

71202-1

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NO. 71202-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

REINHARD WYSGOLL,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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A. ISSUES RAISED ON APPEAL

1. Did the trial court abuse its discretion in finding that the defendant's prior convictions did not constitute same criminal conduct when the defendant failed to prove that the intent and victims for each crime were the same?

B. STATEMENT OF THE CASE

1. THE PRESENT ATTEMPT TO ELUDE CASE.

In November 2013, Reinhard Wysgoll was sentenced for attempting to elude a pursuing police vehicle on August 4, 2013. 2RP 3-13. The issue before the sentencing court was whether his prior convictions for driving under the influence (DUI) and reckless driving constituted the same criminal conduct¹. 2RP 6-11. After considering the written briefs and oral arguments presented by both parties, Judge Robinson found that these convictions did not constitute same criminal conduct. 2RP 11; CP 78-84; CP 85-114. Based on this finding, the court found Wysgoll had eight offender score points and a standard range of 17 to 22 months. CP 45; 2RP 11. The court granted Wysgoll's request for a residential Drug Offender Sentencing Alternative (DOSA). CP 48; 2RP 11.

¹ DUI and reckless driving each score as one felony point when calculating the offender score for the crime of eluding a pursuing police vehicle. RCW 9.94A.525(11).

2. THE PRIOR DUI AND RECKLESS DRIVING CASE.

The facts of the DUI and reckless driving crimes at issue are as follows. Just before midnight on December 14, 2012, Seattle Police Department officers were dispatched to a suspicious circumstances call regarding a running occupied vehicle. CP 99. The 911 caller reported that the two occupants had been doing something with a gas can that was now in the backseat. CP 99. Police arrived to find that the occupants were hunkered down inside the car and that they appeared to be hiding from law enforcement. CP 99. Officer Elias turned on his spotlight. CP 99. The driver (later identified as the defendant Reinhard Wysgoll) began to look around and over his right shoulder. CP 99. The vehicle was running. CP 99. Wysgoll backed up rapidly, bumped up onto the curb and then ran into a very large retaining wall. CP 99. He pulled forward, nearly striking the patrol car. CP 99. He backed up rapidly, ran into the retaining wall again, and then continued to drive in reverse, scraping the driver's side of the vehicle the entire way. CP 99. Officer Elias saw pieces of the vehicle come off and heard a tire pop. CP 99. After approximately 200 feet, the wall that the car was running against curved to the west. CP 99. The car hit the curved part of the wall, causing it to ricochet forward and strike

Officer Elias' patrol car. CP 99. Even after striking the patrol car, Wysgoll attempted to plow his car forward to get away from the wall so he could back up again to escape. CP 99. The patrol car blocked his vehicle from traveling any further. CP 99. Officer Elias noted that the roadway was a very narrow single lane road and that the defendant's actions caused a significant hazard to people and property. CP 99. The passenger in Wysgoll's car, Crystal Karras, stated that she had struck her head when the vehicle hit the wall. CP 100.

Wysgoll had an active felony DOC escape warrant. CP 101. Officers recovered rolled up ziplock baggies on the floorboards of his car and several small ziplock bags that were consistent with narcotics. CP 100. A small amount of cash, mostly in \$20s, was found on his person. CP 100.

Officer Decker, a Drug Recognition Expert, conducted an investigation and found Wysgoll to be impaired by narcotics. CP 101-03. Officer Decker observed that he looked groggy and lethargic even though his pupils were dilated. CP 101. Wysgoll denied drinking alcohol or doing drugs. CP 101. He was slow to react to questions. CP 102. He agreed to participate in field sobriety tests. CP 102. Officer Decker conducted the Horizontal

Gaze Nystagmus test and the results were consistent with impairment due to alcohol/drugs. CP 102. The portable breath test showed Wysgoll had not recently consumed alcohol. CP 102. Officer Decker noticed several burn marks on his fingers and hands that are consistent with smoking methamphetamine from a hot pipe of some type. CP 102. Wysgoll's pulse was 122 beats per minute, which is considerably higher than the normal range of 60-90 beats per minute. CP 102. Wysgoll then refused to participate further in the DRE exam. CP 102. Officer Decker concluded, based on his training and experience, that Wysgoll was impaired by drugs. CP 103. Officer Decker noted that the use of inhalants, such as the gasoline found in the backseat of Wysgoll's vehicle, can cause the nystagmus observed in his eyes. CP 103. Wysgoll's passenger, Karras, told police that the defendant had smoked methamphetamine a couple hours earlier. CP 102.

Wysgoll was charged with DUI, reckless driving, and driving while license suspended. CP 96. The charging document alleged that he committed the crime of DUI "by driving a vehicle within the city of Seattle while under the influence of or affected by intoxicating liquor or any drug." CP 96. The charging document further alleged that he committed the crime of reckless driving "by

operating a motor vehicle with a willful or wanton disregard for the safety of persons and/or property.” CP 96. Wysgoll pled guilty to DUI and reckless driving. In his guilty plea, he stated, “On or about 12-14-12, in Seattle I drove a motor vehicle while appreciably affected by intoxicating liquor. I drove with willful and wanton disregard for the safety of persons and property of others.” He received a concurrent sentence. CP 92-94.

Wysgoll now appeals the trial court’s ruling that the DUI and reckless driving do not constitute same criminal conduct.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE DEFENDANT FAILED TO PROVE SAME CRIMINAL CONDUCT WHEN THE CRIMES HAD DIFFERENT VICTIMS AND DIFFERENT INTENT.

The defendant failed to meet the legal standard to establish same criminal conduct because the crimes of DUI and reckless driving do not involve the same victim and do not involve the same criminal intent. Either of these criteria prevent a finding of same criminal conduct.

The appellate court will reverse a sentencing court’s determination of same criminal conduct only if it finds a clear abuse

of discretion or misapplication of the law. State v. Graciano, 176 Wn.2d 531, 533, 295 P.3d 219 (2013). In Graciano, the Washington State Supreme Court further stated that:

Under this standard, when the record supports only one conclusion on whether crimes constitute the “same criminal conduct,” a sentencing court abuses its discretion in arriving at a contrary result. But where the record adequately supports either conclusion, the matter lies in the court’s discretion.

Id. at 538.

The defendant bears the burden of proving same criminal conduct. Id. at 539. “[E]ach of the defendant’s convictions counts toward his offender score unless he convinces the court that they involve the same criminal intent, time, place and victim.” Id. at 540. If the defendant fails to prove any element under the statute, the crimes are not the “same criminal conduct.” State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). “[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.” State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Crimes constitute the “same criminal conduct” when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a);

State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013); State v. Palmer, 95 Wn. App. 187, 190, 975 P.2d 1038 (1999). As part of this analysis, courts also look to whether one crime furthered another. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 160 (1987). The absence of any one of these three prongs prevents a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

When the statutory intents are different, the court requires an additional analysis. State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987). In Dunaway, a case involving multiple defendants, the court rejected two of the defendants' arguments that convictions for armed robbery and attempted murder were the same course of conduct. The court first looked at the statutory intent for those crimes and rejected the defendants' argument that they committed the attempted murder to avoid being caught for the robberies. The Supreme Court refused to consider this argument because it was based on subjective intent rather than the objective intent identified by statute. The intent of robbery is to acquire property. The intent of attempted murder is to kill. The objective intent for the crimes was different. Dunaway, at 217.

The court then looked at whether one offense furthered the commission of the other and still rejected the defendants' arguments. The Dunaway court reasoned that, "[w]hile the attempted murders may have been committed in an effort to escape the consequences of the robberies, they in no way furthered the ultimate goal of the robberies. Clearly the robberies did not further the attempted murders. Accordingly, we hold that these crimes did not encompass the same criminal conduct." Id. at 217.

Dunaway himself was convicted of robbery and kidnapping. The court found that these crimes encompassed the same criminal conduct because the objective intent remained the same with both crimes. "Robbery was the objective intent behind both crimes. As to the other two factors, it is evidence that the kidnapping furthered the robbery and that the crimes were committed at the same time and place. Therefore, the kidnapping and robbery of a single victim should be treated as one crime for sentencing purposes." Id. at 217.

The crimes of DUI and reckless driving have different statutory intents. DUI is a strict liability offense because it has no mens rea element. RCW 46.61.502(1). In contrast, reckless

driving requires willful or wanton disregard for the safety or property of others. RCW 46.64.500.

The trial court properly looked to whether one crime furthered the other by examining whether the defendant had the same objective intent in committing both offenses. See Dunaway at 217. Because DUI is a strict liability crime, the defendant had no objective intent other than to drive. In contrast, the defendant's objective intent in driving recklessly was to elude Officer Elias. Wysgoll's driving under the influence did not further his reckless driving or vice versa. Judge Robinson agreed with this analysis by stating, "I don't think it has the same purpose or intent." 2RP 11. Because the intent objectively viewed is different, the defendant failed to meet the three requirements of the same criminal conduct test.

Even if the court finds that the defendant's intents for DUI and reckless driving are the same, the convictions still do not constitute same criminal conduct because there are different victims for each crime. The victim of the DUI was the community in general. The victims of this reckless driving offense were Officer Elias and the defendant's passenger. Because the victims were different, the trial court did not abuse its discretion in concluding

that Wysgoll's convictions for DUI and reckless driving do not constitute same criminal conduct.

The defendant had not established same criminal conduct since he failed to prove two of the three required prongs of the same criminal conduct test. Since the defendant failed to prove that the trial court abused its discretion or misapplied the law, it is proper for this Court to affirm the trial court's ruling on same criminal conduct.

D. CONCLUSION

In conclusion, for the reasons stated above, the State respectfully requests the trial court's finding that the DUI and reckless driving convictions are not same criminal conduct be affirmed.

DATED this 24 day of April, 2014.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON

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REINHARD WYSGOLL) Certification of Service
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SAMANTHA SPEARMAN, being first duly sworn on oath, deposes and states that I arranged for service of a copy of the following documents by ABC Legal messenger delivery:

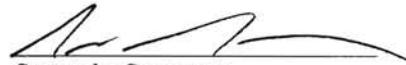
Brief of Respondent

on:

David Koch
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Under penalty of perjury under the laws of the State of Washington, I certify the foregoing is true and correct.

Signed and dated by me this 24th day of April, 2014 at Seattle, Washington.


Samantha Spearman