez's acknowledged date of disposition – August 25, 2000. Because more than five years elapsed between that disposition and the present charges, and because the State failed to present any evidence that would present the charge from washing out, under RCW 9.94A.525(2)(c), the controlled substance charge should not have been included in Lopez's offender score. As a result, Lopez's offender score

should have been 7³ rather than 8, with a standard range of 87-116 months. RCW 9.94A.510.

“[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” *State v. Wilson*, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010) (quoting *Goodwin*, 146 Wn.2d at 867-68). The remedy for the error is to vacate Lopez’s sentence and resentence him using the correct offender score. *Wilson*, 170 Wn.2d at 691.

VI. CONCLUSION

For the foregoing reasons, Lopez respectfully requests that the court reverse his convictions and vacate his sentence.

RESPECTFULLY SUBMITTED this 19th day of September, 2013.



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³ Under RCW 9.94A.525(8), the prior robbery counted as two points in Lopez’s offender score, the adult controlled substance charge counted as one point, and the juvenile theft counted as one-half a point. Under RCW 9.94A.525(2)(a), the first degree robbery conviction does not wash out.

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 19th day of September, 2013 in Walla Walla,
Washington.



Andrea Burkhart