IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29819-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
MARIO JAY UPHAM,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. • Mario Jay Upham appeals the offender score calculation and sentence for his felony marijuana possession conviction. He contends the trial court erred in counting one of his listed juvenile offenses as a felony. In his statement of additional grounds for review (SAG), he argues his plea agreement bound the court to a different sentence, including a drug offender sentencing alternative (DOSA). We affirm.

FACTS

In December 2010, Mr. Upham was charged with four crimes. In February 2011, he pleaded guilty to a single, reduced, amended charge of possessing over 40 grams of marijuana, a felony. The plea statement listed his offender score as 6, with a

standard sentence range of 12+ months to 24 months. The statement partly provides: "The standard sentence range is based on the crime charged and my criminal history" and "[t]he 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." Clerk's Papers (CP) at 7. The prosecutor's statement of Mr. Upham's criminal history, signed by Mr. Upham, lists four adult convictions and four juvenile offense adjudications. One juvenile offense was listed as "VUCSA - Poss." and interlineated with the word "marij." CP at 14. The offense was originally listed as "VUCSA - Poss. Meth." CP at 14.

At the plea hearing, the court explained: "The standard range is 12 months plus one day to 24 months based on an offender score of 6." Report of Proceedings (RP) (Feb. 28, 2011) at 6. The court asked Mr. Upham if he understood the standard range and Mr. Upham replied: "Yes." *Id*. And, in colloquy:

> THE COURT: Attached on the last page of this plea statement is a copy of your criminal history. Have you looked at that and do you believe that is accurate?
> THE DEFENDANT: Yeah. We made one correction on it.
> THE COURT: Okay, I see that.
> THE DEFENDANT: So it is pretty accurate, yeah.
> THE COURT: Okay, I see that. That was marijuana; correct?
> THE DEFENDANT: Yes.
> THE COURT: Okay. Other than that, do you think this is an accurate list?
> THE DEFENDANT: Yes.

RP (Feb. 28, 2011) at 6-7. After discussing other plea consequences such as fines and conditions of community custody, the trial court again discussed the sentencing

range:

> THE COURT: The prosecutor has indicated if you will plead guilty to this amended charge, they would move to dismiss the other charges, they would recommend the low end of the standard range of 12 months plus one day in prison. And you would be requesting a residential DOSA sentence of 3 months of inpatient treatment. Is that the plea agreement as you understand it?
> THE DEFENDANT: Yes, sir.
> THE COURT: Do you fully understand the Court does not have to follow either one of those recommendations, I'm free to give you whatever sentence I believe is fair up to the maximum sentence?
> THE DEFENDANT: Yes.
> THE COURT: If I give you a sentence outside the standard sentencing range, you may appeal that sentence. Do you understand that?
> THE DEFENDANT: Yes.
> THE COURT: I don't recall, I might have misspoke [sic] myself. The standard range is 12 months plus 1 day to 24 months. I might have said 14 months, but it is 24 months. Do you understand that?
> THE DEFENDANT: Yes.

RP (Feb. 28, 2011) at 8.

Mr. Upham asked the court about his DOSA eligibility. The court replied: "that is something I can consider, but I can't promise whether you will be eligible for it, I can't promise you I will order it, but I certainly will consider it." RP (Feb. 28, 2011) at 4. Mr. Upham responded: "Okay. That's fair enough." The court reiterated:

> [E]ven if . . . you are eligible for that program, the Court is not bound to impose that sentence.
> As long as I consider their statements about your qualifications, look at all the facts, consider whether or not I think it is in your best interest and the best interests of the community and whether it would serve to protect the community, I am not compelled to impose that sentence, I could still sentence you just to a standard range sentence.

> Do you understand that?

RP (Feb. 28, 2011) at 12-13. Mr. Upham acknowledged: "Yes." *Id*. at 13.

At sentencing, Mr. Upham requested a three to six-month DOSA. The prosecutor recommended a low end standard range sentence, 12 months and 1 day. Denying the DOSA, the court reasoned Mr. Upham would not comply with a DOSA program and that it would not be in the community's best interest. It suggested: "You can obtain drug and alcohol treatment in the institutional setting if you choose to make use of that." RP (Mar. 14, 2011) at 17. The court ruled, "based upon your criminal history and recent conviction, I don't think you are entitled to a sentence at the low end of the range." *Id.* The court sentenced Mr. Upham to 18 months. He appealed.

ANALYSIS

A. Offender Score Calculation

The issue is whether the trial court erred by miscalculating Mr. Upham's offender score. Mr. Upham contends the court erroneously considered one juvenile offense as a felony rather than a misdemeanor.

A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). A challenge to the offender score calculation may be raised for the first time on appeal. *Id*. We review offender score calculations de novo. *Id*.

RCW 9.94A.525 details the offender score calculation process. If the current conviction is for a nonviolent drug offense and the offender's criminal history does not include a sex offense or serious violent offense, the offender score is calculated by counting one point for each prior adult felony conviction and one-half point for each prior juvenile nonviolent felony adjudication. RCW 9.94A.525(8)-(13). Prior misdemeanors are not counted. RCW 9.94A.525; *see also State v. Wiley*, 124 Wn.2d 679, 683, 880 P.2d 983 (1994). Mr. Upham's current conviction was for a felony nonviolent drug offense, possession of marijuana under RCW 69.50.4013. Mr. Upham's criminal history does not include a sex offense and the convictions are all listed as nonviolent. Without support in this record, Mr. Upham asserts one listed juvenile offense should not count because it was not a felony.

The State accurately responds the offender score was, in context, properly calculated as six based on four prior adult felonies and four prior juvenile felonies. The standard sentence range for a current conviction is determined by an intersection of the seriousness level of the current conviction and the defendant's offender score. Mr. Upham's current conviction under RCW 69.50.4013(1), possession of over 40 grams of marijuana, was a drug offense with seriousness level I. RCW 9.94A.518. The standard sentence range for a drug offense with seriousness level I is 6 months plus 1 day to 18 months when the offender score is 3 to 5, but 12 months plus 1 day to 24 months when the offender score is 6 to 9. The sentencing court and defense counsel included Mr. Upham's challenged juvenile offense in its offender score calculation as a felony. The

record does not show the amount of marijuana concerned in the juvenile offense, the determinative factor in deciding the offense level. *See* RCW 69.50.4013, .4014.

While, Mr. Upham argues we should presume he possessed fewer than 40 grams of marijuana, the record in context supports the trial court's decision. The parties shared an understanding that the juvenile marijuana possession was a felony, and offered that understanding to the sentencing court. Mr. Upham did not disagree with the juvenile offense being included in the offender score calculation; solely juvenile felonies could have been included to calculate the score. Indeed, Mr. Upham's defense counsel advised the court of the sentencing range, calculated from the now challenged offender score. Given all in this record, the trial court properly concluded the offender score as six and did not err.

If Mr. Upham possesses information outside this record showing the challenged juvenile offense was a misdemeanor, his remedy is a personal restraint petition where such information may be produced. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

B. SAG

Mr. Upham raises two concerns in his SAG. First, he argues the trial court was bound by his plea agreement with the prosecution. Second, he argues the State broke its promise to make a specific sentencing recommendation. But the recited facts undisputedly show Mr. Upham pleaded guilty knowing his DOSA request could be denied and that the trial court was not bound by any recommendations. The

sentencing range was correctly explained. More than once, Mr. Upham acknowledged his understanding that the court did not have to follow the State's sentencing recommendation or grant a DOSA. The record shows the State promised to recommend a sentence of 12 months plus 1 day, and did. In sum, we conclude Mr. Upham's SAG lacks merit.

Affirmed.

A majority of the panel has determined 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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Brown, J.

WE CONCUR:

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Korsmo, A.C.J.

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Sweeney, J.