

NO. 44417-8-II

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

STATE OF WASHINGTON, Respondent

v.

ANGELA MARIE RODRIGUEZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-02039-6

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN INCLUDING A POINT IN RODRIGUEZ'S OFFENDER SCORE FOR THE CONVICTION IN COUNT II.

II. THE TRIAL COURT ERRED IN SUSPENDING RODRIGUEZ'S SENTENCE ON COUNT II FOR 60 MONTHS.

III. THE NO CONTACT ORDER MUST BE AMENDED.

B. STATEMENT OF THE CASE

The State agrees with Rodriguez's recitation of the facts.

C. ARGUMENT

I. THE TRIAL COURT ERRED IN INCLUDING A POINT IN RODRIGUEZ'S OFFENDER SCORE FOR THE CONVICTION IN COUNT II.

Rodriguez argues that the trial court erred in including a point in her offender score for the gross misdemeanor that she committed, and was convicted and sentenced for, at the same time as the felony. The State agrees with Rodriguez.

Rodriguez makes several compelling arguments, each of which the State agrees with. First, the plain language of the controlling statute, RCW 9.94A.525 (21) supports Rodriguez's interpretation. RCW 9.94A.525 (21) (c) instructs the court to count one point for each adult *prior conviction* for

a repetitive domestic violence offense¹ that was plead and proven after August 1, 2011. “Prior conviction” is defined in RCW 9.94A.525 (1) as “a conviction that exists before the date of sentencing for the offense for which the offender score is being computed.” Subsection (1) goes on to say “Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.589.”

The State argued here, and the trial court agreed, that because RCW 9.94A.589 (1) (a) instructs the trial court to *treat* other current offenses as though they were prior convictions in order to determine the standard range for each offense, that means that there is no distinction, under the SRA, between prior convictions and other current offenses. Rodriguez shows this is an erroneous reading of RCW 9.94A.589. Because 9.94A.589 (1) (a) is a statute which instructs the court how to determine standard ranges, it plainly applies to offenses which are felonies. With misdemeanors and gross misdemeanors, we simply don’t

¹ Repetitive domestic violence offense is defined in RCW 9.94A.030 (41) as an non-felony domestic violence assault, non-felony domestic violence violation of a no-contact order under chapter 10.99, non-felony domestic violence violation of a protection order under chapter 26.09, 26.10, 26.26, or 26.50, non-felony domestic violence harassment, non-felony domestic violence stalking, or any federal, out-of-state, tribal court, military, county, or municipal conviction for an offense that would be classified as a repetitive domestic violence offense under this subsection. Notably, this definition merely outlines the class of crimes included and does not specify that the convictions must exist prior to the date of sentencing on the current offense. However, RCW 9.94A.525 (21) clearly requires that they be “prior convictions.”

have the concept of the standard range. We have the maximum penalty allowed by law and the court is free to sentence an offender to any period of time up to and including the maximum penalty. There is no “sentence outside the standard range.” Further, the trial court is free to run misdemeanor sentences consecutive not just to other misdemeanors but to felonies without it being deemed an “exceptional sentence.” See *In re Personal Restraint of VanDelft*, 158 Wn.2d 731, 739, 147 P.3d 573 (2006) (RCW 9.94A.589 (1) does not apply to misdemeanors or gross misdemeanors). The reading adopted by the trial court here assumes there is *no difference* in the SRA between “prior convictions” and “other current offenses.” If that were so, however, the legislature would not have bothered to use different terminology to describe them. The legislature could have merely called them “other offenses.” and included a definition of “other offenses” which included prior convictions and other current offenses.

Second, the legislative history supports Rodriguez’s reading. In proposing the recidivist domestic violence offender legislation, former Attorney General Rob McKenna complained that the current sentencing scheme did not “require judges to take into account the previous misdemeanor domestic violence convictions of the most dangerous offenders.” Patricia Sully, *Taking it Seriously: Repairing Domestic*

Violence Sentencing in Washington State, 34 Seattle U.L. Rev. 963, p. 965 (2011), citing ROB MCKENNA, WASH. STATE OFFICE OF ATT'Y GEN., DOMESTIC VIOLENC SENTENCING REFORM: ENHANCED PENALTIES FOR REPEAT/SERIAL DOMESTIC VIOLENCE OFFENDERS 2 (2009). Patricia Sully, in *Taking is Seriously: Repairing Domestic Violence Sentencing in Washington State*, identified the four purposes behind HB 2777, the legislation establishing the repetitive domestic violence offense scoring point:

(1) scoring prior misdemeanor domestic violence offenses, (2) multiplying repeat domestic violence felony convictions, (3) adding a "serial offender" aggravating circumstance and a "victim-defendant" mitigating circumstance. Additionally, the domestic violence designation now needs to be pleaded and proved in order to conform with Blakely.

Patricia Sully, *Taking it Seriously: Repairing Domestic Violence*

Sentencing in Washington State, supra, at 977 (emphasis added). Sully

further observed that this law "requires courts to consider an offender's

full criminal record, including *past misdemeanor* domestic violence

convictions, during sentencing." *Id.* at 985 (emphasis added). Sully

concludes by saying: "HB 2777 is excellent at what it aims to do: ensure

that *chronic* domestic violence offenders serve proportional prison

sentences. It is a moderate change, applying to only 10% of those

convicted of domestic violence crimes-- *repeat offenders with established records of abuse.*" Id. at 992 (emphasis added).

The undersigned counsel acknowledges that there is disagreement with the position the State is taking in this appeal. Trial counsel for the State in this case strongly disagrees with the undersigned², as does, evidently, the Caseload Forecast Council which publishes the Adult Sentencing Guidelines Manual. The current scoring sheet for general nonviolent offense where domestic violence has been plead and proven (as well as the scoring sheets for general violent offense where domestic violence has been plead and prove and general serious violent offense where domestic violence has been plead and proven) calls for the addition of a point where the other current offense is a repetitive domestic violence offense.³ Of course, the Adult Sentencing Guidelines Manual is not authority and each scoring sheet contains a disclaimer at the bottom to the

² I spoke with the current Supervising Attorney for the Domestic Violence Prosecution Center (DVPC) of the Clark County Prosecuting Attorney's Office. She said that the recidivist domestic violence offender point is added, she estimated, in about 80% of their cases because they believe it applies to misdemeanors and gross misdemeanors (which meet the definition of repetitive domestic violence offense) that are committed at the same time as the domestic violence felony or felonies an offender is being sentenced on. This is in stark contrast to the estimated 10% of offenders it was thought would be affected by this law. (See Sully, *supra*, at p. 992), and suggests that the legislative intent of this law was that it would not apply to misdemeanors or gross misdemeanors committed and sentenced at the same time as the felony or felonies.

³ These scoring sheets are attached as an appendix to this brief.

effect that the Caseload Forecast Council is not liable for any errors which occur as a result of reliance on the manual.

The undersigned counsel called the Caseload Forecast Council, which produces the Adult Sentencing Guidelines Manual, and spoke with research analyst Jennifer Jones. She reiterated the disclaimer noted above—namely that the publication is not authoritative but rather a guide—and said that they arrived at the conclusion that “repetitive domestic violence offenses” include misdemeanor and gross misdemeanor offenses committed *at the same time* as the primary offense based solely on the language of RCW 9.94A.589 (1), just as the deputy prosecutor did here. She said that RCW 9.94A.589 (1) pertains to “how offenses should be scored,” and to whether they should be served concurrently or consecutively.⁴ She concurred with the idea that RCW 9.94A.589 (1) (a) collapses any distinction between prior convictions and other current offenses.

In conclusion, the State in this appeal takes a position that, it is told, runs counter to the position being taken by prosecutors elsewhere in the state as well as the drafters of the Sentencing Guidelines Manual. It

⁴ This error, (should this Court find it to be error), on the scoring sheet would explain the resistance I got from fellow deputy prosecutors on this issue, as well as the apparent failure of trial defense counsel to raise this issue consistently (not including trial counsel here, who did raise this issue at sentencing).

appears the resolution of this issue by this Court is much needed.

Rodriguez should be resentenced with an offender score of 0.

II. THE TRIAL COURT ERRED IN SUSPENDING RODRIGUEZ'S SENTENCE ON COUNT II FOR 60 MONTHS.

On Count II, the trial court ordered that the balance of Rodriguez's sentence (314 days) would be suspended for 60 months. Rodriguez claims this was error, and the State agrees. The statutes authorizing a suspension and probationary period on misdemeanors of 60 months plainly applies only to courts of limited jurisdiction (RCW 3.66.068) and municipal courts (RCW 3.50.330).⁵

Rodriguez, however, proffers two possible remedies and does not advocate for one over the other. She argues on the one hand, RCW 9.92.064 (the Suspended Sentence Act) appears only to authorize the superior court to suspend the sentence for the time that was remaining on the incarceration term (in this case, 314 days). On the other hand RCW 9.95.210 (the Probation Act) authorizes the superior court to suspend the sentence for "such a time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer." Rodriguez

⁵ It should be noted that it appears from the transcript that there was a miscommunication between the deputy prosecutor and the trial court on this matter. The deputy prosecutor, it appears, was referring to the felony when speaking about the five year probation whereas the trial court was referring to the gross misdemeanor in Count II. RP at 5. The transcript is unclear.

is unclear about which of these statutes the trial court relied on, and the State is equally unsure. It seems odd that the trial court can simply pick which of the two statutes to rely on, but evidently it can:

Generally speaking, our superior courts use the [Suspended Sentence Act] when they desire to suspend the execution of a sentence during the good behavior of a convicted person, and the [Probation Act] when they desire to defer the imposition of a sentence, with a view to an ultimate dismissal of the charges if the behavior of the convicted person warrants such action. However, the latter is available and is used in many instances for the suspension of the execution of a sentence.

State v. Davis, 56 Wn. 2d 729, 730, 355 P.2d 344, 345 (1960). The Court went on to observe that the Probation act was not intended to repeal or replace the Suspended Sentence Act, and “[t]he trial court could have suspended the appellant’s sentence under either statute...” *Davis* at 731. A question frequently presented in cases involving these two statutes is which act was the trial court relying upon? In *Davis*, supra, the trial court did not explicitly state which act it relied upon. Likewise, in *State v. Monday*, 12 Wn.App. 429, 430, 531 P.2d 811 (1975) the trial court did not specify upon which act it relied to suspend execution of the defendant’s sentence. Relying on *Davis*, the Court of Appeals looked at the differences between the two acts and found one salient difference: the method of supervision of the defendant. Under the Suspended Sentence Act, the defendant would be placed in the charge of “a parole or peace officer during the term of such suspension,” whereas under the Probation Act, the

defendant would be ordered to report to the supervisor of the division of probation and parole of the department of institutions or such officer as the supervisor may designate and as a condition of said probation to follow implicitly the instructions of the supervisor of probation or parole.

Monday at 432. Because the trial court, in *Monday*, explicitly ordered the defendant to report to the Board of Prison Terms and Paroles, it was clear that the court suspended the sentence under the Probation Act. *Monday* at 430.⁶

The two statutes have changed substantially in the intervening years since *Davis* and *Monday*. The misdemeanor judgment and sentence in this case provides for the defendant to be on probation. CP 56. The probation is to be monitored by a Community Corrections Officer of the Department of Corrections. CP 56. It appears that Rodriguez's sentence was suspended under RCW 9.95.210, the Probation Act. However, the Suspended Sentence Act contemplates that an offender would be put under the supervision of a community corrections officer employed by the department of corrections. See RCW 9.92.060 (1) (a).

⁶ In the recent case of *State v. Parent*, 164 Wn.App. 210, 212, 267 P.3d 358 (2011), the Court of Appeals noted that “[u]nder RCW 9.92.060 and RCW 9.95.210, the trial court has discretionary authority to suspend a defendant's sentence and place the defendant on probation.” In that case, it was evidently clear that the trial court relied upon the Probation Act to suspend the defendant's sentence. *Id.*

If this Court is unable to determine which act Rodriguez's sentence was suspended under, the case should be remanded to the trial court to clarify upon which act it relied.

III. THE NO CONTACT ORDER MUST BE AMENDED.

The State agrees with Rodriguez that the no contact order currently exceeds the maximum allowable time for it to remain in effect. Likewise, the State, like Rodriguez, is unsure about what the proper expiration of the no contact order should be because we don't know whether the suspended in this case is governed by the Suspended Sentence Act or the Probation Act. If this Court is unable to resolve that question, the trial court, on remand, must specify an expiration of the no contact order which does not exceed the suspension period allowed by law.

D. CONCLUSION

Rodriguez must be resentenced.

DATED this 19th day of September, 2013.

Respectfully submitted:

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APPENDIX

GENERAL SERIOUS VIOLENT OFFENSE

WHERE DOMESTIC VIOLENCE HAS BEEN PLEAD AND PROVEN

SERIOUS VIOLENT

OFFENDER SCORING RCW 9.94A.525(21)

CURRENT OFFENSE BEING SCORED: _____

ADULT HISTORY:

Enter number of domestic violence felony convictions as listed below* x 2 = _____

Enter number of repetitive domestic violence offense convictions (RCW 9.94A.030(41))
plead and proven after 8/1/11 x 1 = _____

Enter number of serious violent felony convictions x 3 = _____

Enter number of violent felony convictions x 2 = _____

Enter number of nonviolent felony convictions x 1 = _____

JUVENILE HISTORY:

Enter number of subsequent domestic violence felony dispositions as listed below* x 1 = _____

Enter number of serious violent felony dispositions x 3 = _____

Enter number of violent felony dispositions x 2 = _____

Enter number of nonviolent felony dispositions x 1/2 = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other domestic violence felony convictions as listed below* x 2 = _____

Enter number of other repetitive domestic violence offense convictions plead and
proven after 8/1/11 x 1 = _____

Enter number of other violent felony convictions x 2 = _____

Enter number of other nonviolent felony convictions x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? + 1 = _____

*If domestic violence was plead and proven after 8/1/2011 for the following felony offenses:

Violation of a No-Contact Order, Violation of a Protection Order, Domestic Violence Harassment, Domestic Violence Stalking, Domestic Violence Burglary 1, Domestic Violence Kidnapping 1, Domestic Violence Kidnapping 2, Domestic Violence Unlawful Imprisonment, Domestic Violence Robbery 1, Domestic Violence Robbery 2, Domestic Violence Assault 1, Domestic Violence Assault 2, Domestic Violence Assault 3, Domestic Violence Arson 1, Domestic Violence Arson 2.

STANDARD RANGE CALCULATION

Total the last column to get the **Offender Score** (Round down to the nearest whole number)

SERIOUSNESS LEVEL

STANDARD SENTENCE RANGE to

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 20 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 167 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 170.
- ✓ For sentencing alternatives, see page 160.
- ✓ For community custody eligibility, see page 168.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 165.

The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's or court's reliance on the manual, or for any other written or verbal information related to adult or juvenile sentencing. The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Caseload Forecast Council.

GENERAL VIOLENT OFFENSE

WHERE DOMESTIC VIOLENCE HAS BEEN PLEAD AND PROVEN

VIOLENT

OFFENDER SCORING RCW 9.94A.525(21)

CURRENT OFFENSE BEING SCORED: _____

ADULT HISTORY:

- Enter number of domestic violence felony convictions as listed below* x 2 = _____
- Enter number of repetitive domestic violence offense convictions
(RCW 9.94A.030(41)) plead and proven after 8/1/11 x 1 = _____
- Enter number of serious violent and violent felony convictions x 2 = _____
- Enter number of nonviolent felony convictions x 1 = _____

JUVENILE HISTORY:

- Enter number of subsequent domestic violence felony dispositions as listed below* ... x 1 = _____
- Enter number of serious violent and violent felony dispositions x 2 = _____
- Enter number of nonviolent felony dispositions x 1/2 = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

- Enter number of other domestic violence felony convictions as listed below* x 2 = _____
- Enter number of repetitive domestic violence offense convictions plead and
proven after 8/1/11 x 1 = _____
- Enter number of other serious violent and violent felony convictions x 2 = _____
- Enter number of other nonviolent felony convictions x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? + 1 = _____

*If domestic violence was plead and proven after 8/1/2011 for the following felony offenses:

Violation of a No-Contact Order, Violation of a Protection Order, Domestic Violence Harassment, Domestic Violence Stalking, Domestic Violence Burglary 1, Domestic Violence Kidnapping 1, Domestic Violence Kidnapping 2, Domestic Violence Unlawful Imprisonment, Domestic Violence Robbery 1, Domestic Violence Robbery 2, Domestic Violence Assault 1, Domestic Violence Assault 2, Domestic Violence Assault 3, Domestic Violence Arson 1, Domestic Violence Arson 2.

STANDARD RANGE CALCULATION

Total the last column to get the **Offender Score** (Round down to the nearest whole number)

SERIOUSNESS LEVEL

STANDARD SENTENCE RANGE Low to High

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 20 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 167 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 170.
- ✓ For sentencing alternatives, see page 160.
- ✓ For community custody eligibility, see page 168.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 165.

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GENERAL NONVIOLENT/SEX OFFENSE

WHERE DOMESTIC VIOLENCE HAS BEEN PLEAD AND PROVEN

NONVIOLENT/SEX

OFFENDER SCORING RCW 9.94A.525(17)

CURRENT OFFENSE BEING SCORED: _____

ADULT HISTORY:

Enter number of sex offense felony convictions x 3 = _____
 Enter number of domestic violence felony convictions as listed below* x 2 = _____
 Enter number of repetitive domestic violence offense convictions (RCW 9.94A.030(41))
 plead and proven after 8/1/11 x 1 = _____
 Enter number of felony convictions x 1 = _____

JUVENILE HISTORY:

Enter number of sex offense felony dispositions x 3 = _____
 Enter number of subsequent domestic violence felony dispositions as listed below* x 1 = _____
 Enter number of serious violent and violent felony dispositions x 1 = _____
 Enter number of nonviolent felony dispositions x 1/2 = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other sex offense felony convictions x 3 = _____
 Enter number of other domestic violence felony convictions as listed below* x 2 = _____
 Enter number of other repetitive domestic violence offense convictions plead and
 proven after 8/1/11 x 1 = _____
 Enter number of other felony convictions x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) + 1 = _____

*If domestic violence was plead and proven after 8/1/2011 for the following felony offenses:

Violation of a No-Contact Order, Violation of a Protection Order, Domestic Violence Harassment, Domestic Violence Stalking, Domestic Violence Burglary 1, Domestic Violence Kidnapping 1, Domestic Violence Kidnapping 2, Domestic Violence Unlawful Imprisonment, Domestic Violence Robbery 1, Domestic Violence Robbery 2, Domestic Violence Assault 1, Domestic Violence Assault 2, Domestic Violence Assault 3, Domestic Violence Arson 1, Domestic Violence Arson 2.

STANDARD RANGE CALCULATION

Total the last column to get the **Offender Score** (Round down to the nearest whole number)

SERIOUSNESS LEVEL

STANDARD SENTENCE RANGE Low to High

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 20 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 167 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 170.
- ✓ For sentencing alternatives, see page 160.
- ✓ For community custody eligibility, see page 168.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 165.
- ✓ If the offender is not a persistent offender and has a prior conviction for an offense listed in RCW 9.94A.030(37)(b), then the sentence is subject to the requirements of RCW 9.94A.507.

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CLARK COUNTY PROSECUTOR

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