

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

NO. 37664-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

KEVIN M. BICKLE, Appellant.

APPELLANT'S BRIEF

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RP-9-01 NMJD SDSCN

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by finding that Bickle's convictions for unlawful manufacture of a controlled substance (methamphetamine) and unlawful manufacture of a controlled substance (marijuana) were not the same criminal conduct.
2. The trial court erred by finding that the objective intent for unlawful manufacture of a controlled substance (methamphetamine) and unlawful manufacture of a controlled substance (marijuana) was not the same.
3. The trial court erred by finding that Bickle's convictions for unlawful manufacture of a controlled substance (methamphetamine) and unlawful possession of a controlled substance (methamphetamine) were not the same criminal conduct.
4. The trial court erred by finding that the objective intent for unlawful manufacture of a controlled substance (methamphetamine) and unlawful possession of a controlled substance (methamphetamine) was not the same.

5. The trial court erred by finding that Bickle's convictions for unlawful manufacture of a controlled substance (marijuana) and unlawful possession of a controlled substance (marijuana) were not the same criminal conduct.
6. The trial court erred by finding that the objective intent for unlawful manufacture of a controlled substance (marijuana) and unlawful possession of a controlled substance (marijuana) was not the same.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by finding that Bickle's two convictions for unlawful manufacture of a controlled substance did not constitute the same criminal conduct where both manufacture operations occurred in the same time and place and the objective intent was the same for both?
2. Did the trial court err by finding that Bickle's convictions for unlawful manufacture of methamphetamine and unlawful possession of methamphetamine and unlawful manufacture of marijuana and unlawful possession of marijuana did not

constitute the same criminal conduct where the objective intent was the same for manufacture and possession?

III. STATEMENT OF THE CASE

Kevin Bickle was convicted on October 31, 2002, of unlawful manufacture of methamphetamine, unlawful manufacture of marijuana, unlawful possession of methamphetamine, and unlawful possession of marijuana. CP 22. On December 13, 2007, the Court of Appeals reversed and remanded for re-sentencing, finding that Bickle had erroneously been sentenced under the wrong version of the sentencing statute, which had led to the miscalculation of his offender score. Order Granting Petition, Supp CP, Attachment 1.

At the resentencing hearing, Bickle argued that his two manufacturing convictions violated double jeopardy, and that they should be treated as the same criminal conduct. RP 4-5. Bickle also argued that each manufacturing conviction and each possession conviction was the same criminal conduct. RP 5-6. The State conceded that the two possession convictions did constitute the same criminal conduct. RP 4, See also, State's Memorandum, Supp. CP.

The court ruled that because the process of manufacturing methamphetamine differed from the process of manufacturing marijuana, they were not the same criminal conduct and did not violate double jeopardy. RP 5. The court also ruled that because manufacturing was complete without possession of the actual drug, these offenses were not the same criminal conduct. RP 9-11.

The court determined that Bickle's offender score for count one was nine and his offender score for the other three counts was five.¹ CP 23. This included a determination that the two possession convictions constituted the same criminal conduct. CP 23. Bickle was sentenced to 149 months on count one, 22 months on count two, 12 months on counts three and four, to be served concurrently. CP 26. This appeal timely followed.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY FINDING THAT BICKLE'S TWO CONVICTIONS FOR UNLAWFUL MANUFACTURE OF A CONTROLLED SUBSTANCE DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT WHERE BOTH

¹ The offender score for the unlawful manufacturing of methamphetamine was calculating using a tripling provision activated by the State's proof that one of Bickle's prior offenses was committed with a sexual motivation. RP 13, 16-17, CP 23. The Defense's objection the State being permitted to prove sexual motivation at resentencing when this was not alleged and proved at the first sentencing hearing was overruled. RP 14, 16-17.

MANUFACTURE OPERATIONS OCCURRED IN THE SAME TIME AND PLACE AND THE OBJECTIVE INTENT WAS THE SAME FOR BOTH.

If concurrent offenses encompass the same criminal conduct, they are treated as one crime for the purposes of calculating the offender's sentence. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Same criminal conduct "means 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). All three prongs must be met, and the absence of any one prong prevents a finding of "same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The trial court's finding on same criminal conduct is reviewed for abuse of discretion. *State v. Freeman*, 118 Wn. App. 365, 377, 76 P.3d 732 (2003).

In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next. . . . Part of this analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same.

State v. Garza-Villarreal, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993).

In *Garza-Villarreal*, the court held that the fact that two different drugs were involved does not indicate different objectives:

The fact that the two charges involved different drugs does not by itself evidence any difference in intent. The

possession of each drug furthered the overall criminal objective of delivering controlled substances in the future.

123 Wn.2d at 49.

In this case, Bickle was convicted of unlawful manufacture of a controlled substance (methamphetamine) and unlawful manufacture of a controlled substance (marijuana). CP 22. The parties do not dispute that both offenses were committed in his home.² Evidence of the methamphetamine manufacturing was found in the kitchen, as was the methamphetamine; evidence of the marijuana grow was found in the basement, marijuana was found in the basement and the kitchen freezer.³ Thus, the offenses were committed at the same time and place. The parties agreed that the victim for both offenses is the same—the general public. Therefore, the only dispute was whether the objective intent for the offenses changed.

The court held that these offenses were not the same criminal conduct because the process of manufacture for each is different and therefore they have different intent. RP 5. Under *Garza-Villarreal*, this reasoning is incorrect. The fact that two different drugs were

² RP 1-11, See also State's Memorandum, p. 5, Supp. CP.

³ RP(Trial) 95, 98, 107, 174-75; see also State's Memorandum, p. 5, Supp. CP.

involved does not change the fact that the objective intent—
manufacture of an unlawful substance—remained the same for both
offenses. Therefore, it was error to find that the offenses were not the
same criminal conduct. This error requires reversal of the sentence
and remand for re-sentencing.

**ISSUE 2: THE TRIAL COURT ERRED BY FINDING THAT BICKLE’S CONVICTIONS
FOR UNLAWFUL MANUFACTURE OF METHAMPHETAMINE AND UNLAWFUL
POSSESSION OF METHAMPHETAMINE AND UNLAWFUL MANUFACTURE OF
MARIJUANA AND UNLAWFUL POSSESSION OF MARIJUANA CONSTITUTE THE SAME
CRIMINAL CONDUCT WHERE THE OBJECTIVE INTENT WAS THE SAME FOR
MANUFACTURE AND POSSESSION.**

Part of the analysis of whether two crimes share the same
objective criminal intent is “whether one crime furthered the other
and if the time and place of the two crimes remained the same.” *State
v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

In this case, the manufacturing lab and the completed
methamphetamine were found together in the kitchen.⁴ The
marijuana growing operation was found in the basement with
completed marijuana in the basement and the kitchen.⁵ These
offenses occurred at the same time and place and had the same victim.

⁴ RP(Trial) 95, 107; see also State’s Memorandum, p. 5, Supp. CP.

⁵ RP(Trial) 98, 174-75; see also State’s Memorandum, p. 5, Supp. CP.

Thus, again, the question is only whether the objective intent for the offenses was the same.

The objective intent of unlawful manufacturing of a controlled substance is to produce the drug. *State v. Maxfield*, 125 Wn.2d 378, 403, 886 P.2d 123 (1994). The inherent intent of possession is to possess the drug, which is also the ultimate goal of manufacturing.

In *Maxfield*, the court held that the crimes of manufacturing and possession with intent to deliver were not the same criminal conduct because they did not share the same objective intent. 125 Wn.2d at 403. The court held that between the manufacturing and the possession with intent to deliver, there is a “change in the criminal objective.” 125 Wn.2d at 403. “In this case, there were different ‘objectives’; one was to grow the drug and the other was to deliver it to third persons.” 125 Wn.2d at 403.

Maxfield is distinguishable from this case because here, the charge was simple possession, not possession with intent to deliver. The objective intent of manufacturing is to produce the drug and the objective intent of possession is to possess the drug. Thus, there is not a “change in the criminal objective” here. The manufacturing furthers and necessarily coexists with the criminal purpose of

possessing the drug because both are part of a continuous criminal enterprise. Therefore, these crimes share the same objective criminal intent. It was error for the court to refuse to treat each manufacturing count as the same criminal conduct as the associated possession count.

V. CONCLUSION

The trial court erred by failing to find that the two convictions for manufacture of a controlled substance did not constitute the same criminal conduct because both offenses shared the same objective intent irrespective of the type of drug being manufactured. Further, the trial court erred by failing to find that each manufacturing count was the same criminal conduct as its corresponding possession charge when manufacturing and possession are a part of the same criminal enterprise and share the same objective intent. Therefore, Bickle's sentence must be reversed and the case remanded for resentencing.

DATED: October ⁴~~3~~, 2008

By: Rebecca W. Bouchey
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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on October 7, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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03 OCT -7 PM 12:10
STATE OF WASHINGTON
BY *[Signature]*
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WASHINGTON

ATTACHMENT 1:
Order Granting Petition, Filed 12/13/07
Supplemental CP

ATTACHMENT 1



02-1-03720-0 28823544 CPRM 12-14-07

9499 12/14/2007 0001

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
IN COUNTY CLERK'S OFFICE

A.M. DEC 13 2007 P.M.

PIERCE COUNTY, WASHINGTON
BY KEVIN STOCK, County Clerk
DEPUTY

In re the
Personal Restraint Petition of

KEVIN M. BICKLE,

Petitioner.

No. 36079-9-II

ORDER GRANTING PETITION

02-1-03720-0

STATE OF WASHINGTON
BY
DEPUTY

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FILED
COURT OF APPEALS

Kevin M. Bickle seeks relief from personal restraint imposed following his October 31, 2002 jury trial convictions of unlawful manufacture of methamphetamine, unlawful manufacture of marijuana, unlawful possession of methamphetamine, and unlawful possession of marijuana. He argues that (1) his offender scores were incorrect because they were calculated using an outdated sentencing statute; (2) his two manufacturing convictions violate the prohibition against double jeopardy under the "unit of prosecution" rule; and (3) the sentencing court erred when it failed to consider his current offenses same criminal conduct. The State concedes that petitioner's offender scores were calculated using the wrong version of the sentencing statutes and are incorrect and that this error also makes his judgment and sentence facially invalid. We accept the State's concession and remand for resentencing. Because we remand for resentencing, we do not reach the remaining issues.

BACKGROUND

A jury convicted petitioner of unlawful manufacture of methamphetamine, unlawful manufacture of marijuana, unlawful possession of methamphetamine, and unlawful possession of marijuana. Response App. A (Judgment and Sentence) at 1-2. Petitioner committed each of these offenses on August 9, 2002. Response App. A at 2.

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In addition to the four current offenses, petitioner had the following criminal history: (1) a 1992 Pierce County conviction for unlawful possession of a controlled substance with intent to deliver, (2) a 1995 Thurston County conviction for burglary, and (3) a 2000 Thurston County conviction for unlawful imprisonment. Response App. A at 3. Based on petitioner's current offenses and these prior convictions, petitioner stipulated that his offender scores was nine points for the manufacturing methamphetamine conviction and five points for each of the other current convictions; the sentencing court accepted this stipulation. Response App. A at 3; Response App. C.

Petitioner appealed; and we affirmed his convictions and sentence in an unpublished opinion. *State v. Bickle*, No. 29584-9-II (unpublished opinion, filed April 13, 2004). We mandated petitioner's direct appeal on June 8, 2004. Petitioner filed this petition in March 2007.

DISCUSSION

Based on the offender scores used by the sentencing court at sentencing, it appears that the scores were calculated under former RCW 9.94A.525(12)(2002) (as amended in Laws of 2002, ch. 107 §2), which provided:

If the present conviction is for a *drug offense* count three points for each adult prior felony *drug offense* conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(Emphasis added). Under that statute, petitioner's other current manufacturing charge and the prior unlawful possession with intent to deliver conviction counted as three points rather than

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one, and petitioner stipulated to a score of nine points for the manufacturing methamphetamine conviction.¹

But when petitioner committed the current offenses on August 9, 2002, RCW 9.94A.525(12)(2002), as amended by Laws of 2002, ch. 290, §3, was in effect, not the earlier version quoted above. The version in effect provided:

If the present conviction is for *manufacture of methamphetamine* count three points for each adult prior *manufacture of methamphetamine conviction* and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

Because petitioner had no prior or other current convictions for manufacturing methamphetamine and there is nothing suggesting that petitioner's criminal history included a sex offense,² the tripling provision in effect *at the time petitioner committed the current offenses* did not apply, and the offender score of nine points for the manufacturing methamphetamine conviction is incorrect. Furthermore, although petitioner stipulated to this offender score, he cannot stipulate to a legal error, so the stipulation does not prevent us from correcting this error. *See In re Goodwin*, 146 Wn.2d 861, 874 (2002). Additionally, this defect renders petitioner's judgment and sentence facially invalid, so he is entitled to relief

¹ Notably, petitioner's unlawful possession convictions did not qualify as drug offenses. Former RCW 9.94A.030(20)(a) (2002). It also appears that the two straight possession convictions were considered same criminal conduct in order to arrive at the offender scores in the judgment and sentence and the stipulation.

² Interestingly, in the opinion from the direct appeal we noted that detectives from Thurston County believed they had probable cause to arrest petitioner for failing to register as a sex offender, which would imply he had been convicted of a sex offense. *Bickle*, No. 29584-9-II. But there is nothing in petitioner's judgment and sentence or his stipulation showing any sex offense. It is possible, however, that one or both of petitioner's Thurston County convictions were committed with sexual motivation and that this was simply not included in the documents relevant to his offender score calculation because it was irrelevant under the earlier statute.

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despite the one-year time bar stated in RCW 10.73.090. *See State v. Ross*, 152 Wn.2d 220, 231 (2004) (citing *Goodwin*, 146 Wn.2d at 866-67). Because petitioner's offender score was calculated under the wrong statute and he was sentenced with an incorrect offender score, he is entitled relief. We therefore vacate his sentences and remand for resentencing.

Petitioner further contends that (1) his two manufacturing convictions violate double jeopardy because the unit of prosecution under RCW 69.50.401(a)(1)(ii) is "a controlled substance" and this precludes the State from pursuing multiple manufacturing charges based on the simultaneous manufacture of different types of controlled substances, PRP Br. at 7; and (2) his four current convictions were same criminal conduct. PRP Br. at 11, 13-15. Because we are remanding for resentencing, petitioner can raise and address these issues at resentencing and we do not reach them here.

Accordingly, it is hereby

ORDERED that this petition is granted and this matter is remanded to the trial court for resentencing.

DATED this 11th day of December, 2007.

Christy J.
Jain-Buchall, J.
Peng, J.

cc: Kevin M. Bickle
 Pierce County Clerk
 County Cause No(s). 02-1-03720-0
 Kathleen Proctor
 Alicia Burton