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September 8, 2015
Court of Appeals
Division I
State of Washington

COA NO. 73240-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

GLEN SIMS,

Appellant.

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

The Honorable Veronica Galvan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to count prior federal offenses as "same criminal conduct" in calculating the offender score.

2. The court erred in imposing discretionary legal financial obligations without considering appellant's present or future ability to pay them. CP 33.

3. The pre-printed finding in the judgment and sentence that appellant has the current or future ability to pay legal financial obligations. is erroneous. CP 33.

Issues Pertaining to Assignments of Error

1. Whether the prior federal offenses of possession of methamphetamine with intent to distribute and possession of a firearm in furtherance of a drug trafficking offense constitute the "same criminal conduct" in calculating the offender score because each offense involved the same time, place, victim and objective intent?

2. Whether the court erred in imposing discretionary legal financial obligations absent inquiry into appellant's current or future ability to pay them?

B. STATEMENT OF THE CASE

The State charged Glen Sims with possession of methamphetamine. CP 12. Following trial, the jury found Sims guilty. CP 13.

The parties disputed the offender score. CP 62-81; 4RP¹ 2-10. Sims's criminal history included federal convictions for felon in possession of a firearm (count 1), felon in possession of ammunition (count 2), violent felon in possession of body armor (count 3), possession of methamphetamine with intent to distribute (count 4), and possession of a firearm in furtherance of a drug trafficking offense (count 5). CP 76. These offenses all took place on July 31, 2004 and were sentenced concurrently on the same day under the same cause number. CP 76-77.

The federal complaint attached to the State's paperwork on the same criminal conduct issue sets forth the facts of these offenses. CP 69-73. On July 31, 2004, King County Sheriff deputies conducted a traffic stop of a vehicle in which Sims was the passenger. CP 71. Deputies determined that Sims resembled the suspect in a reported assault from a few days earlier.² CP 71. After Sims exited the vehicle, deputies noticed that he wore a bulletproof vest. CP 71. A black Beretta pistol was recovered from the passenger area of the vehicle where Sims had been sitting. CP 71. The driver informed the deputies that he saw Sims remove the gun from his side and attempt to conceal it after the patrol car lights

¹ The verbatim report of proceedings is referenced as follows: 2/19/15; 2RP - 2/23/15; 3RP - 2/24/15; 4RP - 3/12/15.

² The reported assault involved Sims demanding repayment of a loan while wearing a bulletproof vest and armed with a small silver handgun. CP 70-71.

were activated. CP 71. A locked metal Brinks safe box and 20 loose rounds of ammunition were inside a cooler in the vehicle. CP 72. The Brinks box contained, among other items, three baggies of methamphetamine (totaling 4 grams), a baggie of marijuana, 16 empty baggies of the type often used by drug traffickers to measure and package their illegal product, and a digital scale. CP 72.

At sentencing on the current offense, defense counsel argued that Sims's prior federal convictions should all count as the same criminal conduct, resulting in an overall offender score of 4. CP 62-64; 4RP 6-9. The State conceded the firearm possession and firearm possession in furtherance of a drug trafficking offense were the same criminal conduct. CP 67; 4RP 3. But it contended none of the other offenses qualified as the same criminal conduct because they did not share the same intent. 4RP 3-6, 9-10; CP 65-67.

The trial court ruled that the offenses of felon in possession of a firearm (count 1), felon in possession of ammunition (count 2), and possession of a firearm in furtherance of a drug trafficking offense (count 5) were all part of the same criminal conduct. 4RP 10-11. The court did not find the possession of body armor or possession of methamphetamine with intent to distribute offenses qualified as same criminal conduct. Id.

The court therefore treated the 2004 federal offenses as adding 3 points to the offender score, resulting in a total score of 6 points. 4RP 11.

The court imposed a standard range sentence of 12 months plus one day based on an offender score of 6. CP 32, 34. It also imposed mandatory and discretionary legal financial obligations. CP 33, 4RP 18. Sims appeals. CP 44-57.

C. **ARGUMENT**

1. **THE COURT ERRED IN FAILING TO COUNT PRIOR OFFENSES AS THE SAME CRIMINAL CONDUCT IN COMPUTING THE OFFENDER SCORE.**

Sims establishes his prior federal offenses of possession of methamphetamine with intent to distribute and possession of a firearm in furtherance of a drug trafficking offense meet the same criminal conduct test. The court misapplied the law or abused its discretion in ruling otherwise. Remand is required to resentence Sims with a lower offender score.

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.525; RCW 9.94A.530(1). The sentencing court calculates an offender score by adding current offenses and prior convictions. RCW 9.94A.589(1)(a). Offenses that encompass "the same criminal conduct" are counted as one crime for

sentencing purposes. RCW 9.94A.589(1)(a). The sentencing court has an affirmative duty to independently determine whether prior offenses served concurrently shall be counted as one offense using the "same criminal conduct" analysis. State v. Mehaffey, 125 Wn. App. 595, 600-01, 105 P.3d 447 (2005); RCW 9.94A.525(5)(a)(i).

Sims, as the defendant, has the burden of establishing crimes constitute the same criminal conduct. State v. Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of law. Graciano, 176 Wn.2d at 535-36.

"Same criminal conduct" is defined as 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 test is an objective one that "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

The offenses at issue in this appeal — possession of methamphetamine with intent to distribute and possession of a firearm in furtherance of a drug trafficking offense — were committed at the same time. CP 71-72. They involved the same place: the vehicle in which Sims

was riding. Id. The offenses also involved the public as the same victim. See State v. Haddock, 141 Wn.2d 103, 111-12, 3 P.3d 733 (2000) (public is victim of unlawful possession of firearm); State v. Deharo, 136 Wn.2d 856, 857-58, 966 P.2d 1269 (1998) (public is victim of possession with intent to deliver controlled substance). None of this was disputed below.

The dispute centered on whether the crimes involved the same criminal intent, and the trial court's ruling turned on intent. 4RP 10-11. Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318-19; 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).

If Sims had simply been convicted of possession of a controlled substance and possession of a firearm, then same intent could not be established absent additional facts in the record showing a connection between the two offenses. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030, 793 P.2d 976 (1990). In Adame, possession of the firearm and possession of the cocaine did not constitute the same criminal conduct because same objective intent could

not be established. Adame, 56 Wn. App. at 811. The Court of Appeals recognized the purpose of possessing cocaine is to use it or sell it. Id. "The felon's purpose in possessing a short firearm or pistol is less clear, although it may be argued the potential purpose is to facilitate the commission of some other crime." Id. But "the facts on record" in that case did not support an implication that Adame's possession of the firearm furthered his possession of the cocaine, or vice versa. Id. Unhelpfully, the decision did not specify the facts in found relevant in relation to the same criminal conduct issue, although the inference is that the record showed bare possession of drugs and bare possession of a firearm without any particular fact tying the two together.

The record in Sims's case is different. It is better. He was convicted of possessing methamphetamine with intent to distribute and possessing a firearm *in furtherance of* a drug trafficking offense. CP 75-76. The drug trafficking offense referred to is the possession of methamphetamine with the intent to distribute crime that the jury convicted Sims of committing. CP 75-76. The jury was instructed to render a verdict on possessing a firearm in furtherance of a drug trafficking offense only if it first found Sims guilty of possessing methamphetamine with intent to distribute. CP 75.

To prove the possession of a firearm in furtherance of that drug trafficking offense, the government had to establish that Sims (1) knowingly (2) possessed a firearm (3) in furtherance of a federal drug trafficking crime. 18 U.S.C. § 924(c)(1)(A). The "in furtherance" element requires proof that "the firearm helped, furthered, promoted, or advanced the drug trafficking." United States v. Timmons, 283 F.3d 1246, 1252 (11th Cir.), cert. denied, 537 U.S. 1004, 123 S. Ct. 516, 154 L. Ed. 2d 401 (2002).

A jury, in convicting Sims, necessarily found beyond a reasonable doubt that Sims's possession of the firearm furthered the crime of possession of methamphetamine with intent to distribute. Same criminal intent can also be measured in appropriate cases by determining whether one crime furthered the other. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). "[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Here we know one crime furthered the other because Sims was convicted of committing a crime that required the jury to find it furthered the other. The objective intent of the crime — possession of a firearm in

furtherance of a drug trafficking offense — is an element of the crime. Any other interpretation for why Sims had the gun is unavailable. There is only one conclusion to be drawn here. "[W]hen the record supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result." Graciano, 176 Wn.2d at 537-38.

Alternatively, the two offenses are properly viewed as part of the same scheme or plan. The scheme was to distribute drugs. Sims's possession of a firearm was part of that plan because it "helped, furthered, promoted, or advanced" the distribution. Timmons, 283 F.3d at 1252. A single intent includes more than one offense "committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990).

For these reasons, the court misapplied the law or otherwise abused its discretion in failing to treat the prior offenses of possession of methamphetamine with intent to distribute and possession of a firearm in furtherance of a drug trafficking offense as same criminal conduct.

With an offender score of 6, Sims received a 12 month, one day term of confinement on the conviction — the low end of the standard range. CP 32, 34. Treating the possession of methamphetamine with intent to distribute and possession of a firearm in furtherance of a drug

trafficking offenses as "same criminal conduct" shaves one point off the offender score. See RCW 9.94A.525(3) (addressing federal offenses); RCW 9.94A.589(1)(a) ("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"). With an offender score of 5, the standard range is 6+ to 12 months.³ See Former RCW 9.94A.517 (Laws of 2013 2nd sp.s. c 14 § 1, eff. July 1, 2013) (reducing seriousness level I offense to standard range of 6+ to 12 months with offender score of 3 to 5); RCW 9.94A.518 (violation of RCW 69.50.4013 has a drug offense seriousness level of I). The trial court stayed execution of the sentence pending this appeal. 4RP 22-23; CP 58-60. Resentencing is required based on a lower offender score of 5 points for the current conviction.

**2. THE COURT VIOLATED STATUTORY MANDATE
IN FAILING TO CONSIDER ABILITY TO PAY
DISCRETIONARY LEGAL FINANCIAL
OBLIGATIONS.**

The court ordered Sims to pay \$504 in discretionary court costs. CP 33; 4RP 18. The court erred in imposing this legal financial obligation

³ Courts must look to the statute in effect when an offense was committed in determining the sentence. State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004); RCW 9.94A.345. Sims's offense occurred on August 15, 2013 and he is therefore subject to the sentencing law in effect as of that date. CP 31. Defense counsel mistakenly believed the standard range for an offender score of 3 to 5 was 6+ to 18 months. CP 62.

(LFO) because it failed to make an individualized inquiry into Sims's current and future ability to pay it.

The court may order a defendant to pay costs pursuant to RCW 10.01.160. However, the statute also provides "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

A trial court thus has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes legal financial obligations. State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). The record reflects no such consideration here. 4RP 18.

In the judgment and sentence, the following pre-printed, generic language appears: "Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed." CP 33. Sims challenges this finding on the ground that the court did not actually consider his individual financial resources and the burden of imposing such obligations on him. The boilerplate finding regarding ability to pay lacks support in the record. 4RP 18.

Further, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Blazina, 182 Wn.2d at 838. The court failed to follow statutory mandate in imposing the legal financial obligations. The remedy is a new sentencing hearing. Id. at 839.

The issue is ripe for review. Id. at 832 n.1. And although defense counsel did not object below, an appellate court has discretion to reach this error consistent with RAP 2.5. Id. at 830. Sims requests that this Court reach the merits. The LFO system is broken. Id. at 835-37. It will not be fixed until appellate courts reach the merits of these claims and send cases back for resentencing, thereby sending a clear signal to trial judges about the importance of individualized inquiry into ability to pay LFOs.

Problems associated with LFOs imposed against indigent defendants include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. Id. at 835.

The amount owing on LFOs has a way of metastasizing. LFOs accrue interest at a rate of 12 percent and may also accumulate collection

fees when they are not paid on time. Id. at 836. "[I]ndigent offenders owe higher LFO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount that they owe." Id.

Further, "[t]he inability to pay off the LFOs means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37. "The court's long-term involvement in defendants' lives inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs. This active record can have serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. All of these reentry difficulties increase the chances of recidivism." Id. at 837 (internal citations omitted).

Moreover, significant disparities exist in the administration of LFOs in Washington. Id. at 837. Offenses resulting in trial, for example, receive disproportionately high LFO penalties. Id.

A thoughtful trial judge, in the course of making an individualized inquiry into ability to pay, can take these troubling realities into account in

determining whether discretionary LFOs are warranted. The case should be remanded for resentencing.

D. CONCLUSION

For the reasons set forth, Sims requests remand for resentencing on the same criminal conduct and LFO issues.

DATED this 9th day of September 2015

Respectfully Submitted,

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DIVISION ONE

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 73240-4-1
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GLEN SIMS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF SEPTEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GLEN SIMS
1315 RANCHO PLACE #B
EVERETT, WA 98204

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF SEPTEMBER 2015.

X Patrick Mayovsky