

NO. 35542-6-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CALVIN D. OTT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR THURSTON COUNTY

The Honorable Wm. Thomas McPhee, Judge
Cause No. 04-1-01523-9

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

- A. An appellant who challenges the sufficiency of the evidence admits the truth of the state's evidence and all rational inferences that may be drawn therefrom. The school district's director of transportation testified that there was a school bus stop at 4500 Martin Way. Could a rational trier of fact find that there was a school bus stop at 4500 Martin Way?
- B. A Court's determination whether multiple convictions constitute same criminal conduct is discretionary and factually based. At the sentencing hearing, Ott agreed with the State's calculation of his offender score. Can he raise this issue for the first time on appeal?
- C. Trial counsel's performance is deficient if it falls below an objective standard of reasonableness and affects the outcome of the proceedings. Ott's trial counsel agreed with the State's calculation of his offender score, which counted two possession offenses separately, but did not result in a different sentencing range. Was his performance deficient?

II. STATEMENT OF THE CASE

Respondent accepts as adequate, for purposes of this Response, the "Statement of Facts and Prior Proceedings" appearing in the Opening Brief of Appellant, with the following additions and/or clarifications:

Ron McCarty testified that he was the Director of Transportation for school buses in the North Thurston School District, that his duties include being aware of the bus stops in the North Thurston School

District, and that there was a school bus stop at 4500 Martin Way.¹

At the sentencing hearing, after the Deputy Prosecutor advised the Court of Ott's sentencing ranges, offender scores, and the basis thereof, the sentencing judge asked Ott's trial counsel:

Having heard the explanation of the calculation of the defendant's points and standard range for purposes of this sentencing, are there any disputes or different contentions from the defendant concerning the offender score and standard range?

Ott's trial counsel stated that there were no disputes or different contentions.²

III. ARGUMENT

A. AN APPELLANT WHO CHALLENGES THE SUFFICIENCY OF THE EVIDENCE ADMITS THE TRUTH OF THE STATE'S EVIDENCE AND ALL RATIONAL INFERENCES THAT MAY BE DRAWN THEREFROM. THE SCHOOL DISTRICT'S DIRECTOR OF TRANSPORTATION TESTIFIED THAT THERE WAS A SCHOOL BUS STOP AT 4500 MARTIN WAY. COULD A RATIONAL TRIER OF FACT FIND THAT THERE WAS A SCHOOL BUS STOP AT 4500 MARTIN WAY?

Ott first challenges the sufficiency of the evidence that there was a school bus stop within 1000 feet of the location of the drug delivery. Specifically, he asserts that the Director of Transportation for the school district's testimony that there was a school bus stop located at 4500 Martin

¹ RP 65-66.

way is insufficient to support the jury's finding that Ott delivered a controlled substance within 1000 feet of a school bus stop.

Appellate courts review a challenge of insufficient evidence in the light most favorable to the State to determine "whether ... any rational trier of fact could have found guilt beyond a reasonable doubt."³ "The court may infer criminal intent from conduct."⁴ "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant."⁵ "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."⁶ The reviewing court considers circumstantial evidence equally reliable as direct evidence.⁷ "Credibility determinations are for the trier of fact and cannot be reviewed on appeal."⁸

Taking the evidence in the light most favorable to the State, and leaving credibility determinations to the jury, sufficient evidence existed to support the jury's finding. It is utterly reasonable to infer that the

² RP 367.

³ *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

⁴ *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

⁵ *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

⁶ *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

⁷ *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

⁸ *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

school district's Director of Transportation would know where the district's school bus stops are located, and his testimony that a school bus stop was located at 4500 Martin Way could reasonably support the jury's finding that the bus stop was "*designated*" by the school district. As circumstantial evidence carries that same weight as direct evidence, this circumstantial evidence of a designated bus stop carries the same weight as if McCarty had testified that the bus stop at issue was designated by the school district. Therefore, Ott's claim must be rejected.

B. A COURT'S DETERMINATION WHETHER MULTIPLE CONVICTIONS CONSTITUTE SAME CRIMINAL CONDUCT IS DISCRETIONARY AND FACTUALLY BASED. AT THE SENTENCING HEARING, OTT AGREED WITH THE STATE'S CALCULATION OF HIS OFFENDER SCORE. CAN HE RAISE THIS ISSUE FOR THE FIRST TIME ON APPEAL?

Ott next assigns error to the lower court's failure to find that two of his convictions constituted the same course of criminal conduct. He raises this for the first time on appeal, but fails to establish that such a decision is reviewable for the first time on appeal. Indeed, the Washington State Supreme Court has held that, while *some* offender score calculation errors may be raised for the first time on appeal, others may be waived.⁹

⁹ *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

Respondent herein asserts that in the present case, Ott waived the alleged error.

In *In re Goodwin*, the court stated,

[W]e hold that in general a defendant cannot waive a challenge to a miscalculated offender score. There are limitations on this holding. While waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or *where the alleged error involves a matter of trial court discretion*.¹⁰

The court went on to say that waiver may be found in a case like *State v. Nitsch*.¹¹ In *Nitsch*, the defendant explicitly agreed to a particular offender score, but later attempted to challenge it on appeal, asserting that the lower court should have sua sponte, found the two crimes for which he was convicted were the same criminal conduct.¹² The Court of Appeals distinguished the case from those in which the offender score miscalculation was based on a “pure calculation error” or a case of “mutual mistake regarding calculation mathematics,”¹³ stating:

Rather, it is a failure to identify a factual dispute for the court's resolution and a

¹⁰ *Id.* at 874 (emphasis added).

¹¹ 100 Wn.App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000).

¹² *Id.* at 520.

¹³ *Id.*

failure to request an exercise of the court's discretion. A defendant's current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they encompass the same criminal conduct. Offenses encompass the same criminal conduct when they are committed against the same victim, in the same time and place, and involve the same objective criminal intent. The trial court's determination on the issue is reviewed for abuse of discretion.¹⁴

The *Nitsch* court also went on to comment on the propriety of permitting review such cases for the first time on appeal:

Only an illegal or erroneous sentence is reviewable for the first time on appeal. Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion. It is not merely a calculation problem, or a question of whether the record contains sufficient evidence to support the inclusion of out-of-state convictions in the offender score. We therefore see a fundamental difference between this case and *Ford* and *McCorkle*. Unlike the out-of-state conviction provision, the same criminal conduct statute is not mandatory, and sound reasons exist for the implicit grant of discretion contained in the legislative language ("if 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").¹⁵

¹⁴ *Id.* at 520-521 (citations omitted).

Thus, the *Nitsch* court recognized that the determination of whether offenses constitute the same course of conduct is discretionary with the trial court, requiring some factual basis on which to make such a determination. The *Nitsch* court discussed *State v. Anderson*,¹⁶ in its ruling. In *Anderson*, the defendant took some wine from a convenience store without paying for it. When the store clerk tried to stop him from leaving, Anderson hit him with a bottle, ran out of the store, fired a bullet into the store, and fled. A jury found him guilty of first degree robbery while armed with a deadly weapon, and assault in the second degree while armed with a deadly weapon.¹⁷ Anderson did not ask for a determination of same criminal conduct, and the lower court did not make such a determination. The lower court counted the robbery and assault convictions separately.¹⁸ The Court of Appeals treated the lower court's calculation of Anderson's offender score as an implicit determination that the offenses did not constitute the same criminal conduct.¹⁹ To this implicit finding, the *Anderson* court applied the abuse of discretion and misapplication of the law standards of review.²⁰ It then went on to

¹⁵ *Id.* at 523 (citations omitted).

¹⁶ 92 Wn.App. 54, 960 P.2d 975 (1998), *review denied*, 137 Wn.2d 1016, 978 P.2d 1099 (1999).

¹⁷ *Id.* at 56-57.

¹⁸ *Id.* at 61.

¹⁹ *Id.* at 62.

²⁰ *Id.*

theorize that the lower court could have found that Anderson's objective intent was to steal the wine, and that when he went outside, the court could have found that his objective intent changed to an intent to injure, threaten, or frighten. After pointing out again that the offender score reflected the lower court's implicit finding that Anderson's objective intent did not remain the same, it ruled that this finding was neither a misapplication of the law nor an abuse of discretion.²¹

In the present case, Ott not only failed to object to the State's calculation of his offender score, and failed to offer an alternative offender score calculation, but through his counsel, he explicitly agreed with the State's calculation of his offender score. He and his attorney also signed the judgment and sentence, which states that the lower court found that none of the convictions constitute one crime for purposes of determining his offender score.²² The explicit and implicit statements by Ott that none of his convictions merged for sentencing purposes constitutes a waiver.

Under *Goodwin* and *Nitsch*, such a waiver precludes review for the first time on appeal. Indeed, as pointed out above, the *Nitsch* court opined that same criminal conduct issues were not—or *should* not be—reviewable for the first time on appeal.

²¹ *Id.* at 62.

²² CP 5.

Further, this case is distinguishable from those cited by Ott—where the alleged offender score error results in an excessive sentence. Here, the offender score on each count was five. All four of the crimes for which Ott was convicted utilize a range for both the offender score, and for the potential sentence. In effect, an offender score of 3 to 5 results in a sentencing range of 20+ to 60 months on Counts I and II; and 6+ to 18 months on Counts III and IV. Even assuming arguendo that Counts III and IV constitute the same course of criminal conduct, the result would be an offender score of four, *with the same sentencing ranges*. Even if the offender score was erroneous, the sentencing range would not change. Thus, the cases cited by Ott which state that erroneous offender scores which result in excessive sentences are reviewable for the first time on appeal, are inapplicable. In light of his waiver of the offender score calculation, and the lack of any prejudice following therefrom, his claim should be rejected.

- C. TRIAL COUNSEL’S PERFORMANCE IS DEFICIENT IF IT FALLS BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND AFFECTS THE OUTCOME OF THE PROCEEDINGS. OTT’S TRIAL COUNSEL AGREED WITH THE STATE’S CALCULATION OF HIS OFFENDER SCORE, WHICH COUNTED TWO POSSESSION OFFENSES SEPARATELY, BUT THIS DID NOT RESULT IN A DIFFERENT SENTENCING RANGE. WAS HIS PERFORMANCE DEFICIENT?

Continuing in his theme, Ott next asserts that his trial counsel's performance was deficient in that he agreed with the State's representation of his offender score. The law regarding ineffective assistance of counsel is well established. To prevail on a claim of ineffective assistance of counsel, a defendant must show both ineffective representation and resulting prejudice.²³ To satisfy the first prong, a defendant must show that counsel's performance fell below an objective standard of reasonableness.²⁴ To satisfy the second prong, a defendant must establish that counsel's performance was so inadequate that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²⁵ A reasonable probability is a probability sufficient to undermine confidence in the outcome.²⁶

There is a strong presumption that counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions.²⁷ Furthermore, a reviewing court is not

²³ *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn.App. 44, 56, 896 P.2d 704 (1995).

²⁴ *Strickland v. Washington*, 466 U.S. 668, 693, 80 L.Ed 2d 674, 104 S.Ct 2052 (1984); *State v. Sardinia*, 42 Wn.App. 533, 540, 713 P.2d 1302 (1978).

²⁵ *Strickland*, 466 U.S. at 694.

²⁶ *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

²⁷ *Strickland*, 466 U.S. at 689.

required to address both prongs of the test if the defendant makes an insufficient showing on one prong.²⁸

Even assuming *arguendo* that Counts III and IV should have been counted as one point, the result would be to reduce Ott's offender score from five to four. As argued above, this would not have changed the sentencing ranges on any of the counts. Indeed, even if Ott's offender score was reduced by *two*, his range would remain the same. Ott's claim of ineffective assistance cannot stand where there is no prejudice. As both prongs of the *Stickland* test must be met, this claim, too, must be rejected.

IV. CONCLUSION

Even absent direct testimony from the school district's Director of Transportation that he designated the school bus stop in question, a rational jury could infer that the Director of Transportation knew where the designated bus stops were located, and that the bus stop at 4500 Martin Way was designated by the school district. Ott's agreement with the State's calculation of his offender score waived his right to challenge that offender score on appeal. Further, there was no prejudice, as—even if his contention that Counts III and IV merge is correct—the corresponding sentencing range would not change. Consequently, his attorney's failure

²⁸ *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

to argue that those two counts constituted same course of conduct, and to argue for an offender score of four was not prejudicial, and cannot constitute ineffective assistance of counsel.

As regards the scrivener's error, the State agrees that the error should be corrected, and this Court should direct the lower court to enter an order so amending the judgment and sentence. It is unnecessary to require a re-sentencing hearing to correct such an error.

V. REQUEST FOR COSTS

Should this Court determine that the State substantially prevails in this matter, the State requests that Ott be required to pay all taxable costs of this appeal, pursuant to RAP Title 14.

Respectfully submitted this 5th day of September, 2007.

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By:


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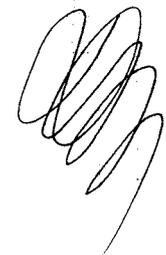
CERTIFICATE

I certify that on 9/5/07, I mailed a copy of the foregoing response by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

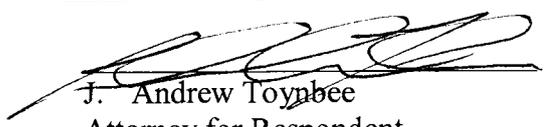
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