

No. 44596-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Greg Hale,

Appellant.

Kitsap County Superior Court Cause No. 12-1-00985-4

The Honorable Judge Leila Mills

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ASSIGNMENTS OF ERROR

1. Mr. Hale's reckless endangerment conviction violated his Fourteenth Amendment right to due process.
2. The evidence was insufficient to prove the elements of reckless endangerment.

ISSUE 1: A conviction for reckless endangerment requires proof that the accused person recklessly engaged in conduct that creates a substantial risk of death or serious physical injury to another. Here, Mr. Hale picked up his child and disobeyed a police officer's commands by attempting to walk away. Did the state fail to prove reckless conduct that created a substantial risk of death or serious physical injury?

3. The trial court failed to properly determine Mr. Hale's criminal history and offender score.
4. The trial court erred by including a conviction for second-degree assault in Mr. Hale's criminal history, when he stipulated only to conspiracy to commit second-degree assault.
5. The trial court erred by sentencing Mr. Hale with an offender score of 8.
6. The trial court erred by adopting Finding of Fact No. 2.2 (Judgment and Sentence)
7. The trial court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence).
8. The trial court erred by failing to determine whether or not any of Mr. Hale's 2010 convictions comprised the same criminal conduct.
9. The evidence was insufficient to prove that Mr. Hale's 2010 convictions were separate and distinct criminal conduct.

ISSUE 2: At sentencing, the prosecution must prove criminal history by a preponderance of the evidence. Here, the prosecutor failed to prove a prior conviction for second-degree

assault and failed to establish that Mr. Hale's 2010 convictions should score as separate criminal conduct. Did the trial court violate Mr. Hale's Fourteenth Amendment right to due process by sentencing him with an offender score of eight?

10. Mr. Hale was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
11. Defense counsel unreasonably failed to seek a same criminal conduct determination at sentencing.

ISSUE 3: The Sixth and Fourteenth Amendments guarantee an offender the effective assistance of counsel at sentencing. Here, defense counsel unreasonably failed to ask the sentencing court to find that Mr. Hale's 2010 convictions comprised the same criminal conduct. Was Mr. Hale denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While Greg Hale was out walking with his child, he was accosted by Bremerton Police Officer Lawrence Green. RP 44-46. Green told him that he had an outstanding warrant. RP 46. Mr. Hale initially told Green that he had the wrong person, but then said “at least let me get my wife.” RP 46, 48. Green agreed, and Mr. Hale picked up his child and started to walk past. RP 48. Officer Green told him he was not free to leave, and drew his taser. He held the taser pointing downward. RP 49.

Mr. Hale continued to try to walk past Green. RP 49. The officer held Mr. Hale against a wall with his forearm. RP 50. As Mr. Hale reached into his pocket for what turned out to be a glass pipe, Officer Green fired his taser past him and touched the wires to Mr. Hale’s body in a “dry stun.” RP 50, 72. He did this to avoid any danger to the child. RP 50. Officer Green did not feel the electrical discharge even though he was touching Mr. Hale. Likewise, the child in Mr. Hale’s arms had no reaction. RP 63.

Mr. Hale surrendered the child to Officer Green and collapsed to the ground. All of this happened very quickly.¹ RP 72. Throughout the

¹ Officer Green called for assistance before he contacted Mr. Hale. Another officer who arrived within “30, 45 seconds, a minute” saw Mr. Hale already on the ground. RP 78.

interaction, Officer Green “was not going to do anything... that would have placed this child in danger.” RP 69.

Mr. Hale was charged with reckless endangerment and possession of methamphetamine.² CP 1. He was convicted of both charges following a jury trial. CP 4. He stipulated that he’d been previously convicted of seven felonies. One of the prior convictions was for conspiracy to commit second-degree assault. RP 168-170; CP 4-5. This conviction was listed as second-degree assault on the judgment and sentence. CP 4-5.

Mr. Hale’s criminal history also included a burglary, theft, and possession of stolen property, all from the same date in 2010. CP 4-5. The three offenses were charged under the same cause number, and Mr. Hale was sentenced for all three charges on the same date. CP 4-5. Defense counsel did not ask the trial judge to make a same criminal conduct determination regarding these three prior offenses. RP 165-177.

The trial judge sentenced Mr. Hale with an offender score of eight. CP 5. He timely appealed. CP 15.

² In addition to the glass pipe, officers found a small folded paper containing methamphetamine. RP 57-59; 79-81.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. HALE OF RECKLESS ENDANGERMENT.

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found the charge proven beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. The prosecution failed to prove beyond a reasonable doubt that Mr. Hale recklessly engaged in reckless conduct that created a substantial risk of death or serious physical injury.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

A conviction for reckless endangerment requires proof that the accused person engaged in reckless conduct that created a substantial risk of death or serious physical injury to another. RCW 9A.36.050. Here, the evidence showed that Mr. Hale picked up his child, disobeyed the officer's

commands by attempting to walk away, and reached in his pocket to remove what turned out to be drug paraphernalia. RP 48-50, 72. None of these actions were reckless in and of themselves. Nor did the conduct itself create a substantial risk of death or serious injury.

Furthermore, Officer Green testified that he “was not going to do anything... that would have placed this child in danger.” RP 69. He also testified that he would expect the same of any police officer in the situation. RP 69.

The state failed to present any evidence of reckless conduct that placed the child at substantial risk of death or serious injury. Under the circumstances, the evidence was insufficient to prove reckless endangerment. Mr. Hale’s conviction must be reversed and the charge dismissed with prejudice. *Smalis* 476 U.S. at 144.

II. MR. HALE’S SENTENCE MUST BE VACATED BECAUSE THE SENTENCING COURT FAILED TO PROPERLY DETERMINE HIS OFFENDER SCORE AND STANDARD RANGE.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist.” RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile

felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

- A. The sentencing court erred by finding Mr. Hale had a prior conviction for second-degree assault.

The burden is on the prosecution to establish criminal history by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012).

Here, Mr. Hale stipulated to a prior conviction for conspiracy to commit second-degree assault. RP 165-170; CP 4-5. The prosecutor presented no additional proof. Despite this, the court found a conviction for second-degree assault, rather than for conspiracy to commit that crime. CP 4-5.³ The court's finding must be vacated and the case remanded for correction of Mr. Hale's criminal history.

³ Second-degree assault is a violent offense; the conspiracy charge is not. *See* RCW 9.94A.030(54). Under some circumstances, violent offenses add two points to the offender score. *See* RCW 9.94A.525. That is not the case here; however, the superior court did sentence Mr. Hale with an extra point. CP 4-5. The reason for this is not clear.

B. The sentencing court should have scored Mr. Hale's 2010 convictions as the same criminal conduct.

A sentencing court is required to analyze multiple prior convictions to determine whether or not they are based on the "same criminal conduct:"

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except: (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations.

RCW 9.94A.525.

A same criminal conduct determination is reviewed for an abuse of discretion. *State v. Graciano*, 176 Wn.2d 531, 533, 295 P.3d 219 (2013).

A court abuses its discretion by failing to exercise discretion. *Kucera v.*

State, Dep't of Transp., 140 Wn.2d 200, 224, 995 P.2d 63 (2000).

The burden is on the offender to establish that multiple convictions stem from the same criminal conduct. *Graciano*, 176 Wn.2d at 540.⁴ “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).

The analysis requires examination of the extent to which the offender’s criminal intent, objectively viewed, changed from one crime to the next. *State v. Haddock*, 141 Wn.2d 103, 113, 3 P.3d 733 (2000); *see also State v. Anderson*, 72 Wn. App. 453, 464, 864 P.2d 1001 (1994). Sometimes this necessitates determination of whether one crime furthered another. *Haddock*, 141 Wn.2d at 114. A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (Williams I); *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

In the case of multiple offenses not previously found to be the same criminal conduct, the sentencing court *must* exercise its discretion and decide whether multiple prior offenses should count separately or together. *State v. Mehaffey*, 125 Wn. App. 595, 600-01, 105 P.3d 447

⁴ Some language in *Graciano* appears to suggest that this rule applies only to current offenses.

(2005). Furthermore, the burglary anti-merger statute cannot be applied to score prior convictions separately. *State v. Williams*, -- Wn.2d --, 307 P.3d 819 (Wash. Ct. App. 2013) (Williams II).

The court here failed to make the required determination with respect to Mr. Hale's 2010 convictions. The three offenses occurred on the same date, were charged under a single cause number, and were sentenced on the same date. CP 4-5. The record establishes a single criminal episode.

Mr. Hale's 2010 convictions should have scored as the same criminal conduct. Accordingly, the sentence must be vacated and the case remanded for resentencing with an offender score of five.⁵ *Williams II*, -- Wn.2d -- at ____.

III. IF THE SAME CRIMINAL CONDUCT ERROR IS NOT PRESERVED, MR. HALE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel requires reversal if counsel provides deficient performance that prejudices the accused. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v.*

⁵ The judgment and sentence erroneously reflects an offender score of eight. CP 4-5. This is inexplicable, given that the court found only seven prior felony convictions total. CP 4-5.

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Id.*; RAP 2.5(a)(3).

B. Defense counsel's failure to seek suppression of unlawfully obtained evidence prejudiced Mr. Thomas.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 U.S. at 685.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

A criminal defendant has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). This includes, for example, a duty to investigate and present evidence and argument relating to mitigating factors. *See, e.g., Becton v. Barnett*, 2 F.3d 1149 (4th Cir. 1993).

If the same criminal conduct error is waived by counsel's failure to raise it at sentencing, Mr. Hale was deprived of the effective assistance of counsel. *Gardner*. The failure cannot be described as a reasonable strategic decision, and counsel's error prejudiced Mr. Hale by increasing his standard range. RCW 9.94A.517.

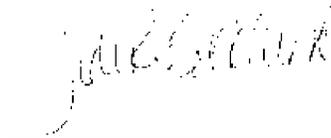
Mr. Hale's sentence must be vacated. The case must be remanded for a new sentencing hearing.

CONCLUSION

Mr. Hale's reckless endangerment conviction must be reversed and the charge dismissed with prejudice. In addition, his sentence must be vacated and the case remanded for resentencing with an offender score of five.

Respectfully submitted on October 3, 2013,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Greg Hale, DOC #861601
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

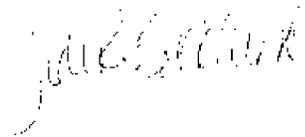
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Kitsap County Prosecuting Attorney
rhauge@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 3, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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