IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM ALLEN BARROW, Appellant.	No. 41660-3-II UNPUBLISHED OPINION

Van Deren, J. — William Barrow appeals his felony conviction for failure to remain at the scene of an accident resulting in an injury. He argues that the trial court's comments during sentencing, coupled with its imposition of a high-end standard range sentence, violated the appearance of fairness doctrine. In his statement of additional grounds for review (SAG),[1] he further argues that (1) the trial court erroneously accepted his stipulated offender score that included his 1999 and 2001 misdemeanor convictions for driving under the influence (DUI), (2) the prosecutor committed misconduct when he mischaracterized the underlying facts of Barrow's 2008 conviction for failure to remain at the scene of an accident resulting in death, and (3) defense counsel was ineffective when he failed to inform the trial court of Barrow's version of the 2008 conviction's underlying facts. Finding no error, we affirm.

[1] RAP 10.10.

FACTS

The State charged Barrow with failure to remain at the scene of a vehicular accident resulting in an injury and third degree driving while license suspended in September 2010. As part of a plea agreement, the State filed an amended information dropping the third degree driving while license suspended charge. Barrow then entered an *Alford*[2] plea to the charge of failure to remain at an accident scene. Barrow stipulated to his criminal history and an offender score of six that included 1999 and 2001 adult misdemeanor convictions for DUI and a 2008 felony conviction for failure to remain at the scene of a vehicular accident resulting in death, as well as to a standard range sentence of 33 to 43 months. The trial court imposed a high-end standard range sentence of 43 months.

ANALYSIS

I. Appearance of Fairness

Barrow contends that the trial court's statements during sentencing, coupled with its imposition of a high-end standard range sentence, violated the appearance of fairness doctrine. But an appearance of fairness claim is not "constitutional" in nature under RAP 2.5(a)(3) and, thus, may not be raised for the first time on appeal. *See State v. Morgensen*, 148 Wn. App. 81, 90-91, 197 P.3d 715 (2008); *see also City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978) ("Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based."). Accordingly, Barrow failed to preserve this issue for appeal when he failed to object below. His claim fails.

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

II. Statement of Additional Grounds For Review

A. Offender Score

Barrow also argues that the trial court erred when it accepted Barrow's stipulated offender score because it included his 1999 and 2001 adult misdemeanor DUI convictions. We disagree.

Generally, a defendant cannot waive a challenge to a miscalculated offender score. *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950(2010). A defendant can waive a challenge to an offender score only where the challenge is based on a factual issue or on a matter within the trial court's discretion. *Wilson*, 170 Wn.2d at 689. Because Barrow argues that the trial court misapplied sentencing statutes when it included his 1999 and 2001 DUI convictions in his offender score, he has not waived the issue. We review the trial court's offender score calculation de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

In September 2010, the Sentencing Reform Act of 1981, chapter 9.94A RCW, defined a violation of RCW 46.52.020(4) as a "'[f]elony traffic offense'" and a non-felony DUI conviction as a "'[s]erious traffic offense.'" Former RCW 9.94A.030(25)(a), (43)(a) (2010).

RCW 9.94A.525(11) provides:

> *If the present conviction is for a felony traffic offense* count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; *for each serious traffic offense*, other than those used for an enhancement pursuant to RCW 46.61.520(2), *count one point for each adult and 1/2 point for each juvenile prior conviction*; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(Emphasis added.) In this case, Barrow pleaded guilty of failure to remain at the scene of a

vehicular accident resulting in an injury, a class C felony. RCW 46.52.020(1), (4)(b). Thus, under RCW 9.94A.525(11), Barrow's prior 1999 and 2001 adult misdemeanor DUI convictions, serious traffic offenses, each counted as one point in calculating his offender score for his current conviction for failure to remain at the scene of a vehicular accident injury, a felony traffic offense.

Barrow argues, however, that under RCW 9.94A.525(2)(d), his 1999 and 2001 DUI convictions washed out and should not have been included in his offender score because that statute provides:

> [S]erious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

But Barrow committed a misdemeanor in 2004 and therefore was not crime free for the required five-year period. His 1999 and 2001 DUI convictions did not wash out and trial court did not err in accepting Barrow's stipulated offender score that included his 1999 and 2001 DUI convictions. His claim fails.

B. Prosecutorial Misconduct and Ineffective Assistance of Counsel

Barrow also argues that (1) he informed his defense counsel that the prosecutor was "bias[ed]" because he at some unknown point mischaracterized Barrow as having "'kill[ed]'" the victim in the 2008 incident and (2) defense counsel failed to inform the trial court of Barrow's version of events, including the contents of a letter written by Barrow. SAG at 6.

We construe Barrow's claims as ones of prosecutorial misconduct and ineffective assistance of counsel. A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Likewise, a defendant claiming ineffective assistance of counsel must show both objectively deficient performance by defense counsel and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Here, Barrow was convicted in 2008 of failure to remain at the scene of an accident resulting in death. Even assuming that the prosecutor said Barrow had "'kill[ed]'" someone, such a statement was not improper, as it was true. SAG at 6. Despite Barrow's argument that the 2008 incident was an accident, it resulted in someone's death. Furthermore, the trial court stated at sentencing that it had read Barrow's letter and, thus, Barrow fails to establish deficient performance by his counsel. Barrow's claims fail and we affirm his conviction and sentence.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.