NO. 101208-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DUSTEN JAMES OWENS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Dusten Owens is a habitual offender who confessed to police, confessed again at the CrR 3.5 hearing, and was found guilty at a bench trial. There is sufficient evidence to establish the corpus delicti of his crimes of possessing methamphetamine with intent to deliver and unlawfully possessing a firearm. His attorney provided effective assistance.

Post-*Blake*, Owens' offender score has changed from 14 to 12, which is still in excess of the 9 score that is the top end. The superior court imposed a low-end, standard-range sentence after hearing and denying motions for an exceptional downward or alternative sentence. Under these circumstances, the court of appeals has reasonably remanded for correction of the offender score post-*Blake*, but not for resentencing.

There is no error and no basis for review.

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II. RESTATEMENT OF THE ISSUES

A. In *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004), this Court observed that a factual finding misstated that 2.8 grams was the weight of three baggies, when the record reflected that 2.8 grams was the weight of six baggies. Is there any merit to Owens' contention that this observation amounts to a holding that a finder of fact cannot reach a conclusion from the evidence and its reasonable inferences?

B. Has the petition raised a significant constitutional question where his counsel made the sound, strategic decision not to further impeach a witness whose testimony had already been confirmed by his own client and where this would only open the door to the witness' commendations?

C. Should this Court deny review of the decision to remand for correction of the offender score rather than resentencing where the petition has not articulated a RAP 13.4(b) basis?

D. Should this Court deny review of moot claims regarding a count on which the Defendant was acquitted and where no RAP 13.4(b) basis is asserted?

III. STATEMENT OF THE CASE

A. The court of appeals found sufficient evidence to establish corpus delicti for possessing methamphetamine with intent to deliver and for unlawfully possessing a firearm.

In this appeal, the Defendant/Petitioner Dusten Owens challenged the corpus delicti for his convictions. Appellant's

Opening Brief (AOB) at 12-13. The court of appeals affirmed the convictions, holding "the evidence is sufficient to establish Owens's constructive possession of the backpack even without the admission of his statements." Unpub. Op. at 7.

When Deputy Gudaitis pulled behind Owens in traffic to compare the license plate with that of a stolen vehicle, Owens sped away. RP 161-67. Owens drove 60 mph in a 35-mph zone and failed to stop at stop signs or yield the right of way. RP 168-69, 173-74, 178-79, 184, 233-34. While Owens was attempting to elude Dep. Gudaitis, a backpack was thrown from Owens' car and immediately recovered by Deputy Baker. RP 175-76, 192, 218, 223-24, 235, 239-41.

Inside the backpack were three one-ounce packets of methamphetamine, a handgun with 13 rounds in the magazine and one in the chamber, a holster, a second magazine, additional ammunition, and keys. RP 190-93, 198, 200-01, 228, 242-45, 296. Owens volunteered that the small amount of methamphetamine in his companion's pocket belonged to him.

RP 190-91, 193, 195-96. He also confessed to having purchased the firearm and to selling the methamphetamine found in the backpack. RP 272-73, 282-84.

At bench trial, a forensic scientist testified that after the packaging was removed, the product found in the companion's pocket weighed a mere 3.6 grams where one of the three bags found in the backpack contained 27.7 grams of methamphetamine, or almost a full ounce of product. RP 344-45, 352-53. Owens was convicted of possessing methamphetamine with intent to deliver, unlawful possession of a firearm in the first degree, and attempting to elude a pursuing police vehicle. CP 111-12, 129-39.

B. The court of appeals held that it was not deficient performance to make a strategic choice not to open the door on a deputy's commendations and accolades.

In motions in limine, Owens asked that he be allowed to cross-examine Dep. Olson about "his being placed on the Brady/PIE[1] list." CP 31. Dep. Olson was only on the list because

[1] Potential Impeachment Evidence

a superior court judge had made a finding that it was not credible that he could have recalled an unrecorded fact, forgotten it, and recalled it over a four-year span of time. CP 56-57; RP 23-24. The single, isolated finding did not establish a reputation for untruthfulness under ER 608 and could have been excluded under ER 404(b). CP 58; RP 20-22.

Defense counsel observed, "Because it's a bench trial, you're aware of it; right?" RP 23. The court agreed: "because this is a bench trial [ ] the bell has been rung." RP 24. The judge ruled that Owens could make a "brief inquiry," warning that an inquiry would open the door to the prosecutor's rehabilitation of the witness. RP 23-24. Ultimately defense counsel chose not to broach the subject again at either the CrR 3.5 hearing or the bench trial. RP 88-91, 274-84.

The court of appeals held that defense counsel's decision was tactical where "he knew the State would inevitably rehabilitate the officer by introducing evidence of his commendations and other accolades." Unpub. Op. at 12-13.

C. The court of appeals remanded for correction of the offender score post-*Blake.*

At his sentencing, Owens' offender score was calculated at 14 points resulting in a standard range of 220 to 240 months on the most serious offense. CP 73-74, 113. The prosecutor had recommended a mid-range sentence of 230 months. RP (1/17/2020) at 441. Owens had asked for either an exceptional downward sentence under RCW 9.94A.535(1)(g) or for the court to refuse to impose the mandatory 10-year firearm enhancement. CP 81-82 (acknowledging the latter request was in violation of *State v. Cyr*, 8 Wn. App. 2d 834, 840, 441 P.3d 1238, 1242 (2019), *aff'd in part, remanded in part*, 195 Wn.2d 492, 461 P.3d 360 (2020)). In his allocution, Owens asked for a drug offender sentencing alternative or DOSA, a sentence for which he was not eligible. RP 445, 452-53, 455.

The judge found no mitigating factor and, pending *State v. Cyr*, 195 Wn.2d 492, 461 P.3d 360 (2020), no basis to impose anything other than a standard range sentence as calculated by

the State. RP 455. Therefore, the court imposed a sentence at the low end of the standard range. CP 116-17.

In supplemental briefing, Owens challenged two of his 14 points under *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) (holding unconstitutional the crime of simple possession). Because the standard range is based on scores between 0 and 9, the reduction in offender score from 14 to 12 points did not affect Owens' range. RCW 9.94A.510; RCW 9.94A.517. The court of appeals remanded to correct the notation in the judgment but not for resentencing. Unpub. Op. at 16.

IV. ARGUMENT

A. The court of appeals' decision is not in conflict with any published authority.

In this petition, Owens alleges that the unpublished opinion is in conflict with *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004). Pet. at 7. There is no conflict.

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1. Owens misrepresents that *Goodman* held that all baggies must be tested where it only observed that 2.8 grams represented the weight of six baggies, rather than three.

Owens claims that *Goodman* prohibits an inference that the untested baggies also contained methamphetamine. Pet. at 12-13. This completely misreads *Goodman* where the court found a misstatement of the evidence in the record, not insufficient evidence for possession with intent.

In that case, six baggies weighed a total of 2.8 grams. *Goodman*, 150 Wn.2d at 779. Three of those baggies were tested. *Id.* Goodman challenged a finding of fact which read:

> Three of those baggies were tested by the State Crime Laboratory. The test was positive for methamphetamine, with a weight of 2.8 grams.

Id. at 782. The reviewing court agreed that this finding misstated the evidence, because the three tested baggies did not weigh 2.8 grams. *Id.* It was all six baggies which weighed this amount.

The misstatement was ultimately inconsequential. *Id*. (noting the error in the finding "does not change the result we

reach"). *Id*. at 782. The court found sufficient evidence of an intent to deliver.

Unlike Goodman, Owens has not alleged that the judge misstated the evidence. Nor did she. The factfinder correctly and precisely described the evidence like this:

XII.

> The white crystalline substance from one of the three baggies found in the backpack was analyzed by Ms. Dudschus and found to contain methamphetamine and weighed 27.7 grams. Ms. Dudschus testified that the three separate baggies were in one item and that the material in each baggie was similar in appearance and structure. The weight and volume of white crystalline substance in each bag also appeared to be the same.

CP 133.

Rather Owens has complained about the factfinder's conclusion that all three baggies in the backpack contained methamphetamine Ap. Op. Br. at 1 (citing Conclusion of Law IV). The court of appeals reviewed the challenge for substantial evidence in the record. Unpub. Op. at 9; *see also State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (substantial evidence

is evidence sufficient to persuade a fair-minded, rational person of the truth). There is substantial evidence that the other baggies contained the same substance where all three baggies were similar in appearance, had the same volume and weight, were packaged together in another bag, and lacked separate markings or labels such that Owens or his buyers would be able to discriminate one baggie from the other. RP 190-93, 228, 296, 344-45, 350, 352-53.

Because this was not the issue in *Goodman*, there is no merit to the claim that the court of appeals' opinion conflicts with *Goodman.*

2. Consistent with *Goodman*, intent to deliver was proven by more than mere amount of the drug.

Goodman explains that the element of "intent to deliver" may be proven by a deliverable amount plus one other fact. *Goodman*, 150 Wn.2d at 782-83 (citing *State v. Zunker*, 112 Wn. App. 130, 136, 48 P.3d 344 (2002) *review denied*, 148 Wn.2d 1012, 62 P.3d 890 (2003)). In *State v. Lane*, 56 Wn. App. 286, 297, 786 P.2d 277 (1989), there was a large amount of product

(one ounce of cocaine) together with large amounts of cash and scales. In *State v. Harris*, 14 Wn. App. 414, 542 P.2d 122 (1975), *review denied*, 86 Wn.2d 1010 (1976), the drugs were packaged in five bags and there were scales. And in *State v. Simpson*, 22 Wn. App. 572, 590 P.2d 1276 (1979), the heroin was located in more than one place in the house and tied off in balloons.

In Owens' case, the evidence was that:

- the amount of drugs in the backpack was significantly more than was common for personal use (RP 291-92, 294-96, 300, 362);
- the drugs in the backpack were packaged for sale (three one-ounce baggies inside another baggie) (RP 344-45, 352-53);
- Owens kept drugs in two locations—in the backpack for sale and hidden with his girlfriend for personal use (RP 196, 227-28);

- the sale stash was in a bag with a gun, and dealers frequently carry a gun with their sale stash to defend it (RP 228, 293-95, 298-99);
- Owens had significant reason to avoid police attention:
    - he believed he had a warrant for failing to check in with his community corrections officer whose office was two blocks from the situs of his arrest (RP 104, 108, 230-31);
    - Owens had reason to know that he could be more easily searched while on community custody; and
    - having just served a sentence for the identical offenses (drugs and firearm possession), he had reason to know that he would face significant prison time if caught (RP 272, 283);
- Owens was driving (RP 185);

- he fled from police (RP 165-69);
- it is not reasonable to believe that he would have risked a two-year sentence for attempting to elude to avoid a few weeks incarceration for a mere community custody violation (CP 155; RP 359);
- Owens' girlfriend begged him stop for the sake of her two-year-old son who was also in the car (RP 132, 189-90);
- he did not stop until the drugs had been tossed from the car (RP 175-75, 218); and
- Owens confessed to possessing both gun and drugs and to an intent to sell the drugs in the backpack (RP 272-73, 276, 279-84).

Consistent with *Goodman*, there was more evidence than a mere saleable amount to support an inference of Owen's intent to deliver. Amount was not, as Owens' alleges, a "crucial" part of "sparse" proof of intent to deliver. Pet. at 14. The State need only show amount plus one additional fact. That one additional

fact could have been Owens' confession, the presence of a gun, his flight, the separate packaging, or the storing of drugs for personal use separately from the drugs intended for sale.

3. Contrary to Owens' claim, the court of appeals explicitly considered the evidence apart from his confession.

Owens claims that the court of appeals only addressed or "convert[ed]" his claim to one of "straight insufficiency," failing to consider sufficiency in the absence of Owens' confession. Pet. at 10. This is false. The evidence is much more than Owens' confession. And the unpublished opinion specifically considered sufficiency apart from the confession.

> We hold that the evidence is sufficient to establish Owens's constructive possession of the backpack even without the admission of his statements.

Unpub. Op. at 7. The court specifically addressed Owens' claim that "nothing connects him to the backpack containing the gun and the methamphetamine except his confession and the State's theory of constructive possession." Unpub. Op. at 8. It noted that the question was not whether Owens' girlfriend had joint

possession, since constructive possession need not be exclusive. *Id.* at 8-9. It found there was sufficient evidence of Owens' possession. *Id.* ("We conclude the evidence is sufficient here.").

Owens persists that he could not have known what was in his backpack, because he threw it out of the passenger window. Pet. at 12. This argument demonstrates that it is Owens, not the court, who "fail[s] to apply the standards." Pet. at 12. Under the correct legal standard, every inference must be drawn most strongly for the state and against the defendant. Owens alone chose when to flee and when to stop fleeing. He only stopped driving after the backpack had been removed from the vehicle. This and many other facts support a strong inference that he knew what was in his backpack which had been in his car.

The court of appeals' decision does not conflict with any published case, and therefore is not reviewable under RAP 13.4(b)(1) or RAP 13.4(b)(2).

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B. The trial attorney's strategy not to impeach a credible witness so as to open the door to even more information commending the witness does not raise a constitutional issue.

Owens maintains that his attorney should have impeached Dep. Olson with the fact that he had forgotten some small unrecorded detail over the course of four years. This innocuous memory lapse cannot impeach a confession promptly memorialized in a police report. There is no likelihood that the potential impeachment information could have altered the outcome of Owens' trial. *State v. Estes*, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

This argument again disrespects the legal standards. The reviewing court begins with a strong presumption that defense counsel acted reasonably in the course of representation. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). A claim of ineffective assistance reviews counsel's full performance throughout representation, not merely the specific allegation. *McFarland*, 127 Wn.2d at 335. And defense counsel's legitimate

trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 336 (citing *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)). The defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Estes*, 188 Wn.2d at 457-58; *McFarland*, 127 Wn.2d at 334-35.

Owens belittles the court of appeals as having engaged in speculation regarding counsel's strategy. Pet. at 16. It was not speculation. The court drew on a specific discussion in the record in which defense counsel acknowledged that he had sufficiently impeached the witness by bringing the motion, since the judge who ruled on the motion would also be the finder of fact in the bench trial. The judge agreed that the bell could not be unrung. The judge then advised that raising the matter at trial would open the door to the deputy's accolades. The attorney's decision not to press further was made in that context.

Owens asserts that Dep. Olson was the only witness to his confession. Pet. at 16. This is not true. Owens was also a witness. And Owens had testified at his CrR 3.5 hearing admitting that Dep. Olson's testimony was the truth. RP 96 ("My state of mind was, 'I can't believe I'm in this again' … I mean the facts are almost identical to the facts of my last case, for two. And just the overall situation."). The same judge who heard Owens' admission would sit on the bench trial.

It would be poor strategy indeed to attack Dep. Olson under these facts. The court of appeals' sound decision does not present a constitutional issue such as would permit review under RAP 13.4(b)(3).

C. Owens offers no RAP 13.4(b) basis to review the court of appeals' decision to remand to correct the offender score post-*Blake.*

Owens would like a full resentencing, although the court still cannot impose anything less than it has. This is not reasonable.

Owens' score still remains far in excess of the maximum 9 points. Owens is a high priority offender based on his criminal history and rapid recidivism. RP 444, 454. His reduced score of 12 still exceeds the 0-9 range and the 9-point high end that the Legislature anticipated. His standard sentence range remains the same. *State v. Cyr*, 195 Wn.2d 492, 461 P.3d 360 (2020) did not change that.

Owens has no right to an exceptional sentence. RCW 9.94A.585(1) (he cannot appeal a standard range sentence). A change from 14 points to 12 points is not a mitigating factor.

The sentencing court already heard and denied Owens' request for exceptional downward departures or a DOSA. It found no mitigating factor, a prerequisite to an exceptional downward sentence. RCW 9.94A.535. *State v. Blake,* 197 Wn.2d 170, 481 P.3d 521 (2021) did not result in a finding of a mitigating factor, so there is still no basis for an exceptional downward sentence. And Owens still remains ineligible for a DOSA. RP 445.

The superior court already imposed a sentence at the low end of the standard range. It cannot give him less. Owens does not assert a basis under RAP 13.4(b) to challenge this decision. None exists.

D. There is no basis to review a challenge to a charge on which the Defendant was acquitted.

In the Statement of Additional Grounds, Owens challenged a bail jumping charge (for lack of notice, lack of probable cause, and blaming the prosecutor, defense counsel, and judge in turn). Owens asserts that the court of appeals held him to an improper standard. Pet. at 21. In fact, the court of appeals denied the claims as moot, because Owens was acquitted of bail jumping. Unpub. Op. at 17. There is no remedy after acquittal. There is no logical reason to review this. And Owens asserts no RAP 13.4(b) basis.

V. CONCLUSION

The Court should deny the petition which meets no consideration under RAP 13.4(b).

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RESPECTFULLY SUBMITTED this 26th day of September, 2022.

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PIERCE COUNTY PROSECUTING ATTORNEY

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