IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:	)	**No. 24491-1-III**
	)	**(Consolidated with**
	)	**(No. 24492-0-III)**
	)	
SHAWN C. WALLWORK,	)	
	)	**Division Three**
	)	
Petitioner.	)	**UNPUBLISHED OPINION**

KATO, J. – Shawn Christopher Wallwork seeks relief from personal restraint imposed following his 2004 Spokane County guilty pleas to first degree unlawful possession of a firearm and second degree theft. He contends, among other things, the sentencing court used an incorrect offender score to calculate his standard range sentences. And, he asks this court to remand with directions that the superior court resentence him using the correct score.

The State concedes the offender score is incorrect but opposes a remand. It argues Mr. Wallwork is barred from challenging the offender score because the federal prosecutor relied upon that score in deciding not to prosecute him on a federal firearms violation. Specifically, the prosecutor understood that the plea agreement provided for an

offender score supporting a standard sentence range of 87-116 months. Mr. Wallwork was sentenced to 87 months. Alternatively, the State asserts Mr. Wallwork has not met his burden to show the sentencing court's use of the incorrect offender score resulted in a complete miscarriage of justice. *Cf. In re Pers. Restraint of Cook,* 114 Wn.2d 802, 810-12, 792 P.2d 506 (1990) (petitioner has burden to show non-constitutional error was a fundamental defect that resulted in a complete miscarriage of justice). It points out that Mr. Wallwork's sentence of 87 months is also within the 67-89 months standard sentence range for the correct offender score.

The Washington Supreme Court has rejected arguments similar to those made by the State here. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002); *In re Pers. Restraint of Call*, 144 Wn.2d 315, 333-34, 28 P.3d 709 (2001). We therefore grant Mr. Wallwork's petition in part and remand for resentencing using the correct offender score. The remainder of Mr. Wallwork's petition is dismissed.

The record supports the following: On February 12, 2004, Mr. Wallwork was sentenced pursuant to his guilty pleas to first degree unlawful possession of a firearm (Spokane County Superior Court No. 03-1-02117-3, COA No. 24492-0-III) and second degree theft (Spokane County Superior Court No. 03-1-0306-1-0, COA No. 24491-1-III). He committed the first degree unlawful possession of a firearm on May 25, 2002. He

committed the second degree theft on September 8, 2002. The court sentenced Mr. Wallwork to concurrent sentences of 87 months on the firearm conviction and 29 months on the theft conviction.

Mr. Wallwork also faced a potential firearm charge in federal court. On May 28, 2003, before entry of the state judgments an assistant United States attorney sent a letter to the Spokane County deputy prosecutor assigned to the pending state court charges against Mr. Wallwork. She addressed a proposed plea agreement to the charges in state court and her willingness not to proceed with a federal prosecution if Mr. Wallwork entered into the proposed plea agreement. In the letter, she stated she understood the joint recommendation in the plea bargain would be for a sentence within a standard range of 87–116 months. The letter reads in its entirety:

> If Mr. Wallwork enters a guilty plea in Spokane County Superior Court to an Information charging him with First Degree Unlawful Possession of a Firearm, in violation of RCW 9.41.040(1)(a), the government will not prosecute Mr. Wallwork in Federal Court for being a previously convicted felon in possession of a firearm. Additionally, it's further understood that Mr. Wallwork will not only plead guilty to First Degree Unlawful Possession of a Firearm in State Court, I also understand that your office and the defense will recommend jointly that the court impose a standard sentence within the state sentencing guidelines, together with the standard fines and costs.
>
> Based on Mr. Wallwork's criminal history, it is the Defendant and United States Attorney's understanding, that at the state level Defendant's sentencing guideline range is 87-116 months.
>
> If you or defense counsel has any question concerning the government's position, please feel free to contact me. Likewise, should Mr.

> Wallwork change his mind and fail to plead guilty to the firearm charge at the state level, please contact me promptly so that the U. S. Attorney's Office and the Bureau of Alcohol, Tobacco and Firearms can coordinate the further prosecution of Mr. Wallwork with your office.

See Attachment 1 to State's Response to Defendant's Motion to Clarify Sentence (part of the pleadings filed in superior court and sent to this court for consideration as a personal restraint petition). The letter does not indicate a copy was sent to Mr. Wallwork.

Mr. Wallwork's Statement of Defendant on Plea of Guilty to the firearm offense refers to the federal charges at page 4, paragraph 6(g):

> The prosecuting attorney will make the following recommendation to the judge:
> Standard range sentence to run concurrent w/ cause # 03-1-03061-0 [the second degree theft]
> **Fed. AUSA have agreed not to prosecute this incident.**

(Emphasis added.) The latter two phrases are in handwriting. The following printed statement appears immediately after the handwriting: "No additional charges based on occurrences prior to the date of this plea." The Statement also recites at page 6, paragraph 10: "No person has made promises of any kind to cause me to enter this plea except as set forth in this statement."

On January 24, 2005, Mr. Wallwork filed in superior court a Motion to Clarify Sentence in which he asked "for an Order properly calculating his offender score." *See* Motion to Clarify at 1. On September 7, 2005, the superior court transferred the motion

and the State's response to the court of appeals for consideration as a personal restraint petition. *See* RAP 16.3; *Toliver v. Olsen,* 109 Wn.2d 607, 609, 746 P.2d 809 (1987).

Subsequently, this court appointed counsel to represent Mr. Wallwork. It asked counsel to brief the question of whether the plea agreement and the federal prosecutor's reliance on it prohibited Mr. Wallwork from challenging the superior court's use of an incorrect offender score.

The State conceded Mr. Wallwork's prior juvenile dispositions should not have been counted in his offender score for first degree unlawful possession of a firearm because they were entered before his 15th birthday. Prior to the 1997 amendments to the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, such offenses did not count in an offender score for a subsequent offense. In *State v. Smith,* 144 Wn.2d 665, 673-75, 30 P.3d 1245, 39 P.3d 294 (2001), our Supreme Court held that such offenses washed out, even if the current offense was committed after the 1997 amendments, if the defendant committed those prior offenses before the effective date of the 1997 amendments. The legislature then amended the SRA, effective June 13, 2002, to "unambiguously require that sentencing courts include defendants' previously 'washed out' prior convictions when calculating defendants' offender scores at sentencing for crimes committed on or after the amendments' effective date." *State v. Varga*, 151

Wn.2d 179, 183, 86 P.3d 139 (2004) (citing RCW 9.94A.525, .030).

Since Mr. Wallwork committed the firearm offense in May 2002, the 2002 amendments to RCW 9.94A.525 and .030 do not apply to that offense. Thus, under *Smith,* his prior juvenile dispositions should not have counted in his offender score for the firearm conviction. *Smith*, 144 Wn.2d at 673-75. Mr. Wallwork's prior adult convictions and his other current offense result in an offender score of 7, with a standard range of 67-89 months, not the 87-116 month range when the juvenile dispositions are included in the offender score.

First, can Mr. Wallwork challenge the incorrect offender score when: (a) The offender score identified in the Statement of Defendant on Plea of Guilty supports the sentence range that formed the basis for the federal prosecutor's decision not to prosecute him for the federal offense; and (b) the original sentence falls within the standard range of the corrected offender score and the prosecutor did not agree to recommend a low-end sentence?

The Washington Supreme Court's opinions in *Goodwin*, 146 Wn.2d at 873-74, and *Call*, 144 Wn.2d at 333-34, control the analysis of this issue.

In *Goodwin*, the petitioner's offender score improperly included juvenile convictions that had washed out. 146 Wn.2d at 865. The State argued, however, that

petitioner had not shown this mistake, although a fundamental defect, had resulted in a complete miscarriage of justice, so as to entitle him to relief from personal restraint. *Id*. at 867. The State took the position that the petitioner "[could] not show a complete miscarriage of justice because he agreed to the criminal history in the plea agreement and the State has detrimentally relied on that agreement." *Id.* at 876.

The *Goodwin* court rejected the State's argument. It held that "the fact a negotiated plea agreement was involved" was not a sufficient ground to distinguish petitioner's case from the court's prior decisions that resentencing is required when a sentence in excess of statutory authority has been imposed. *Id.* at 877.

In *Call*, the sentence originally imposed was within, but not at the low end of the corrected standard range using the corrected offender score. 144 Wn.2d at 321. As part of the plea agreement, the prosecutor had agreed to recommend a sentence at the low end of the standard range. *Id.* at 319-20. The State argued that because the petitioner's original sentence fell within the corrected standard range, he had not established the defect resulted in a complete miscarriage of justice. The court disagreed and held "[t]he sentencing court should be afforded an opportunity to determine the appropriate sentence based upon accurate information used as a basis for calculating an offender score and in determining the correct sentence range under the SRA." *Id*. at 333.

(a) Effect of Federal Prosecutor's Reliance.

We agree with appointed counsel that the federal prosecutor's reliance on the incorrect standard range is no different than the state prosecutor's reliance. In *Goodwin*, the court held that "the fact a negotiated plea agreement was involved" was not a sufficient reason to distinguish its prior decisions that resentencing is required when a sentence in excess of statutory authority has been imposed. *Goodwin*, 146 Wn.2d at 877.

In any event, it is not clear from the record that the federal prosecutor's understanding as to the precise sentence range of 87–116 months was part of Mr. Wallwork's agreement to plead guilty. All that his Statement of Defendant on Plea of Guilty says is that "Fed. AUSA have agreed not to prosecute this incident," and "No additional charges based on occurrences prior to the date of this plea."

We therefore hold that the reliance of the federal prosecutor on the plea agreement does not bar Mr. Wallwork from challenging his incorrect offender score.

(b) Effect of Original Sentence Falling within Corrected Standard Range.

We did not find a case that considered whether an incorrect offender score requires resentencing in the exact circumstances here, that is, the original sentence falls within the standard range for the corrected offender score and the plea agreement only required the State to recommend a standard range sentence rather than a low-end

sentence. On that basis, the State distinguishes *Call,* involving a situation in which the State agreed to, and did in fact recommend, a low-end sentence. In the State's view, if the prosecutor had recommended a low-end sentence and the sentencing court followed that recommendation, it is likely the court on remand would sentence to the low end of the corrected standard range. But no such inference arises when the prosecutor recommended a sentence anywhere within the standard range.

We are not persuaded by the State's analysis. *Call*'s actual holding is not so narrow. The court held "[t]he sentencing court should be afforded an opportunity to determine the appropriate sentence *based upon accurate information* used as a basis for calculating an offender score and in determining the correct sentence range under the SRA." *Call,* 144 Wn.2d at 333 (emphasis added). Here, the original sentencing was concededly not based on accurate information.

In addition, the original sentence imposed by the superior court was at the low end of the incorrect standard range. It is just as reasonable to infer the sentencing court on remand will impose a low-end sentence under the correct standard range, as to infer the opposite.

Accordingly, we remand for resentencing using the correct offender score and standard range.

Mr. Wallwork also contends that under former RCW 9.41.040(1)(a) (2001), second degree burglary is not a predicate felony for first degree unlawful possession of a firearm.

Former RCW 9.41.040(1)(a) (2001)[1] provided that "[a] person . . . is guilty of the crime of unlawful possession of a firearm in the first degree, if the person . . . has in his possession . . . any firearm after having been previously convicted . . . of any serious offense *as defined in this chapter*." (Emphasis added.) Under former RCW 9.41.010(11) and (12) (2001), "serious offense" includes "any crime of violence," and "crime of violence" includes second degree burglary.[2]

Nevertheless, Mr. Wallwork argues burglary is not a violent offense. He cites former RCW 9.94A.030(33) (1991), which defines "violent offense," as that term is used in the SRA. The definition does not include second degree burglary.

But former RCW 9.41.040(1)(a) (2001) is clear – the nature of the prior conviction is determined by the definition provided in that chapter, not the definition provided in the SRA. Mr. Wallwork's conviction for first degree unlawful possession of a firearm is

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[1] Mr. Wallwork committed the unlawful possession offense in May 2002. Therefore, the 2001 statutes apply.

[2] Second degree burglary was included in the definition of "crime of violence" in 1991, as well. That statute applied when Mr. Wallwork committed the second degree burglary in June 1992. *See* former RCW 9.41.010(2) (1991).

therefore properly based upon the burglary offense as the predicate felony.

There was no error.

Finally, Mr. Wallwork argues he is entitled to credit for additional pre-conviction confinement time. The jail certified only the pre-confinement time Mr. Wallwork served on the State's charges against him, and it did not include time he was held on a pending federal charge.

Mr. Wallwork has not shown the jail's certification was incorrect. Under RCW 9.94A.505(6), "[t]he sentencing court shall give the offender credit for all confinement time served before the sentencing *if that confinement time was solely in regard to the offense for which the offender is being sentenced.*" (Emphasis added.) The referenced federal offense was a different offense in a different jurisdiction than the Washington convictions, even if, as Mr. Wallwork alleges, it was based on the same set of facts.

There was no error. Granted in part and dismissed in part.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Kato, J.

WE CONCUR:

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Sweeney, C. J.

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Brown, J.