

Court of Appeals No. 38866-2-III
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 3

State of Washington
v.
Jeremey Douglas Pedersen

Chelan County Superior Court
Cause No. 18-1-00732-04
The Honorable Judge Travis C. Brandt

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

ISSUES AND ASSIGNMENTS OF ERROR 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 4

ARGUMENT 6

**I. MR. PEDERSEN’S EXCEPTIONAL SENTENCE MUST
BE VACATED..... 6**

A. Mr. Pedersen’s sentence must be vacated
because it is inconsistent with the Supreme Court’s
decision in *Blake*..... 7

B. Mr. Pedersen’s sentence must be vacated
because the resentencing proceeding raises an
issue of potential bias under the appearance of
fairness doctrine..... 10

**II. THE CASE SHOULD BE REMANDED TO CORRECT
SCRIVENER’S ERRORS IN THE JUDGMENT AND
SENTENCE. 14**

CONCLUSION..... 15

TABLE OF AUTHORITIES

FEDERAL CASES

<i>In re Murchison</i> , 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955).....	10
<i>Offutt v. United States</i> , 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954).....	10

WASHINGTON STATE CASES

<i>Brister v. Tacoma City Council</i> , 27 Wn. App. 474, 619 P.2d 982 (1980), review denied, 95 Wn.2d 1006 (1981).....	10
<i>Dimmel v. Campbell</i> , 68 Wn.2d 697, 414 P.2d 1022 (1966)...	10
<i>In re Welfare of R.S.G.</i> , 174 Wn. App. 410, 299 P.3d 26 (2013)	11
<i>State v. Blake</i> , 197 Wn.2d 170, 481 P.3d 521 (2021)1, 3, 6, 7, 8, 9, 15	
<i>State v. Dugan</i> , 96 Wn. App. 346, 979 P.2d 85 (1999)	11
<i>State v. Jennings</i> , 199 Wn.2d 53, 502 P.3d 1255 (2022).....	7
<i>State v. Madry</i> , 8 Wn. App. 61, 504 P.2d 1156 (1972).....	10
<i>State v. Solis-Diaz</i> , 187 Wn.2d 535, 387 P.3d 703 (2017) 11, 12, 13	
<i>State v. Toney</i> , 149 Wn. App. 787, 205 P.3d 944 (2009)..	11, 12, 13

ISSUES AND ASSIGNMENTS OF ERROR

1. The court erred by reimposing a 342-month sentence despite the reduction in Mr. Pedersen's offender score.
2. The new sentence is inconsistent with the Supreme Court's decision in *Blake*.

ISSUE 1: The Supreme Court has directed sentencing courts to exclude from an offender score calculation any prior convictions for simple possession. Is Mr. Pedersen's sentence inconsistent with *Blake*?

3. The resentencing court violated the appearance of fairness doctrine by failing to hold a *de novo* sentencing hearing.
4. The resentencing judge gave an appearance of bias in favor of the sentence previously imposed.
5. The resentencing judge improperly presumed that the prior sentence was correct, even though it rested on an incorrect offender score and standard range.

ISSUE 2: A judge violates the appearance of fairness doctrine when there is some evidence of potential bias. Did the resentencing court err by presuming Mr. Pedersen's prior sentence to be appropriate, even though it rested on an offender score that included an unconstitutional conviction?

6. The case must be remanded for correction of scrivener's errors in the Judgment and Sentence.
7. The trial court erred by transposing the offender score and seriousness level for the current offense.
8. The trial court erred by including a juvenile conviction for second-degree burglary in Mr. Pedersen's criminal history.

ISSUE 3: A case may be remanded for correction of scrivener's errors in the Judgment and Sentence. Must Mr. Pedersen's case be remanded to correct errors in the Judgment and Sentence?

INTRODUCTION AND SUMMARY OF ARGUMENT

Jeremey Pedersen was originally sentenced with an offender score that included an unconstitutional prior conviction. On remand for a new sentencing hearing, the resentencing court imposed the same exceptional sentence that had been imposed previously. This new sentence must be vacated for two reasons.

First, the sentence was inconsistent with the Supreme Court's decision in *Blake*,¹ because it revived the error that tainted the first sentencing hearing.

Second, the resentencing judge erroneously presumed that the prior sentence was appropriate, rather than conducting a *de novo* sentencing proceeding. The judge reimposed the same sentence, relying on the previous judge's decision, which rested on the miscalculated offender score.

If the sentence is not vacated, the case should be remanded for correction of two scrivener's errors. The Judgment and Sentence erroneously transposed Mr. Pedersen's offender score (8) with the seriousness level of the offense (12).

¹ *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

The Judgment and Sentence also included a juvenile conviction that the prosecutor conceded they could not confirm.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 2018, the state charged Jeremey Pedersen with two sex offenses said to have occurred in 2011 or 2012. Information filed 11/13/18, Supp. CP. He was acquitted of one count, and convicted of rape of a child in the first degree. CP 4. Mr. Pedersen represented himself at trial. CP 3.

At sentencing in April of 2020, the court found that he had nine points from prior felonies. One of those was a conviction for possession of methamphetamine. Including that offense, his standard range was 240 to 318 months. Judgment and Sentence filed 4/9/20, Supp. CP.

The jury had found a basis for an aggravated sentence. CP 24. Presiding Judge Allan told Mr. Pedersen that the aggravating factors prompted them to “add an additional 24 months onto the range that is at 318,” for a total of 342 months. RP (4/9/20) 615².

² The transcript for this date is filed as part of Mr. Pedersen’s initial appeal under cause number 37538-2-III. The Clerk has

Then the Supreme Court ruled that the law criminalizing simple possession of controlled substance was unconstitutional. CP 21. In its ruling on Mr. Pedersen's appeal, the Court of Appeals directed the trial court to remove the possession as a prior, reduce Mr. Pedersen's score accordingly, and hold a new sentencing hearing. CP 21.

The court held a hearing in April of 2022, with a different judge than the one who presided over the trial. RP (4/4/22) 3.

The correct standard range for Mr. Pedersen was now 209 to 277 months. RP (4/4/22) 5; CP 25. Mr. Pedersen's attorney told the court that the prior judge had stated their intention to add 24 months to the top of the standard range, and suggested the court now do the same. RP (4/4/22) 6.

The new judge instead gave Mr. Pedersen the same sentence the first judge had given, 342 months. RP (4/4/22) 8; CP 25; Judgment and Sentence filed 4/9/21, Supp. CP.

ruled that the court will take judicial notice of this hearing in the present case.

The court found that Mr. Pedersen's score was 8, with a seriousness level of 12. RP (4/4/22) 7. But in the Judgment and Sentence document, these numbers are transposed. CP 25.

During the sentencing hearing, the prosecutor told the court that they "couldn't confirm" a juvenile burglary 2 conviction out of Spokane county. RP (4/9/20) 605-606. But the Judgment and Sentence included that offense as a prior. CP 24.

Mr. Pedersen timely appealed. CP 33.

ARGUMENT

I. MR. PEDERSEN'S EXCEPTIONAL SENTENCE MUST BE VACATED.

Mr. Pedersen's first sentence was based on an offender score that included a void conviction for simple possession. Upon resentencing, a different judge reimposed the same sentence, despite the reduction in the offender score.

The new sentence is inconsistent with the Supreme Court's decision in *Blake*. In addition, the resentencing judge failed to conduct a de novo sentencing proceeding. Instead, the second judge presumed that the sentence imposed by the first

judge was appropriate, even though it rested on an erroneous offender score.

Mr. Pedersen's sentence must be vacated.

- A. Mr. Pedersen's sentence must be vacated because it is inconsistent with the Supreme Court's decision in *Blake*.

In 2021, the Supreme Court declared invalid Washington's statute criminalizing simple possession. *Blake*, 197 Wn.2d at 195. The court found that the statute "criminalize[s] innocent and passive possession, even by a defendant who does not know, and has no reason to know, that drugs lay hidden within something that they possess." *Id.*

Following *Blake*, convictions for simple possession "are constitutionally invalid and cannot be considered in the offender score." *State v. Jennings*, 199 Wn.2d 53, 67, 502 P.3d 1255 (2022). Here, the Court of Appeals determined that Mr. Pedersen was "entitled to resentencing" because his prior controlled substance conviction was void under *Blake*. CP 21.

The appellate court's decision reduced Mr. Pedersen's offender score from nine points to eight. RP (4/4/22) 7; CP 25; Judgment and Sentence entered 4/9/20, p. 4, Supp. CP. His

standard range declined from 240-318 months to 209-277 months. CP 25; Judgment and Sentence entered 4/9/20, p. 4, Supp. CP.

Despite this, Judge Brandt reimposed the same exceptional sentence that had been imposed by their predecessor, Judge Allan. This renewed the constitutional violation stemming from the use of the void conviction during the first sentencing proceeding.

Blake freed offenders from the consequences of conviction based on “passive and wholly innocent nonconduct.” *Blake*, 197 Wn.2d at 185. These penalties included “harsh felony consequences,” as well as the deprivation of “many fundamental rights” and “countless harsh collateral consequences affecting all aspects of [offenders’] lives.” *Id.*

Judge Allan’s inclusion of Mr. Pedersen’s void conviction in his offender score violated *Blake*. Judge Brandt’s decision revived that violation by imposing the same sentence.

Judge Brandt made clear that they were adopting the prior court’s decision. At the resentencing hearing, they told Mr. Pedersen that “having one less possession on your record, I

don't think necessarily would have altered Judge Allan's thought process.” RP (4/4/22) 9. Judge Brandt went on to say they did not “want to alter the trial court's decision to impose sentence in this case as an exceptional high.” RP (4/4/22) 9. As a result, the court decided to “leave the sentence at 342 months, as an exceptional-high sentence, above the standard range of 209 to 277.” RP (4/4/22) 9.

This decision to “leave the sentence at 342 months” meant that *Blake* had no impact on Mr. Pedersen’s prison term. He received no benefit from the Supreme Court’s decision, which was based in part on the unfair effects of a conviction for simple possession. *Blake*, 197 Wn.2d at 185.

Because Judge Brandt followed Judge Allan’s decision, the sentence imposed was premised on the standard range that Judge Allan considered when imposing the 342-month sentence.³

³ There is no indication that Judge Brandt reviewed a transcript of the prior sentencing proceeding. They acknowledged that they had not been the trial judge, and that they had only read the court file. *See* RP (4/4/22) 9.

In other words, Mr. Pedersen’s sentence continues to rest on an offender score that included the void possession conviction. The Court of Appeals should vacate the sentence and remand the case for a new sentencing hearing. *Id.*

B. Mr. Pedersen’s sentence must be vacated because the resentencing proceeding raises an issue of potential bias under the appearance of fairness doctrine.

In order to “perform its high function in the best way ‘justice must satisfy the appearance of justice.’” *In re Murchison*, 349 U.S. 133, 36, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)). In other words, “[t]he law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972).

This is so because “[t]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice.” *Id.*, at 70; *Brister v. Tacoma City Council*, 27 Wn. App. 474,

486, 619 P.2d 982 (1980), *review denied*, 95 Wn.2d 1006 (1981).

The appearance of fairness doctrine can be violated without any question as to the judge's integrity. *See, e.g., Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966). To prevail, a claimant need only provide "some evidence of the judge's... potential bias." *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 85 (1999).

Under the appearance of fairness doctrine, proceedings are invalid unless "a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). The doctrine is violated upon a showing of "potential bias."⁴ *Id.*

The test is an objective one, which contemplates "a reasonable observer [who] knows and understands all the relevant facts." *Id.* Here, there is "some evidence" of potential bias as described in these cases. *Dugan*, 96 Wn.App. at 354.

⁴ Similarly, due process requires "disqualification of a judge... whose impartiality may be reasonably questioned." *In re Welfare of R.S.G.*, 174 Wn. App. 410, 430, 299 P.3d 26 (2013).

Upon remand, Mr. Pedersen was entitled to an “entirely new sentencing proceeding.” *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). This is so because the appellate court’s remand order in this case “did not limit the trial court to making a ministerial correction.” *Id.*

However, instead of conducting an entirely new sentencing hearing, Judge Brandt expressed bias in favor of the sentence previously imposed by Judge Allan. The record shows that Judge Brandt began the resentencing proceeding with a preconception: that Judge Allan’s sentence was appropriate despite the inclusion of a void conviction in Mr. Pedersen’s offender score. RP (4/4/22) 9.

Judge Brandt attempted to rely on “Judge Allan’s thought process.”⁵ RP (4/4/22) 9. They concluded that the corrected standard range would not have changed the decision. RP (4/4/22) 9. The judge “[did] not want to alter the trial court’s decision to impose sentence in this case as an exceptional high.” RP (4/4/22) 9. Finally, they decided to “leave the sentence at 342 months.” RP (4/4/22) 9.

⁵ This was so even though Judge Brandt did not review the transcript of the prior sentencing proceeding. RP (4/4/22) 9.

These remarks show that Judge Brandt did not conduct a *de novo* sentencing proceeding. Instead, they began with the presumption that Judge Allan imposed the correct sentence. This shows “potential bias” in favor of the previously imposed sentence. *Solis-Diaz*, 187 Wn.2d at 540.

Mr. Pedersen did not receive an “entirely new sentencing proceeding.” *Toney*, 149 Wn. App. at 792. Instead, the resentencing was marred by Judge Brandt’s potential bias in favor of Judge Allan’s previous sentence.

But that previous sentence was based on the error that required reversal and remand. Judge Allan’s sentence was premised on an incorrect offender score; the Court of Appeals vacated that sentence and remanded without any limitation on the sentencing court’s authority.

The court should vacate Mr. Pedersen’s sentence. The resentencing proceeding was infected by a “potential bias” in favor of the prior sentence. *Solis-Diaz*, 187 Wn.2d at 540.

The case must be remanded for an “entirely new sentencing proceeding.” *Toney*, 149 Wn. App. at 792. The remanded proceeding may not rest on any preconceptions

relating to the previously imposed prison term. Instead, the sentencing judge must begin the sentencing hearing without any preconceptions stemming from the prior sentence.

II. THE CASE SHOULD BE REMANDED TO CORRECT SCRIVENER’S ERRORS IN THE JUDGMENT AND SENTENCE.

Offender score. Mr. Pedersen’s offender score was determined to be 8 points. RP 7. The crime for which he was convicted had a seriousness level of 12. RCW 9.94A.515. In the Judgment and Sentence, these two numbers are erroneously transposed. CP 25. The case should be remanded for correction of this error.

Criminal History. The court’s criminal history finding erroneously reflects a prior juvenile conviction for second-degree burglary. CP 24. The offense purportedly occurred in 1989, in Spokane. CP 24.

The prosecutor had conceded that they “couldn’t confirm” that Mr. Pedersen had any juvenile convictions entered outside of Chelan County. RP (4/9/2020) 606. They

told the court that records of any such convictions had been destroyed. RP (4/9/2020) 605-606.

In light of this, the burglary charge should not have been included in Mr. Pedersen's criminal history.⁶ The case should be remanded with instructions to strike the burglary conviction from Mr. Pedersen's Judgment and Sentence. This will not affect his offender score, standard range, or the sentence imposed.

CONCLUSION

Mr. Pedersen's 342-month exceptional sentence is inconsistent with the Supreme Court's decision in *Blake*. The resentencing court should have taken into account the reduction in Mr. Pedersen's offender score and standard range when determining his prison term.

In addition, Mr. Pedersen's resentencing proceeding was marred by an appearance of bias. Rather than conducting a *de novo* proceeding, Judge Brandt started with the presumption that Judge Allan's sentence was correct. This presumption was

⁶ It was not listed in the 2020 Judgment and Sentence. *See* Judgment and Sentence entered 4/9/20, p. 3, Supp. CP.

unfair, because Judge Allan’s sentence rested on an offender score that included an unconstitutional prior conviction. Judge Brandt’s preconceived notion that the sentence was appropriate violated the appearance of fairness. Mr. Pedersen’s sentence must be vacated and remanded for an “entirely new sentencing proceeding.” *Id.*

In the alternative, if the sentence is not vacated, the case must be remanded for correction of two scrivener’s errors.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 2376 words, as calculated by our word processing software.

Respectfully submitted on August 3, 2022,

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CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

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I CERTIFY UNDER PENALTY OF PERJURY
UNDER THE LAWS OF THE STATE OF
WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia Washington on August 3, 2022.



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