

COURT OF APPEALS  
DIVISION TWO

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Court of Appeals No. 35421-7-II

STATE OF WASHINGTON  
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**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**BRANDON R. PETTAWAY,**

**Defendant/Appellant.**

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**BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 06-1-03350-9  
The Honorable Beverly G. Grant, Presiding Judge**

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**I. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence to convict Mr. Pettaway of escape in the second degree.
2. The trial court erred in calculating Mr. Pettaway's offender score.

**II. ISSUES PRESENTED**

1. May a defendant be convicted of escape in the second degree where he was not in custody pursuant to a lawful arrest? (Assignment of Error No. 1)
2. Does a trial court properly calculate a defendant's offender score where the trial court fails to conduct the mandatory same criminal conduct analysis for prior convictions of the defendant where the crimes were committed on the same day and were sentenced on the same day? (Assignment of Error No. 2)

**III. STATEMENT OF THE CASE**

**A. Procedural Background**

On July 20, 2006, Mr. Pettaway was charged with one count of escape in the second degree. CP 1.

On September 12, 2006, Mr. Pettaway filed a Motion to Suppress pursuant to Cr 3.6 (CP 4-26) and a Motion to Dismiss pursuant to *Knapstad*. CP 27-44.

On September 13, 2006, a combination 3.5 and 3.6 hearing was held and argument on the *Knapstad* motion was heard. RP 1-70, 9-13-06. The

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trial court denied all the motions. RP 17, 65, 67, 9-13-06.

Trial in this case began on September 20, 2006. RP 27, 9-20-06.

Prior to closing argument, the State moved to bar counsel for Mr. Pettaway from arguing that the jury could not find Mr. Pettaway guilty of escape in the second degree on grounds that the State had not presented evidence that Mr. Pettaway was charged with a felony. RP 11, 9-22-06. The trial court granted the motion. RP 112, 9-22-06.

The jury found Mr. Pettaway guilty of escape in the second degree. CP 84.

***B. Factual Background***

On April 23, 2006, Mr. Pettaway was a passenger in a vehicle stopped for a traffic infraction. RP 29-33, 42-44, 9-20-06. The driver of the vehicle was arrested for driving with a suspended license. RP 33-34, 9-20-06.

When police asked Mr. Pettaway to identify himself for purposes of issuing a citation for failure to wear a seatbelt, Mr. Pettaway gave his correct home address and date of birth, but said his name was Joseph R. Smith. RP 35-83, 40-44, 9-20-06.

The police were not able to verify Mr. Pettaway's identity with the information he gave them, so the police put Mr. Pettaway in the back of a

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patrol car while they determined his identity. RP 38-39, 9-20-06.

In the search of the vehicle incident to the arrest of the driver, police discovered a criminal citation carbon copy with the name Brandon Pettaway underneath the front passenger seat. RP 40-42, 9-20-06. The address and the birthday listed on the criminal citation matched those given to Officer Lorberau by Mr. Pettaway. RP 42-43, 9-20-06. Police retrieved a booking photo of Brandon Pettaway on a police computer and the photo matched the passenger. RP 43-44, 9-20-06. The police then determined that Mr. Pettaway should be placed under arrest. RP 44, 9-20-06.

The police walked to the rear passenger door of the police vehicle where Mr. Pettaway was sitting, opened the door, and told Mr. Pettaway to put his hands behind his back and that he was going to be handcuffed. RP 44-45, 9-20-06. Several other officers told Mr. Pettaway he was under arrest and was going to be put in handcuffs. RP 46, 9-20-06. Mr. Pettaway pushed the officers away and then pushed his way out of the vehicle. RP 46, 9-20-06.

Mr. Pettaway ran away from the officers and several officers pursued Mr. Pettaway and told him to stop. RP 47-48, 9-13-06. One officer tazed Mr. Pettaway, but the probes fell out and Mr. Pettaway got away. RP 48-49,

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9-20-06.

Mr. Pettaway was never handcuffed. RP 54, 9-20-06.

#### **IV. SUMMARY OF TESTIMONY**

##### 3.5/3.6 hearing

##### *Officer Kevin Lorberau*

On April 23, 2006, Officer Kevin Lorberau stopped a Buick traveling southbound on South G Street at 6<sup>th</sup> Avenue. RP 18-21, 9-13-06.<sup>1</sup> Officer Lorberau stopped the Buick because the Buick was not displaying a front license plate. RP 21, 9-13-06. Fifteen minutes earlier, Officer Lorberau had run the rear license plate of the Buick and determined that the plates were expired. RP 21, 9-13-06.

When Officer Lorberau approached the driver of the Buick, Officer Lorberau saw Mr. Pettaway in the passenger seat. RP 22, 9-13-06. Officer Lorberau noticed that Mr. Pettaway was not wearing a seatbelt. RP 23, 9-13-06.

Officer Lorberau arrested the driver of the Buick for driving with a suspended license. RP 23 9-13-06. Around the time Officer Lorberau arrested the driver, Officers Metzger and Sbory arrived to assist Officer

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<sup>1</sup> The volumes of the report of proceedings are not numbered continuously. Reference to the record will be made by giving the page number followed by the date of the hearing.

Lorberau. RP 23-24, 9-13-06. Officer Metzger contacted Mr. Pettaway to obtain his identity in order to give Mr. Pettaway a citation for failing to wear a seatbelt. RP 24, 9-13-06. Mr. Pettaway identified himself as Joseph R. Smith. RP 24, 9-13-06. Officer Metzger told Officer Lorberau that no law enforcement records existed for Joseph R. Smith, so Officer Lorberau contacted Mr. Pettaway to confirm his name. RP 25, 9-13-06. Mr. Pettaway again said that his name was Joseph Smith. RP 25, 9-13-06. Officer Lorberau asked Mr. Pettaway if he had ever been in jail or had a driver's license. RP 26, 9-13-06. Mr. Pettaway said he had been in jail and he had identification but that the identification had been issued in other States. RP 26, 9-13-06. Officer Lorberau performed a records check for records of Joseph Smith in other States but no records came back. RP 26, 9-13-06.

Officer Lorberau took Mr. Pettaway to Officer Metzger's patrol vehicle to secure him while the officers verified his identity. RP 26-27, 9-13-06. Officer Lorberau then searched the Buick incident to the arrest of the driver and discovered a criminal citation carbon copy with the name Brandon Pettaway underneath the front passenger seat of the Buick. RP 27-28, 9-13-06. The address and the birthday listed on the criminal citation matched those given to Officer Lorberau by Mr. Pettaway. RP 28, 9-13-06. Officer

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Lorberau then retrieved a booking photo of Brandon Pettaway on his computer and the photo matched Mr. Pettaway. RP 28, 9-13-06. Officer Lorberau also learned that Mr. Pettaway had felony and misdemeanor arrest warrants. RP 28, 9-13-06.

Officer Lorberau confirmed that the warrants were valid, then he and Officer Metzger went to tell Mr. Pettaway that he was under arrest. RP 29, 9-13-06. As the officers approached Officer Metzger's vehicle, Mr. Pettaway moved from sitting behind the driver's seat to sitting behind the passenger seat. RP 29, 9-13-06. Mr. Pettaway stuck his feet towards the driver's side rear door. RP 30, 9-13-06. Officers Lorberau and Metzger opened the rear driver's door and told Mr. Pettaway he was under arrest. RP 30, 9-13-06. Mr. Pettaway asked why he was under arrest, and Officer Metzger told him she was going to put Mr. Pettaway in handcuffs. RP 30, 9-13-06. Mr. Pettaway pushed Officer Metzger away and then pushed his way out of the vehicle. RP 30-31, 9-13-06.

Officer Lorberau pulled out his tazer, but Mr. Pettaway had pushed Officer Metzger into Officer Lorberau, rendering Officer Lorberau unable to use his tazer. RP 31, 9-13-06. Mr. Pettaway ran away from the officers and Officers Metzger and Lorberau pursued Mr. Pettaway and told him to stop.

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RP 31, 9-13-06. Officer Lorberau tazed Mr. Pettaway but the probes fell out and Mr. Pettaway got away. RP 31, 9-13-06.

Trial

*Officer Kevin Lorberau-* RP 28, 9-20-06

On April 23, 2006, Officer Kevin Lorberau stopped a vehicle traveling southbound on South G Street at 6<sup>th</sup> Avenue. RP 29-30, 9-20-06. Officer Lorberau stopped the vehicle because it was not displaying a front license plate. RP 30, 9-20-06. Fifteen minutes earlier, Officer Lorberau had run the rear license plate of the vehicle and determined that the plates were expired. RP 30-31, 9-20-06.

When Officer Lorberau approached the driver of the vehicle, Officer Lorberau noticed that the passenger was not wearing a seatbelt. RP 32-33, 9-20-06. The vehicle was a Buick. RP 31, 9-20-06.

Officer Lorberau arrested the driver of the Buick for driving with a suspended license. RP 33-34, 9-20-06. Around the time Officer Lorberau arrested the driver, Officers Metzger and Sbory arrived to assist Officer Lorberau. RP 34-35, 9-20-06. Officer Metzger contacted the passenger to obtain his identity in order to give him a citation for failing to wear a seatbelt. RP 35, 9-20-06. Failure to wear a safety belt is an infraction and a non-

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criminal charge. RP 51, 9-20-06. The passenger identified himself as Joseph R. Smith and said his birth date was 7-18-76. RP 35-36, 9-20-06. Officer Lorberau contacted the passenger to confirm his name. RP 38, 9-20-06. The passenger again said that his name was Joseph Smith and gave the same date of birth. RP 38, 9-20-06. Officer Lorberau asked the passenger if he had ever been in jail or had any State I.D. RP 38, 9-20-06. The passenger said he had identification in Louisiana and Maryland. RP 38, 9-20-06. Officer Lorberau was not able to verify the passenger's identity with the information. RP 38, 9-20-06.

Officer Lorberau asked the passenger for his address and asked the passenger to step back to Officer Lorberau's vehicle so Officer Lorberau could verify the passenger's I.D. before issuing him a ticket. RP 38-39, 9-20-06. Officers Lorberau, Metzger, and Sbory walked the passenger back to Officer Sbory's vehicle and had the passenger sit in the back of the vehicle. RP 39-40, 9-20-06.

Officer Lorberau then searched the Buick incident to the arrest of the driver and discovered a criminal citation carbon copy with the name Brandon Pettaway underneath the front passenger seat of the Buick. RP 40-42, 9-20-06. The address and the birthday listed on the criminal citation matched

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those given to Officer Lorberau by the passenger. RP 42, 9-20-06. Officer Lorberau then retrieved a booking photo of Brandon Pettaway on his computer and the photo matched the passenger. RP 43-44, 9-20-06. Officer Lorberau then determined that he was going to place Mr. Pettaway under arrest. RP 44, 9-20-06.

At trial, Officer Lorberau identified Mr. Pettaway as the passenger. RP 43, 9-20-06.

Officer Sbory walked to the rear passenger door of the vehicle opened the door, and told Mr. Pettaway to put his hands behind his back and that he was going to be handcuffed. RP 44-45, 9-20-06. Mr. Pettaway moved to the driver's side of the vehicle where Officers Metzger and Lorberau were standing. RP 45, 9-20-06.

Officers Lorberau and Metzger opened the rear driver's door and told Mr. Pettaway he was under arrest. RP 46, 9-20-06. Officer Metzger told him she was going to put Mr. Pettaway in handcuffs. RP 46, 9-20-06. Mr. Pettaway pushed Officer Metzger away and then pushed his way out of the vehicle. RP 46, 9-20-06.

Mr. Pettaway had pushed Officer Metzger into Officer Lorberau. RP 47, 9-20-06. Mr. Pettaway ran away from the officers and Officers Metzger

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and Lorberau pursued Mr. Pettaway and told him to stop. RP 47-48, 9-13-06. Officer Lorberau tazed Mr. Pettaway but the probes fell out and Mr. Pettaway got away. RP 48-49, 9-20-06.

Mr. Pettaway was never handcuffed. RP 54, 9-20-06.

*Officer Ashley Metzger-* RP 60, 9-20-06

On April 23, 2006, Officer Metzger assisted Officer Lorberau in a traffic stop. RP 61-62, 9-20-06. Officer Lorberau asked Officer Metzger to contact the passenger and identify him. RP 62, 9-20-06. Officer Metzger contacted the passenger of the vehicle Officer Lorberau had pulled over, asked the passenger what his name was, and ran it through records. RP 63, 9-20-06. The passenger told Officer Metzger his name was Robert Smith. RP 63, 9-20-06. Officer Metzger did not get a return on that name from records. RP 64, 9-20-06. This meant the person was not in “the system.” RP 64-65, 9-20-06.

Officer Metzger told Officer Lorberau that no computer record was found and Officer Lorberau went and contacted the passenger. RP 65, 9-20-06.

Officer Metzger identified Mr. Pettaway as the passenger. RP 65-66, 9-20-06.

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Officer Metzger's next contact with Mr. Pettaway was when Mr. Pettaway was in the back of her patrol car and Officer Lorberau told Officer Metzger that Mr. Pettaway was under arrest and Officers Lorberau and Metzger went to contact Mr. Pettaway and put him in handcuffs. RP 66-67, 9-20-06.

Mr. Pettaway was first informed that he was under arrest when Officer Sbory opened the door. RP 67, 9-20-06. Officer Metzger opened the door to put handcuffs on Mr. Pettaway and Mr. Pettaway pushed Officer Lorberau into Officer Metzger. RP 68-71, 9-20-06. Officer Lorberau tazed Mr. Pettaway but the tazer did not stop Mr. Pettaway. RP 72, 9-20-06. Officer Metzger chased Mr. Pettaway and gave him commands to stop but Mr. Pettaway did not respond. RP 72-73, 9-20-06.

*Officer Michael Sbory- RP 87, 9-20-06*

On April 23, 2006, Officer Sbory assisted Officer Lorberau on a traffic stop. RP 88, 9-20-06.

After the foot chase, Officer Sbory stayed with the driver of the stopped vehicle. RP 90, 9-20-06.

When Officer Lorberau placed the passenger in the back of Officer Sbory's vehicle, Officer Sbory kept an eye on the passenger. RP 90, 9-20-06.

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When Officer Lorberau advised Officer Sbory to place the passenger under arrest, Officer Sbory opened the rear passenger door to place the passenger from the stopped vehicle into handcuffs. RP 90-91, 9-20-06. Officer Sbory heard Officer Metzger tell the passenger he was under arrest. RP 92-93, 9-20-06.

Officer Lorberau identified Mr. Pettaway as the passenger of the stopped vehicle. RP 91-92, 9-20-06.

When Mr. Pettaway was in the back of Officer Sbaro's patrol vehicle, he was not under arrest. RP 96, 9-20-06.

Officer Sbaro told Mr. Pettaway at least once that he was under arrest. RP 98, 9-20-06.

## V. ARGUMENT

### A. **There was insufficient evidence to convict Mr. Pettaway of escape in the second degree where he was not in custody pursuant to a lawful arrest.**

Mr. Pettaway was charged with violating RCW 9A.76.120(1)(b). CP 1. RCW 9A.76.120 provides that, "A person is guilty of escape in the second degree if: (b) Having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody."

*i. Mr. Pettaway did not stipulate that he was lawfully*

*arrested.*

Here, Mr. Pettaway stipulated that on April 23, 2006, he was charged with a felony offense and that on April 23, 2006, there was sufficient legal basis to arrest Brandon Pettaway pursuant to a felony case. CP 52-53. However, as discussed below, Mr. Pettaway was actually arrested twice and the stipulation was a stipulation for trial purposes only that there was sufficient legal basis to arrest Mr. Pettaway the second time pursuant to the warrants *after* they learned his true identity.

ii. *Mr. Pettaway was in custody prior to Officer Lorberau discovering that there were warrants for Mr. Pettaway's arrest based on a felony.*

9A.76.010 defines "custody" as "restraint pursuant to a lawful arrest or an order of a court."

Whether a person is under custodial arrest depends on whether a reasonable person would believe himself to be under arrest under the circumstances. *State v. Rivard*, 131 Wn.2d 63, 75, 929 P.2d 413 (1997). Among the restraints commonly associated with custodial arrest are whether the person is asked not to leave and whether he was physically apprehended, restrained, handcuffed, placed in a police vehicle, or taken to the police station. *Rivard*, 131 Wn.2d at 76, 929 P.2d 413.

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Mr. Pettaway was “arrested” twice: the first time when he was removed from his vehicle and placed in the back of Officer Sbory’s vehicle with the doors shut and with Officer Sbory “keeping an eye on” him (RP 39-40, 90, 9-20-06) and the second when the police told him he was under arrest after learning his true identity and learning of the warrants for his arrest. RP 44-46, 9-20-06.

Clearly, a reasonable person in Mr. Pettaway’s circumstances would have believed himself to be under arrest at the time he was placed in the back of the patrol car: he had been physically apprehended and placed in the back of a police vehicle. Thus, Mr. Pettaway was “arrested” prior to the police attempting to handcuff him.

*iii. The initial arrest of Mr. Pettaway was not lawful.*

Probable cause for arrest exists when the facts and circumstances known to an officer are sufficient to warrant a prudent or cautious man to believe that a crime has been committed. *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986), *cert. denied* 499 U.S. 979, 111 S.Ct. 1631, 113 L.Ed.2d 726 (1991).

a. Insufficient probable cause existed to arrest Mr. Pettaway prior to the police learning his true identity.

Upon observing that a passenger in stopped vehicle was not wearing

his seatbelt, an officer has authority to request the individual's identification. *State v. Chapin*, 75 Wn.App. 460, 464, 879 P.2d 300, review denied 125 Wn.2d 1024, 890 P.2d 465 (1994), overruled on other grounds *State v. Ladson*, 138 Wash.2d 343, 359, 979 P.2d 833 (1999).

Passengers in a vehicle stopped by police are not required to carry drivers licenses or other identifications; a passenger need only identify himself, give a current address, and sign an acknowledgement of receipt of a notice of infraction. *State v. Cole*, 73 Wn.App. 844, 848, 871 P.2d 656, review denied 125 Wn.2d 1003, 886 P.2d 1134 (1994), impliedly overruled on other grounds *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41, 48 (1997).

Under RCW 46.61.021,

(2) Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

(3) Any person requested to identify himself or herself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself or herself and give his or her current address.

“But, to detain a suspect beyond what the initial stop demands, the

officer must be able to articulate specific facts from which it could reasonably be suspected that the person was engaged in criminal activity.” *State v. Santacruz*, 132 Wn.App. 615, 619, 133 P.3d 484 (2006).

Officer Lorberau arrested Mr. Pettaway because Officer Lorberau could not confirm Mr. Pettaway’s identity. However, Mr. Pettaway was not obligated to carry any identification. The only things Mr. Pettaway was obligated to do was to identify himself, provide a current address, and acknowledge receipt of a notice of infraction. While Mr. Pettaway did not initially give his correct name, he is not charged with any crime relating to giving a false name and he did give his correct address and date of birth. RP 42-43, 9-20-06.

The fact that Mr. Pettaway was not in the records system searched by Officer Lorberau did not give Officer Lorberau probable cause to arrest Mr. Pettaway. Officer Metzger testified that the significance of a no records return on a search means that an individual had no Washington DOL records or jail records. RP 64-65, 9-20-06. The facts that an individual has chosen not to obtain an State issued ID card and had never been arrested are not sufficient facts to warrant a prudent or cautious man to believe that a crime has been committed.

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b. *State v. Chelly is not controlling and is distinguishable.*

In *State v. Chelly*, 94 Wn.App. 254, 970 P.2d 376, review denied 138 Wn.2d 1009, 989 P.2d 1138 (1999), Division I held that

[i]ndividuals who have committed a traffic infraction have the obligation to sufficiently identify themselves to the officer issuing a citation. Failure to do so is a misdemeanor. Thus, where the facts give rise to a reasonable belief that an individual has provided a false identity, that reasonable belief justifies extending detention to permit a warrants check.

*Chelly*, 94 Wn.App at 256, 970 P.2d 376.

Decisions of a division of the Court of Appeals are not binding on other divisions of the Court of Appeals. *State v. Schmitt*, 124 Wn.App. 662, 669 n. 11, 102 P.3d 856 (2004).

Besides not being binding on this court, *Chelly* is factually distinguishable from this case. In *Chelly*, police stopped a vehicle for a malfunctioning tail light and saw that the two passengers were not wearing their seatbelts. *Chelly*, 94 Wn.App. at 256, 970 P.2d 376. The officer asked the passengers to present identification and one of them stated that he had no identification on him. *Chelly*, 94 Wn.App. at 256, 970 P.2d 376. The officer

asked the passenger if he had ever had identification and the passenger said he had not. *Chelly*, 94 Wn.App. at 256, 970 P.2d 376. The passenger appear to the officer to be in his mid 20s and the officer believed that it was highly unusual that anyone of 16 years of age to never have identification. *Chelly*, 94 Wn.App. at 256-257, 970 P.2d 376. Based on his experience, the officer believed that the because the passenger had no identification, the passenger was likely to give a false name in order to conceal his identity due to outstanding warrants for his arrest. *Chelly*, 94 Wn.App. at 257, 970 P.2d 376. The officer noted that all three occupants of the vehicle were exceedingly nervous and sweating, and that none of the occupants made eye contact with the officer. *Chelly*, 94 Wn.App. at 257, 970 P.2d 376.

The officer ordered the passenger out of the vehicle and the passenger gave the officer what turned out to be a false name, date of birth, and a correct social security number. *Chelly*, 94 Wn.App. at 257, 970 P.2d 376. The officer ran the information given to him by the passenger and came up with a number of warrants based on names and dates of birth very similar to those given by the passenger. *Chelly*, 94 Wn.App. at 257, 970 P.2d 376. The officer confronted the passenger but the passenger maintained that the name and date of birth he gave were accurate. *Chelly*, 94 Wn.App. at 257, 970

P.2d 376. The officer then questioned another occupant of the vehicle who gave the officer what turned out to be the passenger's correct name. *Chelly*, 94 Wn.App. at 257, 970 P.2d 376. The officer then arrested the passenger on the outstanding warrants. *Chelly*, 94 Wn.App. at 257, 970 P.2d 376.

Division I held that, “[u]nder the totality of the circumstances, the specific and articulable facts taken together with rational inferences from those facts [rendered the officer’s] detention of [the passenger] for a reasonable time for the purpose of ascertaining his true identity was warranted.” *Chelly*, 94 Wn.App. at 261, 970 P.2d 376.

The facts which may have rendered the detention of the passenger reasonable in *Chelly* were not present in this case. Mr. Pettaway did give a false name, but he gave an accurate address and an accurate date of birth, there is no evidence he was nervous or sweating, no other persons contradicted Mr. Pettaway’s identification of himself, and the officer’s were not aware of any warrants for Mr. Pettaway’s arrest when he was taken into custody.

Besides being factually distinguishable, the decision in *Chelly* is also contrary to *Terranova* and *Santacruz*. The fact that a passenger in a vehicle who is contacted by police does not have any records in the police database

does create probable cause to arrest that person. This court should reject the reasoning in *Chelly* and hold that there was not probable cause to arrest Mr. Pettaway.

Because insufficient probable cause existed to arrest Mr. Pettaway at the time of his initial arrest, his arrest was not a lawful arrest. Because Mr. Pettaway was not lawfully arrested, there was insufficient evidence to convict him of escape in the second degree since he was already in custody at the time of the second arrest.

**B. The trial court abused its discretion in calculating Mr. Pettaway's offender score when it failed to conduct the required "same criminal conduct" analysis for Mr. Pettaway's prior convictions.**

RCW 9.94A.525 provides, in pertinent part,

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. *The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the*

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*offense that yields the highest offender score shall be used.*

The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations.

(emphasis added).

Under RCW 9.94A.589(1)(a), when a person is convicted of two or more crimes they are counted separately to determine the offender score and the standard range for sentencing, except:

[I]f the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. ‘Same criminal conduct,’ as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim....

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an offender score. *State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

Thus in order for separate offenses to “encompass the same criminal conduct” under RCW 9.94A.589(1)(a), three elements must be present: (1) same criminal intent, (2) same time and place, and (3) same victim.

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Here, Mr. Pettaway's criminal history included three counts of robbery in the second degree which all occurred on January 23, 1998, and which were all sentenced on March 26, 1998. Despite this, the trial court failed to conduct any determination or enter any finding regarding whether or not Mr. Pettaway's second degree robbery convictions were the same criminal conduct for purposes of sentencing. The crimes were all committed on the same day and the sentences were all entered on the same day, so the trial court could not have presumed that the crimes were not the same criminal conduct. However, here, the trial court's determination of Mr. Pettaway's offender score was contained within one sentence, "I'm going to adopt the recommendations of the prosecutor with regards to the scoring of the points." RP 7, 10-6-06.

If the sentences for prior adult offenses were served concurrently, the trial court "shall" determine whether those offenses constituted the same criminal conduct. RCW 9.94A.525(5)(a)(i). This is mandatory and a court abuses its discretion when it declines to make this determination. *State v. Wright*, 76 Wn.App. 811, 829, 888 P.2d 1214, *review denied*, 127 Wn.2d 1010 (1995). Under RCW 9.94A.589, whenever a person is sentenced for two or more current offenses, the sentences for those offenses "shall be served concurrently" unless the person is convicted of two or more serious violent offenses arising from

separate and distinct criminal conduct or if the person is convicted of unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both.

Here, Mr. Pettaway was convicted and sentenced on the same date for three counts of second degree robbery. CP 89-100. In 1998, serious violent offenses were defined by then RCW 9.94A.030 to include

(a) Murder in the first degree, homicide by abuse, murder in the second degree, manslaughter in the first degree, assault in the first degree, kidnapping in the first degree, or rape in the first degree, assault of a child in the first degree, or an attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this subsection

Second degree robbery was therefore not a serious violent offense at the time Mr. Pettaway was sentenced in 1998.

In the instant case, the trial court failed to conduct the required same criminal conduct analysis mandated by RCW 9.94A.525. This was done in spite of the fact that counsel for Mr. Pettaway informed the court that Mr. Pettaway objected to the calculation of his offender score as a 10 and that Mr. Pettaway believed that his prior robbery convictions should be found to be the same criminal conduct for purposes of his sentencing. RP 6-7, 10-6-06.

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Had the trial court found that the three robbery convictions were the same criminal conduct, Mr. Pettaway would have had an offender score of 8 which would have given him a standard range sentence of 43-57 months, rather than 51-60 months. RCW 9.94A.510. This court should remand for resentencing where the trial court will conduct the necessary same criminal conduct analysis.

**VI. CONCLUSION**

For the reasons stated above, this court should vacate Mr. Pettaway's conviction and dismiss the case. Alternatively, this court should vacate his sentence and remand for resentencing with the trial court conducting the required same criminal conduct analysis.

DATED this 13<sup>th</sup> day of July, 2007.

Respectfully submitted,



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**Certificate of Service:**

The undersigned certifies that on July 13, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by U.S. Mail to appellant, Brandon R. Pettaway, DOC # 726114, Washington Corrections Center, Post Office Box 900, Shelton, WA. 98584 true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on July 13, 2007.

  
Norma Kinter