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King County Prosecutor  
Appellate Unit

NO. 63647-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILSON TILLMAN,

Appellant.

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

The Honorable Steven Gonzalez, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to enter Findings of Fact and Conclusions of Law pursuant to CrR 3.5(c).

2. The court erred in sentencing appellant based on an incorrect offender score calculation because the malicious mischief and attempted theft of a motor vehicle counts were the same criminal conduct.

Issues Pertaining to Assignments of Error

1. Where a trial court fails to enter written findings of fact and conclusions of law pursuant to CrR 3.5 is remand for entry of findings and conclusions required?

2. Is one count of malicious mischief and the attempted theft of a motor vehicle the “same criminal conduct,” where the offenses meet the same victim, intent, time, and place requirements of the “same criminal conduct” rule?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural History

Wilson Tillman was charged by amended information with two counts of third degree assault (Counts I and II), two counts of malicious mischief (Counts III and IV) and one count of attempt to take a motor vehicle

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<sup>1</sup> The hearing on January 30, 2009 is referred to as 1RP; the hearing on May 4, 2009 is referred to as 2RP; the hearings on May 5, 2009, May 6, 2009, and May 7, 2009 are referred to as 3RP, 4RP, and 5RP and are sequentially numbered; the hearing on June 5, 2009 is referred to as 6RP.

(Count V). CP 1-5. Count I alleged Tillman assaulted police officer John Stevens and Count II alleged he assaulted officer Kimberly Biggs. Id. Count III alleged Tillman damaged a police car and Count IV a Jeep Cherokee. Id. Count V alleged Tillman attempted to steal the same Jeep Cherokee referenced in Count IV. Id. A jury found Mr. Tillman guilty as charged. CP 10-14.

A hearing to determine the admissibility of Tillman's pre-arrest statements was held pursuant to CrR 3.5. 2RP 6-46. The trial court denied the motion to suppress those statements. 3RP 4. Findings of Fact and Conclusions of Law were not entered as required by CrR 3.5(c).

For Counts I-IV Tillman's offender score was calculated as nine. CP 94-104. Based on that offender score, the standard range sentence for Counts I and II was 51 to 60 months. 6RP 4. The standard range sentence for Counts III and IV was 22 to 29 months. 6RP 4. The standard range sentence for Count V (Attempted Theft of a Motor Vehicle) was 32 and a quarter to 42 and three-quarters months based on an offender score of 15. 6RP 4.

Tillman was sentenced, concurrently, to 56 months each for Counts I and II, 29 months each for Counts III and IV and 42 and three-quarters months for Count V. 6RP 6; CP 94-104.

## 2. Substantive Facts

On October 28, 2008, someone saw a person breaking into a white Jeep and called 911. 4RP 79-81. Two Seattle Police officers, Michael Cross and John Stevens, went to the location and saw Tillman in the Jeep's drivers' seat with a screwdriver and vise-grips. 3RP 60. The Jeep had significant damage to the driver's side door and ignition. 4RP 152-153.

The officers arrested and handcuffed Tillman. 4RP 97-99. Officer Kimberly Biggs arrived a short time later and asked Tillman to get into a patrol car. 4RP 176. Tillman refused so Biggs and Stevens attempted to lift Tillman into the car. 4RP 177-179. According to Biggs, Tillman began kicking the car and slamming officers into the doorframe. 4RP 181. They were eventually able to get Tillman into the car. 4RP 182.

Tillman then tried to force his way out of the police car. 4RP 183. Police were not able to keep Tillman in the car so Biggs tased him three times. 4RP 184-185. The struggle continued, however, and Tillman kicked out the back window of the car. 4RP 187, 5RP 249. Tillman was then placed into a padded prisoner van. 4RP 189, 5 RP 255. Tillman continued kicking the doors of the van. 4RP 190, 5RP 255.

As a result of the struggle Biggs' left wrist was injured and placed in a splint for two months. 4RP 191. Stevens' had his hand bitten by Tillman. 5RP 247.

C. ARGUMENTS

1. THE TRIAL COURT'S FAILURE TO FOLLOW CrR 3.5(c) WARRANTS A REMAND FOR ENTRY OF PROPER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

After a hearing to determine the admissibility of a defendant's statements the trial court must enter written findings of facts and conclusions of law. CrR 3.5(c). Written findings and conclusions are mandatory. State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1(d), which requires entry of written findings of fact and conclusions of law after bench trial).

Here, the trial court held a hearing to determine whether to admit Tillman's statements to police. 2RP 6-46. The trial court admitted the statements but did not enter written findings of fact and conclusions of law.

The purpose of written findings and conclusions is to promote efficient and precise appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (written findings necessary to simplify and expedite

appellate review). The absence of written findings and conclusions prohibits effective appellate review.

Although the trial court entered oral findings, those findings are not a suitable substitute. A court's oral opinion is not a finding of fact. State v. Hescok, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a court's oral opinion is merely an expression of the court's informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated in the written findings, conclusions and judgment. Id., citing State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966).

A trial court's failure to enter written findings and conclusions requires remand for entry of the required findings. Head, 136 Wn.2d at 624. Here, because the trial court failed to enter written findings and conclusions, remand is the appropriate remedy.

2. THE CONVICTIONS FOR MALICIOUS MISCHIEF AND ATTEMPTED THEFT OF A MOTOR VEHICLE WERE THE SAME CRIMINAL CONDUCT.

Tillman was convicted of malicious mischief in Count IV for damage to the Jeep. For sentencing purposes on that count, Tillman's offender score was calculated as nine. CP 94-104, 6 RP 3-4. The offender score was based on Tillman's criminal history and his current convictions,

including Count V, the attempted theft of a motor vehicle. RCW 9.94A.589, CP 94-104. The standard range sentence for Count IV, based on an offender score of nine, was 22 to 29 months. RCW 9.9A.510; CP 94-104; 6RP 4.

In Count V, Tillman was convicted of attempted theft of a motor vehicle---the same Jeep he was convicted of damaging in Count IV. For that court Tillman's offender score was calculated as fifteen. CP 94-104; 6RP 4. The offender score was also based on Tillman's criminal history and current convictions, including Count IV, the malicious mischief charge. RCW 9.94A.589; CP 94-104. The standard range sentence for Count V, with an offender score of fifteen, was 32 and a quarter to 42 and three-quarters months. RCW 9.9A.510, CP 94-104, 6RP 4.

Tillman did not ask the court to find Counts IV and V were same criminal conduct and the trial court did not make a same criminal conduct finding. If the two counts are the same criminal conduct, Tillman's offender score for Count IV, the malicious mischief charge, is eight and the standard range 17 to 22 months. RCW 9.9A.510.

Generally, an appellate court will not address an issue not raised at trial. State v. Wiley, 63 Wn. App. 480, 482, 820 P.2d 513 (1991), *overruled in part*, State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). However, a party may challenge a sentence for the first time on

appeal on the basis that it is contrary to law. See State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993); State v. Roche, 75 Wn. App. 500, 512-13, 878 P.2d 497 (1994); State v. Moen, 129 Wn.2d at 547. This rule is designed to bring sentences into conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand only because counsel did not object in the trial court. State v. Paine, 69 Wn. App. at 884; State v. Moen, 129 Wn.2d at 545-47. Under this rule, Tillman's failure to raise the issue of same criminal conduct in the trial court does not preclude appellate review of that issue. The court reviews the trial court's calculation of an offender score *de novo*. State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995).

RCW 9.94A.525 provides that multiple crimes which arise from the "same criminal conduct" count as a single crime for purposes of calculating a defendant's offender score. Whether offenses encompass the "same criminal conduct" is determined by a three-part test: (1) the offenses were committed at the same time and place; (2) the offenses involved the same victim; and (3) the offenses involved the same objective criminal intent. RCW 9.94A.525; State v. Palmer, 95 Wn. App. 187, 190, 975 P.2d 1038 (1999).

### Same Victim

Clearly the two offenses involved the same victim. The malicious mischief (Count IV) involved the same Jeep Cherokee that Tillman was charged with attempting to steal (Count V). CP 1-5.

### Same Time

Where crimes are committed sequentially as part of a “continuous, uninterrupted sequence of conduct,” the crimes satisfy the “same time” element of the “same criminal conduct” rule. State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). The Jeep sustained significant damage to the driver’s side door and the ignition. 4RP 152-153. Police testified Tillman was in the process of stealing the Jeep when the damage occurred. 3RP 60. Tillman’s act of malicious mischief was done as a part of a sequence of conduct aimed at stealing the Jeep. Thus, both offenses occurred as the same time.

### Same Place

Here, the damage to the Jeep occurred at the same place where Tillman was found inside it. The two offenses were committed at the same the place. 3RP 60.

### Same Intent

Finally, both offenses shared the same criminal intent. Courts “look objectively at whether one crime furthered the other, or whether

there was a substantial change in the nature of the criminal objective.” State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). For purposes of determining same criminal conduct, intent is not the mens rea element of the crime but rather the offender’s objective criminal purpose in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990); see, State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (Defining “intent” for same criminal conduct analysis as the general purpose underlying the offenses). Stated differently, “if one crime furthered another, and if the time and place of the crimes remained the same, then the defendant’s criminal purpose or intent did not change and the offenses encompass the same criminal conduct.” State v. Lessley, 118 Wn.2d 773, 77, 827 P.2d 996 (1992).

Here, Tillman was convicted of attempting to steal the Jeep and malicious mischief for damaging the Jeep while in process of attempting to steal it. CP 10-14. There is no evidence Tillman caused any damage to the Jeep other than that which was consistent with the attempt to steal it. The malicious mischief furthered the attempted theft and therefore was part of the same criminal conduct.

Where a trial court erroneously finds multiple convictions do not encompass the same criminal conduct for purposes of calculating an offender score, the proper remedy is reversal and remand for sentencing

based on a properly calculated offender score. State v. Haddock, 141 Wn.2d 103, 115-16, 3 P.3d 733 (2000). This case should be remanded for a new sentencing hearing where Counts IV and V are scored as the same criminal conduct.

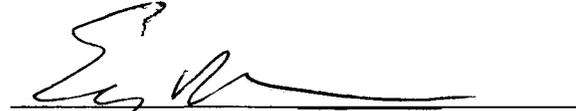
D. CONCLUSION

Because the trial court failed to follow CrR 3.5(c), this Court should remand for entry of proper findings of fact and conclusions of law. Additionally, the malicious mischief and attempted theft of a motor vehicle encompassed the same criminal conduct. Thus, this case should be remanded for sentencing based a corrected offender score.

DATED this 10 day of November, 2009.

Respectfully submitted,

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