

62339-7

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NO. 62339-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JABARIE PHILLIPS,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES

1. To be considered the same criminal conduct, two crimes must share the same victim and the same objective criminal intent, and must have occurred at the same time and place. The victim of Phillips's 1992 conviction for Taking a Motor Vehicle Without Permission was the owner of the car; the victims of his 1992 conviction for Attempting to Elude a Pursuing Police Vehicle were the persons whose lives and property were threatened by his driving. The crimes did not share the same objective intent, nor was it clear that one furthered the other. It was also unclear whether the two crimes occurred at the same time and place. Did the trial court properly apply the law and exercise its discretion in concluding that the crimes were not the same criminal conduct, and in counting them separately in calculating Phillips's offender score for his present conviction of Manslaughter in the First Degree?

B. STATEMENT OF THE CASE

Defendant Jabarie Phillips was charged by information with Murder in the Second Degree, along with a firearm allegation. The State alleged that, on March 14, 2007, Phillips killed Dewayne West by shooting him in the chest with a 12-gauge shotgun. CP 1-6.

With the understanding that Phillips would plead guilty, the State amended the charge to Manslaughter in the First Degree. 1RP¹ 3; CP 7-10. Phillips pled guilty, reserving the right to challenge his offender score; specifically, Phillips planned to argue that his 1992 convictions for Attempting to Elude a Pursuing Police Vehicle and Taking a Motor Vehicle Without Permission were the same criminal conduct, and should be scored as only one point. 1RP 8-10; CP 12, 22. If the State were correct, and the convictions counted separately, Phillips's offender score would be 7, and his standard range would be 159-211 months. 1RP 10, CP 10, 21. If Phillips were correct, and the prior convictions were the same criminal conduct, his offender score would be 6, and his standard range would be 146-194 months. 1RP 10. In either event, the State planned to recommend the low end of the standard range. CP 14.

The parties briefed the issue for the court. CP 48-52, 54-59. Phillips focused on the objective intent of the two crimes, arguing that attempting to elude furthered the taking of the car. CP 55. Relying primarily on the State's joinder language in the information,

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (4-7-08); 2RP 7-11-08); 3RP 8-15-08).

he argued that the two crimes occurred at the same time and place. CP 55-56. Finally, Phillips argued that the two crimes shared the same victim. CP 56. The State disagreed on each of these points. CP 49-52.

The parties maintained their positions in arguing to the trial court at sentencing. 3RP 6-8. The trial court adopted the State's position. First, the court found that the two crimes at issue had different victims – the vehicle owner was the victim of the car theft, while the public and the police were the victims of the eluding. 3RP 9. Recognizing that the two crimes were committed in a continuum, the court nevertheless found separate intents, and found that the two crimes were not committed at the same time. 3RP 9-10.

The trial court accordingly found that Phillips's two 1992 convictions were not the same criminal conduct, and that his offender score was thus 7. 3RP 10; CP 27, 31. In accordance with the plea agreement, the State recommended the low end of the standard range, 159 months. 3RP 11. Phillips joined in the recommendation. 3RP 15-16. Respecting the agreement of the parties, the court followed the recommendation and sentenced Phillips to 159 months of confinement. 3RP 19; CP 29.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY FOUND THAT PHILLIPS'S PRIOR CONVICTIONS FOR TAKING A MOTOR VEHICLE WITHOUT PERMISSION AND ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE WERE NOT THE SAME CRIMINAL CONDUCT.

Phillips contends that the trial court should have counted his 1992 convictions for Taking a Motor Vehicle Without Permission and Attempting to Elude a Pursuing Police Vehicle as the same criminal conduct. He argues that the two crimes were committed at the same time and place, and involved the same victim and the same intent. Neither the law nor the facts support this position. The trial court properly exercised its discretion in concluding that the requirements for a finding of same criminal conduct were not met, and properly counted the two convictions separately in calculating Phillips's offender score for his current conviction.

The Sentencing Reform Act of 1981 ("SRA") sets out the procedure for calculating a defendant's offender score at sentencing. RCW 9.94A.525. The SRA specifically directs the sentencing court on how to count certain prior offenses:

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.^[2] 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(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). The absence of any one of these elements prevents a finding of same criminal conduct. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

"A trial court's determination of what constitutes the same criminal conduct will not be disturbed absent an abuse of discretion or misapplication of the law." State v. French, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). "Review for abuse of discretion is appropriate when the facts in the record are sufficient to support a finding either

² Phillips does not claim that his 1992 convictions were previously found to encompass the same criminal conduct.

way on the presence of any of the three statutory elements that, taken together, constitute same criminal conduct." State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003), aff'd on other grounds, 153 Wn.2d 765, 108 P.3d 753 (2005). Courts should narrowly construe the statute to disallow most assertions of same criminal conduct. State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000), rev. denied, 143 Wn.2d 1014 (2001); State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007).

In charging Phillips with Taking a Motor Vehicle Without Permission, the State alleged that, on or about April 20, 1992, Phillips "did intentionally and without permission of Ethel Frazier, the owner and person entitled to possession thereof, take and drive away a motor vehicle, to-wit: a 1981 Plymouth Reliant, Washington license plate # 597 BXA, and with knowledge that such motor vehicle had been unlawfully taken did voluntarily ride in and upon such motor vehicle." CP 58. In charging him with Attempting to Elude a Pursuing Police Vehicle, the State alleged that Phillips, on or about April 20, 1992, "while driving a motor vehicle and having been given a visual and audible signal by a uniformed police officer to immediately bring the vehicle to a stop, wilfully failed and refused to stop and drove the vehicle in a wanton and wilful disregard for

the lives and property of others while attempting to elude a marked official pursuing police vehicle." CP 58-59.

Focusing first on the question of separate victims, the charging language itself makes clear that the victim of the motor vehicle theft was the owner of the car, Ethel Frazier. The eluding charge names no specific victim; the logical conclusion is that, by virtue of Phillips's driving "in a wanton and wilful disregard for the lives and property of others," the victims of this crime were any members of the public who happened to be on (or have property on or near) the streets on which Phillips was driving during the commission of this crime.

Washington case law has long supported this conclusion. In State v. Malone, 106 Wn.2d 607, 724 P.2d 364 (1986), the court in a different context analyzed the policy behind the eluding statute, RCW 46.61.024. The court concluded that "the Legislature enacted the statute to address the dangers of high-speed chases," and noted that "Malone's extreme recklessness during the high-speed chase by Deputy Wolfinger threatened the lives of Washington citizens." Id. at 611.

More recently, in State v. Webb, 112 Wn. App. 618, 50 P.3d 654 (2002), this Court addressed the issue of same criminal

conduct more directly in this context. Webb contended that his prior convictions for taking a motor vehicle and attempting to elude should have been considered the same criminal conduct. Id. at 624. This Court disagreed, finding that "the victim of the TMV was the owner of the stolen car, and the victims of the eluding were the pursuing troopers and the civilians endangered by Webb's weaving in and out of traffic at high speed." Id.

Phillips's crimes did not involve the same victim. Because he must meet all three criteria before a finding of same criminal conduct is proper, his claim fails.

The claim also fails because the crimes involved separate intents. This analysis focuses on objective intent, and not on the defendant's subjective intent. State v. Dunaway, 109 Wn.2d 207, 216-17, 743 P.2d 1237 (1987). Thus, two crimes do not involve the same criminal intent when the defendant's intent objectively changes from one crime to the other. Wilson, 136 Wn. App. at 613. When dealing with sequentially committed crimes, objective intent may be determined by examining whether one crime furthered the other, or whether both crimes were part of a recognizable scheme or plan. Id.; Price, 103 Wn. App. at 857. The trial court is not

bound to accept a defendant's own depiction of his subjective intent. Freeman, 118 Wn. App. at 378.

Viewed objectively, the intent required for Taking a Motor Vehicle Without Permission is the intent to take someone else's car. The intent required for Attempting to Elude a Pursuing Police Vehicle is the intent to get away from the police. These objective intents are clearly different.

Phillips nevertheless argues that his decision not to pull over when signaled to do so by the police was part and parcel of his plan to take the car, and that "refusing to pull over most certainly furthered theft of the car." Brief of Appellant at 5. But the mere fact that a crime is committed in an effort to escape the consequences of a different crime does not mean that the second crime furthered the first such that they are the same criminal conduct. Dunaway, 109 Wn.2d at 216-17 (attempted murders committed in an effort to escape the consequences of robberies did not further the ultimate goal of the robberies).

Moreover, when the second crime is accompanied by a new objective intent, and the first is completed before the second is begun, the two crimes are not the same criminal conduct. Wilson, 136 Wn. App. at 601, 613-14 (rejecting argument that assault and

harassment of same victim were same criminal conduct, even though the crimes were committed very close in time); Price, 103 Wn. App. at 856-59 (rejecting argument that two attempts to murder same victims were same criminal conduct, even though the crimes were committed very close in time). Here, Phillips's crime of taking Ethel Frazier's car was completed before the police signaled him to pull over. Upon seeing such signal, Phillips formed a new intent, and initiated a separate action, to get away from the police and thus avoid arrest.

The court's analysis in Freeman is instructive. In that case, Freeman and Pitchford were riding in a car together. Freeman, 118 Wn. App. at 368. When the car stopped, Freeman got out of the front seat, opened the backseat door, and pointed a gun at Pitchford, telling him to turn over his property. Id. When Pitchford hesitated, Freeman shot him. Id. Freeman argued that his only intent was to rob Pitchford, that the assault was in furtherance of the robbery, and that the two crimes should accordingly be considered the same criminal conduct. Id. at 378. The court disagreed:

The trial court was not legally bound to accept Freeman's self-serving depiction of his *subjective* intent merely to further the robbery by shooting

Pitchford, even though the shooting clearly persuaded Pitchford that his old friend was not joking, and indeed was seriously robbing him at gunpoint. Because the evidence at trial was sufficient to persuade a fair-minded trier of fact that the shooting was a gratuitous, cold-blooded afterthought that went far beyond the force required to accomplish the robbery, we affirm the trial court's finding that the assault and robbery did not constitute the same criminal conduct.

Id. (italics in original).

Similarly, here, the trial court was not required to accept Phillips's self-serving contention that he only attempted to get away from the police to further the car theft. His motive in eluding the police was just as likely to be avoidance of arrest and possible confinement as it was to be retention of the stolen car. Because the taking of the car was completed before Phillips eluded police, and because driving with a wanton and wilful disregard for the lives and property of others went well beyond what was necessary to effect the theft, the trial court acted within its discretion in finding that the two crimes were not the same criminal conduct.

Finally, Phillips has not shown that the two crimes occurred at the same time and place. He relies primarily on the joinder language in the information (that the crimes were "part of a

common scheme or plan" and were "so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other"), but does not explain why the criteria for joinder should govern the same criminal conduct analysis. In reality, based on the facts before the sentencing court, there was no way to know whether the police saw Phillips take the car and immediately signaled him to pull over, or whether (as is more likely), the police saw the car, determined that it was stolen, and ordered the driver to stop. These two events, while they undeniably occurred on the same date, could have been separated by many hours and many miles. Given the directive to narrowly construe the statute to disallow a finding of same criminal conduct, the trial court did not abuse its discretion in finding that the two crimes did not occur at the same time and place.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the trial court's finding that Phillips's 1992 convictions for Taking a Motor Vehicle Without Permission and

Attempting to Elude a Pursuing Police Vehicle were not the same criminal conduct, and affirm the judgment and sentence.

DATED this 1st day of July, 2009.

Respectfully submitted,

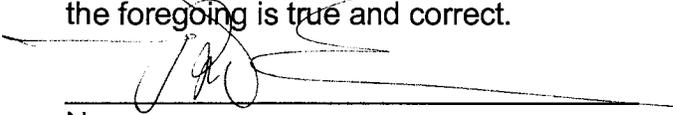
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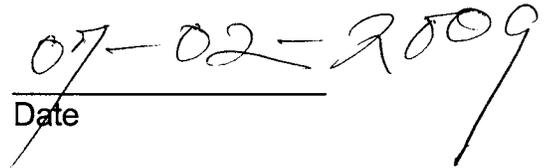
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **David B. Koch**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent**, in **STATE v. JABARIE PHILLIPS** Cause No. **62339-7-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Done in Seattle, Washington



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