

63113-6

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 DEC 18 AM 10:30

NO. 63113-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK C. TOLLEFSON,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. For the attempted first degree robbery, the trial court erred in computing an offender score of 0 and a standard sentence range of $23\frac{3}{4}$ to $30\frac{3}{4}$ months.

2. For the attempted first degree robbery, the trial court erred in imposing a base sentence of $30\frac{3}{4}$ months' confinement.

3. For the attempted first degree burglary, the trial court erred in computing an offender score of 0 and a standard sentence range of $11\frac{1}{2}$ to 15 months.

4. For the attempted first degree burglary, the trial court erred in imposing a base sentence of 15 months' confinement.

II. ISSUES

A. ISSUE RAISED ON CROSS-APPEAL.

(1) The defendant committed an attempted burglary with the intent to commit robbery. Under the burglary anti-merger statute, did the sentencing court have discretion to count the attempted burglary and the attempted robbery separately, even though the two fit the statutory definition of "same criminal conduct"?

B. ISSUES RAISED ON APPEAL.

(2) If the two crimes are counted together in determining the offender score, are the firearm enhancements on those crimes required to be consecutive?

(3) Should the case be remanded for correction of an inconsistency between the offender scores and sentence ranges set out in the judgment and sentence?

III. STATEMENT OF THE CASE

A. EVIDENCE AT TRIAL.

A jury found the defendant (appellant), Patrick Tollefson, guilty of attempted first degree burglary and attempted first degree robbery, both with firearm enhancements.¹ 1 CP 27-30. According to the State's evidence at trial, the defendant met on the evening of June 3, 2008, with Tyson Gaynor and Christopher Dichesare. 2 RP 150-51.

Mr. Gaynor testified that the three of them decided to rob a drug dealer at his home. 2 RP 89-91. They drove off in Mr. Gaynor's Jeep Cherokee. Mr. Gaynor was driving, with the defendant in the front passenger seat and Mr. Dichesare in the rear

¹ The defendant was also charged with first degree assault, but the jury acquitted him on that charge. 1 CP 32.

seat. The defendant was armed with a 9 mm Glock semi-automatic pistol. They went to the drug dealer's house, but the defendant couldn't get in. They went to a second house suggested by the defendant. When they arrived there, there was a police car in the driveway, so they decided not to rob that house either. 2 RP 92-97.

They started driving around, looking for a suitable house to rob. They ended up at a house owned by Tod and Colleen Moon. The defendant got out of the car and approached the house. 2 RP 102-06.

Mr. Moon got up to go to work at 3:15 a.m. on the morning of June 4. As he was dressing, his driveway alarm went off. He went outside to investigate. He saw a Cherokee in his driveway. A person got out of the driver's side, pulled out a gun, and pointed it at Mr. Moon. Mr. Moon jumped inside and slammed his door. 1 RP 16-20. He crouched behind the door. Four bullets came through the door. He immediately called the police. 1 RP 16-24, 30.

A police officer spotted the Cherokee nearby. He followed it to a convenience store. The defendant got out of the front passenger seat and went into the store. Mr. Gaynor and Mr. Dichesare remained in the car. Shortly afterwards, additional

officers arrived and arrested all three. 1 RP 48-53. When brought to the scene of the arrest, Mr. Moon identified Mr. Dichesare as the shooter. 3 RP 38.

Mr. Dichesare led police to a gun that had been thrown out of the car. 1 RP 70-74. A firearms examiner later determined that shell casings found in the Moons' driveway had been fired from this gun. 3 RP 95. A swab taken from the gun contained DNA matching the defendant. The likelihood that a random person would match this DNA was 1 in 59. 3 RP 77-78.

B. SENTENCING.

The sentencing court concluded that the attempted burglary and attempted robbery arose out of the same course of conduct. Sent. RP 18. The State argued that under the burglary anti-merger statute, the court had discretion to treat the two crimes separately. 1 CP 20; Sent. RP 4. The court ruled that the anti-merger statute did not apply to attempted burglary. It therefore concluded that the offender score for each crime was a zero. Sent. RP 17-18. The court said that this ruling gave the defendant "a benefit that frankly I wish I didn't have to give to [him]." Sent. RP 16.

With an offender score of 0, the standard sentence range was 23¼ to 30¾ months for the attempted robbery and 11¼ to 15

months for the attempted burglary. The court imposed sentences at the top of these ranges, to run concurrently. Additionally, the court imposed a 36 month firearm enhancement on each count, to run consecutively to each other and to the base sentences. Sent. RP 28-29; 1 CP 8. The total sentence is 102¾ months (30¾ + 36 + 36).

IV. ARGUMENT

A. SINCE ANTICIPATORY OFFENSES ARE TREATED THE SAME AS COMPLETED OFFENSES IN COMPUTING THE OFFENDER SCORE, THE BURGLARY ANTI-MERGER STATUTE APPLIES TO COMPUTATION OF THE OFFENDER SCORE FOR ATTEMPTED BURGLARY.

The defendant was convicted of attempted first degree burglary and attempted first degree robbery. Burglary convictions are governed by the burglary anti-merger statute, RCW 9A.52.050.

Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor, as well as for the burglary, and may be prosecuted for each crime separately.

Under this statute, a sentencing court has discretion to count a burglary towards the offender score, even if it encompasses the same criminal conduct as another crime. State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1982).

The trial court believed that the anti-merger statute was inapplicable because it only applies to burglaries, not attempted

burglary. Sent. RP 17-18. This analysis overlooks RCW 9.94A.525(4):

Score prior convictions for felony anticipatory offenses (attempts, criminal solicitation, and criminal conspiracies) the same as if they were convictions for completed offenses.

This applies equally to the scoring of current offenses. When a person is sentenced for multiple current offenses, “the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score.” RCW 9.94A.589(1)(a). This means that a conviction for an anticipatory offense is treated as having all attributes of the completed offense. Suppose, for example, that a defendant is convicted of second degree murder (a violent offense) and attempted second degree robbery (a non-violent offense). In computing the offender score, the conviction for attempted robbery is treated as if it were a conviction for a completed robbery. Since second degree robbery is a violent offense, the attempted robbery conviction counts 2 points, not 1. See State v. Knight, 134 Wn. App. 103, 106-109, 138 P.3d 1114 (2006), aff'd on other grounds, 162 Wn.2d 806, 174 P.3d 1167 (2008).

Similarly in the present case, the conviction for attempted burglary is scored as if it were a conviction for burglary. When a defendant is convicted of burglary, the court has discretion to count that conviction separately. Consequently, this applies equally to a conviction for attempted burglary.

When a burglary and another crime encompass the same criminal conduct, Lessley gives the sentencing court discretion to count these convictions either together or separately. In the present case, the court did not believe that it had any discretion. The court did not want to give the defendant the benefit of counting the two crimes together, but it felt compelled to do so. Sent. RP 16-17.

This error establishes an abuse of discretion. A court abuses its discretion when it reaches a decision by applying the wrong legal standard. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A court also abuses its discretion when it fails to exercise discretion. State v. Malone, 138 Wn. App. 587, 157 P.3d 909 (2007). Here, the sentencing court erroneously believed that the burglary anti-merger statute did not apply. As a result, the court failed to exercise any discretion on whether to count the robbery and burglary separately towards the offender score. Sent. RP 17-

18. The case should be remanded for re-computation of the offender score and re-sentencing if necessary.

B. UNDER CLEAR STATUTORY LANGUAGE, FIREARM ENHANCEMENTS ARE CONSECUTIVE TO ALL OTHER FIREARM ENHANCEMENTS, INCLUDING THOSE FOR CRIMES THAT ENCOMPASS THE SAME CRIMINAL CONDUCT.

If the attempted burglary and attempted robbery were properly counted together, the next issue is whether the trial court properly imposed consecutive firearm enhancements. Such enhancements are governed by RCW 9.94A.533(3)(e):

Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

Division Three of this court has specifically applied this statute to crimes that encompass the same criminal conduct.

[T]he meaning of the amended statute is clear — it provides that firearm enhancements “*shall run consecutively to all other sentencing enhancements, including other firearm or deadly weapon enhancements.*” If the statute’s meaning is plain on its face, we must give effect to that plain meaning as an expression of the legislative intent.

State v. Callihan, 120 Wn. Ap p 620, 623, 85 P.2d 979 (2004)
(court’s emphasis, citations omitted).

If the plain meaning of the statute does not resolve the matter, this court can turn to legislative history. State v. Hirschfelder, 148 Wn. App. 328, 199 P.3d 1017, review granted, 166 Wn.2d 1011 (2009). The relevant statutory language was enacted by Laws of 1998, ch. 235, § 1 (SB 5695). The legislative report on the bill shows that it means what it says:

When an offender is being sentenced for two or more crimes encompassing the same criminal conduct where a firearm or deadly weapon finding has been made on at least one of the crimes, the enhancement is applied to the end of the total period of confinement, regardless of which underlying offense was subject to the enhancement.

Firearm and deadly weapon enhancements are to be served consecutive to all other sentencing provisions, including other firearm and deadly weapon enhancements.

Final Bill Report on ESB 5695 (1988).² This report makes it clear that the statute was intended to require consecutive enhancements in all cases, including those involving crimes that encompass the same criminal conduct.

The defendant seeks to invoke the “rule of lenity.” Under that rule, statutory ambiguities should be resolved in favor of a

² This report can be viewed at <http://apps.leg.wa.gov/documents/billdocs/1997-98/Pdf/Bill%20Reports/Senate/5695.FBR.pdf>. (The final period is not part of the web address.) A copy is set out in the appendix.

criminal defendant. In re Charles, 135 Wn.2d 239, 250, 955 P.2d 798 (1998). The rule does not, however, require a forced, narrow, or overly strict construction that defeats the intent of the Legislature. Id. n. 4. “[C]ourts must first attempt to clarify a statutory ambiguity before applying the rule of lenity, and cannot apply the rule where it would contravene the Legislature’s intent.” In re Bowman, 109 Wn. App. 869, 875, 38 P.3d 1017 (2001), review denied, 146 Wn.2d 1001 (2002). Since both the statutory language and the legislative intent are clear, the “rule of lenity” is inapplicable.

The defendant claims that when an offender is convicted of crimes that constitute the same criminal conduct, he is not sentenced on each such crime. This is not correct. “Same criminal conduct” determinations are governed by RCW 9.94A.589(1)(a):

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

The effect of a “same criminal conduct” determination is to reduce the offender score. A sentence is still imposed for each such crime. See State v. Longuskie, 52 Wn. App. 838, 847, 801 P.2d 1004 (1990); State v. Tili, 139 Wn.2d 107, 128, 985 P.2d 365 (1999). Even consecutive sentences may be imposed for crimes that are the “same criminal conduct,” if there are aggravating factors justifying an exceptional sentence. State v. Worl, 91 Wn. App. 88, 94-95, 955 P.2d 814, review denied, 136 Wn.2d 1024 (1988). Since the defendant must be sentenced for each count, those sentences must include firearm enhancements, and those enhancements must run consecutively. RCW 9.94A.533(3).

This analysis also disposes of the defendant’s double jeopardy arguments. “[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.” Albernaz v. United States, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed.2d 275 (1981); see State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Since the legislature mandated cumulative weapons enhancements, imposition of such enhancements does not violate double jeopardy.

The defendant raises the hypothetical situation of a person who is found guilty of multiple degrees of assault based on the same act. In that situation, the merger doctrine would apply. “When a finding of guilty is made regarding both the greater and the lesser-included offense, the entry of judgment for the lesser offense must be vacated, as it is deemed to have merged in the finding of guilty of the greater offense.” State v. Rhodes, 18 Wn. App. 191, 193, 567 P.2d 249 (1977). If a conviction is vacated, there is no sentence that could be made consecutive to any other sentence. Thus, consecutive enhancements would not be possible in this hypothetical situation.

In the present case, however, there is no issue of merger. The merger doctrine is independent of the doctrine of “same criminal conduct.” Longuskie, 59 Wn. App. at 847. When two convictions merge, the legislature has indicated its intent to foreclose *any* multiple punishments for those crimes. In re Fletcher, 113 Wn.2d 42, 50-51, 776 P.2d 114 (1989). A “same criminal conduct” determination reduces but does not eliminate cumulative punishment. See State v. Zumwalt, 119 Wn. App. 126, 82 P.3d 672 (2003), aff’d sub nom. State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). The legislature has made it clear that

consecutive firearm enhancements must be imposed whenever a defendant is sentenced for multiple crimes. The trial court properly applied that legislative determination.

C. THE CASE SHOULD BE REMANDED FOR CORRECTION OF THE INCONSISTENCY BETWEEN THE OFFENDER SCORE AND THE SENTENCE RANGE.

Finally, the defendant points out that the offender score set out in the judgment and sentence does not coincide with the sentence range applied by the sentencing court. As discussed above, the State contends that the court had discretion to use an offender score of 2, as set out in the judgment and sentence. It is thus unclear whether the error lies in the offender score or the sentence range. The case should be remanded for correction of this error.

V. CONCLUSION

For the reasons stated above, the case should be remanded for re-sentencing. On remand, the court should exercise its discretion on whether to treat the attempted robbery and attempted burglary as “the same criminal conduct.” Regardless of the court’s resolution of this question, its decision to make the enhancements consecutive should be affirmed.

Respectfully submitted on December 17, 2009.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent

FINAL BILL REPORT

ESB 5695

C 235 L 98

Synopsis as Enacted

Brief Description: Increasing sentences for crimes involving firearms.

Sponsors: Senators Roach, Long, Oke, Schow, Morton, Benton and Hochstatter.

Senate Committee on Law & Justice

House Committee on Criminal Justice & Corrections

Background: For most all felony crimes, if a court finds that the criminal or an accomplice was armed with a deadly weapon at the time of the crime, an additional penalty is added to the standard range sentence. There are different length enhancements for firearms and other deadly weapons. The enhancement cannot cause the criminal to serve more than the maximum penalty for the crimes committed.

A dispute has arisen over how the weapon enhancements are to be applied when a criminal is sentenced for multiple offenses and a weapon finding has been made on one of the counts. The enhancement may be applied to the entire package of crimes at the end of the standard sentence. The enhancement may, instead, be applied to the particular crime where a weapon was used. Where it is applied can affect the length of the criminal's sentence.

Summary: When an offender is being sentenced for two or more crimes encompassing the same criminal conduct where a firearm or deadly weapon finding has been made on at least one of the crimes, the enhancement is applied to the end of the total period of confinement, regardless of which underlying offense was subject to the enhancement.

Firearm and deadly weapon enhancements are to be served consecutive to all other sentencing provisions, including other firearm and deadly weapon enhancements.

When an underlying sentence plus an enhancement would exceed the statutory maximum if both were served, the full enhancement must be served and the underlying sentence reduced so that the total does not exceed the statutory maximum.

If an offender is convicted of unlawful possession of a firearm in the first or second degree and for either theft of a firearm or possession of a stolen firearm, or both, the offender must serve consecutive sentences for each conviction and for each firearm unlawfully possessed.

Votes on Final Passage:

Senate	42	7
House	96	0

Effective: June 11, 1998

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THE STATE OF WASHINGTON,

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PATRICK C. TOLLEFSON,

Appellant.

No. 63113-6-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 17th day of December, 2009, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

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ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 7th day of December, 2009.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit