

FILED
Jun 12, 2015
Court of Appeals
Division I
State of Washington

No. 72332-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICKY LEE LEWIS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The offender score was miscalculated.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

When an offender is convicted of second degree assault, his prior juvenile convictions for nonviolent felonies count as only one-half point in the offender score. Here, Ricky Lewis was convicted of second degree assault but the court counted his prior juvenile conviction for a nonviolent felony as one whole point in the offender score. Was the offender score miscalculated?

C. STATEMENT OF THE CASE

Ricky Lewis was charged in King County Superior Court with one count of second degree assault and two counts of unlawful imprisonment. CP 65-66. On May 30, 2014, he entered an Alford¹ plea to the three counts as charged, pursuant to a plea agreement with the State. CP 67-91.

Mr. Lewis's guilty plea statement says, "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." CP 69.

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

The plea agreement, incorporated into the guilty plea statement, also says:

The defendant agrees to this Plea Agreement and that the attached sentencing guidelines scoring form(s) (Appendix A), offender score, and the attached Prosecutor's Understanding of Defendant's Criminal History (Appendix B) are accurate and complete and that the defendant was represented by counsel or waived counsel at the time of prior conviction(s). . . .

CP 86.

Attached to the guilty plea statement is a document entitled "Prosecutor's Understanding of Defendant's Criminal History." CP 89.

The document lists six prior convictions under the heading "Adult Felonies." CP 89. One of those convictions is a February 9, 1976, conviction from Georgia for "theft by taking-auto theft." CP 89.

Contrary to the "Prosecutor's Understanding of Defendant's Criminal History," Mr. Lewis's Georgia conviction for "auto theft" is a juvenile and not an adult offense. Mr. Lewis's date of birth is March 10, 1958. CP 4, 67; 5/30/14RP 8. Thus, the February 9, 1976, conviction for auto theft was obtained when Mr. Lewis was only 17 years old.

Also attached to the guilty plea statement is a sentencing guidelines scoring form for second degree assault. CP 87. Using the

scoring form, the prosecutor counted Mr. Lewis's prior juvenile conviction for auto theft as one whole point. CP 87, 89. The prosecutor calculated Mr. Lewis's offender score for the second degree assault conviction as nine, which includes one whole point for the juvenile conviction. CP 87.

At sentencing, the trial court adopted the State's offender score calculation and determined the standard sentence range for the second degree assault conviction was 63 to 84 months, based on an offender score of nine. CP 95. The court imposed a high-end standard-range sentence of 84 months, to be served concurrently with the sentences for the two unlawful imprisonment convictions. CP 97.

D. ARGUMENT

The offender score was miscalculated, requiring that Mr. Lewis be resentenced based upon an offender score of eight for the second degree assault conviction

- 1. The trial court miscalculated the offender score by counting Mr. Lewis's prior nonviolent juvenile offense as one whole point*

A trial court may impose a sentence only as authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). When a sentencing court acts without statutory authority in

imposing a sentence, the error may be raised for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

Under the Sentencing Reform Act (SRA), an offender's "standard sentence range" is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the offender's "criminal history," which is "the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere."² See RCW 9.94A.030(11); RCW 9.94A.525.

A trial court's calculation of the offender score is reviewed *de novo*. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

Here, Mr. Lewis was convicted of one count of second degree assault and two counts of unlawful imprisonment. CP 94. Second degree assault is a "violent offense" for purposes of the offender score. RCW 9.94A.030(54)(a)(viii). When the trial court sentences an offender for a "violent offense," the court "count[s] two points for each prior adult and juvenile violent felony conviction, one point for each prior adult

² When a person is sentenced for more than one current offense, the sentence range for each offense is calculated by treating the other current offenses as if they were prior convictions for purposes of calculating the offender score, unless the court finds they encompass the same criminal conduct. RCW 9.94A.525(1), 9.94A.589(1)(a).

nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.” RCW 9.94A.525(8).

Mr. Lewis’s criminal history consisted of six prior felony convictions. CP 89. As stated, one of those convictions was obtained when Mr. Lewis was only 17 years old. CP 4, 67, 89; 5/30/14RP 8. That conviction, for “auto theft,” is for a nonviolent offense and should have counted as only one-half point in the offender score. RCW 9.94A.525(8).

The prosecutor asserted Mr. Lewis’s prior juvenile conviction for “auto theft” was an adult felony and counted as one whole point in the offender score for the second degree assault conviction. CP 87, 89. The prosecutor asserted the offender score was nine, which included one whole point for the juvenile conviction. CP 87, 89. The trial court adopted the prosecutor’s representations and calculated Mr. Lewis’s offender score for the second degree assault conviction as nine. CP 95.

In doing so, the trial court misapplied the sentencing statute and exceeded its authority. The court should have counted the prior juvenile conviction as only one-half point in the offender score. RCW 9.94A.525(8). “The offender score is the sum of points accrued under this section rounded down to the nearest whole number.” RCW

9.94A.525. When Mr. Lewis's juvenile conviction for "auto theft" is properly counted as one-half point, the offender score is eight and a half, not nine. When rounded down to the nearest whole number, as required by RCW 9.94A.525, the total offender score is eight.

Because the trial court imposed a sentence based on an offender score of nine rather than eight, it exceeded its statutory authority.

2. *Because the error that occurred in the calculation of the offender score was a "legal" error resulting in a sentence in excess of statutory authority, Mr. Lewis may challenge the error notwithstanding his plea agreement with the State*

It is well-established that a defendant cannot be held to the consequences of a plea agreement to an excessive sentence based upon an incorrect offender score. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 60 P.3d 618 (2002). That is because a sentence based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. Id. at 868. The Washington Supreme Court "has often reaffirmed the principle that a sentence in excess of statutory authority is subject to challenge, and the defendant is entitled to be resentenced." Id. at 869.

Generally a plea agreement is regarded and interpreted as a contract and the parties are bound by the terms of a valid plea

agreement. State v. Codiga, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). But when a defendant's criminal history is correct and complete yet the court miscalculates the resulting offender score, the defendant cannot be held to the consequences of the mistake. Id. at 929. The defendant simply "cannot agree to punishment in excess of that which the Legislature has established" and cannot be held to the consequences of a plea agreement to an excessive sentence. Goodwin, 146 Wn.2d at 869, 873-74. "[A] plea bargain cannot exceed the statutory authority of the courts." Id. at 871.

The defendant does not assume the risk of a legal error in the calculation of the offender score because it is ultimately *the court's* obligation, not that of the parties, to determine the correct offender score and the applicable standard sentence range based upon the asserted criminal history. Codiga, 162 Wn.2d at 926, 929. "Although the prosecution may agree to sentencing recommendations, the sentencing court bears the ultimate responsibility to determine the correct offender score and sentencing range." State v. Malone, 138 Wn. App. 587, 593, 157 P.3d 909 (2007).

Because a defendant cannot agree to be sentenced in excess of statutory authority, his decision to challenge a legal error in the

calculation of the offender score does not constitute a breach of a plea agreement. Malone, 138 Wn. App. at 593-94.

A defendant who entered a plea agreement with the State may challenge his offender score calculation if the miscalculation was the result of a *legal error* and does not involve a factual dispute. Courts distinguish between cases where a sentencing mistake is a factual one involving the defendant's criminal history, and those where the defendant completely and correctly revealed his criminal history but the attorneys and the court made a legal mistake as to the resulting sentencing range. Codiga, 162 Wn.2d at 926. If the error is a legal one resulting in an excessive sentence, principles of waiver and invited error simply do not apply. Goodwin, 146 Wn.2d at 874; In re Pers. Restraint of West, 154 Wn.2d 204, 214, 110 P.3d 1122 (2005).

In Goodwin, for instance, Goodwin entered an Alford plea as a result of a negotiated plea agreement and agreed that the prosecutor's statement of his criminal history was correct and complete. Id. at 863-64. But the trial court miscalculated the offender score by including a juvenile conviction that had actually washed out. Id. at 866-67. Because the offender score was miscalculated as the result of a legal error, the plea agreement did not bind Goodwin to the unlawful

sentence. Id. at 876-77. “There [wa]s simply no question that Goodwin’s offender score was miscalculated,” and thus his sentence was in excess of statutory authority as a matter of law. Id. at 875-76. Goodwin was entitled to be resentenced based upon a correct offender score. Id. at 877-78; see also Malone, 138 Wn. App. at 593-94 (offender score miscalculation resulting from inclusion of prior conviction that had actually washed out was *legal error* that could be challenged without breaching plea agreement).

Similarly, in State v. Wilson, Wilson pled guilty pursuant to a negotiated plea agreement and agreed with the prosecutor’s list of his criminal history. State v. Wilson, 170 Wn.2d 682, 685, 244 P.3d 950 (2010). But the trial court miscalculated the offender score by classifying one of the prior convictions as a felony rather than a misdemeanor. Id. at 688. Because the error was a legal error, determined simply by reference to the controlling statute, Wilson did not waive his right to raise the challenge notwithstanding his plea agreement. Id. at 689-90. Wilson was entitled to be resentenced based upon a correct offender score. Id. at 691.

Here, as in Goodwin, Wilson, and Malone, the error that occurred in the calculation of Mr. Lewis’s offender score is a *legal*

error that involves no factual dispute. There is simply no question that Mr. Lewis’s prior Georgia conviction for “auto theft” was obtained when he was a juvenile. CP 4, 67, 90; 5/30/14RP 8. The trial court misapplied the sentencing statute by classifying the prior conviction as an adult offense rather than a juvenile offense and in counting it as one whole point in the offender score. Thus, Mr. Lewis may challenge the miscalculation of his offender score notwithstanding his plea agreement with the State. Wilson, 170 Wn.2d 689-90; Codiga, 162 Wn.2d at 929; Goodwin, 146 Wn.2d at 873-74. His challenge to the erroneous offender score does not constitute a breach of the plea agreement. Malone, 138 Wn. App. at 593-94.

3. *The remedy is to resentence Mr. Lewis based upon a correct offender score*

When a sentence is erroneous based upon a miscalculated offender score, the remedy is to remand for resentencing based upon a correct offender score. Wilson, 170 Wn.2d at 691; Goodwin, 146 Wn.2d at 869. Resentencing does not “affect the finality of that portion of the judgment and sentence that was correct and valid when sentence was imposed.” Goodwin, 146 Wn.2d at 869. The judgment need not be vacated nor the plea agreement withdrawn; the error is grounds for

reversing only the erroneous portion of the sentence imposed. West, 154 Wn.2d at 215.

Thus, Mr. Lewis must be resentenced based upon a correct offender score. Wilson, 170 Wn.2d at 691; Goodwin, 146 Wn.2d at 869.

F. CONCLUSION

Because the court committed a legal error in calculating the offender score, Mr. Lewis must be resentenced based upon a correct offender score.

Respectfully submitted this 12th day of June, 2015.

/s/ Maureen M. Cyr

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DIVISION ONE**

STATE OF WASHINGTON,)	
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v.)	NO. 72332-4-I
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RICKY LEWIS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF JUNE, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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