

**FILED
Court of Appeals
Division II
State of Washington
1/10/2018 3:15 PM**

NO. 50581-9-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL NAILLIEUX,

Appellant.

RESPONDENT'S BRIEF

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Representing Respondent**

**HALL OF JUSTICE
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I. ISSUE

1. Did the trial court apply an erroneous legal standard in determining that the appellant's prior convictions did not encompass same criminal conduct?
2. Did the trial court err in imposing discretionary legal financial obligations ("LFOs")?

II. SHORT ANSWER

1. **No.** The trial court did not apply an erroneous legal standard in determining the appellant's offender score.
2. **Yes.** The imposition of discretionary LFOs was done without determining the appellant's ability to pay.

III. FACTS

The State agrees, for the most part, with the factual and procedural history as set forth by the Appellant. Where appropriate, the State's brief will point to specific facts in the record regarding the issues before the Court.

IV. ARGUMENT

A. THE TRIAL COURT CORRECTLY DETERMINED THAT THE APPELLANT'S PRIOR CONVICTIONS DID NOT ENCOMPASS SAME CRIMINAL CONDUCT.

A defendant's offender score is computed from his criminal history, including prior and current convictions. *State v. Dunaway*, 109 Wn.2d 207, 212-213, 743 P.2d 1237 (1987). "Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be

counted as one offense.” RCW 9.94A.525(5)(a)(i). “‘Same criminal conduct,’ as used in this subsection, 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). Offenses do not constitute same criminal conduct if any element of one crime is missing from the other. *State v. Torngren*, 147 Wn. App. 556, 564, 196 P.3d 742 (2008) (citing *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994)).

When reviewing whether two or more crimes constitute the same criminal conduct for purposes of calculating an offender score, an appellate court will not disturb the sentencing court’s determination absent a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); *State v. Knutson*, 64 Wn. App. 76, 82, 823 P.2d 513 (1992); *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). The concept of same criminal conduct is construed narrowly to disallow most assertions. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Generally, the appellate court will defer to the sentencing court’s discretion. *Haddock*, 141 Wn.2d at 110.

In deciding if crimes encompass 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...[P]art 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.

Maxfield, 125 Wn.2d at 402 (quoting *State v. Garza Villarreal*, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993)). In *Maxfield*, the defendant challenged the trial court's determination that his separate convictions for possession of a controlled substance with intent to deliver and manufacture of a controlled substance should not be considered same criminal conduct. *Maxfield*, 125 Wn.2d at 401. The Washington Supreme Court disagreed, finding that

[T]he objective criminal intent is not the same for the two crimes defendant committed; there was a change in the criminal objective. In manufacturing, the objective intent is to produce the drug and the crime is complete without any showing of an intent to deliver...there were different "objectives"; one was to grow the drug, the other was to deliver it to third person.

Maxfield, 125 Wn.2d at 403. *Maxfield* also recognized that separate convictions for delivery of a controlled substance and possession with intent to deliver were separate crimes and not same criminal conduct because "they involved different criminal intents – an intent to deliver at the present versus an intent to deliver in the future." *Id.*

In the present matter, the State argued that the appellant's prior convictions for possession with intent to deliver, possession with intent to manufacture and unlawful storage of anhydrous ammonia were not same criminal conduct because they were three separate offenses and three different statutory elements that would require separate proof. RP at 369. The trial court agreed with the State, stating "It looks to me those are all

different kinds of – one is intent to deliver, one is storage, one is attempt to manufacture.” RP at 371. Although this is not the most detailed of analysis, this falls within RCW 9.94A.525(5)(a)(i), RCW 9.94A.589(1)(a), and the above-cited case law. The trial court correctly found that because the criminal intent in each of the three offenses – delivery, storage, and manufacture – were different, they were not same criminal conduct.

B. THE STATE AGREES THAT THE IMPOSITION OF DISCRETIONARY LFOs WAS IMPROPER.

The record is silent on the issue of the imposition of the discretionary LFOs, specifically the Prosecutor Drug Fund assessment and Jury Demand fee. It is the State’s assumption that those fees were mistakenly added to the judgment and sentence prior to the sentencing hearing. Since there was no discussion about the appellant’s ability to pay his LFOs, the State agrees that they should be stricken.

V. CONCLUSION

The trial court properly concluded that the appellant's prior convictions were not same criminal conduct. The State agrees that the discretionary LFOs were improperly imposed. Thus, the State requests this Court affirm the appellant's sentence, but remand to address the LFOs.

Respectfully submitted this 10th day of January, 2018.



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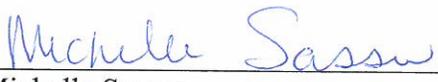
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on January 10th, 2018.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

January 10, 2018 - 3:15 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v. Michael W. Naillieux, Appellant
Superior Court Case Number: 16-1-01244-0

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