FILED

DECEMBER 30, 2011

Court of Appeals
Division III
State of Washington

NO. 29903-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN NEILD CARAKER,

Appellant.

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

The Honorable Robert G. Swisher, Judge
The Honorable Bruce A. Spanner, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial judge erred in allowing the state to amend the Information to add count two.

2. The trial judge erred in denying Mr. Caraker's motion to sever counts one and two.

3. The trial judge erred in admitting evidence that Mr. Caraker was in possession of a stolen laptop computer.

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possession of stolen property charge causing prejudice to Mr. Caraker. Did the trial judge's error deny Mr. Caraker a fair trial?

2. A trial judge must determine whether or nor multiple prior offenses comprise the same criminal conduct. Here, the prosecutor failed to establish that all of Mr. Caraker's prior offenses scored separately. Did the trial judge violate RCW 9.94A.525 by failing to appropriately score some of Mr. Caraker's prior offenses as the same criminal conduct?

3. Under RCW 9.94A.525(19), the court shall add a point to an offender score if an offender was on community custody when the offense occurred. RCW 9.94A.525(19) applies solely to community custody imposed for Washington convictions sentenced under the SRA.[1] Did the trial court err in adding a point to Mr. Caraker's offender score when Mr. Caraker was on federal probation and not state community custody when the offense occurred?

C. STATEMENT OF THE CASE

Late on the evening of October 3, 2010, two persons entered the Kennewick Les Schwab. RP ("Report of Proceedings") 03/08/11[2] at 69, 107. They got in by apparently prying open a bay door. RP 03/08/11 at 69, 86, 92, 76-77. Once inside, they went through office drawers and

[1] Sentencing Reform Act of 1981, 9.94A RCW
[2] The specific volume of verbatim where the citation is found is identified by the hearing date.

seemingly selected merchandise that they intended to steal. RP 03/08/11 at 103. They put those items by a door. Id. The items included batteries, wheels, and car cleaning products. RP 03/08/11 at 108.

Nothing was taken from the Les Schwab as the two intruders left the business perhaps in response to the sounding of an audible alarm. That there were two intruders was captured by an in-store surveillance camera. RP 03/08/11 at 162.

Kevin Caraker was in the same neighborhood as the Les Schwab around the time the burglary happened. RP 03/08/11 at 216. Mr. Caraker is an avid skateboarder and skates regularly in that neighborhood. RP 03/08/11 at 217; RP 03/09/11 at 316. He sometimes skates with his roommate, Rick Bohne. RP 03/08/11 at 220; RP 03/09/11 at 316. A neighbor saw Mr. Caraker's Volkswagen Jetta parked near the Les Schwab that evening. RP 03/08/11 at 114, 118, 128. While the police were investigating the burglary, the neighbor, Tana Perkes, gave the police a description of the Jetta and a partial license plate. RP 03/08/11 at 118, 128, 140.

The police identified Mr. Caraker as a possible suspect based on the description of the Jetta and the partial license plate. RP 03/08/11 at 229-32. The police obtained a search warrant and searched Mr. Caraker's home two days later. RP 03/08/11 at 219. During the search, the police

found a laptop computer stolen from the Kennewick Seventh Day Adventist Church during a burglary on an unspecified date. RP 03/08/11 at 204-06, 221-22. Also during the search, the police found in a drawer of towels and rags what they believed was a cut up gray sweatshirt. RP 03/08/11 at 243. The police tried to piece the gray rags together. Id. They suspected that the reconstructed gray rags looked like a sweatshirt worn by one of the two Les Schwab intruders as seen on the surveillance video. RP 03/08/11 at 237, 242.

Also during the search, the police found an article about the Les Schwab burglary cut from the local newspapers. RP 03/08/11 at 239. They also found a handwritten note that said "Steal tires in Jetta?" RP 03/08/11 at 240. No one determined who wrote the note. RP 03/08/11 at 276.

The state charged Mr. Caraker with the Les Schwab burglary. CP ("Clerk's Papers") 1-2. The state later moved to amend the Information to add a charged of possession of stolen property in the second degree for the stolen Seventh Day Adventist laptop. CP 5-7; RP 01/26/11 at 2-3. Mr. Caraker strongly objected to the state adding the stolen property charge. RP 01/26/11 at 2-3. Later, during motions in limine, Mr. Caraker moved to sever the two counts. RP 03/07/11 at 41-42. He argued that the stolen property charge was not relevant to the burglary charge. RP 03/07/11 at

41-46. The trial judge disagreed and allowed the both charges to be heard at trial. RP 03/07/11 at 47. Mr. Caraker renewed the motion to sever at the end of the state's case. RP 03/09/11 at 324-25. The trial judge again denied the severance motion. RP 03/09/11 at 326.

The jury found Mr. Caraker guilty of the Les Schwab burglary but acquitted him of possessing the stolen computer. CP 79, 80; RP 03/09/11 at 382.

At sentencing, the court adopted the state's proposed characterization of Mr. Caraker's criminal history without performing a same criminal conduct analysis. RP 04/15/11 at 390-401;

	CRIME	DATE OF SENTENCE	SENTENCING COURT	DATE OF CRIME	A or J	TYPE OF CRIME
1	Felon in Possession Firearm	12/06/05	Federal	12/08/04	A	NV
2	Malicious Mischief 1	07/29/03	Grant County	06/10/03	A	NV
3	Burglary 2	07/29/03	Grant County	06/10/03	A	NV
4	Burglary 2	07/29/03	Grant County	06/10/03	A	NV

5	Burglary 2	07/29/03	Grant County	03/31/03	A	NV
6	Burglary 2	07/29/03	Grant County	03/31/03	A	NV

CP 100 (Judgment and Sentence Finding of Fact 2.2).

The state never presented any proof of Mr. Caraker's prior convictions. RP 04/15/11 at 390-401. In his allocution, Mr. Caraker acknowledged having a couple of burglary convictions as a teenager. RP 04/15/11 at 394-99. In early October 2010, Mr. Caraker was on federal parole. RP 04/15/11 at 391-92.

After being sentenced to 65 months on an offender score of 11 points, Mr. Caraker made this timely appeal. RP 04/15/09 at 399; CP 100, 109.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO SEVER COUNT ONE FROM THE UNRELATED CHARGE IN COUNT TWO.

A trial court's failure to sever offenses at trial is reviewed for abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable, based upon untenable grounds, or where the court bases its decision on an incorrect legal standard. *State v.*

Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Under CrR 4.3(a), a trial court may join offenses in one trial if the offenses (1) are the same or similar in character, or (2) are based on the same conduct or on a series of acts that are part of a single scheme or plan. Conversely, the trial court may sever joined offenses if doing so will promote a fair trial. CrR 4.4(b).

Because joinder may result in prejudice, a trial court must consider a number of factors: (1) the strength of the evidence on each count; (2) the clarity of the defenses on each count; (3) the court's instructions on considering each count separately; and (4) the cross admissibility of the evidence of each count. *Russell*, 125 Wn.2d at 63. An offender who seeks to sever offenses has the burden of showing that joinder is so prejudicial that it outweighs the need for judicial economy. *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

The police searched Mr. Caraker's home on a search warrant related only to the Les Schwab burglary. The discovery of the Seventh Day Adventist laptop was pure happenstance. The search warrant did not include any authority for the police to seize a computer. They were only able to do so after Mr. Caraker gave the police permission to seize it. At trial, the state presented no evidence that Mr. Caraker knew the laptop was

stolen. Knowledge that the laptop was stolen is a required element of possession of stolen property. CP 65; RCW 9A.56.140, 160. As the state did not prove that element, it was reasonable for the jury to acquit Mr. Caraker of second degree possession of stolen property.

But the state lost nothing in successfully convincing the trial judge to join the stolen property charge to the Les Schwab burglary charge. What the state did get into evidence through its weak possession charge was that the laptop was stolen from a church in a burglary. That left the jury to draw an inference that Mr. Caraker was predisposed to steal the property of others through illegal entries to their business and churches. Had these two unrelated charges not been joined, the evidence that Mr. Caraker possessed the stolen laptop would not have been admissible at trial because its only value was as improperly propensity evidence. ER 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.")

Mr. Caraker was prejudiced by the joinder of the unrelated and prejudicial stolen property charge. His burglary conviction should be reversed.

2. THE TRIAL JUDGE FAILED TO MAKE A SAME CRIMINAL CONDUCT DETERMINATION.

A sentencing court's "same criminal conduct" determination will be reversed based on a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 773 (2000). Failure to exercise discretion requires reversal. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Here the trial judge failed to make a "same criminal conduct" determination thereby failing to exercise its discretion. Mr. Caraker's sentence must be reversed.

Under RCW 9.94A.525, the sentencing court is required to analyze multiple prior convictions to determine whether or not they should count as one offense:

> (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.

RCW 9.94A.525(5)(a)(i).

Under RCW 9.94A.589(1)(a), "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. The sentencing court is not bound by prior determinations, but must exercise its discretion and decide whether prior multiple prior offenses should count separately or together. *State v. Wright*, 76 Wn. App. 811, 829, 888 P.2d 1214 (1995), *interpreting former* RCW 9.94A.360(6)(a).

The statute does not allow the sentencing court to presume prior cases should be counted separately. First, as the legislature specifically designates the things to which a statute applies, there is an inference that omissions are intentional. *Queets Band of Indians v. State*, 102 Wn.2d 1, 5, 682 P.2d 909 (1984). In such cases, "the silence of the Legislature is telling." *Id.* at 5. This rule of statutory construction is expressed by the Latin phrase *expressio unius est exclusio alterius* – specific inclusions exclude implication. *State v. Sommerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988).

Second, RCW 9.94A.525 allows the sentencing court to presume prior cases were separate if the sentences were "imposed on separate dates, or in separate counties or jurisdictions," of if the charges were filed "in separate complaints, indictments or informations...." RCW

9.94A.525(5)(a)(i). It does not mention other prior cases not meeting these conditions.

Applying the maxim *expressio unius est exclusio alterius* to this language, the statute does not allow the court to presume prior cases were separate unless they stem from different charging documents, were filed in different counties, or were sentenced on different dates. RCW 9.94A.525(5)(a)(i); *Sommerville*, *supra*. This is inconsistent with the burden of proof, which requires the state to establish that multiple prior convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wn. App. 361, 365, 921 P.2d 590 (1996), *review denied*, 131 Wn.2d 1006 (1997), citing RCW 9.94A.110; *State v. Jones*, 110 Wn.2d 74, 750 P.2d 620 (1988) and *State v. Gurrola*, 69 Wn. App. 152, 848 P.2d (1993), *review denied*, 121 Wn.2d 1032 (1993).

Mr. Caraker's five Grant County adult convictions were sentenced on the same date and possibly under the same cause number.[3] CP 100. The state did not present any evidence establishing the five offenses counted separately. Accordingly, the evidence was insufficient to prove that they were not the same criminal conduct. *State v. Hunley*, 161 Wn. App. 919, 253 P.3d 448, *review granted*, 172 Wn.2d 101 (2011). By

[3] The criminal history adopted by the trial judge in the Judgment and Sentence does not list the prior conviction's cause numbers. CP 100.

scoring these offenses separately, the trial judge violated Mr. Caraker's right to remain silent and his right to due process. *Id.*

Because the court sentenced Mr. Caraker without making the determination required by RCW 9.94A.525(5)(a), the sentence must be vacated and the case remanded for a new sentencing hearing.

3. THE TRIAL JUDGE ERRED IN ADDING A POINT TO MR. CARAKER'S OFFENDER SCORE FOR BEING ON FEDERAL PAROLE WHEN THE BURGLARY WAS COMMITTED.

A sentencing court's offender score determination is reviewed de novo. *State v. Rivers*, 130 Wn. App. 689, 699, 128 P.3d 608 (2005), *review denied*, 163 Wn.2d 1043, *cert. denied*, __ U.S. __, 129 S.Ct. 648, 172 L.Ed.2d 627 (2008).

An offender may challenge erroneous sentences lacking statutory authority for the first time on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

Under RCW 9.94A.525(19), the court shall add a point to an offender's criminal history score if the offender was on community placement or community custody when the offense was committed. At

sentencing, the state presented no evidence that Mr. Caraker was on community custody or community placement on October 3 or 4, 2010, the date of the Les Schwab burglary. Instead the state maintained that Mr. Caraker was on "federal community custody." RP 3/9/11 at 391. But in *State v. King*, 162 Wn. App. 234, 253 P.3d 120 (2011), this court clarified that any point on an offender score calculation related to community custody or community placement status under RCW 9.94A.525 requires that the underlying sentence be an SRA sentence.

RCW 9.94A.525(19) states:

> If the present conviction is for an offense committed while the offender was under community custody, add one point. For purposes of this subsection, community custody includes community placement or post-release supervision, as defined in chapter 9.94B RCW.

The referenced definitions used in chapter 9.94B RCW are found in RCW 9.94B.020, which states:

> *In addition to the definitions set out in RCW 9.94A.030*, the following definitions apply for purposes of this chapter:
>
> (1) "Community placement" means that period during which the offender is subject to the conditions of community custody and/or post-release supervision, which begins either upon completion of the term of confinement (post-release supervision) or at such time as the offender is transferred to community custody in lieu of earned release. Community placement may consist of entirely community custody, entirely post-release supervision, or a combination of the two.
>
> (2) "Community supervision" means a period of time during which a convicted offender is subject to crime-related prohibitions and

other sentence conditions imposed by a court pursuant to this chapter or RCW 16.52.200(6) or 46.61.524. Where the court finds that any offender has a chemical dependency that has contributed to his or her offense, the conditions of supervision may, subject to available resources, include treatment. *For purposes of the interstate compact for out-of-state supervision of parolees and probationers, RCW 9.95.270, community supervision is the functional equivalent of probation and should be considered the same as probation by other states.*

(3) "Post-release supervision" is that portion of an offender's community placement that is not community custody.

Finally, the definition for "community custody" is found in RCW 9.94A.030(5):

"Community custody" means that portion of an offender's sentence of confinement in lieu of earned early release time or *imposed as part of a sentence under this chapter* and served in the community subject to controls placed on the offender's movement and activities by the department.

Review of these extensive definitions establishes that the command of RCW 9.94A.525(19) to add one point to the offender score if the current offense was committed while the offender was under community custody applies only to the various forms of post-custodial supervision applied to offenders under the SRA. The underscored language of the above-quoted definitions emphasizes that community custody and community supervision are terms of art referring to SRA sentences. The italicized language of RCW 9.94B.020(2) above establishes that the Legislature understood there were times when Washington supervision needed to equate with the practices of other states. The Legislature, however, did not equate other states' supervision of felons with Washington's supervision for purposes of scoring crimes committed in this state.

We hold that RCW 9.94A.525(19) applies solely to community custody imposed for Washington convictions sentenced under the SRA.

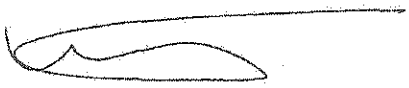
(Emphasis in italics are those in the opinion.) *King*, 162 Wn. App. at 239-240.

As Mr. Caraker was on federal parole, he is not subject to the additional community custody/supervision point. His case should be remanded for resentencing.

E. CONCLUSION

Because of the error in admitting evidence of the stolen laptop computer, Mr. Caraker's conviction should be reversed and his case remanded for dismissal. Alternatively, Mr. Caraker's case should be remanded for resentencing.

Respectfully submitted on December 30, 2011.



LISA E. TABBUT, WSBA #21344
Attorney for Kevin Neild Caraker

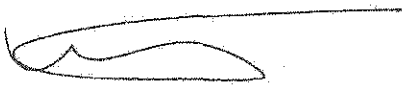
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I (1) efiled Appellant's Amended Brief with the Court of Appeals, Division III, and (2) mailed Appellant's Amended Brief to Andrew Kelvin Miller, Benton County Prosecutor's Office, 7122 W. Okanogan Pl., Bldg A, Kennewick, WA 99336-235 and to (3) Kevin N. Caraker/DOC#860557, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326.

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

Signed December 30, 2011, in Longview, Washington.



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