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Court of Appeals
Division I
State of Washington

NO. 73240-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GLEN SIMS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE VERONICA GALVÁN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. For purposes of calculating an offender score, two or more prior convictions count as one when they constitute the same criminal conduct. Offenses are the same criminal conduct only when they occur at the same time and place and involve the same victim and same criminal intent. Offenses do not share the same criminal intent, and thus cannot constitute the same criminal conduct, when one crime has a statutory intent element and the other does not. Sims' criminal history includes convictions for possession of methamphetamine with intent to distribute and possession of a firearm in furtherance of a drug trafficking crime, which contains no intent element. Was the trial court within its discretion to consider the crimes as separate offenses?

2. Unpreserved errors concerning legal financial obligations do not command review as a matter of right and appellate courts properly exercise their discretion by refusing to consider such a claim for the first time on appeal. Sims did not object to the discretionary LFOs imposed as part of his sentence. Should this Court decline to review the unpreserved error?

B. STATEMENT OF THE CASE

The State charged Glen Sims with one count of Violation of the Uniform Controlled Substances Act for possession of methamphetamine. CP 12. Following trial, a jury convicted Sims as charged. CP 13.

The parties disagreed about how to calculate Sims' offender score. RP 2.¹ The essence of the disagreement was how to score Sims' prior federal convictions for (1) Felon in Possession of a Firearm, (2) Felon in Possession of Ammunition, (3) Violent Felon in Possession of Body Armor, (4) Possession of Methamphetamine with Intent to Distribute, and (5) Possession of a Firearm in Furtherance of a Drug Trafficking Offense. CP 76. All of these offenses were committed on the same day, and were discovered in the course of the same traffic stop. CP 69-73.

Sims argued that all five of the federal felonies were the same criminal conduct and should score together as 1 point. CP 62-64. The State argued that the convictions yielded 4 points, reasoning that Counts 1 and 5 constituted the same criminal conduct. RP 3; CP 65-67.

¹ The verbatim report of proceedings for March 12, 2015 will be referred to in this brief as "RP."

The trial court concluded that Counts 1, 2, and 5 were part of the same criminal conduct and scored together as 1 point. RP 10. The court determined that Count 3 (possession of body armor) and Count 4 (possession of methamphetamine) were separate offenses, each yielding 1 point. RP 10-11. Accordingly, the federal convictions contributed 3 points to Sims' offender score of 6. RP 11; CP 32. The court imposed a low-end standard range sentence of 12 months and a day. CP 31-38. The court imposed discretionary court costs of \$504 in addition to the mandatory \$500 victim penalty assessment and the mandatory \$100 DNA fee. CP 33. Sims did not object to the legal financial obligations.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY CALCULATED SIMS' OFFENDER SCORE.

Sims contends that the trial court erred in scoring his previous federal convictions. He argues that his conviction for Possession of Methamphetamine with Intent to Distribute should be considered the same criminal conduct as his conviction for Possession of a Firearm in Furtherance of a Drug Trafficking Offense. Because the drug charge does not share the same

criminal intent with the firearm charge, the trial court properly considered them separate crimes.

For the purpose of calculating an offender score, the trial court is to count all prior convictions separately unless two or more of the prior offenses encompass the same criminal conduct. RCW 9.94A.525(5)(a)(i). The defendant bears the burden of proving same criminal conduct. State v. Graciano, 176 Wn.2d 531, 538-39, 295 P.3d 219 (2013).

Because a same criminal conduct determination involves a factual inquiry, this Court reviews the trial court's determination of same criminal conduct for "clear abuse of discretion or misapplication of the law." Graciano, 176 Wn.2d at 536. Thus, "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 537-38. The same criminal conduct exception 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).

To be the same criminal conduct, two or more crimes must require the same criminal intent, be committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). In this case, the record establishes that Sims' five federal crimes were committed at the same time and place and involve the same victim (the public). CP 69-81.

To determine whether there was also the same criminal intent, courts first objectively view each underlying statute and determine if the required intents are the same for each count. State v. Bickle, 153 Wn. App. 222, 234, 222 P.3d 113 (2009). If the statutory intents are the same, the court next objectively views the facts to determine whether a defendant's intent was the same with respect to each count. State v. Hernandez, 95 Wn. App. 480, 485-86, 976 P.2d 165 (1999), accord State v. Polk, 187 Wn. App. 380, 396, 348 P.3d 1255 (2015). But "[w]here one crime has a statutory intent element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct." State v. Hernandez, 95 Wn. App. 480, 485-86, 976 P.2d 165 (1999).

The two offenses at issue in this case, Possession of Methamphetamine with Intent to Deliver and Possession of a Firearm in Furtherance of a Drug Trafficking Offense, do not share the same criminal intent. The drug charge requires specific intent to distribute a controlled substance. 21 U.S.C. § 841(a)(1).² “Objectively viewed, the criminal intent of delivery is to transfer the narcotics from one person to another usually, if not universally, with an expectation of benefit to the person effecting the delivery.” State v. Baldwin, 63 Wn. App. 303, 307, 818 P.2d 1116 (1991). In contrast, the firearm charge has no statutory intent element and applies to “any person who, during and in relation to any ... drug trafficking crime ... uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm[.]”

² The two federal statutes underlying the offenses at issue here have been amended since 2004, when Sims committed the federal offenses, but the provisions at issue have not been changed. 21 U.S.C. § 841(a)(1) provides, in relevant part, as follows:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

18 U.S.C. § 924(c)(1)(A).³ Because the offenses do not share the same criminal intent, they are not the same criminal conduct as a matter of law. Hernandez, 95 Wn. App. at 485-86; Polk, 187 Wn. App. at 396.

Sims contends that because he was convicted of possessing a firearm "*in furtherance of a drug trafficking offense*," the firearm and drug charges must be the same criminal conduct. Brief of Appellant at 7. But although courts sometimes consider whether one crime furthered another in analyzing same criminal conduct, "the 'furtherance test' was never meant to be and has never been the lynchpin of [the supreme court's] analysis of 'same criminal conduct.'" State v. Haddock, 141 Wn.2d 103, 114, 3 P.3d 733

³ 18 U.S.C. § 924(c)(1)(A) provides, in relevant part, as follows:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(2000). Rather, “the furtherance test lends itself to sequentially committed crimes” and “[i]t’s application to crimes occurring literally at the same time is limited.” State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). All of Sims’ federal offenses occurred simultaneously. Thus, the fact that Sims’ firearm charge contains “in furtherance of” in its title is not dispositive.

The relevant inquiry is to what extent, viewed objectively, the criminal intent differed from one crime to the next. Here, Sims’ objective intent in possessing methamphetamine was to distribute that drug, presumably in exchange for money. His objective intent in possessing the firearm is less clear.⁴ Even though a jury determined that the firearm furthered the drug offense, the record provides no *facts* from which the trial court in this case could assess Sims’ objective intent in carrying the weapon. See Polk, 198 Wn. App. at 396 (where there is no difference in statutory intents, court must “look objectively to the sentencing facts to determine whether a particular defendant’s intent was the same or different with respect to each count”). He may have had the gun to facilitate the drug crime, or he may have carried it for personal

⁴ The record indicates that Sims assaulted Lea Lopez with the firearm three days before he was arrested on the charges at issue. CP 70-71. This assault was apparently an effort to collect on a loan, and had nothing to do with drug trafficking. CP 71.

protection. Either way, he would have violated 18 U.S.C § 924(c)(1)(A), which also applies when one “uses or carries a firearm” during and in relation to drug trafficking.

Finally, even if the trial court abused its discretion in declining to count the drug offense as the same criminal conduct as the firearm offense, it arrived at the correct offender score. Sims argues that the drug offense and the “in furtherance of” firearm offense are the same criminal conduct. He does not argue that those two offenses are also the same criminal conduct as the Felon in Possession of a Firearm and Felon in Possession of Ammunition offenses. And the trial court expressly concluded that the drug offense was a crime separate from those offenses. RP 11. Thus, the federal convictions still contribute 3 points to Sims’ offender score: 1 point for the methamphetamine possession and “in furtherance of” firearm offense; 1 point for the body armor charge,⁵ and 1 point for the felon in possession of a firearm and ammunition offenses. Thus, any error in the court’s same criminal conduct analysis made no difference in his sentence and was harmless. This Court should affirm.

⁵ Although Sims argued below that all five of the federal crimes should be counted as one point, he does not challenge on appeal the trial court’s decision to count the body armor charge as a separate crime.

2. SIMS FAILED TO PRESERVE HIS CLAIM
CONCERNING LEGAL FINANCIAL OBLIGATIONS.

Sims also contends that the trial court erred in imposing discretionary legal financial obligations without first considering his current and likely future ability to pay. Because Sims failed to preserve this claim, this Court should decline to address it.

The trial court ordered Sims to pay \$504 in discretionary court costs. CP 33; RP 18. The record does not show that the court made an individualized inquiry into Sims' current and likely future ability to pay, despite boilerplate language to that effect on the judgment and sentence. CP 33. In light of State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015), the State concedes that the trial court's failure to make an individualized inquiry was error.

However, Sims did not object to this error at sentencing. "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." Blazina, 182 Wn.2d at 832. This rule "exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond." Id. at 832-33. Unlike erroneous sentences, which can be challenged for the first time on

appeal, unpreserved LFO errors do not implicate concerns about sentencing uniformity. Id. at 833-34.

An appellate court properly exercises its discretion in declining to review unpreserved LFO claims. Blazina, 182 Wn.2d at 834. This Court should decline to review Sims' unpreserved claim.

D. CONCLUSION

For the reasons expressed above, the State respectfully asks this Court to affirm Sims' sentence.

DATED this 10th day of December, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Casey Grannis
(grannisc@nwattorney.net), the attorney for the appellant, Glen Sims,
containing a copy of the Brief of Respondent in State v. Glen Sims, Cause
No. 73240-4 -I, in the Court of Appeals, Division I, for the State of
Washington.

I certify under penalty of perjury of the laws of the State of Washington that
the foregoing is true and correct.

Name

Done in Seattle, Washington

12-10-15
Date