

62577-2

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No. 62577-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RYAN B. BARTOCILLO,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

BARTOCILLO MAY CHALLENGE HIS OFFENDER SCORE FOR THE FIRST TIME ON APPEAL, BECAUSE HE DID NOT AFFIRMATIVELY ACKNOWLEDGE AT SENTENCING THAT HIS TWO OFFENSES ENCOMPASSED THE SAME CRIMINAL CONDUCT

In his opening brief, Bartocillo argued his convictions for first degree robbery and unlawful imprisonment should have counted as only one point in the offender score, because they encompassed the same criminal conduct. The State does not dispute that the two offenses encompassed the same criminal conduct. Instead, the State argues Bartocillo waived his right to raise the issue on appeal, because defense counsel "affirmatively agreed" to the offender score by recommending a sentence within the standard range as asserted by the State. SRB at 6-7; 10/24/08RP 5. But in State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009), the Supreme Court recently held that merely recommending a sentence within the standard range as asserted by the State does not amount to an "affirmative acknowledgement" of the State's representations of criminal history. Similarly, merely recommending a sentence within the range asserted by the State cannot amount to an "affirmative acknowledgement" of the State's representations of same criminal conduct. Because Bartocillo's two

offenses encompassed the same criminal conduct, which the State does not dispute, and because Bartocillo did not waive his right to challenge the offender score, he is entitled to be resentenced.

The State relies on State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000) in arguing that Bartocillo waived his right to challenge his offender score. In Nitsch, at sentencing, the parties agreed to the calculation of the standard range. Id. at 513-14, 517. The standard range was based on an offender score of two, arrived at by counting each offense separately as an "other current offense." Id. at 518. Further, Nitsch explicitly agreed, in writing, as part of a plea agreement, that his offender score was properly calculated. Id. at 521-22. Therefore, the Court of Appeals concluded, "this affirmative assertion places Nitsch squarely within the Ford<sup>[1]</sup> reasoning that a sentencing court may rely upon information acknowledged by the defendant in his offender score calculation." Id. at 522. Because Nitsch did not merely remain silent, as did the defendant in Ford, but instead filed a presentence report in which he affirmatively alleged a standard range that could be arrived at only by counting each offense separately in the

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<sup>1</sup> State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).

offender score, he waived his right to raise the issue on appeal. Id. at 522.

Nitsch acknowledged two prior cases in which the Court of Appeals had permitted the defendants to raise the same criminal conduct issue for the first time on appeal. Nitsch, 100 Wn. App. at 521-22 (citing State v. Anderson, 92 Wn. App. 54, 960 P.2d 975 (1998) and State v. Rowland, 97 Wn. App. 301, 983 P.2d 696 (1999)). But Nitsch distinguished those cases on the basis that, again, in Nitsch, the defendant affirmatively agreed at sentencing to the standard range and therefore waived the right to raise the issue on appeal. Id.

In State v. Mendoza, the Supreme Court recently clarified that, notwithstanding Nitsch, a defendant does not "affirmatively acknowledge" the prosecutor's assertions about his criminal history by merely agreeing with the State's asserted standard range. 165 Wn.2d at 928. In Mendoza, prior to sentencing, the prosecutors filed lists asserting the defendants' criminal histories. Id. at 917-19. The defendants did not object to the criminal history summaries and recommended sentences within the standard ranges as asserted by the State. Id. The Supreme Court concluded that the defendants "did nothing *affirmative* with respect to their criminal

histories." Id. at 929. They therefore did not "affirmatively acknowledge" the State's assertions about their criminal histories and did not waive the right to challenge their offender scores for the first time on appeal.

Just as a defendant cannot waive the right to challenge the State's factual representations about criminal history by agreeing with the State's asserted standard range, a defendant should not be deemed to have waived the right to challenge the State's factual representations about same criminal conduct by agreeing with the standard range. Mendoza emphasized the State's obligation to prove the existence of prior convictions by a preponderance of the evidence, an obligation imposed by the Due Process Clause. 165 Wn.2d at 920. Because this obligation rests with the State, a defendant must take some *affirmative* action in order to waive the right to challenge the State's factual representations. Id. at 929.

Similarly, the State bears the burden to prove by a preponderance of the evidence that two or more offenses do *not* encompass the same criminal conduct. RCW 9.94A.500(1); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1995). Here, by asserting each offense should be counted separately in Bartocillo's offender score, the prosecutor implicitly asserted the offenses

encompassed separate conduct. Defense counsel did not "affirmatively agree" with or stipulate to the prosecutor's factual representations. Counsel did nothing *affirmative* with respect to the State's factual assertions. Therefore, under Mendoza, Bartocillo did not waive his right to challenge the offender score calculation on appeal.

Because Bartocillo did not "affirmatively agree" with the State's assertions about same criminal conduct, his case falls squarely under the rule articulated in State v. Anderson and similar cases. Anderson, 92 Wn. App. 54; see also State v. Soper, 135 Wn. App. 89, 143 P.3d 335 (2006); State v. Channon, 105 Wn. App. 869, 20 P.3d 476 (2001). In Anderson, the defendant argued on appeal that his assault and robbery convictions encompassed the same criminal conduct but did not raise the issue in the trial court. Anderson, 92 Wn. App. at 61. This Court explained that Anderson could raise the issue on appeal under the well-established common law rule that a party may challenge a sentence for the first time on appeal on the basis that it is contrary to law. Id. The purpose of the rule is to bring sentences into conformity and compliance with existing sentencing statutes and avoid permitting widely varying sentences to stand only because

counsel did not object in the trial court. Id. (citing State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993); State v. Moen, 129 Wn.2d 535, 545-47, 919 P.2d 69 (1996); see also Mendoza, 165 Wn.2d at 920. Further, a trial court's failure to make a finding regarding same criminal conduct does not preclude review, as the court's calculation of the offender score is "an implicit determination" that the offenses constitute the same criminal conduct. Id. at 62. Just as in cases where the trial court explicitly considers the issue, the court's implicit determination is reviewed on appeal for an abuse of discretion or misapplication of the law. Id. at 62.

Anderson explained that a trial court commits an error of law in counting multiple offenses separately when the facts in the record support a determination that each of the three same criminal conduct elements is present. Id. at 62. But if the facts "are sufficient to support a finding either way on any of the three elements," the court's decision is reviewed for abuse of discretion. Id.

In sum, if the facts in the record support a finding that multiple offenses encompass the same criminal conduct, a trial court commits an error of law in counting the offenses separately in

the offender score. Id. This rule is long-standing and well-established. See, e.g., State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991) (citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); State v. Burns, 114 Wn.2d 314, 319, 788 P.2d 531 (1990); State v. Lewis, 115 Wn.2d 294, 301-02, 797 P.2d 1141 (1990)). It is equally well-established that when the trial court commits an error of law in calculating the offender score, the defendant cannot waive the right to challenge the offender score on appeal by failing to raise the issue at trial. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

The Court of Appeals has continued to apply the rule as stated in Anderson, notwithstanding Nitsch. In Soper, for example, the defendant argued for the first time on appeal that the trial court erred in finding that his convictions were not the same criminal conduct. 135 Wn. App. at 103-04. This Court permitted review and even cited Nitsch in support. Id. at 104 n.11. Similarly, in Channon, the same criminal conduct issue was raised for the first time on appeal. 105 Wn. App. at 877. The Court applied the reasoning of Anderson and treated the trial court's calculation of the offender score as an *implicit determination* that the offenses did not constitute the same criminal conduct. Id.

Here, the trial court committed an error of law by failing to find that Bartocillo's convictions for robbery and unlawful imprisonment encompassed the same criminal conduct. As stated in the opening brief, the facts supported the determination that all three elements of the same criminal conduct analysis were met. AOB at 8-9 (and cases cited). The State does not dispute that the offenses amounted to the same criminal conduct. Bartocillo is therefore entitled to raise the issue on appeal and must be resentenced.

**B. CONCLUSION**

For the reasons set forth above and in the opening brief, Bartocillo must be resentenced and his two current offenses counted as only one point in the offender score.

Respectfully submitted this 4th day of January 2010.



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DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 62577-2-I
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	)	
RYAN BARTOCILLO,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> RYAN BARTOCILLO 324424 WSP 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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DIVISION ONE  
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**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF JANUARY, 2010.

X \_\_\_\_\_ 

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