

NO. 33994-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

ROBERT W. LEONHARDT,

Appellant.

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BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY

The Honorable James B. Sawyer II, Judge
Cause No. 04-1-00481-1

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking the case from the jury for lack of sufficient evidence in Counts I-II.
2. The trial court erred in not finding that Leonhardt's convictions for unlawful possession of a controlled substance (Counts I-II) encompassed the same criminal conduct for purposes of calculating his offender score even though these crimes involved different controlled substances.
3. The trial court erred in permitting Leonhardt to be represented by counsel who provided ineffective assistance by failing to argue the offender score issues previously set forth.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to uphold Leonhardt's convictions for unlawful possession of a controlled substance (Counts I-II) beyond a reasonable doubt? [Assignment of Error No. 1].
2. Whether the trial court erred in not finding that Leonhardt's convictions for unlawful possession of a controlled substance (Counts I-II) encompassed the same criminal conduct for purposes of calculating his offender score even though these crimes involved different controlled substances? [Assignment of Error No. 2].
3. Whether the trial court erred in permitting Leonhardt to be represented by counsel who provided ineffective assistance by failing to argue the offender score issues previously set forth? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Robert W. Leonhardt (Leonhardt) was charged by amended information filed in Mason County Superior Court with one count of unlawful possession of a controlled substance—marijuana—with the intent to deliver or in the alternative with one count of unlawful possession of a controlled substance—marijuana (Count I), and one count of unlawful possession of a controlled substance—methamphetamine (Count II). [CP 51-52].

Prior to trial, a CrR 3.6 suppression motion was held. [CP 56-60; RP 50-116]. After hearing testimony from Officers Ledford and Adams and Leonhardt, as well as argument from the State and Leonhardt's counsel, the court denied Leonhardt's motion to suppress. [RP 113-116]. The court entered the required written findings as follows:

FINDINGS OF FACT

- I. On November 28, 2004, at approximately 2239 hrs., Deputies Ledford and Adams of the Mason County Sheriff's Office initiated a traffic stop of Robert W. Leonhardt's vehicle for failure to have an illuminated rear license plate in Mason County, State of Washington.
- II. Deputy Ledford and Deputy Adams had probable cause to initiate a traffic stop based on the observation that Leonhardt's rear vehicle license plate was not illuminated as required by law.

- III. After initiating the stop, Deputy Ledford approached the driver's side of the vehicle and Deputy Adams approached the passenger side. There were two occupants, Leonhardt in the driver's seat and a front passenger. Upon contact, both deputies observed that neither occupant was wearing a seatbelt. The occupant(s) claimed the vehicle did not have seatbelts.
- IV. Deputy Ledford inquired of both occupants their names and dates of birth for identification. Before doing any further investigation as to whether the vehicle came equipped with seatbelts. Deputy Ledford ran both names for wants and warrants, and discovered that the passenger had confirmed warrants for her arrest.
- V. Pursuant to the warrants, Deputy Ledford placed the passenger under arrest and initiated a search incident thereto. During the search, Deputy Ledford discovered evidence in the unlocked glove box that is the subject of this motion to suppress.

Based upon the foregoing findings of fact, the court hereby makes the following:

CONCLUSIONS OF LAW

- I. The deputies had probable cause to initiate an investigative traffic stop of Leonhardt's vehicle based on the lack of a rear license plate light.
- II. The scope of the stop was appropriately extended to the passenger upon the observation that she was not wearing a seatbelt as required by law. The deputies had a sufficiently independent basis upon which to predicate the inquiry into her identity. Whether seatbelts were ultimately in the vehicle or not does not bear on the deputies' reasonableness in believing that a traffic infraction had been committed.
- III. The deputies properly arrested the passenger on her warrant, and the subsequent search incident to arrest was therefore lawful.

IV. The evidence located in the vehicle is admissible, and the defendant's motion to suppress is hereby denied.

[CP 21-23].

Leonhardt was tried by a jury, the Honorable James B. Sawyer II presiding. Leonhardt entered a stipulation to having a prior conviction for a serious offense. [CP 53; RP 246-247]. Leonhardt took exception to the court's instruction regarding unwitting possession albeit conceding that the instruction was a correct statement of the law. [RP 319]. The jury found Leonhardt guilty of the alternative of unlawful possession of a controlled substance—marijuana (Count I), and of unlawful possession of a controlled substance—methamphetamine (Count II). [CP 24, 25, 26; RP 380-381].

The court sentenced Leonhardt on Count I to a standard range sentence of 3-months, and on Count II to a standard range sentence of 3-months based on an offender score of one on each count (Leonhardt had no prior criminal history and without objection or argument by Leonhardt's counsel the court counted each current offense as one point against the other) with both sentences running concurrently for a total sentence of 3-months. [CP 6-20; RP 382-387].

Timely notice of appeal was filed on October 31, 2005. [CP 15].

This appeal follows.

2. Facts.¹

On November 28, 2004, at approximately 10:30 PM, Deputies Ledford and Adams initiated a traffic stop of Leonhardt's vehicle for lack of a light on the rear license plate. [RP 155-157]. Upon contacting Leonhardt and his passenger, both deputies noticed that neither Leonhardt nor his passenger was wearing seatbelts as required by law. [RP 157-158]. The deputies asked Leonhardt and his passenger for identification, and upon receiving Leonhardt's identification and the name and date of birth of his passenger, ran them for warrants. [RP 157-159]. Leonhardt's passenger, Sybil Miller, came back with warrants for her arrest. [RP 158-159].

The deputies asked Ms. Miller to exit the vehicle, which she did by sliding across the driver's side and was arrested. [RP 159]. Ms. Miller was placed in the patrol vehicle and a search of the vehicle where she had been sitting as a passenger including the unlocked glove compartment revealed marijuana along with a number of other drug related items. [RP 138-143, 159-160]. Leonhardt was then placed under arrest and a search of his person revealed a film canister containing methamphetamine. [CP 53; RP 160, 167-170, 246].

¹ It should be noted that the facts as related in this portion of the brief relate solely to the crimes for which Leonhardt was convicted.

Leonhardt testified in his defense that when the deputies initiated the stop that Ms. Miller had placed something in the glove compartment of his vehicle and he had no idea what that was. [RP 287-288, 290-296]. He also testified that when he was asked to exit the vehicle he had scooped up a number of items putting them in his pocket on his person that he had dumped on the seat, but he had no dumped a film canister on the seat even though he put it in his pocket, and that he had no idea what the film canister contained until he was searched by the deputies incident to his arrest revealing the methamphetamine inside the film canister. [RP 271-273, 291-292, 298-300, 312]. He had admitted to the deputies that he had a firearm, which they discovered during the search of his person. [RP 292, 298].

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT LEONHARDT WAS GUILTY OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (MARIJUANA AND METHAMPHETAMINE) IN COUNTS I AND II.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d

1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Leonhardt was charged and convicted of two counts involving the possession of two different controlled substances (marijuana and methamphetamine). In order to sustain these charges and convictions, the State bore the burden of proving beyond a reasonable doubt that Leonhardt in fact unlawfully possessed these controlled substances. The sum of the State’s evidence on these two charges is that marijuana was found in the glove compartment of Leonhardt’s vehicle and methamphetamine was found in a film canister taken from Leonhardt’s person. However, as Leonhardt testified, Ms. Miller had placed some item in the glove compartment of his vehicle as he was being stopped by the deputies, and the film canister found on his person did not belong to him, and was a random item he had scooped up prior to exiting the vehicle at

the direction of deputies. The totality of the evidence does not support a conclusion that Leonhardt unlawfully possessed the two controlled substances for which he was convicted in Counts I and II. While it is true that the court instructed the jury regarding unwitting possession, Instruction No. 12 [CP 41], the jury would have had to disregard the dictates of this instruction and the evidence in order to find Leonhardt guilty. The evidence presented does not support the jury's verdict given this apparent disregard of the law and evidence. This court should reverse and dismiss Leonhardt's two convictions for unlawful possession of a controlled substance.

- (2) LEONHARDT'S CONVICTIONS FOR TWO COUNTS OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (COUNTS I-II) ENCOMPASSED THE SAME OR SIMILAR CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE EVEN THOUGH THESE COUNTS INVOLVED DIFFERENT CONTROLLED SUBSTANCES.

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an offender score. State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

“RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal

conduct to be counted as one crime in determining the defendant's offender score." State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), *reviewed denied*, 143 Wn.2d 1010 (2001) (*quoting State v. Tili*, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, "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).

For purposes of RCW 9.94A.589(1)(a), intent is not defined as the specific intent required as an element of the crime charged. Rather, the inquiry focuses on the extent to which criminal intent, as objectively viewed, changed from one crime to the next. Whether one crime furthered the other may be relevant but generally does not apply when the crimes occurred simultaneously. State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). Moreover, our courts have held that separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. *See e.g.*, State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997); State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

The instant case is identical to Vike, *supra*, a prosecution for several counts of possession of a controlled substance, where the

defendant simultaneously possesses different controlled substances.

There, as here, the crimes occur simultaneously, intent to possess is not an element of the crime, and the fact that different items are involved (different drugs) does not, by itself, create a difference in a defendant's objective criminal intent. *See Vike*, 125 Wn.2d at 411-13 (simultaneous possession of two different controlled substances encompasses the same criminal conduct for sentencing purposes).

It cannot be disputed that Leonhardt possessed marijuana and methamphetamine at the same time and place (November 28, 2004 on his person and in his vehicle in which he was the driver) with the same intent (possession of controlled substances). Consequently, under RCW 9.94A.589(1)(a), the trial court erred in not finding that these offenses encompassed the same course of criminal conduct for purposes of calculating Leonhardt's offender score. This court should remand for resentencing.

(3) LEONHARDT WAS PREJUDICED BY HIS
COUNSEL'S FAILURE TO ARGUE THE SENTENCING
ISSUES SET FORTH IN THE PRECEDING SECTION
OF THIS BRIEF.²

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Assuming, arguendo, this court finds that trial counsel waived the issues presented in the preceding two sections of this brief by failing to

² While it has been argued in the preceding section of this brief that the errors at issue constitute constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

object to or by assenting to the court's calculation of Leonhardt's offender score, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have so acted or failed to act. For the reasons set forth in the preceding section of this brief, had counsel properly objected, the trial court would not have imposed the unlawful sentence it did.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: for the reasons set forth in the preceding section of this brief, but for counsel's failure to object to or by assenting to the trial court's calculation of Leonhardt's offender score, the trial court would not have imposed the unlawful sentence it did and Leonhardt would not be serving a sentence longer than which the law allows.

E. CONCLUSION

Based on the above, Leonhardt respectfully requests this court to reverse and dismiss his convictions and/or remand for resentencing.

DATED this 5th day of July 2006.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 5th day of July 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 5th day of July 2006.

Patricia A. Pethick
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