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COA NO. 69825-7-I

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

REC'D
SEP 16 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

STEVEN SYMITH,

Appellant.

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

The Honorable Hollis Hill, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to count the current offenses of felony driving under the influence and reckless driving as "same criminal conduct" in calculating the offender score.

2. The court erred in failing to count the prior offenses of reckless driving and vehicular assault as "same criminal conduct" in calculating the offender score.

3. The court erred in imposing a sentence on count I that exceeds the statutory maximum.

4. The court erred in suspending the sentence and imposing probation conditions for counts II and III.

Issues Pertaining to Assignments of Error

1. Whether the current offenses of felony driving under the influence and reckless driving constitute the "same criminal conduct" in calculating the offender score because each offense involved the same time, place, victim and objective intent?

2. Whether the prior offenses of reckless driving and vehicular assault constitute the "same criminal conduct" in calculating the offender score because each offense involved the same time, place, victim and objective intent?

3. Whether the combined term of confinement and community custody exceeds the five year statutory maximum for the offense under count I?

4. Where the court ordered confinement for the statutory maximum term under counts II and III, whether the court lacked statutory authority to suspend the sentence and impose probation conditions for those counts?

B. STATEMENT OF THE CASE

1. Procedural Background

The State charged Steven Symith with felony driving under the influence (DUI) under count I, first degree driving while license suspended (DWLS) under count II, and reckless driving under count III. CP 11-12. Symith pled guilty to the DWLS charge. CP 41-48; 2RP¹ 6-14. Counts I and III went to trial. 3RP -5RP.

2. Trial

On December 27, 2010 at around 8 p.m., witnesses saw a car with no lights on drive in a serpentine manner, weave into oncoming traffic and then drive off the side of the road and down an embankment, where it

¹ The verbatim report of proceedings is referenced as follows: 1RP – 8/29/12, 8/30/12; 2RP - 8/30/12, 9/4/12 (voir dire); 3RP – 9/4/12, 9/5/12; 4RP – 9/10/12; 5RP – 9/11/12; 6RP – 9/12/12, 1/4/13.

crashed into some bushes. 3RP 26-30, 32; 4RP 32-33. A police officer arrived at the scene. 3RP 90. Symith had slow, slurred speech and red, watery eyes. 3RP 91, 94-95. An odor of alcohol emanated from him. 3RP 91. His coordination was slow. 3RP 92. Symith acknowledged consuming alcohol earlier. 3RP 93, 157. Symith's performance on the horizontal gaze nystagamus test indicated consumption of alcohol and impairment. 3RP 99; 4RP 154-55. An officer administering a blood alcohol content test believed Symith refused to give a second breath sample. 3RP 115-17, 122, 163-64.

The same officer opined Symith was highly intoxicated. 3RP 125. Symith stipulated he had a prior conviction for vehicular assault while under the influence, which raised the DUI charge to a felony. 4RP 177.

Symith has diabetes. 4RP 79. A diabetic episode can sometimes look like intoxication. 4RP 158. A blood sugar test taken at the scene was in the normal range and did not show Symith was in the midst of a diabetic emergency. 4RP 80-81, 99-100. The defense theory was that Symith had suffered a diabetic episode and the State had not proven he was impaired by alcohol. 6RP 31-56. A jury found Symith guilty on counts I and III. CP 63-64.

3. Sentencing

Symith moved to dismiss the reckless driving conviction on double jeopardy grounds, arguing the DUI and reckless driving convictions arose from the same incident. CP 88-94. Symith also argued the prior offenses of reckless driving and vehicular assault under King County Superior Court cause number 08-1-03689-4 should count as the "same criminal conduct." CP 98. Symith further argued all three current offenses should count as the "same criminal conduct." CP 98-99.

At the sentencing hearing, the State contended there was no double jeopardy violation or "merger" because the offenses were not the same in law and fact. 6RP 94-95. The State, did "not believe it is a [sic] issue of merger because they are not the same criminal conduct because there are two different crimes committed two different ways." 6RP 95. The court concluded there was no double jeopardy violation and "because they have different elements they are not considered to be the same conduct under the law either, so the motion on that basis is also denied." 6RP 96.

The parties and court also addressed whether the prior offenses of vehicular assault and reckless driving should be considered the same criminal conduct in calculating the offender score. 6RP 98-100. The court used the term "merge" in referring to the same criminal conduct argument: "so the only area of disagreement is whether the prior reckless

driving and DUI merge into the same conduct." 6RP 99-100. The State argued "they don't merge for the very same arguments I made to the Court moments ago. They should be counted as separate offenses." 6RP 100. The court responded "I agree with the State on that that [sic], they do count as separate offenses, so that leaves the offender score at 6." 6RP 100.

The court sentenced Symith to 54 months confinement and 12 months community custody on the felony DUI. CP 130-31. The court also purported to suspend the sentence for the gross misdemeanors under counts II and III on the condition that Symith serve 364 days in confinement, with count II running consecutive to count I and count III running concurrent to the other counts. CP 136-38. This appeal timely follows. CP 140-54.

C. ARGUMENT

1. THE COURT ERRED IN FAILING TO COUNT CURRENT AND PRIOR OFFENSES AS THE SAME CRIMINAL CONDUCT IN COMPUTING THE OFFENDER SCORE.

The facts show the current offenses of felony DUI and reckless driving, and the prior offenses of vehicular assault and reckless driving, meet the same criminal conduct test. The court misapplied the law or

abused its discretion in ruling otherwise. Remand is required to resentence Symith with a lower offender score.

a. The Current Offenses Of Felony DUI And Reckless Driving Qualify As Same Criminal Conduct.

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.530(1); RCW 9.94A.525. The sentencing court calculates an offender score by adding current offenses and prior convictions. RCW 9.94A.589(1)(a). Current offenses that encompass "the same criminal conduct" are counted as one crime for sentencing purposes. Id.

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of law. State v. Graciano, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). The defendant bears the burden of proving current offenses qualify as "same criminal conduct." Graciano, 176 Wn.2d at 539.

"Same criminal conduct" is defined as 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). The test is an objective one that "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there

was any substantial change in the nature of the criminal objective." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

The crimes charged in this case — driving while intoxicated and reckless driving — were committed at the same time. Symith drove recklessly while he drove in an intoxicated state. 3RP 26-30, 32; 4RP 32-33. The offenses involved the same place: the road. Id. The offenses also involved the public as the same victim. Id.

The question is whether the crimes involved the same criminal intent. "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. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (quoting State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)). Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318-19; State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted

criminal episode. State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997).

Here, the reckless driving and the driving while intoxicated offenses were part of a continuous, uninterrupted sequence of conduct. Viewed objectively, driving while intoxicated furthered the crime of reckless driving. Symith's intoxicated state while driving caused the reckless driving. Same criminal intent can be measured by determining whether one crime furthered the other. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). "[I]f 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, 777, 827 P.2d 996 (1992).

The State's own closing argument highlights the intimate relationship between the two offenses. Referring to the DUI charge, the State argued it needed to prove whether "the alcohol he consumed that night affected his ability to drive." 6RP 20. Symith's reckless driving behavior showed he was intoxicated. 6RP 20-21. The State further argued the "willful" element of reckless driving was met because "No one forced alcohol in his mouth. No one forced him to get in the car. So he made the conscious decision, despite everything he did that night, to climb

into a car and drive on a road in the city of Federal Way in the state of Washington." 6RP 19. The "wanton" element of reckless driving was met by "[d]rinking and getting into a car. . . . Having several drinks and get into a car is what this case is about. He disregarded that fact." 6RP 19. Such comments accord with the evidence. They also accord with the conclusion that the offenses meet the "same criminal conduct" test.

The court misapplied the law or otherwise abused its discretion in failing to treat the current offenses of felony DUI and reckless driving as same criminal conduct. The court did not apply the correct legal test to the facts of Symith's case. The court applied a double jeopardy test in refusing to find same criminal conduct. See 6RP 96 ("because they have different elements they are not considered to be the same conduct under the law either."); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006) (under the "same evidence" test, if each offense contains an element not contained in the other offense, the offenses are different for purposes of double jeopardy and the multiple convictions can stand).

"A double jeopardy violation claim is distinct from a 'same criminal conduct' claim and requires a separate analysis." State v. French, 157 Wn.2d 593, 611, 141 P.3d 54 (2006). A trial court necessarily abuses its discretion when it applies an incorrect legal analysis. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). That is what

happened here. The court did not apply the requisite analysis in rejecting Symith's same criminal conduct argument.

With an offender score of 6, Symith received a 54 month term of confinement on the felony DUI conviction — the high end of the standard range. CP 128-30. Treating the felony DUI and the reckless driving offenses as "same criminal conduct" shaves one point off the offender score. See RCW 9.94A.525(11) (count one point for "serious traffic offense" such as reckless driving); RCW 9.94A.589(1)(a) ("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"). With an offender score of 5, the standard range is 33-43 months. See RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (felony DUI has seriousness level of V). Because the current felony DUI and reckless driving offenses count as same criminal conduct, resentencing is required based on a lower offender score for the felony DUI count.

b. The Prior Offenses Of Vehicular Assault And Reckless Driving Qualify As Same Criminal Conduct.

The sentencing court has an affirmative duty under RCW 9.94A.525(5)(a)(i) to independently determine whether prior offenses served concurrently shall be counted as one offense using the "same

criminal conduct" analysis. State v. McCraw, 127 Wn.2d 281, 287, 898 P.2d 838 (1995); State v. Reinhart, 77 Wn. App. 454, 459, 892 P.2d 110, review denied, 127 Wn.2d 1014 (1995); State v. Mehaffey, 125 Wn. App. 595, 600, 105 P.3d 447 (2005). The State has the burden of proving prior criminal history, including the burden of proving prior convictions do not constitute "same criminal conduct" when disputed by the defendant. State v. Bergstrom, 162 Wn.2d 87, 89, 169 P.3d 816 (2007).

In 2008, Symith pled guilty to vehicular assault and reckless driving under cause number 08-1-03689-4 SEA. CP 107-25. Symith stated he was guilty of the vehicular assault because, on November 6, 2007, he drove a motorcycle on a public road while intoxicated and caused an accident in which his passenger, Michael Falk, suffered substantial bodily harm. CP 116. Symith failed to negotiate a curve, hit the guardrail and crashed. CP 116.

Symith further stated he was guilty of the reckless driving charge because, on November 6, 2007, he drove a motorcycle while speeding and aggressively weaving around traffic. CP 123. He failed to make a curve, hit the guardrail, and his passenger, Michael Falk, suffered a leg fracture that required amputation. CP 123. The sentences on these two convictions were served concurrently. CP 164.

The prior offenses of reckless driving and vehicular assault were committed at the same time. Offenses need not be simultaneous to satisfy the "same time" element. Porter, 133 Wn.2d at 182-83. The "same time" element may be established if the individual acts were part of a continuing, uninterrupted sequence of conduct. Id. at 186. Symith's act of reckless driving culminated in the crash that constituted the vehicular assault on Falk. CP 116, 123. Those two acts were part of a continuous sequence of conduct. Furthermore, the offenses involved the same place: the road. The offenses also involved Michael Falk as the same victim. Id.

The two offenses also involved the same objective intent. The reckless driving furthered the vehicular assault. Both acts were part of continuous, uninterrupted criminal episode in which the reckless driving caused the crash that injured Falk. Id.; Porter, 133 Wn.2d at 186; Lessley, 118 Wn.2d at 777.

The court abused its discretion or misapplied the law in ruling these two prior offenses did not constitute the same criminal conduct. Once again, the court applied a double jeopardy analysis, referencing whether the offenses "merged" and adopting the State's argument that it had made in reference to the current offenses addressed in section C. 1. a., supra. 6RP 99-100; see State v. Parmelee, 108 Wn. App. 702, 710-11, 32 P.3d 1029 (2001) (merger doctrine is part of double jeopardy analysis);

State v. Ralph, __ Wn. App. __, __ P.3d __, 2013 WL 3999878 at * 4 (slip op. filed Aug. 7, 2013) (same).

Applying the correct test yields the conclusion that the two prior offenses qualify as the same criminal conduct. Treating the prior vehicular assault (a felony) and reckless driving offenses as same criminal conduct removes one point from the offender score. See RCW 9.94A.525(11) (count one point for "serious traffic offense" such as reckless driving). Because those two prior offenses count as same criminal conduct, resentencing is required based on a lower offender score for the current felony DUI count.

2. THE COMBINED TERM OF CONFINEMENT AND COMMUNITY CUSTODY ON COUNT I EXCEEDS THE STATUTORY MAXIMUM.

The court sentenced Symith to 54 months confinement for the felony DUI conviction under count I. CP 130. The court also imposed a 12 month term of community custody on count I. CP 131; see RCW 9.94A.701(3)(a) (one year term of community custody for any crime against persons under RCW 9.94A.411(2)); RCW 9.94A.411(2) (felony DUI counts as a "crime against a person"). The combined term of confinement and community custody equals 66 months and therefore exceeds the five year (60 months) statutory maximum for the offense.

"[A] court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5). Felony DUI is a class C felony. RCW 46.61.502(6). The statutory maximum for a class C felony is five years. RCW 9A.20.021(1)(c). The combined term of confinement (54 months) and community custody (12 months) exceeds the five year (60 month) statutory maximum for the felony DUI conviction under count I. CP 130-31.

RCW 9.94A.701(9) provides "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021."

RCW 9.94A.701(9) became effective on July 26, 2009. Laws of 2009, ch. 375, § 5. For defendants like Symith who were sentenced after this statute became effective, the trial court, not the Department of Corrections, is required to reduce the term of community custody to avoid a sentence in excess of the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). Defense counsel did not raise this challenge below, but erroneous sentences may be challenged for the first time on appeal.

State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Symith's case must be remanded for resentencing to either amend the community custody term or resentence Symith on the count I conviction consistent with RCW 9.94A.701(9). Boyd, 174 Wn.2d at 473.

3. THE COURT LACKED AUTHORITY TO IMPOSE A SUSPENDED SENTENCE AND CONDITIONS OF PROBATION ON COUNTS II AND III BECAUSE THE COURT SENTENCED SYMITH TO SERVE THE MAXIMUM TERM OF CONFINEMENT FOR EACH COUNT.

The court imposed a sentence of 364 days on the gross misdemeanor convictions under counts II and III suspended on the condition that Symith serve a 364 day term of confinement in jail, with count II running consecutive to the felony conviction under count I and count III running concurrent to the other two counts. CP 136. The boxes for supervised or unsupervised probation are not checked. CP 136, 137. Bu the court ordered, as condition of probation, "[n]o driving w/o valid license and insurance and ignition interlock device functioning." CP 138. At the sentencing hearing, the court told Symith "on the misdemeanors, one condition is no law violations." 6RP 113.

A court can grant probation by "suspend[ing] the imposition or the execution of the sentence." RCW 9.95.210(1). But if a court imposes a maximum sentence of confinement and actually suspends none of it, the

court lacks the authority to impose probation. State v. Gailus, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), overruled on other grounds by State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009).

A gross misdemeanor is punishable by imprisonment for a maximum term of not more than 364 days. RCW 9A.20.021(2). The court purported to suspend the sentence for counts II and III on the condition that Symith serve 364 days in custody. CP 136. The court also imposed probationary conditions. CP 138; 6RP 113. Because this sentence did not actually suspend any jail time, the suspended sentence and associated probation conditions must be vacated for counts II and III. Gailus, 136 Wn. App. at 201.

D. CONCLUSION

For the reasons set forth, Symith respectfully requests that this Court (1) remand for resentencing with a corrected offender score for count I; (2) remand for resentencing on count I to comply with RCW 9.94A.701(9) (3) vacate the suspend sentence and associated probation terms on counts II and III.

DATED this 16th day of September 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 69825-7-1
)	
STEVEN SYMITH,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF SEPTEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEVEN SYMITH
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COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
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SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF SEPTEMBER, 2013.

x *Patrick Mayovsky*

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