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September 15, 2016
Court of Appeals
Division I
State of Washington

NO. 74557-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRETT WHITE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED.

Whether the trial court properly exercised its discretion in finding two prior convictions for violating a no-contact order to be separate and distinct conduct for sentencing purposes when the defendant, in pleading guilty to those crimes, had explicitly agreed that the conduct forming the basis of those convictions occurred at separate and distinct times.

B. STATEMENT OF CASE.

Brett White was initially charged with felony violation of a court order, domestic violence, for assaulting Christy Andregg while violating a court order for Andregg's protection. CP 1. Pursuant to a plea agreement, the State amended the charge to felony harassment and White pled guilty to the amended charge. CP 8-22. The plea form reflects that the parties disputed the correct offender score. CP 10, 31.

In the plea paperwork, the State calculated White's offender score to be six. CP 32. This score was reached, in part, by counting two misdemeanor convictions for domestic violence violation of a court order from a 2013 King County Superior Court case, No. 13-1-12075-1, separately as two points. CP 32. Based

on that offender score, the State recommended a standard range sentence. CP 34.

In the defense presentence report, defense counsel also asserted that White's offender score was six. CP 67. Defense counsel agreed that White's score included two prior felony convictions, three prior misdemeanor domestic violence offenses (including the two convictions in King County Superior Court No. 13-1-12075-1), and a point for being on community custody at the time of the offense. CP 67. However, defense counsel presaged in the pre-sentence report, that it was "entirely possible that Mr. White will object to this score." CP 67.

At sentencing, the State and defense counsel both asserted an offender score of six. RP 55, 60-62. The State argued that the two convictions from King County Cause No. 13-1-12075-1 should count separately as two points. RP 69-70.

To support its calculation of the offender score, the State presented the sentencing court with White's Statement of Defendant on Plea of Guilty from the 2013 case. CP 80. In pleading guilty to an amended information charging two counts of

violation of a no-contact order in that case,¹ White's statement of the facts, contained in Paragraph 11 of the standard plea form, stated:

Between 7/29/13 and 7/31/13, in King Co., I knowingly and willfully violated the terms of a court order issued on 3/7/14 by Kent Municipal Court pursuant to RCW 10.99 and RCW 26.50 for the protection of Christy Andregg by contacting her on two separate and distinct occasions.

CP 87. In addition, the amended information had alleged that Count 2 was based on "an act separate and distinct from that alleged in Count 1." CP 89. The certification for determination of probable cause, incorporated into the plea statement, reflected that White had crawled through a window of the victim's apartment in the middle of the night and had held her captive for two days, threatening her and not letting her leave. CP 93. The victim was finally able to escape from her apartment, though White had punched her in the hallway outside the apartment until neighbors approached, and she fled. CP 93.

After the sentencing court and the parties reviewed this plea statement from the 2013 case, White's attorney conceded that those two convictions should be counted separately in White's

¹ It appears that White was initially charged with burglary in the first degree and unlawful imprisonment. CP 93.

offender score for the current sentencing. RP 74. Upon inquiry from the court, however, White himself argued that those two convictions could only count as one point because they had “the same cause number.” RP 75-76. The trial court concluded that “it’s pretty clear from the statement that you acknowledged by signing the document that these are two separate and distinct offenses.” RP 84.

The sentencing court thus found that White’s offender score was six, resulting in a standard range of 22 to 29 months. CP 39; RP 84. The court imposed a mid-range sentence of 25 months. RP 84; CP 41.

C. ARGUMENT.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN CONCLUDING THAT THE TWO 2013 CONVICTIONS FOR MISDEMEANOR VIOLATION OF A NO-CONTACT ORDER COUNTED SEPARATELY.

White argues on appeal that the trial court erred in calculating his offender score as six. To the contrary, the trial court properly exercised its discretion in finding that White failed to meet his burden of proving that his two 2013 convictions for violation of a no-contact order were the same criminal conduct, especially in light

of his previous agreement in that case that the acts were committed on separate and distinct occasions.

RCW 9.94A.525 sets forth the rules for calculating a defendant's offender score based on prior criminal history. RCW 9.94A.525(5)(a) provides that all prior convictions are counted separately except convictions that were determined at their initial sentencing to be "same criminal conduct," or convictions that are determined by the current sentencing court to constitute the "same criminal conduct" as defined in RCW 9.94A.589(1)(a).

RCW 9.94A.589(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." In keeping with this fact-based inquiry, a sentencing court's determination of same criminal conduct is reviewed on appeal for abuse of discretion. State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). A trial court abuses its discretion if its decision "(1) adopts a view that no reasonable person would take and is thus 'manifestly unreasonable,' (2) rests on facts unsupported in the record and is thus based on 'untenable grounds,' or (3) was reached by applying the wrong legal standard and is thus made 'for

untenable reasons.” State v. Johnson, 180 Wn. App. 92, 100, 320 P.3d 197 (2014) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

RCW 9.94A.589’s definition of same criminal conduct is construed narrowly so as to disallow most claims that multiple offenses constitute the same criminal act. Graciano, 176 Wn.2d at 539. The defendant bears the burden of proving that two convictions constitute the same criminal conduct. Id. “[E]ach of a defendant’s convictions counts toward his offender score *unless* he convinces the court that they involved the same criminal intent, time, place, and victim.” Id. at 540 (emphasis in original). In Graciano, the court held that the defendant failed to meet his burden of proving same criminal conduct where there was “no suggestion the incidents were continuous, simultaneous, or happened sequentially within a short time frame.” Id. at 541.

In the present case, the defendant failed to meet his burden of proving that the two convictions for violation of a no-contact order were the same criminal conduct. Significantly, his counsel conceded that there was no argument that the two convictions were

not separate and distinct.² White simply argued that the two convictions should be counted as one because they were under the same cause number. RP 77. White presented no factual argument as to why the two convictions met the statutory definition of same criminal conduct. Given the lack of any coherent factual argument, White clearly failed to meet his burden of proving same criminal conduct.

For the first time on appeal, White argues that the unit of prosecution for violation of a court order supports viewing his two convictions as the same criminal conduct. This Court should refuse to consider this argument, as it was not made below. Where the defendant bears the burden of proof below, it would be unfair to the trial court to allow new factual arguments on appeal.

Moreover, it would be unfair to allow White to renege on his plea agreement in the prior case by arguing that the two crimes were the same criminal conduct when he explicitly agreed that the two crimes occurred on two separate and distinct occasions. The plea statement in that case showed that, in exchange for reduced

² While the sentencing court could have declined to consider White's pro se argument because he was represented by competent counsel at the hearing, the sentencing court did consider and rule on defendant's pro se argument, and thus the court's ruling is properly raised on appeal. State v. Bergstrom, 162 Wn.2d 87, 97, 169 P.3d 816 (2007).

charges, White agreed that his conduct occurred on “two separate and distinct occasions.” CP 87. One obvious purpose for such an agreement was to foreclose arguments that the two crimes were the same criminal conduct for purposes of scoring. White has received the benefit of his bargain in the 2013 case, and he should be held to the terms of his agreement, so that the State receives the benefit of its bargain as well.

Moreover, a unit of prosecution analysis is of no avail to White under these circumstances. White cites to no case that holds that a defendant cannot be convicted of more than one count of violating a no contact order for holding a victim captive for days on end. In addition, it is unclear from the plea documents whether White’s contact during those two days was in fact continuous or interrupted. In Graciano, the supreme court noted that because the evidence was unclear as to whether the offenses occurred at the same time, Graciano had failed to meet his burden of proof, and the trial court’s refusal to find same criminal conduct was not an abuse of discretion. Graciano, 176 Wn.2d at 541. Likewise, in this case, there is, at best, an absence of facts establishing whether White’s contact over the two-day period was continuous or interrupted. Because White previously agreed that the crimes were committed

on separate and distinct occasions, and because there is an absence of facts proving that the contact was continuous, the trial court acted well within its discretion by refusing to find same criminal conduct and counting the two 2013 crimes as two points.

D. CONCLUSION.

The sentence imposed was based on a correct calculation of White's offender score, and should be affirmed.

DATED this 15th day of September, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Travis Stearns, the attorney for the appellant, at travis@washapp.org, containing a copy of the Brief of Respondent, in State v. Brett Dominic White, Cause No. 74557-3, 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.

Dated this 15 day of September, 2016.



Name:
Done in Seattle, Washington