69271-2

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NO. 69271-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES S. JOHNSON,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) The defendant has prior convictions that have previously been used as criminal history. When the defendant was originally sentenced for those crimes, the courts did not find that they encompassed the same criminal conduct. At sentencing for a subsequent offense, however, the court did count them as the same criminal conduct. In computing criminal history for the current offense, is the court required to treat these prior convictions as one offense?

(2) The defendant was sentenced based on a standard range of 47¼-60 months' confinement. Defense counsel recommended a sentence of 60 months, but she pointed to facts that could justify a lesser sentence. The defendant personally asked for a sentence of 48 months. In imposing a sentence of 58 months, the court gave a detailed explanation of why the facts justified a sentence close to the top of the range. Has the defendant showed that he was prejudiced by any deficient performance by counsel in making a 60-month recommendation?

II. STATEMENT OF THE CASE

A. THE CRIME.

At around 9 p.m. on December 8, 2011, Tiffany Baisden made a cash withdrawal at an ATM located outside a grocery store in Lynnwood. As she walked back to her car, she was followed by the defendant (appellant), James Johnson. She got in her car and tried to shut the door. The defendant grabbed the door before she could close it. He told her, "Give me the money." He was holding an object in his hand that looked like a knife. She started screaming and kicking him. He continued trying to get into the car. After she kicked him several times, he ran to a nearby car and drove away. 1 RP 61, 65-71.[1]

The defendant testified that he had mistaken Ms. Baisden for a high school friend. He walked up to her car, opened the door, and said, "Give me the money." He did not intend to rob her. He was carrying his cell phone in his hand. Ms. Baisden started screaming. At that point, the defendant realized that Ms. Baisden was not the person he thought she was. He put his hands up, said "my bad," shut the car door, and left. 2 RP 88-92.

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[1] The report of proceedings for 7/2/12 will be referred to as "1 RP." The volume covering 7/3, 7/5, and 8/24 will be referred to as "2 RP."

A jury found the defendant guilty of attempted second degree robbery, as charged. 1 CP 25.

B. DEFENDANT'S CRIMINAL HISTORY.

At sentencing, the State presented evidence of nine prior felony convictions: one for second degree murder, four for obtaining a controlled substance by forged prescription, two for forgery, one for second degree possession of stolen property. and one for second degree burglary. 2 CP 155-209. The issues on appeal center on two groups of these convictions. One group comprises the four prescription forgeries. The other comprises the possession of stolen property and one of the forgeries.

1. Prescription Forgeries.

The State introduced the judgments and sentences, informations, affidavits of probable cause, and plea statements for these crimes. 2 CP 170-89, 78-103. The judgments show on their faces that the crimes were committed on four different dates. 2 CP 170, 180. The other documents confirm that the defendant was charged and pleaded guilty to crimes committed on four different dates. 2 CP 78, 80, 82. 92, 95-96, 98.

In sentencing the defendant for the prescription forgeries, the court treated the four crimes as separate criminal conduct. 2 CP

170-71, 180-81. At the later sentencing for forgery and possession of stolen property, the court likewise counted these crimes separately. 2 CP 201. At the sentencing for the murder, however, the court listed these crimes as "same crim. conduct." 2 CP 196. The record does not indicate what information that court relied on in reaching that decision.

2. Forgery/Possession Of Stolen Property.

Again, the State introduced the judgment and sentence, information, affidavit of probable cause, and plea statement. 2 CP 200-09, 104-22. The information showed that the possession of stolen property involved two stolen credit cards. The forgery involved signing a false name to a credit card slip. 2 CP 104. The judgment and sentence does not contain any finding that these crimes were the same criminal conduct. 2 CP 200.

At the sentencing for the murder, the court found that these two crimes as well were "same crim. conduct." 2 CP 196. Again, the record does not indicate the basis for this decision.

C. SENTENCING.

At sentencing, both counsel agreed that the defendant had an offender score of 10. 2 RP 172, 174. This yielded a standard sentence range of 47¼-60 months' confinement. The prosecutor

argued for a 60-month sentence based on "the defendant's extensive criminal history, his very rapid recidivisim after having just gotten out of prison on his prior murder conviction, and the impact on the victim, who I did submit a victim impact statement." 2 RP 173.

Defense counsel submitted certificates showing some of the defendant's accomplishments while in prison. 2 CP 123-44. At the sentencing hearing, counsel agreed that a 60-month sentence was appropriate. Since this was the statutory maximum, it would not include any period of community custody. Counsel added: "The classes and things that Mr. Johnson was doing towards the end of his prison sentence, also the fact that he had been attempting to start his own business, I think he was on track to try to better himself." 2 RP 174-75.

The defendant asked the court to impose a sentence of 48 months. He pointed out that he had been offered that sentence in a plea bargain. He also spoke of his "regret for what happened with Tiffany Baisden, the victim." 2 RP 175-78.

The court "view[ed] the defense recommendation as a 48-month recommendation towards the low end." The court outlined in detail the conflicting considerations affecting the sentence. (The

court's full sentencing remarks are set out in the appendix.) 2 RP 180-84.

On the one hand, the defendant's letter and statements in court "give hope that perhaps Mr. Johnson is getting wiser with age." The court thought there was value to a period of community custody, which would not exist if the court imposed the maximum sentence. Although the crime was serious, the defendant did not persist, and his actions did not cause any physical injury. 2 RP 181-82.

On the other hand, "[t]he victim impact statement I think speaks eloquently to the impact that Mr. Johnson's actions had upon her." There was only a short time span between the defendant's release from prison and the new offense. The court was also concerned about "the seriousness of Mr. Johnson's previous history, which is largely taken into account in terms of the range, but it's certainly worthy to note that history includes a homicide charge." Considering all of these factors, the court imposed a sentence of 58 months' confinement. 2 RP 182-83.

III. ARGUMENT

A. THE OFFENDER SCORE WAS CORRECTLY COMPUTED.

1. Under RCW 9.94A.525, A Court Is Required To Respect "Same Criminal Conduct" Determinations Made By The Original Sentencing Court, But Not Those Made By Subsequent Sentencing Courts.

The defendant challenges the trial court's computation of his offender score. At sentencing, defense counsel affirmatively agreed that the State's computation was correct. 2 RP 174. Nonetheless, it appears that this issue can be raised on appeal. A defendant's stipulation to his offender score does not foreclose a subsequent argument that this score reflected a legal error. A stipulation does, however, foreclose claims based on alleged factual errors or matters of judicial discretion. State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004). Here, the defendant claims that he was entitled to have his prior convictions counted together as a matter of law, without regard to the facts of those convictions.

The rules for scoring multiple prior offenses are set out in RCW 9.94A.525(5)(a):

> [1] Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. [2] The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently ... whether those offenses shall be

> counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a). . .

This subdivision sets out two alternative scoring rules. Under the first sentence, the court is required to treat prior offenses as a single offense. This applies whenever such offenses "were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct." If there was no such finding, the second sentence applies. That sentence requires the court to make its own determination "using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a)."

To determine how these provisions apply, this court must examine RCW 9.94A.589. That section sets out rules for determining whether sentences will be consecutive or concurrent. Subdivision (1)(a) provides the default rule for multiple current offenses:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if 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. Sentences imposed under this subsection shall be served concurrently. . . "Same

> criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

RCW 9.94A.589(1)(a) only applies "whenever a person is to be sentenced for two or more current offenses." In other words, it applies only to the *original* sentencing proceeding. In subsequent proceedings when a court is determining criminal history, the offender is no longer "to be sentenced for two or more *current* offenses." As a result, any determination with regard to criminal history is not made "under RCW 9.94A.589(1)(a)."

RCW 9.94A.525(5)(a) distinguishes between determinations that are made "under RCW 9.94A.589(1)(a)" and those that are made "using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a)." Only the former determinations are made binding on later sentencing courts. "It is a basic rule of statutory construction that the legislature intends different terms used within an individual statute to have different meanings." State v. Tracer, 173 Wn.2d 708, 717 ¶ 22, 272 P.3d 199 (2012). Giving the same meaning to the two terms would violate this rule.

This distinction also makes sense. Decisions "under RCW 9.94A.589(1)(a)" are made by the original sentencing court. That

court will normally have extensive information about the facts of the crimes. It is in a better position than future courts to decide whether the crimes encompass the same criminal conduct. For that reason, the original sentencing court's decision on this issue should not be second-guessed by future courts.

In contrast, a court that sentences an offender on later charges may have little information about prior offenses. That court is in no better position than any future court to make a "same criminal conduct" determination. Consequently, there is no reason to make its decision binding on future courts.

The defendant argues that "if a prior trial court has determined that two or more convictions constitute the same criminal conduct, the current sentencing court is bound by that determination." Brief of Appellant at 9. This argument ignores the statutory requirement that the prior determination be made "under RCW 9.94A.589(1)(a)." Under the defendant's argument, these words are superfluous. If they were deleted from the statute, its meaning would not change. Such a construction is improper. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered

meaningless or superfluous." State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196, 201 (2005).

If the defendant's argument is correct, one decision that two crimes encompass the same criminal conduct trumps any number of contrary decisions. Here, for example, both the original sentencing court and a subsequent court determined (correctly) that the four counts of prescription forgery were *not* the same criminal conduct. Under the defendant's argument, however, this makes no difference. According to him, all future courts must ignore the two correct determinations and instead apply the incorrect determination. This makes no sense.

Under a correct application of RCW 9.94A.525(5)(a), the trial court acted properly. There has been no prior decision under RCW 9.94A.589(1)(a) that any of the defendant's prior convictions encompassed the same criminal conduct. Consequently, the court was required to decide whether to count those decisions separately "using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a)." Under that analysis, the four prior convictions for prescription forgery were not the same criminal conduct because they were committed on different days. The prior forgery and possession of stolen property were not the same criminal conduct

because they were committed against different victims. Consequently, all of these convictions counted separately towards the offender score.

2. The History Of RCW 9.94A.525 Confirms That Determinations "Under RCW 9.94A.589(1)(a)" Are Only Made By The Original Sentencing Court.

An examination of the statutory history confirms this interpretation of the statute. Under the original version of the Sentencing Reform Act, all prior convictions that were served concurrently counted as a single offense. Laws of 1983, ch. 115, § 7(8); Laws of 1984, ch. 209, § 19(11). Shortly after the Act took effect, the legislature decided to expand the number of prior convictions that would count towards the offender score. The legislature therefore enacted the following:

> In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:
>
> (a) Prior adult offenses which were found, under RCW 9.94A.400(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently whether those offenses shall be counted as one offense or as separate offenses. . .

Laws of 1986, ch. 257, § 24. At the same time, the legislature amended RCW 9.94A.400(1)(a) to create a "same criminal

conduct" standard for multiple current offenses. Id. § 28; see State v. McGraw, 127 Wn.2d 281, 296-98, 898 P.2d 838 (1995) (Talmadge, J., dissenting) (discussing history of 1986 amendments). RCW 9.94A.400 is the predecessor of RCW 9.94A.589.

Under these 1986 amendments, the reference to a finding "under RCW 9.94A.400(1)(a)" clearly referred to a finding by the original sentencing court. This is because the statute did not provide for any other court to make any such determination. If no such finding was made by the original sentencing court, it would never be made.

The 1986 statute was construed as conferring unrestricted discretion on subsequent sentencing courts to decide what crimes would be included in criminal history, whenever the offender had served concurrent sentences for crimes that had not been found to encompass the same criminal conduct. State v. Lara, 66 Wn. App. 927, 834 P.2d 70 (1992); McGraw, 127 Wn.2d at 287-88 (majority opinion). The court could choose to count the convictions separately or as a single conviction. This decision could be based on any factors that the court considered appropriate.

The 1995 Legislature decided that this discretion was too broad. It therefore amended the subdivision by adding the underlined language:

> [1] Prior adult offenses which were found, under RCW 9.94A.400(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yield the highest offender score. [2] The current sentencing court shall determine, with respect to other prior adult offense for which sentences were served concurrently whether those offenses shall be counted as one offense or as separate offenses <u>using the "same criminal conduct" analysis found in RCW 9.94A.400(1)(a)</u>. . .

Laws of 1995, ch. 316, § 1(6)(a)(i).

This amendment made no changes to the first sentence. The amendment only changed the second sentence, to limit the authority of subsequent sentencing courts. These courts no longer had unrestricted discretion to decide how to count prior criminal history. Rather, such discretion had to be exercised "using the 'same criminal conduct' analysis."

The 1995 amendment was intended to narrow the authority of subsequent sentencing courts, not to expand it. The rule as to prior "same criminal conduct" determinations was left unchanged. Prior to the enactment of this amendment, such determinations were binding only if they were made by the original sentencing

court. After the amendment, the same remains true. Subsequent sentencing courts do not have the authority to bind future courts – only the original sentencing court has that authority.

The trial court correctly resolved the factual issue of whether the prior offenses encompassed the same criminal conduct. Furthermore, even if that factual decision was wrong, the defendant's agreement to the offender score prevents him from challenging it. Ross, 152 Wn.2d at 231. The sentencing range was correctly computed.

B. IN VIEW OF THE COURT'S CAREFUL BALANCING OF FACTORS AFFECTING THE APPROPRIATE SECTION, THERE IS NO REASON TO BELIEVE THAT DIFFERENT ARGUMENTS BY DEFENSE COUNSEL WOULD HAVE RESULTED IN A DIFFERENT SENTENCE.

The defendant also claims that he received ineffective assistance of counsel at sentencing. To establish this, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant alleges two areas of ineffectiveness: (1)

stipulating to the offender score and (2) failing to argue for a more lenient sentence.

The first alleged deficiency is immaterial. The State has conceded above that the computation of the offender score can be challenged on appeal notwithstanding counsel's concession. If the offender score is incorrect, the defendant will be entitled to re-sentencing, whether or not counsel's performance is considered deficient. If the offender score is correct, counsel's failure to challenge it was not prejudicial. Since prejudice cannot be established, the court need not determine whether counsel's actions were deficient.

With regard to the other alleged deficiency, what sentence to recommend is normally a tactical choice. The State cannot, however, suggest any valid tactical reason in this case for seeking a sentence at the top of the range. This court may therefore conclude that counsel's performance was deficient. Nonetheless, the defendant again cannot show prejudice:

> [A]n allegedly unsuccessful or poor quality sentencing argument alone is unlikely to result in demonstrable prejudice because of the near impossibility of showing a nexus between the argument and the eventual sentence. We must be persuaded the result would have been different. A standard range sentence is a matter of broad trial court discretion. Argument merely

> attempts to influence the court's exercise of its sentencing discretion

State v. Goldberg, 123 Wn. App. 848, 853, 99 P.3d 924 (2004).

Here, the court treated the defense recommendation as one for the low end of the range. The court "focus[ed] ... on the things that [defense counsel] has pointed to as justifying something less than the high end." The court reviewed the factors supporting a lenient sentence, as well as those that justified a more severe sentence. After this careful review of relevant factors, the court imposed a sentence of 58 months, slightly less than the 60-month maximum. 2 RP 179-84. In view of this careful analysis by the court, there is no reason to believe that further argument by counsel would have changed the sentence. Any deficient performance was not prejudicial.

IV. CONCLUSION

For the reasons stated above, the sentence should be affirmed. Since the defendant has not challenged his conviction for

attempted second degree robbery, that conviction should be affirmed in any event.

Respectfully submitted on August 7, 2013.

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By: 

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THE COURT: Okay. Mr. Johnson, did you have anything further?

THE DEFENDANT: Yeah. At this point one other thing, I would just like you -- I do have an extensive criminal history, but with the exception of the -- almost all of them are close to 20 years old. That's just -- I wanted to add that as well. Hopefully maybe that you will take that into consideration when considering the 48 months as opposed to the 60.

THE COURT: Okay. Thank you. Mr. Dickinson, did you have anything to add at this point?

MR. DICKINSON: Nothing to add. No.

THE COURT: Okay. Thank you. The Court, of course, is always conscious at various proceedings that there be a record and so that if there were any issues that might come up on appeal or collateral attack that the record is made.

Ms. Trueblood has articulated, I think, some reasons for going less than the high end. Although, ultimately, she made reference to the State's high-end recommendation. Mr. Johnson has recommended something towards the low end, a 48-month recommendation. I would just indicate that the Court in considering this is essentially viewing the defense recommendation as a 48-month recommendation towards the low end.

And I might say that, again, I have reviewed the documents and record in this matter, and the Court was prepared or had a lot of information before it and had a fairly good idea of what might be appropriate before I came out on the bench. And that's typically so. But I obviously always await and do not make a final decision until I hear what is presented at the sentencing hearing. And as I say, I am treating the defense position as the 48-month recommendation, noting Ms. Trueblood's observations, but focusing really on the things that she has pointed to as justifying something less than the high end. Recognizing her ultimate conclusion, still with the defense recommendation being viewed as 48 months, I have a conflicting recommendation from the State of 60 months. Whatever the ultimate decision here would be, it is the Court's ultimate decision that counts. And I have made my own independent judgment.

Let me turn to that. Actually, before that, I would also indicate that although it is acknowledged now that the offender score is 10, with a range effectively of 47 and a quarter to 60 months, which would put the midpoint using that as the effective range of 53 and 5/8, I had also reviewed the paperwork submitted by Mr. Dickinson. And regardless of essentially the stipulation from the

defense, I would view accurately the score as being a 10 with a range of 47 and a quarter to 60.

Now, determining where to fall within that range in terms of its sentence, there are a number of positives that I think can be pointed to. I have in hand the defendant's letter and also statements here in court which I think do give hope that perhaps Mr. Johnson is getting wiser with age and will do better. He has apparently taken some positive steps and expresses a willingness to continue with positive steps in the future.

Also, I think as something that the Court had considered, and I understand there are conflicting views about the value of community custody, for that it can be viewed as often from the defense perspective as actually being somewhat onerous. Still there are reasons to think that a goal of getting Mr. Johnson briefly on community custody so as to connect him with crime-related services, some of which were not addressed under his current community placement, may be of benefit.

Also, I would note that while the offense -- which, again, this Court obviously presided over the trial and heard -- was serious, and while the attempted robbery wasn't completed, he did not continue to persist, so to

speak. He did ultimately cease and desist his actions and did not cause physical injury. This is arguably not as serious an incident as it might have been or as with some offenses of this type.

Looking at it from the other perspective, this is a very serious offense that Mr. Johnson has been convicted of. The victim's statement I've also certainly weighed and considered. The victim impact statement I think speaks eloquently to the impact that Mr. Johnson's actions had upon her. This case is, in a very real sense, not over for her and will continue to persist in her mind way into the future.

As Mr. Dickinson has also articulated, there is what might be generally characterized as rapid recidivism here. It was not an alleged factor and not proven as a basis for an exceptional sentence, but the time span between his release from prison and this new offense was short. It essentially comes on the heels of his return to the community. That is of concern, as is the seriousness of Mr. Johnson's previous history, which is largely taken into account in terms of the range, but it's certainly worthy to note that history includes a homicide charge.

So, after weighing everything, the Court does on balance tend towards the high end, but not quite as high

as the deputy prosecutor would recommend or perhaps defense counsel was willing to acquiesce, but in recognition of some of these other factors. Although I'm going towards the high end, in part so I can also order community custody, I'm not going to go to the very top.

Rather than the 48 months asked by the defense, I'm going to order a sentence of 58 months. And in addition to that, I will order two months of community custody. I recognize that may seem like a token amount. However, it will provide some opportunity for Mr. Johnson upon his release into the community to potentially connect with certain services which I think are appropriate.

I recall from the testimony at trial that Mr. Johnson was drinking on the night of this offense, which creates concerns about potential substance abuse. It is a crime-related factor that alcohol was involved to some degree at this offense. So, in addition to the standard conditions, I will order that he be evaluated and comply with substance abuse treatment if that is recommended. As I say, I believe that is crime related and appropriate here.

I will also order as a condition of the community custody that he have no contact with the victim. But on top of that, I will further order as a separate order