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THE SUPREME COURT OF
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN ANTHONY BAILEY,

Appellant.

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW
BY YAKIMA COUNTY

David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

 ORIGINAL

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A. INTRODUCTION

In State v. Bailey, 179 Wn.App. 433, 335 P.3d 942 (2014), the Court of Appeals reversed Bailey's sentence as a persistent offender, finding his prior 1998 conviction for second degree robbery could not be used to sentence him as a persistent offender under the Persistent Offender Accountability Act (POAA), the actual validity of the conviction was not challenged.

The appeal from which this petition for review arises stems from Mr. Bailey's resentencing following that decision. At resentencing, Mr. Bailey argued his prior 1998 conviction for second degree robbery that was the subject of the court of appeals opinion should not be counted at all in his offender score. RP 13-14. The sentencing court disagreed and counted the prior robbery as a prior conviction in computing the offender score. RP 45; CP 7. Mr. Bailey also argued that his prior convictions for taking a motor vehicle without permission and attempting to elude constituted the same criminal conduct. The judgment and sentence from those two prior offenses showed an offense date of November 7, 2000, and neither box was checked indicating whether the offenses were or were not the same course of conduct. RP 15. The sentencing court disagreed stating, "[I]n order for them to be the same course of criminal conduct don't they have to share the same intent? . . . And the intent to steal is not

the same as the attempt to elude.” RP 17. The court included both convictions in calculating the offender score. RP 45; CP 7. The court sentenced Mr. Bailey to 300 months based on an offender score of nine. RP 41-42. Mr. Bailey argued his offender score should only be 6. RP 22.

The Court of Appeals, in an unpublished opinion, upheld the actions of the trial court. Appellate counsel was allowed to withdraw as counsel for Bailey on October 23, 2015.

B. ISSUE PRESENTED BY PETITION

Bailey has now petitioned this court requesting review of the decision of the Court of Appeals upholding the actions of the trial court at Bailey’s resentencing. Petitioner alleges;

1. The Court of Appeals erred when ruled that the trial court was correct when it included the 1998 Robbery conviction in Bailey’s offender score.
2. The Court of Appeals erred when it ruled that the trial court did not abuse its discretion when it ruled that two prior offenses, Attempting to Elude a Pursuing Police Officer and Taking a Motor Vehicle without the owner’s Permission (TMVOP) counted as separated offenses for offender scoring purposes.

ANSWER TO ISSUES PRESENTED BY PETITION

1. This request for review of the Court of Appeals decision does not meet the requirements of RAP 13.4. The Court of Appeals was correct when it determined that the trial court properly denied Bailey’s argument that the original Robbery conviction did not count for scoring purposes.
2. The Court of Appeals correctly found that the trial court did not abuse its discretion when it determined that the two felonies, Attempt to Elude and TMVOP did not count as one offense.

C. STATEMENT OF THE CASE

This issue now before this court simply put is did the trial court correctly determine that the 1997 Robbery, the Attempt to Elude and the TMVOP all counted for and were separate felony offenses for scoring purposes.

The Court of Appeals set forth the facts in its decision, the State will rely on that statement and shall address specific areas of the facts in the argument s section below.

D. ARGUMENT

1. Standards of Review.

RAP 13.4(b) Considerations Governing Acceptance of Review;

This case does not 1) Conflict with any decision by this court, the claim by Bailey that the Court of Appeals ruling is incorrect is unfounded.; 2) This ruling does not conflict with any ruling by any other division of the Court of Appeals or for that matter any court. The issue of pricy rights to abandon property has been ruled on previously as indicated by the cases cited by the Court of Appeals. 3) The ruling of the Court of Appeals does not raise a significant question under either the State or Federal Constitution; the ruling merely reiterates the standard that has

been applied for years regarding abandon property and a criminal right to privacy in that item.

Bailey has not demonstrated that he has met his burden demonstrating that one of the reasons set forth in RAP 13.4 would allow this court to grant review.

FIRST BASIS FOR REVIEW.

The trial court erred when it included the 1998 Robbery conviction in Bailey's offender score.

As addressed by the State in its brief filed in the direct appeal the initial and fatal error in Bailey's argument is that he states that the Court of Appeals in State v. Bailey, 179 Wn.App. 433, 335 P.3d 942 (2014) (Bailey I)¹ disallowed the use of the prior robbery for "offender score" purposes under the POAA and therefore it could not be included in his offender score for calculation of his standard range. The problem is clearly a failure to read the opinion as written not as he wants it to read.

The opinion in Bailey I states "[a]ccordingly, we reverse the robbery sentence." Id at 435 (Emphasis mine.) This sentence is being interpreted by Bailey to mean "conviction" that is not what the court was asked to address, it was asked to consider the "sentence" that was imposed in the robbery conviction. There was nothing in Bailey I that stated the

¹ The State shall refer to State v. Bailey, 179 Wn.App. 433, 335 P.3d 942 (2014) as Bailey I and unpublished opinion from which this petition for review arises, State v. Bailey 32545-8-III, as Bailey II.

conviction was reversed. The court was asked to address whether Bailey's rights when his case was transferred from juvenile court to adult court had been scrupulously adhered to and the answer to that was no. The court therefore found that the conviction could not be used as a "strike" offense. Nothing in Bailey I states that the actual "conviction" was overturned or reversed or for that matter the validity of the conviction challenged. The challenge was the use of that conviction for POAA. Under RCW 9.94A.030. Definitions a "conviction" is defined as follows..."(9) "Conviction" means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." When Bailey stated on the record at his second sentencing that he wanted to challenge the prior robbery conviction the trial court correctly addressed this "THE COURT: Alright. Yeah. There's a way to do that but I'm not sure -- you -- you can't collaterally attack it in this proceeding." (RP 46)

One of the final sentences in Bailey I states "[u]nder Saenz, the transfer of Mr. Bailey's case to adult court is, therefore, invalid and his 1998 conviction in adult court cannot be used as a strike under the POAA." Id at 443. Once again affirming the State's position.

The was confirmed by the Court of Appeals in Bailey II;

The prior appeal of this matter resulted in a determination that Mr. Bailey was not an "offender" under the POAA. However, that appeal was not a collateral attack on the 1997 robbery conviction. RCW 10.73.090 et seq. Instead, it was an appeal of the assault conviction and ensuing persistent offender sentence. *Bailey*, 179 Wn. App. at 443. This court did not invalidate the robbery conviction in its reversal of the POAA sentence.
(*Bailey II* slip at page 3)

As the Court of Appeals ruled that *State v. Inocencio*, 187 Wn.App. 765, 351 P.3d 183 (Wn.App. Div. 3 2015), a case which also arose from Yakima County, is controlling. The Court of Appeals in *Bailey II* summarized the ruling in *Inocencio* as follows;

There the defendant contended that two of his prior convictions committed before his 18th birthday should not be counted in his offender score because they had been entered by the adult court instead of a juvenile court. *Id.* at 767. This court disagreed, noting that the issue in earlier cases involving transfer of jurisdiction from superior court to adult court had revolved around the question of whether or not the defendant was shown to be an "offender" under the Persistent Offender Accountability Act (POAA). *Id.* at 771-777 (discussing *State v. Saenz*, 175 Wn.2d 167,283 P.3d 1094 (2012) and *State v. Knippling*, 166 Wn.2d 93,206 P.3d 332 (2009)).

Inocencio noted that while the prosecution must establish the criminal history, the defendant bears the burden of establishing the invalidity of a prior conviction. 187 Wn. App. at 776. However, a conviction cannot be collaterally attacked during the sentencing of an unrelated case. *Id.* (citing *State v. Ammons*, 105 Wn.2d 175,188,713 2d 719 (1986)). Instead, the offender must seek post-conviction relief. *Id.* at 776-777. In most instances, however, the ability to collaterally attack a conviction will be restricted by RCW 10.73.090 et seq.

Mr. Bailey makes the same argument here that Mr. Inocencio made, and our answer is the same as in that case. The prior appeal of this matter resulted in a determination that Mr. Bailey was not an "offender" under the POAA. However, that appeal was not a collateral attack on the 1997 robbery conviction. RCW 10.73.090 et seq. Instead, it was an appeal of the assault conviction and ensuing persistent offender sentence. Bailey, 179 Wn. App. at 443. This court did not invalidate the robbery conviction in its reversal of the POAA sentence. (Footnote omitted.)

Because the 1997 Robbery was not voided as argued by Bailey the trial court properly included it in Bailey's offender score at the time he was resentenced to the non-persistent, standard range, sentence. There was no error on the part of the trial court and there was no error on the part of the Court of Appeals.

Bailey has not demonstrated that there is a basis under RAP 13.4 which would allow review of this allegation.

SECOND BASIS FOR REVIEW.

The trial court improperly found that the two prior convictions, Taking a Motor Vehicle without Permission and Attempting to Elude a Pursuing Police Vehicle are not the same criminal conduct for sentencing purposes.

This is the record from the trial court;

THE COURT: Well, it -- the Judgment and Sentence on that one is not part of the record in this case and won't be. And doesn't the -- in order for them to be the same course of criminal conduct don't they have to share the same intent?

MR. KLEIN: Well, the -- the --

THE COURT: And the intent to steal is not the same as the attempt to elude.

MR. KLEIN: Well, I -- I think it -- I mean, obviously it's supposed -- it -- it should be same time, same place and typically same victim and -- and obviously the victim of a theft is not the same as the victim of an elude necessarily; but I need to make the argument that --

THE COURT: Well, unless it's a police car I guess so --

MR. KLEIN: Well, the -- I've read the statement of probable cause and it says that Stephen was not apprehended that night but two people that were say Stephen was driving the vehicle with a punched ignition that was fleeing from the police. And based upon that an -
- an Alford plea was entered in Juvenile Court where the Court left the boxes unchecked way back when.

THE COURT: Well, unless it's a police car I guess so --

MR. KLEIN: Well, the -- I've read the statement of probable cause and it says that Stephen was not apprehended that night but two people that were say Stephen was driving the vehicle with a punched ignition that was fleeing from the police. And based upon that an -- an *Alford* plea was entered in Juvenile Court where the Court left the boxes unchecked way back when. RP 16-18

The Court of Appeals stated the following regarding this record:

Here, the trial court concluded that the defense failed to establish that the pair of 2000 offenses shared the same intent or involved the same victim, even while noting that it was theoretically possible if the stolen vehicle had been a police car. Report of Proceedings at 17-18. Mr. Bailey never contended that the prior offense involved a police vehicle nor did the defense present any other evidence suggesting that the two offenses involved the same victim. Accordingly, the trial court properly concluded that the two crimes did not constitute the same criminal conduct.

That court then stated the following in its ruling, “[t]he trial court's same criminal conduct ruling is reviewed for abuse of discretion because it involves a factual inquiry. Graciano, 176 Wn.2d at 535-536. Thus, "when

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. But where the record adequately supports either conclusion, the matter lies in the court's discretion." *Id.* at 537-538 (citation omitted). This exception "is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)."

State v. Johnson, 180 Wn.App. 92, 100, 320 P.3d 197 (2014)

... " 'determination of what constitutes the same criminal conduct [for] abuse of discretion or misapplication of the law.'" *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011) (alteration in original) (quoting *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999)). 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. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Here Bailey had the burden to prove that the two challenged offenses were the same criminal conduct. The record that he supplied the trial court did not meet this burden. That same record was reviewed by the Court of Appeals and again found lacking

The legislature intended the phrase "same criminal conduct" to be construed narrowly. State v. Flake, 76 Wn.App. 174, 180, 883 P.2d 341 (1994) A defendant has the burden of proving that the current offenses constitute the same criminal conduct. State v. Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). See also, State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). "[B]ecause a finding by the sentencing court of same criminal conduct favors the defendant, 'it is the defendant who must establish [that] the crimes constitute the same criminal conduct.'" State v. Johnson, 180 Wn.App. 92, 320 P.3d 197, 203 (2014) (alteration in original) (quoting State v. Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013) The crimes will not be considered the same criminal conduct if the defendant fails to prove any of the three elements of the statute. Id. at 540. Crimes affecting more than one victim cannot encompass the same criminal conduct. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

E. CONCLUSION

Bailey's two claims do not meet the requirements of RAP 13.4. The actions of the trial court and the Court of Appeals well-reasoned decision should not be disturbed.

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Respectfully submitted this 3rd day of February 2016.

s/ David B. Trefry

David B. Trefry WSBA 16050

Deputy Prosecuting Attorney

Attorney for Yakima County

P.O. Box 4846, Spokane, WA 99220

Telephone: (509) 534-3505

Fax: (509) 535-3505

David.Trefry@co.yakima.wa.us

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I, David B. Trefry, hereby certify that on this date I mailed a copy
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Stephen Anthony Bailey DOC777393
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

Dated at Spokane, WA this 3rd day of February, 2016.

s/ David B. Trefry
David B. Trefry WSBA 16050
Senior Deputy Prosecuting Attorney
Attorney for Yakima County
P.O. Box 4846, Spokane, WA 99220
Telephone: (509) 534-3505
Fax: (509) 535-3505
David.TrefryLaw@co.yakima.wa.us

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To Whom It May Concern:

Please find attached the State's response to the petition for review filed in this case.

David B. Trefry
Senior Deputy Prosecuting Attorney
Appellate Division
Yakima County Prosecutors Office
P.O. Box 4846
Spokane, WA 99220
(509) 534-3505
FAX: (509) 534-3505
David.Trefry@co.yakima.wa.us