NO. 102011-2

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MUMIN ADAN HUSSEIN,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

LEESA MANION (she/her)
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. INTRODUCTION

This Court should deny the petition for review because the criteria for review are not met in this case. The trial court implicitly found that petitioner Mumin Hussein's prior convictions did not constitute the same criminal conduct when it scored them separately, and the Court of Appeals properly applied this Court's precedent in finding that Hussein may not raise a same criminal conduct claim for the first time on appeal. If this Court nevertheless grants review of this issue, it should also address an argument briefed by the State below but not reached by the Court of Appeals: that any error in failing to sua sponte conduct a same criminal conduct analysis on the record was harmless, because the record did not support a finding that any of Hussein's prior convictions constituted the same criminal conduct.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in

conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

C. STATEMENT OF THE CASE

Hussein stole a car that had been left running with two children inside. When the children's father grabbed onto the open driver's window as Hussein drove away, Hussein attempted to push the father off of the car, dragging him for a period of time before eventually dislodging him, which caused injury to the father. At trial, Hussein was convicted of fourth-degree assault against the father and first-degree robbery based on injury to the father, both predicated on Hussein's actions to dislodge the father while stealing the car. The Court of Appeals accepted the State's concession that the fourth-degree assault

conviction should be vacated on double jeopardy grounds, and neither party seeks review on that issue.

At sentencing, the State calculated Hussein's offender score as seven, which it supported with certified judgments and sentences reflecting six prior felony convictions and testimony by a DOC official that the defendant had been on community custody at the time of the current offenses. CP 205, 210-27; RP 1297-98, 1300.

The certified judgments and sentences reflect the following prior offenses and dates:

Offense	**Date of Offense**
Unlawful Possession of a Firearm in the Second Degree	12/27/2017
Taking a Motor Vehicle Without Permission in the Second Degree	12/27/2017
Assault in the Third Degree – Domestic Violence	09/12/2016
Unlawful Possession of a Firearm in the Second Degree	09/12/2016 through 09/16/2016
Unlawful Imprisonment – Domestic Violence	09/16/2016
Malicious Mischief in the Second Degree	09/12/2016

CP 212, 220. The prior judgments and sentences do not clearly identify the charged victims in each of Hussein's prior offenses, but they contain no findings of same criminal conduct, and all of the prior convictions were scored separately at the original sentencings.[1] CP 213, 221.

Hussein neither affirmatively agreed to his score nor contested it; he simply recommended an exceptional sentence of 60 months after assuming for the sake of argument that the trial court would find his score to be seven. CP 248; RP 1310-11. At no point did Hussein argue that—or ask the court to evaluate whether—any of his prior convictions constituted the "same criminal conduct" for scoring purposes. RP 1310-22. As a result, the court conducted no such analysis on the record

[1] Had Hussein raised a same criminal conduct claim in the trial court, the State could have provided additional records pertaining to Hussein's prior convictions, which would have conclusively established that none of the prior convictions involved both the same date of offense and the same victim.

before agreeing with the State that Hussein's offender score was seven.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

Hussein fails to establish that any of the criteria for review are satisfied here. He cites RAP 13.4(b)(2)-(4), but never discusses the criteria for review beyond a bare assertion that the "Court of Appeals' decision conflicts with other decisions and deprives a person of their right to be sentenced on the correct offender score." Petition for Review at 6. However, Hussein does not actually contend that his offender score is incorrect, nor does he cite any other decision that conflicts with the Court of Appeals' holding that, because he did not raise a same criminal conduct claim in the trial court, he may not raise one for the first time on appeal.

Instead, Hussein relies on language from a Court of Appeals opinion about a trial court's obligations *after a defendant raises a same criminal conduct claim in the trial court* to argue that the trial court was required to conduct a

same-criminal-conduct analysis (1) sua sponte and (2) on the record. Petition at 8, 10 (citing State v. Williams, 176 Wn. App. 138, 141, 307 P.3d 819 (2013), aff'd, 181 Wn.2d 795, 336 P.3d 1152 (2014)). Because the Court of Appeals' decision in this case is consistent with existing caselaw and Hussein's arguments are unsupported by statute or caselaw, this Court should deny the petition for review.

1. THE COURT OF APPEALS CORRECTLY APPLIED EXISTING CASELAW TO CONCLUDE THAT HUSSEIN WAIVED ANY SAME CRIMINAL CONDUCT CLAIM BY FAILING TO RAISE THE ISSUE IN THE TRIAL COURT.

Appellate courts generally will not consider an issue that is raised for the first time on appeal unless the appellant establishes a lack of jurisdiction or a manifest constitutional error. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a). There is an exception that permits review for the first time on appeal of an illegal sentence. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). However, the

exception requires that the illegality be apparent within the four corners of the judgment and sentence. Id. at 231.

When calculating a defendant's offender score, multiple current offenses that constitute the same criminal conduct are counted as one offense. RCW 9.94A.589(1)(a). Two or more offenses constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). If any of these elements is not present, the offenses are not the same criminal conduct. State v. Aldana Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). The definition of "same criminal conduct" is applied narrowly to disallow most same criminal conduct claims. Id.

The defendant bears the burden of establishing that two or more offenses encompass the same criminal conduct. Id. at 539; State v. Valencia, 2 Wn. App. 2d 121, 125-26, 416 P.3d 1275 (2018). "[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." Aldana Graciano, 176 Wn.2d at 540. The same analysis applies when the defendant's offender score is being calculated in subsequent sentencings, except that a finding by the original sentencing court that two convictions are same criminal conduct is binding on all future courts. RCW 9.94A.525(a)(i). A trial court's same-criminal-conduct determination is reviewed for abuse of discretion. State v. Nitsch, 100 Wn. App. 512, 521, 997 P.2d 1000 (2000).

As the Court of Appeals has previously held, a claim that a court should have sua sponte found two convictions to be the same criminal conduct is "not an allegation of pure calculation error . . . . Nor is it a case of mutual mistake regarding the calculation mathematics. Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion." Id. at 520 (footnote omitted); see also In re Pers. Restraint of Toledo-Sotelo, 176 Wn.2d 759, 764, 297 P.3d 51 (2013) (describing same criminal

conduct as an "underlying factual determination"). This Court has repeatedly held that where an alleged error is a "factual error" or "a matter of trial court discretion," a defendant waives the issue by failing to raise it in the trial court. State v. Wilson, 170 Wn.2d 682, 688, 244 P.3d 950 (2010); In re Pers. Restraint of Shale, 160 Wn.2d 489, 494, 158 P.3d 588 (2007); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

In accordance with that binding precedent, the Court of Appeals has previously held that, where prior convictions have not been found to constitute the same criminal conduct by prior sentencing courts, and where the defendant does not ask the trial court to make a "same criminal conduct" determination at sentencing, the defendant may not raise the issue for the first time on appeal. State v. Wilson, 117 Wn. App. 1, 20-22, 75 P.3d 573 (2003); Nitsch, 100 Wn. App. at 523-25. As the court explained in Nitsch,

> [i]f a defendant can wait to raise the same criminal conduct issue on appeal, he can try one argument with the trial court while reserving the other and, if the first is unsuccessful, he can ask the appellate court to remand for consideration of the second (factually inconsistent) argument. Lapses of memory or changes in prosecutorial or judicial personnel may then work to his advantage, and in any event, finality is postponed. From the point of view of a defendant with nothing to lose, this is a windfall. And while a defendant's objective and subjective intent may be different, this is not an inquiry for an appellate court in the first instance.
>
> Second, the effect of permitting review for the first time on appeal is to require sentencing courts to search the record to ensure the absence of an issue not raised. In the same criminal conduct context, such a search requires not just a review of the evidence to support the State's calculation, or a review to ensure application of the correct legal rules, but an examination of the underlying factual context in every sentencing involving multiple crimes committed at the same time. Because this is not the legislature's directive, **the trial court's failure to conduct such a review sua sponte cannot result in a sentence that is illegal. The trial court thus should not be required, without invitation, to identify the presence or absence of the issue and rule thereon**.

100 Wn. App. at 524-25. This Court has repeatedly cited Nitsch with approval on this point and explicitly reaffirmed the principles on which Nitsch relied. Wilson, 170 Wn.2d at 689;

Goodwin, 146 Wn.2d at 874. Because Hussein raises an alleged error that is both factual and involves an exercise of the trial court's discretion, he is not permitted to raise it for the first time on appeal and the Court of Appeals properly declined to consider his claim.

Even if Hussein were permitted to raise his claim for the first time on appeal, his claim is not that the trial court miscalculated his offender score, but that the trial court was required to engage in the same-criminal-conduct analysis before scoring them separately. Br. of Appellant at 15-20. But the record does not establish that the trial court did not engage in a same-criminal-conduct analysis, only that it did not do so *on the record*. The act of scoring prior convictions separately when calculating an offender score demonstrates as an implicit determination that offenses do not constitute same criminal conduct. Nitsch, 100 Wn. App. at 525.

RCW 9.94A.525(5)(a)(i) does not state that a same-criminal-conduct analysis must be done *out loud on the record*

in every single case where prior convictions were served concurrently, and Hussein provides no authority for that proposition. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Moreover, as the court noted in Nitsch, in some circumstances a defendant may make a deliberate decision not to request a same-criminal-conduct finding. Nitsch, 100 Wn. App. at 524. The Court of Appeals in this case properly applied Nitsch's conclusion that "[t]he trial court . . . should not be required, without invitation, to identify the presence or absence of the [same-criminal-conduct] issue and rule thereon." Nitsch, 100 Wn. App. at 524-25.

2. ANY ERROR IN FAILING TO CONDUCT A SAME CRIMINAL CONDUCT ANALYSIS ON THE RECORD WAS HARMLESS.

A non-constitutional error is harmless unless the defendant demonstrates a reasonable probability that the outcome of the proceeding would have been materially affected had the error not occurred. State v. Barry, 183 Wn.2d 297, 317-18, 352 P.3d 161 (2015). Here, there is no reasonable probability that the trial court's scoring decision would have been different had the court sua sponte conducted an on-the-record same-criminal-conduct analysis. As noted above, a defendant bears the burden to establish that convictions constitute the same criminal conduct. Aldana Graciano, 176 Wn.2d at 539; Valencia, 2 Wn. App. 2d at 125-26. When making a same-criminal-conduct ruling, a sentencing court abuses its discretion if the record supports only the opposite conclusion. Valencia, 2 Wn. App. 2d at 126.

In order to find that some of Hussein's prior convictions constituted the same criminal conduct, the trial court would

have had to find that they "require[d] the same criminal intent, [we]re committed at the same time and place, and involve[d] the same victim." RCW 9.94A.589(1)(a). The evidence of the prior convictions presented to the trial court did indicate that two pairs of Hussein's prior offenses were committed on the same dates: (1) unlawful possession of a firearm and taking a motor vehicle without permission committed on December 27, 2018, and (2) domestic violence assault and non-domestic violence malicious mischief committed on September 12, 2016. CP 212, 220. However, there was no evidence before the court suggesting that those offenses involved the same criminal intent or the same victims.

The victim of unlawful possession of a firearm is the general public, and thus it is not the same criminal conduct as an offense with a specific victim. State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000). There was also no indication that the 2016 non-domestic-violence malicious mischief involved the same victim as the domestic-violence assault that

occurred the same day. CP 220-27. Indeed, the fact that the judgment and sentence included no-contact provisions protecting both a woman and a motel, when the malicious mischief was the only non-domestic-violence offense with a specific victim, strongly suggested that the motel was the victim of the malicious mischief and the woman was the victim of the domestic-violence assault. CP 223.

On this record, there is no reasonable probability that the trial court would have found that Hussein had met his burden to establish that any of his prior convictions were the same criminal conduct. Indeed, it would have been an abuse of discretion to enter such a finding without any evidence that the convictions involved the same victim. Any error in failing to conduct a same criminal conduct analysis on the record was therefore harmless.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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DATED this 20th day of June, 2023.

Respectfully submitted,

LEESA MANION (she/her)
King County Prosecuting Attorney

By: 
STEPHANIE FINN GUTHRIE, WSBA #43033
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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