

FILED

June 16, 2016
Court of Appeals
Division I

NO. 74557-3-I

State of Washington

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRETT WHITE,

Appellant.

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

APPELLANT'S OPENING BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. INTRODUCTION

In 2014, Brett White pled guilty to two counts of violating a no contact order. These convictions were the result of a plea bargain, after the State reduced a single felony violation of a no contact order and related charges to two misdemeanors for sentencing purposes. Despite the lack of a factual basis, the guilty plea statement contains language indicating the charges were separate and distinct.

In this matter, Mr. White pled guilty to felony harassment. The sentencing court found the previous violations to be separate and distinct for sentencing purposes on the current charge. No factual basis exists for this conclusion.

As a result of this miscalculation, the sentencing court increased Mr. White's offender score. Resentencing is required to correct this error.

B. ASSIGNMENT OF ERROR

The court miscalculated the offender criminal history by scoring separately two criminal convictions for misdemeanor violations of a no contact order which constituted one unit of prosecution and should have only been scored one time.

C. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Under the Sentencing Reform Act, prior history which constitutes the same criminal conduct may only be scored once. Where a domestic violence no contact order conviction results from a continuous violation of the order, only one unit of prosecution occurs. Is resentencing required where the trial court erred in calculating Mr. White's offender history by scoring one continuous violation of a no contact order twice?

D. STATEMENT OF THE CASE

Brett White pled guilty to felony harassment on November 15, 2015. CP 9. Although the parties were able to agree to a resolution of the charges, the parties were in dispute regarding how to calculate Mr. White's prior history. CP 10, RP 21. The State originally believed Mr. White's prior history scored as seven points, while Mr. White believed his score could be as low as four. RP 21.

At sentencing, the State conceded some of the history they originally alleged should score did not, now arguing Mr. White had a score of six. CP 47, RP 55. While Mr. White's attorney did not dispute this score, Mr. White argued he should only have been scored with five points. CP 67, RP 60.

Mr. White's uncontested history which would score is as

follows:

Cause No.	Conviction	Date
92-1-02419-1	Assault second degree	April 1, 1992
02-1-06174-1	Unlawful possession of a firearm	September 1, 2002
12-1-00658-6	Assault fourth degree	January 6, 2013

CP 56-57.

Mr. White was also on community custody, which increased his score by one. CP 54.

At issue was whether Mr. White should be scored twice for conduct he and his attorney argued should merge. RP 63.

Cause No.	Conviction	Date
13-1-12075-1	Misdemeanor Domestic Violence No Contact Order Violation	July 29, 2013
13-1-12075-1	Misdemeanor Domestic Violence No Contact Order Violation	July 29, 2013

CP 57.

Mr. White's attorney argued the history at issue should merge. RP 64. Mr. White's attorney argued Mr. White should receive the low end of the standard range, for both an offender who had six or five points. RP 77. Mr. White maintained he had a score of five points and asked the court to sentence him to a sentence within that range. RP 75.

The sentencing court reviewed the guilty plea forms in the 2013 matter. RP 74. The court found Mr. White had six points of prior criminal history. RP 84. He found the two misdemeanor convictions from 2013 scored independently because Mr. White signed a guilty plea form which stated the conduct was two separate and distinct offenses. CP 39, RP 83. The court sentenced Mr. White to 25 months of incarceration. CP 41, RP 83.

E. ARGUMENT

MR. WHITE IS ENTITLED TO A NEW SENTENCING HEARING BASED UPON THE COURTS MISCALCULATION OF HIS OFFENDER SCORE.

When a court undertakes to calculate an offender score under RCW 9.94A.525 it takes “three steps: (1) identify all prior convictions; (2) eliminate those that wash out; (3) ‘count’ the prior convictions that remain in order to arrive at an offender score.” *State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). Criminal history is “the list of a defendant’s prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.” RCW 9.94A.030 (11).

If the present conviction is for a qualifying domestic violence conviction, prior convictions for domestic violence as defined by RCW 9.94A.030 score when they are pled and proven. RCW 9.94A.525

(21). Prior misdemeanor violations of a domestic violence no contact order are included in the definition of repetitive domestic violence.

RCW 9.94A.030.

1. Where the conduct is continuous, a violation of a no contact order is a single unit of prosecution.

“A unit of prosecution can be either an act or a course of conduct.” *State v. Hall*, 168 Wn.2d 726, 731, 230 P.3d 1048 (2010).

Although unit of prosecution cases are of constitutional dimension, they are resolved by examining the relevant statute to determine legislative intent. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). If the legislature’s intent is unclear, the court construes the ambiguity in the defendant’s favor by applying the rule of lenity. *State v. Graham*, 153 Wash.2d 400, 405, 103 P.3d 1238 (2005).

The legislature intended a violation of a no-contact order to be a continuing crime. *State v. Spencer*, 128 Wn.App. 132, 137, 114 P.3d 1222 (2005). Especially with domestic violence no contact orders, the legislature devised a scheme which is designed to make a no contact order violation a continuing crime. *Id.* This is to give maximum protection to victims of abuse. *State v. Ward*, 148 Wn.2d 803, 813, 64 P.3d 640 (2003) (citing RCW 10.99.010). To give full effect to the legislature’s punishment scheme and so that language in the statute is

not rendered meaningless, this court should find the violations of no contact order convictions from 2013 were a continuing course of conduct.

2. *Same criminal conduct must only be scored once.*

“Same criminal conduct” means two or more crimes requiring the same criminal intent, committed at the same time and place, and involve the same victim. RCW 9.94.589(1)(a).

The test to determine whether offenses have the same criminal intent is objective and examines whether intent changes from one offense to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). “Intent, in this context is not the particular mens rea element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” *State v. Adame*, 56 Wn.App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030, 793 P.2d 976 (1990); *see also State v. Kloepper*, 179 Wn.App. 343, 356–57, 317 P.3d 1088, *review denied*, 180 Wn.2d 1017, 327 P.3d 55 (2014); *State v. Davis*, 174 Wn.App. 623, 642, 300 P.3d 465, *review denied*, 178 Wn.2d 1012, 311 P.3d 26 (2013).

In determining whether multiple crimes constitute the same criminal conduct, courts consider “how intimately related the crimes

are,” “whether, between the crimes charged, there was any substantial change in the nature of the criminal objective,” and “whether one crime furthered the other.” *State v. Phuong*, 174 Wn.App. 494, 546–47, 299 P.3d 37 (2013) (quoting *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990)).

3. *Mr. White’s criminal convictions for two violations of a no contact order which occurred at the same time constitute a single course of conduct.*

In 2014, Mr. White was convicted of two counts of misdemeanor no contact order violations. CP 63. He was sentenced to 364 days, with all but 231 days suspended. CP 63. While the judgment and sentence indicated his sentence was to be run concurrently, there is no other indication the court sentenced Mr. White independently upon his two convictions. CP 63.

The court reviewed the judgment and sentence for these convictions. Although Mr. White’s statement on plea of guilty says these acts were separate and distinct, no factual basis exists for this assertion. Mr. White appears to have been in constant contact with the complainant over the course of the 2013 incident. Rather than separate and distinct acts, this would appear to be a continuous course of conduct. *Spencer*, 128 Wn.App. at 137.

Where a no contact order violation arises out of a continuous course of conduct, no separate and distinct act occurs. *Spencer*, 128 Wn.App. at 137. The court erred in determining his score for this offense should be counted twice.

F. CONCLUSION

The court erred in scoring Mr. White's conviction for two counts of misdemeanor violation of no contact order twice. This scoring error resulted in a miscalculation of Mr. White's score by the court.

Because this error requires correction, this Court should remand this matter for a new sentencing hearing.

DATED this 16th day of June 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	NO. 74557-3-I
)	
BRETT WHITE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] BRETT WHITE 993730 WASHINGTON STATE PENITENTIARY 1313 M 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF JUNE, 2016.

X _____



Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710