FILED
Court of Appeals
Division III
State of Washington
10/7/2019 8:00 AM

FILED
SUPREME COURT
STATE OF WASHINGTON
10/8/2019
BY SUSAN L. CARLSON
CLERK

97747-0

NO. 36009-1--III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

SIMON CHARLES P. CRIBBS,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

1. IDENTITY OF PETITIONER

Simon Charles P. Cribbs requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Cribbs seeks review of an Unpublished Opinion of Division III of the Court of Appeals dated September 26, 2019. (Appendix "A" 1-10)

3. ISSUES PRESENTED FOR REVIEW

1. What does the phrase "the comparable offense definitions and sentences provided by Washington law," as set out in RCW 9.94A.525 (3), mean?

2. Does the Court of Appeals, in its opinion, conduct an accurate comparability analysis with respect to Mr. Cribbs' Florida convictions for battery of a law enforcement officer and resisting arrest with violence?

3. Do the Florida convictions for battery of a law enforcement officer and resisting arrest with violence constitute the same criminal conduct for purposes of calculating Mr. Cribb's offender score?

4. STATEMENT OF THE CASE

Mr. Cribbs was charged with five (5) offenses pursuant to an Information filed on March 7, 2018. The offenses included: second degree assault (DV), two (2) counts of fourth degree assault (DV), resisting arrest and felony harassment. (CP 1)

An Amended Information was filed on March 19, 2018 for the purpose of correcting the maximum punishment on Count IV. (CP 4)

Prior to trial Mr. Cribbs pled guilty to two (2) counts of fourth degree assault and resisting arrest. (CP 7)

A jury determined that Mr. Cribbs was not guilty of second degree assault; but guilty of the lesser degree offense of fourth degree assault (DV). He was also found guilty of felony harassment. (CP 14; CP 15; CP 17)

The State and Mr. Cribbs disputed his offender score. Sentencing memoranda were filed on April 26, 2018 and April 27, 2018. (CP 18; CP 29)

Mr. Cribbs' prior criminal history is from the State of Florida. The sentencing court conducted a comparability analysis and determined that his offender score was a six (6). (RP 29, ll. 10-24; RP 30, ll. 14-22; RP 33, ll. 6 to RP 34, l. 14; RP 34, ll. 15-24)

The sentencing court included class C felonies which resulted in a miscalculation of Mr. Cribb's offender score. (*See:* Following Chart)

Offense Date	Offense	Conviction Date	Sentence	Class
05/05/93 (CP 43)	Burglary Structure Grand Theft	11/29/93	3 years	B
05/05-19/93 (CP 63)	Grand Theft Dealing Stolen Property	11/29/93	3 years 3 years	C C

08/31/97 (CP 106)	Battery Law Enforcement Officer	11/21/97	***Probation**	C
10/20/98 (CP 117)	Escape	02/24/99	23.7 Months	Gross Misdemeanor
08/31/02 (CP 178)	Battery Law Enforcement Officer	11/21/03	15 Years (Violent Career Criminal)	C
08/31/02 (CP 178)	Resisting with Violence	11/21/03		C
09/18/13 (CP 240)	Battery			Gross Misdemeanor
***Rev** 02/24/99 (CP 112)	1 year jail		448 d Cr (CP 171)	
03/14/08 (CP 188)	Count I Sentence Reversed Non-Violent Career Criminal [2nd District 07-3296 District COA - 2d District]		5 years - 06/27/08 (CP 204)	
08/08/09 (CP 217)	Count IV Sentence Reversed Non-Violent Career Criminal [2nd District 08/4114] Non-qualified prior		8.5 years 11/06/09	
(CP 218)	Notice Habitual Offender			

Judgment and Sentence was entered on May 1, 2018.

Mr. Cribbs filed his Notice of Appeal on May 2, 2018. (CP 279)

The Court of Appeals issued its unpublished opinion on September 26, 2019 affirming the trial court's calculation of the offender score.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The calculation of a defendant's offender score is controlled by the provisions of RCW 9.94A.525. There are numerous subdivisions contained within that statute. The critical language is in subsections (1), (2)(c), and (3).

RCW 9.94A.525 states, in part:

> The offender score is the sum of points accrued under this section rounded down to the nearest whole number.
>
> (1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.
> (2) …
> (c) Except as provided in (e) of this subsection, class C prior felony convictions … shall not be included in the offender score **if, since the last date of release from confinement** (including full-time residential treatment) **pursuant to a felony conviction,** if any, or entry of judgment and sentence, **the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.**
> …

> (3) Out-of-state convictions for offenses shall be classified according to **the comparable offense definitions and sentences provided by Washington law**. … .

(Emphasis supplied.)

The critical language in conducting a comparability analysis in Mr. Cribbs's case is the meaning of the phrase "**the comparable offense definitions and sentences provided by Washington law**."

Mr. Cribbs contends that both the trial court and the Court of Appeals ignored the language of RCW 9.94A.525 (3). Both courts, in conducting the comparability analysis, stopped once they made the comparison of the offense definitions. Both courts ignored the language concerning comparable sentences.

The Legislature would not have used and required both the "offense definitions and sentences" unless they were to be considered together in relationship to a comparability analysis.

A foreign offense definition and the foreign sentence must both be comparable to the Washington offense definition and the Washington sentence.

The particular offenses under consideration are Mr. Cribbs' Florida convictions for battery of a law enforcement officer and resisting arrest with

violence. Both offenses occurred on August 31, 2002. He was sentenced on November 21, 2003.

Mr. Cribbs twice appealed his November 21, 2003 convictions. The sentencing court originally ruled that he was a "violent career criminal" and sentenced him to fifteen (15) years in prison.

Mr. Cribbs' first appeal resulted in a determination that he was not a "violent career criminal" as to battery of a law enforcement officer.

Mr. Cribbs' second appeal resulted in a determination that he was not a "violent career criminal" as to resisting arrest with violence.

Mr. Cribbs was resentenced on November 6, 2009 to eight point five (8.5) years in prison. He was released on November 24, 2009. The reason for this sentence was a determination by the Florida court that Mr. Cribbs was an habitual offender. There is no comparable offense in the State of Washington for being an habitual offender. (CP 218)

Thus, the habitual offender determination is subsumed into the underlying offense and must be treated as a class C felony. *See*: RCW 9.94A.525 (3).

"The State bears the burden of proving the existence and comparability of all out-of-state convictions." *State v. Olsen,* 180 Wn.2d 468, 472, 325 P.3d 187 (2014).

The sentencing court determined that because Mr. Cribbs was not released from Florida custody until November 24, 2009 that he did not remain crime free in the community for the requisite five (5) year period due to a subsequent offense resulting in a conviction for battery. (CP 88; CP 240)

Mr. Cribbs contends that the above release date is not the critical point in time under the facts and circumstances of his case. Rather, the five (5) year period for the November 21, 2003 convictions should be treated as commencing the date of their commission (August 31, 2002) and ending on August 31, 2007.

In conducting a comparability analysis, the court must engage in a two-part test.

> First, a sentencing court compares the legal elements of the out-of-state crime with those of the Washington crime. If the crimes are so comparable, the court counts the defendant's out-of-state conviction as an equivalent Washington conviction. If the elements of the out-of-state crime are different, then the court must examine the undisputed facts from the record of the foreign conviction to determine whether the conviction was for conduct that would satisfy the elements of the comparable Washington crime.

State v. Larkins, 147 Wn. App. 858, 862-63, 199 P.3d 441 (2008).

The trial court determined that the convictions for battery of a law enforcement officer and resisting arrest with violence were both equivalent to the Washington offense of third degree assault as defined in RCW 9A.36.031 (1)(a) and/or (g).

The Court of Appeals decision affirmed the trial court's determination. It also affirmed the trial court's determination that the two offenses did not constitute the "same criminal conduct."

Both the trial court and the Court of Appeals relied upon the following language from RCW 9.94A.525 (2)(c) to support its reasoning: "the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction."

Neither court conducted a comparability analysis as to the sentences. The lack of that analysis violates the statutory directive of RCW 9A.94 525 (3).

Both courts determined that the commencement date of that five year period was Mr. Cribbs's release from prison in Florida on November 24, 2009.

Mr. Cribbs's release date in Florida is not comparable to what his release date would have been in Washington. If his two Florida convictions are both equivalent to Washington's third degree assault statute, and his offenses occurred on August 31, 2002, then the maximum possible release

date in Washington would have been August 31, 2007. Five years from that date would have been September 1, 2012. All of his class C felonies would have washed out as of that date.

Mr. Cribbs's next conviction was on September 18, 2013 for battery in the State of Florida. It was a gross misdemeanor.

> Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process. "Men of common intelligence cannot be required to guess at the meaning of the enactment." *Winters v. New York,* 333 U.S. 507, 515, 92 L. Ed.2d 840, 68 S. Ct. 665 (1947); *Seattle v. Pullman,* 82 Wn.2d 794, 797, 514 P.2d 1059 (1973).

State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980)

Mr. Cribbs asserts that his due process rights under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3 were denied as a result of the erroneous comparability analysis and offender score miscalculation.

RCW 9.94A.525(3) (formerly RCW 9.94A.360(3)) was examined in *State v. Cameron,* 80 Wn. App. 374, 378, 909 P.2d 309 (1996). The *Cameron* Court stated at 378-79:

> **The statute's purpose is to give an out-of-state conviction the same effect as if it had been rendered in-state, or, in alternative terms, to treat a person convicted outside**

> **the state as if he or she had been convicted in Washington.** …
>
> …
>
> To classify the comparable Washington offense, we ask whether it is a felony under Washington law and, if so, whether it is an A, B, or C felony.

(Emphasis supplied.)

It is Mr. Cribbs' position that the statute requires not only a comparability analysis with regard to the legal and factual prongs of the respective statutes; but also it must recognize that the Washington sentence is the controlling sentence insofar as the out-of-state conviction is concerned.

If the Washington sentence is not controlling in the comparability analysis, then the language contained in the statute, "**the comparable offense definitions and sentences provided by Washington law,**" becomes meaningless. (Emphasis supplied.)

One of the purposes of the Sentencing Reform Act (SRA) is set forth in RCW 9.94A.010(2) which states: "Promote respect for the law by providing punishment which is just."

Fairness and justice are bedrocks upon which the court system is founded. The due process clauses of the United States Constitution and the Washington State Constitution guarantee to a criminal defendant that he

will be treated fairly and that justice will be administered in a fair and impartial manner. *See*: Fourteenth Amendment to the United States Constitution and Const. art I § 3.

The Court of Appeals failed to recognize that when conducting a comparability analysis it must not ignore any portion of the provisions of RCW 9.94A.525 (3).

The Legislature directs courts to conduct a comparability analysis as to both the "definitions and sentences provided by Washington law." The Court of Appeals did not do so.

> "[A] single word in a statute should not be read in isolation, and … 'the meaning of words may be indicated or controlled by those with which they are associated.' " *State v. Roggenkanp*, 193 Wn.2d 614, 623, 106 P.3d 196 (2005) (internal quotation marks omitted) (quoting *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)).

Detention of Strand, 167 Wn.2d 180, 188, 217 P.3d 1159 (2009).

The *Strand* Court also noted that the plain meaning of a statute must be taken into consideration when interpreting legislative intent.

> "Plain meaning is 'discerned from the ordinary meaning of language at issue, the context of the statute in which that provision is found, related provisions, and that statutory scheme as a whole.' " *Udall v. T.D. Escrow Servs. Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007) (quoting *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007)).

Detention of Stand, supra.

The plain meaning of RCW 9.94A.525 (3) is that a court, in conducting a comparability analysis of an out-of-state conviction, must take into consideration not only the definitions of the offenses involved; but also the sentences provided by the respective states.

If the definitions are comparable then the classification of the offense is to be utilized based upon Washington law. It follows that the statutory language then dictates the sentence to be used for washout purposes is what the offender's comparable offense sentence would be in Washington.

Mr. Cribbs contends there can be no argument about that fact based upon the statutory language.

If Mr. Cribbs is correct, then his offender score should be a two (2) instead of a six (6).

Mr. Cribbs finds support for his position in *Seattle v. Winebrenner,* 167 Wn.2d 451, 462, 219 P.3d 686 (2009):

> If after applying rules of statutory construction we conclude that a statute is ambiguous, "the rule of lenity requires us to interpret the statute in favor of the defendant against legislative intent to the contrary." *Jacobs,* [*State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 28u1 (2005)] at 601 (citing *In re Post-Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998)). The rule states that **an ambiguous criminal statute cannot be interpreted to increase the penalty imposed**.

> *State v. Adlington-Kelly*, 95 Wn.2d 917, 920-21, 631 P.2d 954 (1981).

(Emphasis supplied.)

The Court of Appeals conclusion that Mr. Cribbs presents a novel argument without authority and is speculative is in error. The authority is the statute. He is not attempting to change the wording of the statute. Rather, he is requesting that the courts honor the language of the statute and not ignore the requirement of a comparability analysis involving the sentences involved.

It appears that the Court of Appeals conflated RCW 9.94A.525 (2)(c) and RCW 9.94A.525 (3).

The State argued that Mr. Cribbs did not remain crime free in the community for a period of five years. That argument is based upon the Florida sentence. It is not based on the comparable Washington sentence.

Thus, Mr. Cribbs contends that this is an issue of first impression in the State of Washington and review should be accepted on this issue at a minimum.

The Court of Appeals decision also claims that Mr. Cribbs failed to raise the issue of "same criminal conduct." It is difficult to conceive how the Court of Appeals arrived at this conclusion.

Assignment of Error 2 in Mr. Cribbs's original appeal brief states: "The sentencing court erred when it declined to treat Mr. Cribbs' November 21, 2003 convictions as the 'same criminal conduct.' "

Issue 3 in the original appeal brief states: "Does a 'same criminal conduct' analysis apply to out-of-state convictions?"

Mr. Cribbs presented argument on the issue of "same-criminal conduct," at his sentencing hearing:

> So, that tells me the only inference that you can draw from the charging document is that if violence was shown towards anybody it was Trujillo who is the one that was kicked. Then you come to same criminal conduct analysis or double-jeopardy because what the State is arguing is okay, if it's not a comparable felony to – something here in Washington then it's got to be comparable to the third degree assault of a law enforcement officer, which you can't have two counts against the same officer. That would be double-jeopardy, to be convicted of the same offense twice.

(RP 16, LL. 14-24)

The Court of Appeals then goes on to indicate that the trial court was not given the opportunity to exercise its discretion. Again, the Court of Appeals is in error. *See*: (CP 18, CP 29).

As previously noted, the resisting arrest with violence conviction accompanied a conviction of battery of a law enforcement officer. The same officer was involved on the one occasion and a "same criminal conduct" analysis is required. (CP 184)

RCW 9.94A.589 provides, in part:

> …[I]f the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. … "Same criminal conduct," as used in this section, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

The two (2) offenses were committed in continuous contact with law enforcement. The same officer was involved. The time and place were the same. The intent was to prevent arrest.

No interrogatories were provided to the Florida jury. Thus, there is no way to determine whether there was an independent determination that the offenses were committed against more than one officer. Nevertheless, the fact that one officer was kicked while resisting draws both offenses within a single ambit of intent, time and place.

"To determine whether a defendant's intent changed, we analyze whether crimes are sequential or continuous." *State v. Mehrabian*, 175 Wn. App. 678, 711, 308 P.3d 660 (2013).

Mr. Cribbs contends that there was no change in intent during the encounter with the officers.

6. CONCLUSION

The correct interpretation of RCW 9.94A.525 is that when conducting a comparability analysis for out-of-state convictions a sentencing court must not only apply the legal and factual analysis; but also a sentencing analysis.

If a defendant has been sentenced to a term of custody on an out-of-state conviction that exceeds the term that would have been imposed in the State of Washington, then the release date must be based upon when the individual would have been released by the State of Washington. Otherwise, the statutory language of RCW 9.94A.525(3) becomes meaningless.

Due process requires that Mr. Cribbs be given the benefit of a correct statutory interpretation, that his offender score be recalculated, and that the case be returned to the trial court for resentencing on an offender score of two (2).

Alternatively, if Mr. Cribbs' argument on statutory interpretation does not prevail, then his offender score should be reduced based upon a "same criminal conduct" analysis as to the November 23, 2003 convictions.

DATED this 7th day of October, 2019.

Respectfully submitted,

s/ Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

APPENDIX “A”

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

September 26, 2019

E-mail:
Dennis W. Morgan
Attorney at Law
PO Box 1019
Republic, WA 99166-1019

E-mail:
HON Kathryn Isabel Burke
Ferry County Prosecutor's Office
350 E Delaware Ave Stop 11
Republic, WA 99166-9747

CASE # 360091
State of Washington v. Simon C. Cribbs
FERRY COUNTY SUPERIOR COURT No. 181000092

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renée S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. Jessica T. Reeves
c: E-mail: Simon C Cribbs
#411130
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla WA 99362

FILED
SEPTEMBER 26, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 36009-1-III
Respondent,	)	
	)	
v.	)	
	)	
SIMON CHARLES P. CRIBBS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Simon Cribbs appeals from multiple domestic violence related convictions, primarily challenging the court's inclusion of prior Florida convictions in his offender score. We affirm.

PROCEDURAL HISTORY

Mr. Cribbs pleaded guilty to resisting arrest and two counts of fourth degree assault (domestic violence). A Ferry County jury also found him guilty of felony harassment and, as an inferior offense, an additional charge of fourth degree assault (domestic violence). Both parties filed well-written briefs concerning the existence and scoring of defendant's extensive Florida criminal history.

After hearing argument, the trial court found the existence of 12 prior Florida convictions entered between 1993 and 2013. The court calculated an offender score of 6 on the harassment conviction after determining that five of the convictions were the equivalent of misdemeanor or gross misdemeanor offenses in this state. The court also exercised its discretion to treat one Florida burglary and one grand theft as the same criminal conduct.

Using that offender score, the court imposed a prison sentence of 56 months by running some of the gross misdemeanor sentences consecutive to the standard range 29 month felony sentence. Mr. Cribbs then timely appealed to this court. A panel considered his case without hearing oral argument.

ANALYSIS

The appeal presents arguments that the court erred in its offender score calculation by including the Florida convictions that are the equivalent of class C offenses in Washington and by failing to treat two of them as the same criminal conduct. The court correctly applied the comparability and "wash out" statutes and was never asked to consider treating the two offenses as one. We address the three issues in the noted order.

Scoring of 2003 Conviction

Mr. Cribbs first argues that his 2003 Florida conviction for resisting with violence is only comparable to Washington misdemeanor offenses or resisting arrest or obstructing

a public servant. The trial court properly concluded it was equivalent to third degree assault.

When considering a conviction from another jurisdiction, Washington courts will compare the foreign offense with Washington offenses in order to properly classify the crime. RCW 9.94A.525(3). To determine comparability, we "first consider if the elements of the foreign offense are substantially similar to the Washington counterpart. If so, the inquiry ends." *State v. Sublett*, 176 Wn.2d 58, 87, 292 P.3d 715 (2012). If, however, the elements of the foreign conviction are not substantially similar, or if Washington defines the offense more narrowly than the foreign jurisdiction, it is necessary to look to the factual record of the foreign conviction to establish factual comparability. *State v. Latham*, 183 Wn. App. 390, 397, 335 P.3d 960 (2014). Offenses are factually comparable "if the defendant's conduct constituting the foreign offense, as evidenced by the undisputed facts in the foreign record, would constitute the Washington offense." *Id.* at 397-398. The State must prove factual comparability by a preponderance of the evidence. *Id.* at 398. This court conducts de novo review of a comparability ruling. *Sublett*, 176 Wn.2d at 87.

Mr. Cribbs was convicted of violating a Florida statute that provided:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . member of the Florida Commission on Offender Review or any administrative aide or supervisor employed by the commission; parole and probation supervisor; county probation officer; personnel or representative of the Department of Law Enforcement; or other person legally authorized

> to execute process in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree.

FLA. STAT. § 843.01.

> Washington's third degree assault statute states, in relevant part:
>
> A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
>
> (a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another;

RCW 9A.36.031(1).

The two offenses are legally comparable and criminalize the use of force to resist an arrest. To the extent that the Florida statute might be broader than Washington's statute, consideration of the facts of the encounter confirm that the two are comparable. The conviction stemmed from a single incident involving three police officers attempting to arrest Mr. Cribbs. Clerk's Papers (CP) at 184. Mr. Cribbs struggled with three officers as they attempted to place him under arrest, "shouting and flailing his arms," as well as kicking at the patrol cars and the officers. CP at 184. Factually, Mr. Cribbs' actions substantially fit into Washington's third degree assault statute.

The court correctly determined that the Washington offense of third degree assault was equivalent to the Florida offense of resisting with violence. It did not err by including the conviction in the offender score.

Scoring of Class C Equivalent Offenses

Mr. Cribbs argues that the trial court erred in including the five class C equivalent offenses in his offender score because it counted the actual prison time served in Florida instead of the punishment Washington would have accorded the same offenses. He argues that they should have "washed out" of his offender score. The trial court correctly rejected this novel contention.

Offenses may be excluded from criminal history given good behavior and sufficient passage of time. Thus, for class C offenses, RCW 9.94A.525(2)(c) provides, in relevant part:

> class C prior felony convictions . . . shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

The 2003 convictions for battery of a law enforcement officer and resisting with violence both were considered to be the equivalent of third degree assault, a class C felony. Because his next conviction was not until 2013, Mr. Cribbs believes that all five of his equivalent Florida convictions should be excluded from his offender score. However, he did not spend sufficient time in the community to wash out the offenses.

Florida treated Mr. Cribbs as a career violent offender due to the 2003 convictions. A pair of appeals resulted in resentencing in each case. CP at 285-287. Mr. Cribbs was incarcerated until November 2009 for these offenses after serving more than seven years

in custody.[1] CP at 88. He now argues that because the Florida offenses are the equivalent of class C offenses in Washington, this state should apply its maximum sentence to the Florida sentences.

He presents no authority in support of this novel argument, which would change the terms of the statute. As noted above, the statute allows a class C offense to wash out if the offender spends "five consecutive years in the community without committing any crime." The statute is cast in terms of actual time free in the community.[2] It does not require that foreign sentences be converted to Washington sentences and a fictitious release date be assigned to foreign sentences that were longer than Washington's sentence might have been. The statute deals in actuality, not speculation.

This argument is without merit. The trial court correctly concluded that the equivalent class C offenses did not wash out. Mr. Cribbs never spent five crime free years in the community.

---

[1] The crimes were committed August 31, 2002. He was originally sentenced to a term of 10 to 15 years, but that sentence was overturned on appeal. Ultimately, Mr. Cribbs served a little over seven years in prison on a final sentence of 8.5 years.

[2] "Community" does not include time spent in custody. *E.g.*, *State v. Gauthier*, 189 Wn. App. 30, 40-42, 354 P.3d 900 (2015); *In re Pers. Restraint of Higgins*, 120 Wn. App. 159, 163-164, 83 P.3d 1054 (2004).

Scoring of 2003 Offenses

Finally, Mr. Cribbs argues that the 2003 convictions for battery of a law enforcement officer and resisting with violence should have been treated as the same criminal conduct, thereby reducing his offender score by a point. However, he never asked the court to do so.

For past offenses committed at the same time, the current sentencing court has discretion to treat them as a single offense for the purpose of scoring the current convictions. RCW 9.94A.525(5)(a)(i). The defendant bears the burden of proving that prior crimes should be counted as the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). "Same criminal conduct" means that the offenses occurred at the same time and same place, had the same victim, and have the same criminal intent. RCW 9.94A.589(1)(a). Offenses have the same criminal intent when, viewed objectively, the intent does not change from one offense to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). "Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

The trial court's same criminal conduct ruling is reviewed for abuse of discretion because it involves a factual inquiry. *Graciano*, 176 Wn.2d at 535-536. Thus, "when the record supports only one conclusion on whether crimes constitute the 'same criminal

conduct,' a sentencing court abuses its discretion in arriving at a contrary result. But where the record adequately supports either conclusion, the matter lies in the court's discretion." *Id.* at 537-538 (citation omitted). This exception "is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Here, the trial court was not requested to exercise its discretion.[3] It could not have abused discretion it was never asked to exercise. Mr. Cribbs simply cannot establish error.

Filing Fee

The Washington Supreme Court has determined that the 2018 amendments to the legal financial obligations statutes apply retroactively to all cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 735, 426 P.3d 714 (2018). As a result, Mr. Cribbs requests, and the State agrees, that the filing fee assessed against him be struck. We direct that the trial court strike the fee.

[3] On this record, it looks like the claim would have foundered on the "same victim" prong of the same criminal conduct test. There was one named victim of the battery, but three named victims (and the public at large) on the resisting charge.

Convictions affirmed and case remanded to strike the filing fee.[4]

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.

Korsmo, J.

WE CONCUR:

Fearing, J.

Siddoway, J.

[4] The court also should correct a scrivener's error in paragraph 2.2 of the judgment that includes incorrect sentencing dates for two of the 1993 offenses.

NO. 36009-1--III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. SIMON CHARLES P. CRIBBS, Defendant, Appellant.	)	FERRY COUNTY NO. 18 1 00009 2 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 7th day of October, 2019, I caused a true and correct copy of the *PETITION FOR DISCRETIONARY REVIEW* and to be served on:

COURT OF APPEALS, DIVISION III — E-FILE
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

FERRY COUNTY PROSECUTOR'S OFFICE — E-FILE
Attn: Kathryn I Burke
kiburke@county.ferry.wa.us

Simon Cribbs #411130 U.S. MAIL
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

s/Dennis W. Morgan_____
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99169
Phone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

October 07, 2019 - 7:52 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36009-1
Appellate Court Case Title:	State of Washington v. Simon C. Cribbs
Superior Court Case Number:	18-1-00009-2

The following documents have been uploaded:

- 360091_Petition_for_Review_20191007074928D3054946_1217.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PDR CRIBBS.pdf

A copy of the uploaded files will be sent to:

- kiburke@co.ferry.wa.us

Comments:

Sender Name: Dennis Morgan - Email: nodblspk@rcabletv.com
Address:
PO BOX 1019
REPUBLIC, WA, 99166-1019
Phone: 509-775-0777

Note: The Filing Id is 20191007074928D3054946