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

STATE OF WASHINGTON,	)	
	)	No. 30115-0-III
Respondent,	)	
	)	
v.	)	
	)	
TROY DEAN STUBBS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	
	)	

Siddoway, J. — In 2006, Troy Stubbs was convicted of first degree assault and sentenced to 480 months' confinement, an exceptional sentence that was imposed on the basis of a jury finding that his victim's injuries substantially exceeded the level of bodily harm necessary to justify the elements of the offense. On appeal, the Washington Supreme Court reversed and remanded the case for resentencing within the standard range, concluding that no injury can substantially exceed the level of bodily harm necessary to establish the "great bodily harm" required to prove first degree assault. *State v. Stubbs*, 170 Wn.2d 117, 131, 240 P.3d 143 (2010).

The trial court resentenced Mr. Stubbs to 240 months, the top of the standard

range. He now appeals asserting an error in the offender score relied upon by the court. He argues that his class B and C felony convictions washed out because he remained felony-free from 1989 to 2005. He relies on RCW 9.94A.525(2) and *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

Mr. Stubbs misreads *Ervin.* Because the trial court relied on a correct offender score and Mr. Stubbs presents no error in his pro se statement of additional grounds that warrants reversal, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Mr. Stubbs was arrested in October 2005 on a charge of first degree assault and was convicted of the charge following a jury trial. In calculating his offender score, the court included five prior class B and C criminal convictions that occurred in 1985, 1986, and 1988 and two juvenile adjudications from 1980. Based on his prior convictions, Mr. Stubbs had an offender score of six, which carried with it a standard range of 186 to 240 months. The trial court imposed an exceptional sentence based on a finding by the jury of aggravating circumstances. He appealed and this court affirmed. *State v. Stubbs*, 144 Wn. App. 644, 184 P.3d 660 (2008).

Mr. Stubbs petitioned for review by the Washington Supreme Court, which granted review, in part, in March 2009. While his appeal was pending, Mr. Stubbs moved the trial court pursuant to CrR 7.8(b) to amend his sentence based on alleged

errors in the calculation of his offender score. Before the motion could be heard, the Supreme Court reversed this court and remanded to the trial court for resentencing within the standard range. *Stubbs*, 170 Wn.2d at 131.

In June 2011, the trial court heard the parties' arguments regarding the alleged offender score error in conjunction with the resentencing. The court found no error in the score and sentenced Mr. Stubbs to 240 months. He appeals.

ANALYSIS

The sole issue is the correctness of Mr. Stubbs' offender score. A sentencing court's calculation of a defendant's offender score is a question of law that we review de novo. *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995). "A sentencing court acts without statutory authority . . . when it imposes a sentence based on a miscalculated offender score," *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997); accordingly, such an error can be raised for the first time on appeal. *State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

Mr. Stubbs' challenge to his offender score turns on the proper interpretation of RCW 9.94A.525(2)(b) and (c), which establish when class B and C felony convictions are "washed out" (disregarded in calculating a defendant's offender score) as the result of a sufficient period of crime-free time spent in the community. Mr. Stubbs contends his class B and C felonies should have washed out because of the 16 years—from 1989 to

2005—that he spent in the community without committing a felony.

Statutory interpretation is a question of law reviewed de novo. *In re Det. of Williams*, 147 Wn.2d 476, 486, 55 P.3d 597 (2002). "The court's paramount duty in statutory interpretation is to give effect to the legislature's intent." *In re Pers. Restraint of Nichols*, 120 Wn. App. 425, 431, 85 P.3d 955 (2004) (citing *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992)). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, we "'give effect to that plain meaning.'" *State v. Jacobs*, 154 Wn.2d 596, 600 115 P.3d 281 (2005) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). If the statute is susceptible to more than one reasonable interpretation, it is deemed ambiguous and this court "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

Sentencing courts "look to the statute in effect at the time [the defendant] committed the [current] crimes" when determining a defendant's sentence. *State v. Delgado*, 148 Wn.2d 723, 726, 63 P.2d 792 (2003). Before 1995, an offender's class B felony convictions washed out, "if[,] since the last date of release from confinement . . . or entry of judgment and sentence, the offender had spent ten consecutive years in the community without being convicted of any felonies." Former RCW 9.94A.360(2)

(1992). Convictions of class C felonies would wash out if the offender spent five consecutive years in the community "without being convicted of any felonies." *Id.*

Following amendment in 1995, however, class B felonies wash out "if[,] since the last date of release from confinement . . . or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing *any crime* that subsequently results in a conviction." RCW 9.94A.525(2)(b) (emphasis added). A parallel change was made to the five-year washout period for class C felonies. The statute is clear: any crime, misdemeanor or felony, interrupts the 5 or 10 consecutive crime-free years required to wash out prior class B or C felonies.

In nonetheless arguing that his misdemeanor offenses committed between 1989 and 2005 do not interrupt the washout period, Mr. Stubbs relies on our Supreme Court's decision in *Ervin*, 169 Wn.2d 815. In that case, Mr. Ervin, facing sentencing in 2006, argued that class C felonies he had committed before 1999 had washed out because he went five consecutive years without committing a crime: from his April 1999 commission of a misdemeanor until his next commission of a crime (again, a misdemeanor) in July 2005. The State disagreed—not on the basis that Mr. Ervin had not been crime-free for the required 5 years (he had), but because he had been jailed for 17 days in 2002 for violating terms of the probation imposed for his 1999 misdemeanor. The State argued that any jail time served during the five-year crime-free period required to wash out prior

class B or C felonies—even jail time served not for a crime, but for a probation violation—causes an offender to violate an independent requirement that he spend the five years "in the community."

The Supreme Court found the statutory reference to five consecutive years "spent in the community" to be ambiguous. After analysis, it concluded that an offender spends consecutive years "in the community" if he or she is in confinement for a crime during the five years. The court held that time spent in jail as the result of a probation violation does not interrupt the washout period.

The holding of *Ervin* has no application to Mr. Stubbs' situation. In Mr. Stubbs' case, his criminal history begins with two 1980 juvenile convictions: burglary in the second degree and taking a motor vehicle without the owner's permission. In 1985 and 1986, Mr. Stubbs committed four class B felonies: three crimes of burglary in the second degree and one crime of taking a motor vehicle without permission. In May 1988, Mr. Stubbs was convicted of the class C felony of forgery.

Between 1985 and 2002, however, Mr. Stubbs was convicted of 22 misdemeanors, ranging from driving with a suspended license to domestic violence assault. At no point in what Mr. Stubbs urges as the periods in which his prior class B and C felonies washed out did he go more than two years and a few months without being convicted of some misdemeanor. Because Mr. Stubbs committed misdemeanors during the periods he

proposes as having washed out his prior crimes, one never reaches the issue decided by *Ervin*, of whether a five-year crime-free period was spent "in the community." And although not the holding of *Ervin*, we note that the Supreme Court observed in passing in that case that Mr. Ervin's commission of a misdemeanor criminal trespass in 1999, for which he was convicted, "implicated the continuity/interruption clause, effectively resetting the five-year clock." *Id.* at 821.

Because Mr. Stubbs was continually in and out of confinement for misdemeanor convictions, his "clock" was never reset. His prior class B and C felony convictions did not wash out.

STATEMENT OF ADDITIONAL GROUNDS

In his pro se statement of additional grounds, Mr. Stubbs raises two issues: (1) the trial court miscalculated his offender score by including several juvenile convictions that occurred prior to obtaining the age of 15 and (2) the State has breached plea agreements that were induced on the premise that his class B and C felonies would wash out if he remained felony-free.

Juvenile Convictions

Mr. Stubbs asserts the sentencing court miscalculated his offender score by including juvenile adjudications that occurred before he turned 15.

An offender score is calculated based on a defendant's "criminal history." Former

RCW 9.94A.030(13) (2003); RCW 9.94A.525; RCW 9.94A.589(1)(a). A defendant's criminal history lists both prior convictions and juvenile adjudications. Former RCW 9.94A.030(13). "Criminal history" is a defined term in the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. *Id.* A decision whether a prior conviction shall be included in an individual's offender score is determined by the law in effect on the day the current offense was committed. *State v. Varga*, 151 Wn.2d 179, 189, 86 P.3d 139 (2004).

In 1997 and 2002, the legislature amended the definition of "criminal history" in respects that are controlling here. Laws of 1997, ch. 338, § 2; Laws of 2002, ch. 107, § 2(13); *Varga*, 151 Wn.2d at 193. Before the 1997 amendment, a defendant's "criminal history" did not include juvenile adjudications that occurred before the juvenile was 15. Former RCW 9.94A.030(12) (1996). The 1997 amendment included such convictions in a defendant's criminal history, but without indicating that the amendment operate retroactively; it was therefore construed by our Supreme Court as not restoring pre-1997 adjudications to the criminal history of a defendant for purposes of later sentencing if those adjudications had "never existed" or had "washed out," in effect, as a result of pre-1997 law. *In re Pers. Restraint of LaChapelle*, 153 Wn.2d 1, 11-12, 100 P.3d 805 (2004). The 2002 amendment further redefined the term "criminal history" to clearly provide that for purposes of future sentencing, prior law did not have the effect of

rendering nonexistent or washing out juvenile adjudications occurring before a juvenile was 15. Following amendment, the statute includes all prior juvenile adjudications in a defendant's criminal history unless they have been vacated. Former RCW 9.94A.030(13) (2002).

An offender has no vested right in the definition of "criminal history" that was in effect at the time he acquires his history. *LaChapelle*, 153 Wn.2d at 12. In particular, a defendant convicted of a crime committed after the 2002 amendment of the definition of "criminal history" has no vested right to have his pre-2002 juvenile convictions disregarded. *State v. McDougall*, 132 Wn. App. 609, 614, 132 P.3d 786 (2006). Because a change in the definition by the SRA does not increase punishment for a defendant's prior offenses, it does not violate state or federal ex post facto provisions. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 362, 759 P.2d 436 (1988).

While Mr. Stubbs' juvenile convictions were disregarded when he was convicted of his felonies in 1985, 1986, and 1988, his offender score for his 2005 conviction must be calculated based on the law in effect when the crime was committed. Mr. Stubbs is subject to the 2002 definition of "criminal history," meaning that his juvenile adjudications are part of that history and count toward his offender score. The court properly included his juvenile convictions in his offender score calculation.

Prior Plea Agreements

Mr. Stubbs next asserts that the State has breached the prior plea agreements he entered into because his prior convictions are no longer treated as having washed out despite his spending 10 years felony-free. He contends that he accepted the plea agreements in reliance on the prosecutor's representation that his felonies would wash out if he was felony-free for the period provided by the then-existing statute.

A plea agreement is a contract between the State and the defendant. *State v. Sledge*, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Basic contract principles of good faith and fair dealing impose on the State an implied promise to act in good faith in plea agreements. *Id*. at 839. The State fulfills its obligations under a plea agreement if it acts in good faith and does not contravene any of the defendant's reasonable expectations that arise from the agreement. *State v. McRae*, 96 Wn. App. 298, 305, 979 P.2d 911 (1999). The State acts in good faith when it informs the defendant of the correct sentencing law at the time of the plea. *State v. Hendricks*, 103 Wn. App. 728, 748, 14 P.3d 811 (2000), *rev'd on other grounds sub nom. State v. Smith*, 144 Wn.2d 665, 30 P.3d 1245, 39 P.3d 294 (2001).

Mr. Stubbs has not shown any promise by the State to exclude the convictions from his criminal history in the future but, at most, a representation as to existing law. A defendant is not entitled to rely solely on an expectation that sentencing laws will not change. *McRae*, 96 Wn. App. at 305 (citing *State v. Hennings*, 129 Wn.2d 512, 528, 919

P.2d 580 (1996)). Plea agreements themselves do not entitle the defendants to any exemption from the sentencing laws. *Id*. at 306.

Mr. Stubbs fails to demonstrate that inclusion of the convictions in calculating his offender score constitutes a breach of his prior plea agreements or that application to him of the current sentencing provisions violates due process.

Affirmed.

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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Siddoway, J.

WE CONCUR:

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Korsmo, C.J.

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Sweeney, J.