

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY EUGENE McANDREW, JR.,

Appellant.

No. 41025-7-II

Consolidated with:

No. 41028-1-II

UNPUBLISHED OPINION

Johanson, J. — Anthony McAndrew appeals his sentences for possession of a controlled substance, first degree burglary, second degree unlawful possession of a firearm, and theft of a firearm. He challenges the calculation of his offender score. We agree that the score relied upon by the trial court is incorrect. We vacate the sentences and remand for resentencing.¹

FACTS

On June 2, 2010, the State charged McAndrew with possession of a controlled substance and making a false or misleading statement to a public servant. The next day, the State filed an additional information, charging McAndrew with one count of first degree burglary, five counts of second degree unlawful possession of a firearm, and six counts of theft of a firearm. McAndrew agreed to plead guilty to possession of a controlled substance in cause number 10-1-00872-1 and one count each of first degree burglary, second degree unlawful possession of a firearm, and theft

¹ A commissioner of this court considered this matter pursuant to RAP 18.14 and referred it to a panel of judges.

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of a firearm in cause number 10-1-00879-9. The court accepted the pleas, entered judgments against him, and held a sentencing hearing on June 28, 2010.

The agreed declaration of criminal history lists two juvenile offenses that counted as 1/2 point each, and two convictions of second degree identity theft that counted as 1 point each. The declaration adds 1 additional point because McAndrew committed the current offenses while on community custody. The State counted 3 points for the current crimes, and the total indicated on the offender scoring worksheets was 7. However, the plea statements show offender scores of 8.

The judgment and sentence for the controlled substance conviction in cause number 10-1-00872-1 shows a standard range of 12 to 24 months, with a 24-month sentence actually imposed, to run concurrent with the sentences in cause number 10-1-00879-9.

The judgment and sentence in cause number 10-1-00879-1 shows the burglary conviction with a standard range of 67 to 89 months based on an offender score of 7 but with a 102-month concurrent sentence actually imposed. The standard range for the firearm-possession conviction is shown as 33 to 43 months based on an offender score of 7. The court imposed 43 months, to run consecutively with the sentence for the theft-of-a-firearm conviction. And finally, for the theft-of-a firearm conviction the standard range listed is 57 to 75 months, based on an offender score of 7, also to run consecutively. The court imposed 75 months which, when added to the 43 months for the firearm possession, equals the 118-month-maximum standard range for both of the firearm convictions.

ANALYSIS

This court reviews a trial court's sentencing calculation de novo. *State v. Cross*, 156 Wn.

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App. 568, 587, 234 P.3d 288 (2010). If miscalculation of the offender score involves a legal error, rather than a factual error, the defendant cannot waive his objection because such a sentence lacks statutory authority. *State v. Wilson*, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010). The remedy for a miscalculated offender score is resentencing using the correct offender score. *Wilson*, 170 Wn.2d at 691.

No facts are in dispute here. McAndrew asserts that his offender score for the burglary and controlled substances convictions should be 7, rather than 8; and the offender score for the firearm convictions should be 6, rather than 7. He is correct.

McAndrew's criminal history gives him 3 points, 1 point for his two juvenile nonviolent felony convictions, and 1 point each for his two adult nonviolent felony convictions. *See* RCW 9.94A.525(7), 9.94A.525(8), 9.94A.525(10), 9.94A.525(13). The sentencing court also properly assigned 1 point for McAndrew's commission of new crimes while on community custody. *See* RCW 9.94A.525(19)

With respect to McAndrew's burglary conviction, the statute requires the sentencing court to treat his other current convictions as if they were prior convictions for the purpose of his offender score. RCW 9.94A.589(1)(a). Subsection (8) of RCW 9.94A.525 therefore applies to his three other current convictions. None of them are listed under RCW 9.94A.030(53) as violent offenses so they each count as 1 point, 3 points in all. RCW 9.94A.525(8). Thus, his offender score should have been 7. The sentencing data contained the correct standard range and offender score, but the sentencing court imposed a sentence of 102 months, corresponding to the maximum range for first degree burglary if the offender score is 8. *See* RCW 9.94A.510;

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9.94A.515. The sentence is therefore legally incorrect.

The same calculation applies to the possession of a controlled substance conviction. *See* RCW 9.94A.525(7). However, as to this crime, the sentence range used by the court is correct. See the drug offender sentencing grid in RCW 9.94A.517 (same range for 6 to 9 points). Nevertheless, the sentence should be amended to reflect the correct offender score.

Finally, McAndrew's firearm convictions do not count as current offenses against each other. *See* RCW 9.94A.589(1)(c). Thus, the sentencing court should have assigned only 2 points for the other current convictions, making McAndrew's offender score 6 for each of those convictions. With that score, the standard range for the unlawful possession of a firearm is 22 to 29 months and the standard range for the theft of a firearm is 46 to 61 months. *See* RCW 9.94A.510, 9.94A.515. These sentences must be served consecutive to each other.

McAndrew's sentence is vacated, and this case is remanded for resentencing in accordance with this opinion.

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.

Johanson, J.

We concur:

Van Deren, J.

Penoyar, C.J.

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