

FILED
Court of Appeals
Division II
State of Washington
5/29/2020 2:43 PM

NO. 54424-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

HENRY SADOWSKI, III,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Lanese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's prior convictions for robbery and assault involve the same criminal conduct for sentencing purposes.

Issue Pertaining to Assignment of Error

Appellant was previously convicted of robbery and assault. Appellant's crimes involve the same victim, same time and place, and same intent. Did the sentencing court err when it failed to find they constituted the "same criminal conduct" for purposes of appellant's current offender score?

B. STATEMENT OF THE CASE

The Thurston County Prosecutor's Office charged Henry Sadowski, III, with Burglary in the Second Degree and Bail Jumping. CP 3. Sadowski waived his right to a jury trial and agreed to a bench trial before the Honorable Chris Lanese. CP 45; RP 4-53. Judge Lanese found Sadowski guilty of Bail Jumping, and the State dismissed the Burglary charge. CP 22-24; RP 53-56.

The parties disputed Sadowski's offender score. Included in Sadowski's criminal history were three Pierce County convictions for offenses committed in 2009 – Robbery in the Second Degree, Assault in the Third Degree, and Malicious Mischief in the First Degree. CP 51. All charges were filed in the same information. CP 17-18.

The robbery charge alleged that Sadowski took the personal property of J. Ewing by the use or threatened use of force. CP 17. The assault charge alleged that Sadowski, with criminal negligence, caused bodily harm to J. Ewing by means of a weapon, instrument, or thing likely to produce bodily harm. CP 18. And the malicious mischief charge alleged that Sadowski knowingly and maliciously damaged a car. CP 18.

The circumstances underlying these charges were more thoroughly described in a declaration for determination of probable cause:

That in Pierce County, Washington, on or about the 10th day of July, 2009, the defendants, FRANK VERNON MCKINLEY and HENRY ANTHONY SADOWSKI, did commit the crime of robbery.

On the above date at 2147 hours Sheriff's Deptueis [sic] responded to the 2200 block of 304th Street east regarding a robbery. When deputies arrived they met with victim J. Ewing who was bleeding form [sic] a significant head laceration. Ewing told police that he had been at a party in the area with several men. At some point Ewing drove some of the men (known to Ewing as "Frankie" and "Tony") to a grocery store to buy beer. After the purchase en route back to the party "Frankie," who was seated in the backseat, grabbed Ewing by the neck and choked him. Ewing stopped the car and was thrown out of the his [sic] own car. "Tony" threw a beer bottle at Ewing and hit him in the head causing the injury. "Frankie" and "Tony" then fled in Ewing's car.

A day later deputies located Ewing's car on a power line access road. The car had been burned and was now a hulk. Deputies believed MCKINLEY was a possible suspect. A photomontage was created and Ewing positively identified MCKINLEY as "Frankie." During the course of the investigation deputies contacted MCKINLEY and SADOWSKI. Both were together during a traffic stop. SADOWSKI told deputies that he knew nothing about a robbery and did not know Ewing. SADOWSKI did tell deputies that he had been with MCKINLEY during the period of time the robbery occurred. MCKINLEY also denied that he had participated in a robbery.

CP 64.

Sadowski was convicted in Pierce County Superior Court on all three counts, and sentenced on March 18, 2010. CP 51.

The defense argued that – for Sadowski's current sentencing on Bail Jumping – all three Pierce County convictions should be treated as the same criminal conduct and scored as a single point. CP 52-53. The State filed a memorandum in opposition. Supp. CP ____ (sub no. 73, Sentencing Memorandum).

At sentencing, Judge Lanese ruled for the State on this issue, ultimately calculating Sadowski's offender score as 8 and his standard range as 43 to 57 months in prison. CP 27; RP 65-66. Judge Lanese imposed 44 months, and Sadowski timely filed his Notice of Appeal. CP 28, 43; RP 66.

C. ARGUMENT

SADOWSKI'S PIERCE COUNTY ROBBERY AND ASSAULT CONVICTIONS ARE "THE SAME CRIMINAL CONDUCT" FOR PURPOSES OF HIS CURRENT OFFENDER SCORE.

Where a defendant has multiple prior convictions, those convictions count in the current offender score unless they satisfy the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a). RCW 9.94A.525(5)(a)(i). "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 current sentencing court is not bound by an earlier court's failure to treat offenses as same criminal conduct. State v. Johnson, 180 Wn. App. 92, 100-104, 320 P.3d 197, review denied, 181 Wn.2d 1003, 332 P.3d 984 (2014). The court's decision on this issue is reviewed for an abuse of discretion or misapplication of the law, and the defendant bears the burden to show two crimes involve the same criminal conduct. State v. Graciano, 176 Wn.2d 531, 535-539, 295 P.3d 219 (2013).

Sadowski's prior robbery and assault convictions involved the same victim – J. Ewing. CP 64. The State did not argue otherwise

below.

Both crimes also involved the same time and place. Our Supreme Court has recognized that "the same time and place analysis applies . . . when there is a continuing sequence of criminal conduct." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); see also State v. Porter, 133 Wn.2d 177, 183, 186, 942 P.2d 974 (1997) (rejecting "simultaneity" requirement). During the course of the robbery, J. Ewing was thrown out of his car and then immediately assaulted when hit with the bottle thrown at his head. CP 64. Sadowski and McKinley then fled in Ewing's car. CP 64. This continuous sequence of events demonstrates that the robbery and assault were committed at the same time and place.

At sentencing, the State argued the robbery was complete the moment Ewing was thrown from his car. Therefore, the assault did not occur at the same time. As support, the State cited State v. Knight, 176 Wn. App. 936, 309 P.3d 776 (2013), review denied, 179 Wn.2d 1021, 318 P.3d 279 (2014). Supp. CP ____ (sub no. 73, Sentencing Memorandum, at 6-9). The State was mistaken.

The State's contention that the robbery was complete upon Ewing's removal from his car is inconsistent with Washington law. Washington has adopted the transactional view of robbery,

meaning the use of force can occur during the taking and/or thereafter to retain possession of the property. State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992). Under this view, the transaction is not complete “until the assailant has effected his escape.” Id. at 290 (quoting State v. Manchester, 57 Wn. App. 765, 769, 790 P.2d 217, review denied, 115 Wn.2d 1019, 802 P.2d 126 (1999)); see also State v. Truong, 168 Wn. App. 529, 535-536, 277 P.3d 74 (“The taking is ongoing until the assailant has effected an escape.”), review denied, 175 Wn.2d 1020, 290 P.3d 994 (2012).

The bottle was thrown at Ewing immediately after Ewing was physically removed from his car and immediately before Sadowski and McKinley fled in the car. CP 64. Because Sadowski had not effected his escape when he assaulted Ewing with the bottle, this use of force was still part and parcel of the ongoing robbery. Both crimes occurred at the same time.

The decision in State v. Knight does not alter this conclusion. In that case, the defendant and an accomplice successfully robbed a couple of three wedding rings (a ring the couple was advertising for sale on Craigslist and the wedding ring each wore at the time) after posing as buyers, restraining the couple with zip ties, and taking the rings. Knight, 176 Wn. App. at 941-942. The defendant

and her accomplice signaled two additional accomplices to enter the victims' home, found and restrained two children upstairs, and then turned their attention to finding other valuables in the home. Id. at 942-943. Thereafter, the wife was assaulted while the group tried to determine if there was a safe in the house, and her husband was murdered after escaping the ties and fighting with one of the assailants in the garage. Id. at 943.

In Knight, both the sentencing court and the Court of Appeals rejected the defendant's arguments that her robbery and murder of the husband were the same criminal conduct and, similarly, that her robbery and assault of the wife were the same criminal conduct. These crimes did not satisfy the "same time" requirement because the robbery of the rings was quite clearly complete by the time of the later assault and murder. Id. at 959-962.

Knight is correctly decided on its facts, since there was a clear and significant separation between the robberies and the later crimes committed after additional accomplices entered the house, after the children were restrained, and after the group had clearly changed their focus to discovering any other valuables in the home. In contrast, the assault on Ewing happened in a quick and

uninterrupted sequence of events following his removal from the car. Given the transactional view of robbery, the robbery was still in progress at that time. Judge Lanese indicated he was ruling against Sadowski “for the reasons articulated by the State in their memorandum.” RP 65. To the extent Judge Lanese felt bound by Knight, he was mistaken.

The only remaining question is whether the robbery and assault involved the same intent. The State appears to have conceded this question below because it did not argue against it.

“The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). This includes whether the crimes were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996). Also relevant is whether one crime furthered the other. Graciano, 176 Wn.2d at 540; State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

Here, both crimes were part of the same episode. Moreover, the assault most certainly furthered the robbery, as it was a means by which to ensure that Ewing made no effort to stop Sadowski and McKinley as they escaped with his car. It was still part of the force

used to obtain and retain the car.

Because all requirements for same criminal conduct are met, Sadowski's prior robbery and assault should have been treated as a single crime for purposes of his current offender score. His correct score is 7 and his correct range is 33-43 months. CP 60.

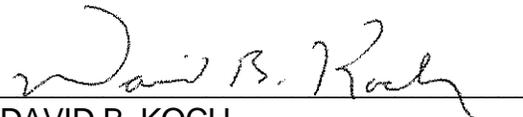
D. CONCLUSION

Sadowski's offender score should be corrected, and his case remanded for resentencing.

DATED this 29th day of May, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in cursive script, appearing to read "David B. Koch", is written over a horizontal line.

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May 29, 2020 - 2:43 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Henry Sadowski, Appellant
Superior Court Case Number: 18-1-01079-2

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