IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 25835-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JIMMY GEORGE BUCKMAN,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Schultheis, C.J. — Jimmy George Buckman appeals an order denying his motion to withdraw his guilty plea. He argues that his guilty plea and subsequent sentence are invalid because it was based on an erroneous offender score. We agree and remand for resentencing.

FACTS

Mr. Buckman was charged by amended information with attempted first degree theft, allegedly committed on October 2, 2005. Pursuant to a plea agreement, Mr. Buckman pleaded guilty on February 8, 2006. Mr. Buckman's plea statement did not contain a criminal history and none was attached.

Mr. Buckman was sentenced to 24.75 months based on an offender score of eight. According to the judgment and sentence, Mr. Buckman's offender score was based on a March 1999 conviction for eluding, 1995 conviction for second degree escape, 1994 VUSCA (violation of Uniform Controlled Substances Act) conviction, two 1992 VUSCA convictions, 1991 first degree possession of stolen property conviction, and two convictions for possession of a controlled substance over 40 grams in 1981 and 1982.

After sentencing, Mr. Buckman moved to withdraw his plea based on an incorrect offender score. At the hearing, Mr. Buckman's attorney informed the court that she had examined Mr. Buckman's criminal history and determined that one conviction had washed out and another conviction was invalid because there was no conviction data. She went on to state that despite this inaccuracy the offender score was still eight because the criminal history did not include two 2005 felonies. She did not identify the crimes involved in the 2005 matters. The court denied Mr. Buckman's motion stating that he had no basis to withdraw the plea because his offender score was correct. Mr. Buckman appeals.

This matter was docketed on this court's motion on the merits. On April 17, 2008, a commissioner of this court denied the motion on the merits and remanded this case to the trial court for entry in the record of the eight prior criminal judgments that had

previously been submitted to the court and for a determination of the correct offender score.[1]

The trial court held a reference hearing on October 3, 2008. At that hearing, the State entered into evidence eight certified copies of criminal judgments that the State claimed to comprise Mr. Buckman's felony history. Those convictions include a second degree theft and second degree possession of stolen property from 2006,[2] attempting to elude from 1999, second degree escape from 1995, three cocaine possessions from 1992 and 1994, and a first degree possession of stolen property from 1991. The State acknowledged that two marijuana possession convictions in 1981 and 1982 were listed in error and that they had "wash[ed] out or were dismissed." Report of Proceedings (Oct. 3, 2008) (RP) at 9. The State asserted, however, that because the two property convictions from 2006 were inadvertently omitted, the offender score would be the same.

The State also raised Mr. Buckman's misdemeanor history, evidently for the first

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[1] Mr. Buckman was released from supervision on August 30, 2007, thus completing both the confinement and nonconfinement portions of his sentence. Because Mr. Buckman seeks to withdraw his guilty plea, our commissioner rejected the State's claim that the offender score issue was moot. "When a guilty plea is based on misinformation, including a miscalculated offender score that resulted in an incorrect higher standard range, the defendant may move to withdraw the plea based on involuntariness." *State v. Mendoza*, 157 Wn.2d 582, 592, 141 P.3d 49 (2006).

[2] The 2006 convictions were evidently the 2005 unspecified crimes described by Mr. Buckman's counsel in the previous hearing before the trial court.

time on the record, but the trial court declined to consider it. Instead, the court ruled:

> Defense counsel has asserted those [older convictions] should wash because the dates of conviction show that there were more than five years between some of those convictions. That does not in itself refute the fact these documents indicate an offender score of eight. Looking at the face of these documents, they indicate an offender score of eight.
>
> Nothing in the record establishes that these scores have washed. So the court does not believe that the fact five years may have passed between some of these convictions establishes that they have, in fact, washed. It does not establish, looking at these felony judgment and sentences that they did wash. I don't think it's appropriate at this point for this court to look at additional information regarding the misdemeanor score to make that determination one way or the other, but looking at these judgment and sentences on their face does establish in this court's mind a basis for an offender score of eight.

RP at 18-19.

On March 26, 2009, a commissioner of this court again denied the motion on the merits, ruling:

> An issue exists that is not appropriate for disposition on the motion docket. Specifically, does the State have the burden of showing that Mr. Buckman's prior class C felony convictions, as determined on remand, did not wash-out? *See In re the Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 875, 123 P.3d 456 (2005).

Comm'r's Ruling (Mar. 26, 2009).

The parties re-briefed the issue and the matter was referred to us.

DISCUSSION

Sentences are determined by two factors, the seriousness level of the offense and

the offender score. RCW 9.94A.510. The court applies these two factors to the statutory sentencing grid that in turn provides the court with a sentencing range for each offense. RCW 9.94A.510. Class C felonies wash out if the current offense was committed over five years after the offender was last released from confinement. Former RCW 9.94A.525(2) (2002). The wash-out provision is calculated from the date of conviction or plea. *State v. Thomas*, 57 Wn. App. 403, 409-10, 788 P.2d 24 (1990), *overruled on other grounds by State v. Parker*, 132 Wn.2d 182, 937 P.2d 575 (1997).

Offender scores are reviewed de novo and a defendant generally cannot waive a challenge to a miscalculated offender score. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003); *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). "While waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *Goodwin*, 146 Wn.2d at 874. A determination of whether crimes constitute the same criminal conduct is a factual and discretionary determination and therefore the issue can be waived. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000); *Goodwin,* 146 Wn.2d at 875. But a challenge to an offender score based on the fact that prior convictions have washed out is a factual determination that may not be

waived. *Nitsch*, 100 Wn. App. at 523; *Goodwin*, 146 Wn.2d at 875. Because Mr. Buckman contends that prior convictions have washed out, he did not waive his challenge to the offender score.

Where a waiver is not found, a sentencing court acts without statutory authority in issuing a sentence based on an inaccurate offender score. *Goodwin*, 146 Wn.2d at 868. An inaccurate offender score causes a "fundamental defect that inherently results in a miscarriage of justice," even when the sentence is still within the correct sentencing range. *Id*. Remand is necessary unless the record shows that the sentencing court would have imposed the same sentence if the offender score had been correct. *Tili*, 148 Wn.2d at 358.

The State has the burden of establishing the existence of criminal history at sentencing by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

Based on the criminal history established on remand, Mr. Buckman was sentenced to 12 months and 1 day for eluding, his last conviction of the 1990s, on March 12, 1999. He would have been released on March 13, 2000. Mr. Buckman then pleaded guilty to the 2006 property convictions and was sentenced on January 20, 2006.

Because more than five years passed between Mr. Buckman's release from his

eluding conviction in 2000 and his convictions for property crime in 2006, all of Mr. Buckman's class C felony convictions prior to March 2005 have washed out. This includes the eluding in 1999 (RCW 46.61.024(1)), the second degree escape in 1995 (RCW 9A.76.120(3)), and the drug possessions in 1994 and 1992 (RCW 69.50.4013(2)).

The only convictions then remaining for the purposes of his felony criminal history are the two property crime convictions in 2006 and the first degree possession of stolen property conviction (a class B felony, RCW 9A.56.150(2)).[3] This results in an offender score of three. This is all that the State proved.

Our commissioner denied the motion on the merits for a determination by us as to whether the State had the burden of showing that Mr. Buckman's prior class C felony convictions, as determined on remand, did not wash out. In their briefs, the parties agree on the general proposition that the State has the burden of proving criminal history. Neither party directly addresses the commissioner's inquiry. But the general rule on the burden of proof avails.

The *Cadwallader* court did not permit the State to present additional evidence on remand because the State had failed to provide evidence of an intervening conviction that

[3] Mr. Buckman does not acknowledge that this crime is a class B felony. Instead, he argues that all of the crimes are class B felonies and that all of the convictions wash out, except for the 2006 crimes.

would have shown that a wash-out provision had not been triggered. 155 Wn.2d at 875-78. Here, the State was given an opportunity to establish the existence of such an intervening conviction that would prevent convictions from washing out. But it did not.

To prove criminal history, the prosecution is required to "introduce evidence of some kind to support the alleged criminal history." *Ford*, 137 Wn.2d at 480. The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, places the burden of persuasion of criminal history on the State at sentencing because it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove." *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988). If the evidence used to support the criminal history indicates, on its face, a wash out of the conviction under the provisions of former RCW 9.94A.525(2), the evidence does not support the conviction. *See State v. Knippling*, 166 Wn.2d 93, 101, 206 P.3d 332 (2009).

In *Knippling*, a 1999 criminal judgment used to support Mr. Knippling's third "strike" under the Persistent Offender Accountability Act showed that he was 16 years of age at the time of the conviction. 166 Wn.2d at 101. For the conviction to constitute a strike under the Act, the State had to prove that Mr. Knippling was convicted in 1991 as an offender—a person at least 18 years old or younger than 18 years of age if the

conviction was based on an automatic decline charge or if the juvenile court declined jurisdiction. *Id.* at 99.

Mr. Knippling was initially charged in superior court with first degree robbery, a crime over which the superior court has automatic jurisdiction. *Id*. Although plea negotiations resulted in the reduction of the first degree robbery charge to second degree robbery, a crime over which the juvenile court had exclusive jurisdiction, there had been no remand to juvenile court.

The Washington Supreme Court held that the State did not meet its burden of showing that Mr. Knippling had a 1999 conviction because there was no evidence in the record that the superior court had jurisdiction over Mr. Knippling by conviction of an automatic decline charge or that the juvenile court declined jurisdiction. *Id.* at 101.

The proof problem in *Knippling* related to a criminal judgment that was facially insufficient to show an applicable conviction, but which could be shown by other documentation that the State did not produce. *Id.* at 102 (if the juvenile court declined jurisdiction, the State should have been able to produce the record because RCW 13.40.110(4) requires that all juvenile court declination decisions be in writing). The same is true here.

In this case, the criminal judgments show the lapse of five years from Mr.

Buckman's 2000 release from confinement to his 2006 convictions. The State had the burden to prove that the wash-out statute was inapplicable. It failed to do so.

Based on the evidence presented by the trial court on remand, Mr. Buckman's offender score was incorrect. Therefore, Mr. Buckman is entitled to resentencing with the correct offender score.

We note that the legislature amended the SRA last year "in order to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether imposed at sentencing or upon resentencing."[4] Laws of 2008, ch. 231, § 1 (emphasis added). These provisions are retroactive. Laws of 2008, ch. 231, § 5.

We therefore remand for resentencing pursuant to this new sentencing legislation.

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

[4] Specifically, in 2008 the legislature amended RCW 9.94A.525(21) to provide that "[p]rior convictions that were not included in criminal history or in the offender score shall be included *upon any resentencing to ensure imposition of an accurate sentence*" (emphasis added); RCW 9.94.530(2) to provide that "[o]n *remand for resentencing* following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, *including criminal history not previously presented*" (emphasis added); and RCW 9.94A.500(1) to include a statement that, at a sentencing hearing, "[a] criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein."

2.06.040.

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Schultheis, C.J.

WE CONCUR:

_____ _____
Brown, J. Korsmo, J.