

70536-9

70536-9

NO. 70536-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ALVIN BURNS

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON

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**BRIEF OF RESPONDENT**

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COURT OF APPEALS  
STATE OF WASHINGTON

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A. ISSUE PRESENTED

The washout period for a class B felony is ten years. Burns was convicted on May 5, 2004 of conspiracy to possess cocaine with intent to deliver, a class B felony. Did the trial court properly include Burns' 2004 conviction in his offender score when he was sentenced for his January 13, 2010 felony conviction?

B. STATEMENT OF THE CASE

On June 15, 2011, a jury convicted Burns of violation of the uniform controlled substances act – possession with intent to deliver cocaine. CP 4. On July 8, 2011, the Honorable Monica Benton sentenced Burns to the low end of the range, 60 months, based on an offender score of eight. CP 4-13. Burns filed a direct appeal, claiming errors in the trial and challenging his offender score. CP 17-25. The State conceded that Burns' offender score should have been seven instead of eight. CP 24-25. In an unpublished opinion, this Court affirmed his conviction and remanded for resentencing on the correct offender score. State v. Burns, 2013 WL 950874, 174 Wn. App 1004 (2013).<sup>1</sup>

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<sup>1</sup> Despite the error in his offender score, Burns' standard range remained the same, 60 to 120 months.

On June 3, 2013, Burns was resentenced by Judge Benton. RP 1-19.<sup>2</sup> At the hearing, the State asked the court to impose the same 60-month sentence. RP 13. Defense counsel argued that one of Burns' prior offenses should wash out because it was a class C felony and it appeared he had been crime-free for five years. RP 6-9. The prior offense was conspiracy to possess cocaine with intent to deliver, for which Burns received a six-month sentence on May 5, 2004. CP 159-60, 168-75. Defense counsel also presented to the court a document that showed Burns had been in custody with the Department of Corrections until January 18, 2005. RP 8-9. The State erroneously stated Burns had not been crime-free for five years, and presented a docket from Seattle Municipal Court indicating that Burns had been charged with contributing to the delinquency of a minor, a misdemeanor, on January 7, 2005.<sup>3</sup> CP 2-4; RP 11. Burns was convicted of that misdemeanor offense on February 8, 2005. CP 2-4.

In reviewing the Seattle Municipal Court docket, the sentencing court stated, "It seems to me that [the] date of

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<sup>2</sup> RP refers to the verbatim report of the resentencing hearing held on June 3, 2013.

<sup>3</sup> The five-year anniversary would have been January 7, 2010, and the new offense was committed on January 13, 2010.

conviction is the trigger on the muni court case going forward to the date of violation on the subsequent matter.” Thus the relevant date would be February 8, 2005. RP 11. However, the court ultimately ruled that the relevant date was January 18, 2005, which was the day Burns was released from custody.<sup>4</sup> RP 12. Since the new offense occurred on January 13, 2010, the court stated, “His anniversary date would be 1-17-2010, so if this new crime occurs on 1-13-2010, he’s, you know, four days shy.” RP 12. The court then found Burns’ offender score to be seven and reimposed the 60-month sentence. RP 13-14. Burns now appeals.

C. ARGUMENT

THE WASHOUT PERIOD FOR CONSPIRACY TO POSSESS COCAINE WITH INTENT TO DELIVER IS TEN YEARS AND BURNS’ NEW OFFENSE OCCURRED WELL WITHIN THE TEN-YEAR PERIOD.

Burns argues that the trial court erred by finding that the date of his misdemeanor conviction, rather than the date of the commission of the offense, reset the five-year washout period for his most recent prior felony conviction, which was his 2004 conspiracy to possess with intent to deliver cocaine. His argument

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<sup>4</sup> The document referenced by the court and by defense, which states that Burns was in the custody of the Department of Corrections and released on January 18, 2005, was not filed. RP 8-9.

is incorrect because his last felony conviction is a class B felony, making the washout period ten years. Thus, even if the trial court had found the trigger date to be the date of the commission of the crime, his 2004 conviction would not wash out. Additionally, his argument misstates the record. Even though the court entertained the analysis as to what date was relevant with respect to the misdemeanor conviction, the court ruled that the triggering date was the day he was released from custody on his Department of Corrections hold, which was January 18, 2005.

RCW 69.50.407 provides that conspiracy to commit a drug crime is punishable by up to the same maximum sanction prescribed for the underlying substantive offense:

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Unlawful possession of cocaine with intent to deliver is a class B felony:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug...is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years.

RCW 69.50.401. Cocaine is a schedule II narcotic drug. RCW 69.50.206(b)(5); State v. Marquez, 68 Wn. App. 290, 293, 842 P.2d 969 (1992). Thus, for scoring purposes, conspiracy to possess cocaine with intent to deliver is a class B felony.

RCW 9.94A.525(2)(b) governs the washout of prior class B felonies:

Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

Hence, the washout period for conspiracy to possess cocaine with intent to deliver is ten years.

Burns was convicted of conspiracy to possess cocaine with intent to deliver on May 5, 2004. CP 159-60, 168-75. He was sentenced to six months in jail and to twelve months of community custody. CP 159-60, 168-75. At the time of sentencing his jail term was satisfied. CP 168-75. So May 5, 2004 triggered the

commencement of the ten-year period for washout purposes. Assuming Burns had not committed any violations of his community custody or any new crimes, his conspiracy conviction would have washed out on May 5, 2014. Burns committed the offense that is the subject of this appeal on January 13, 2010. Therefore, even if he had not committed the misdemeanor in 2005, his conspiracy charge would have not washed out and his offender score would be the same.

Burns suggests that because conspiracy to deliver cocaine is an unranked felony, then for offender score purposes, it is considered a class C felony. This argument is erroneous. The general statute that governs criminal conspiracy specifies that conspiracy to commit a Class B felony becomes a Class C offense. RCW 9A.28.040(3)(c). However, conspiracy to commit a drug offense is treated differently. RCW 69.50.407 specifically provides that conspiracy to commit a drug crime is punishable by up to the same maximum sanction prescribed for the underlying substantive offense. Thus, this Court has held that since this is the more specific statute for drug offenses, it governs instead of the more general RCW 9A.28. State v. Mendoza, 63 Wn. App. 373, 377-78, 819 P.2d 387 (1991), review denied, 841 P.2d 1232 (1992).

Burns also argues that the trial court found that the date of Burns' municipal court conviction, rather than the date on which he committed the offense, was the reset date for the five-year clock. This misstates the record. Even though Judge Benton did in fact discuss with the parties whether the clock would reset on the day of the offense or the day of conviction, she ultimately did not rule that the conviction date was the trigger date. Rather, she found the trigger date to be the day when Burns was released from custody for his Department of Corrections hold, which was January 18, 2005. RP 12. Her ruling was correct. The washout period begins when a defendant is last released from confinement pursuant to a felony conviction. State v. Blair, 57 Wn. App. 512, 789 P.2d 104 (1990) (incarceration due to violation of probation for felony is "confinement pursuant to a felony conviction" within meaning of statute excluding Class C felony convictions from offender score). Hence, his release from the custody of the Department of Corrections on January 18, 2005, was the trigger date for any washout period.

D. CONCLUSION

Burns' 2004 conviction for conspiracy to possess cocaine with intent to deliver has a ten-year washout period, and this offense occurred five years and eight months after he was released from custody on that matter. Furthermore, the sentencing court found the trigger date to be when Burns was released from custody from the Department of Corrections, not when he was convicted for his misdemeanor. Thus, Burns' offender score is seven and his sentence should stand.

DATED this 30<sup>th</sup> day of January, 2014.

Respectfully submitted,

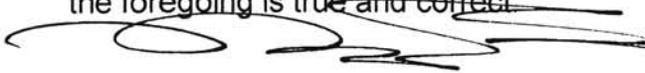
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ALVIN BURNS, Cause No. 70536-9-I, in the Court of Appeals, Division I, for the State of Washington.

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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Bora Ly  
Done in Seattle, Washington

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Date