

NO. 37664-4

FILED
COURT OF APPEALS
DIVISION II

09 JAN 30 PM 2:12

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY *th*
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN BICKLE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann Van Doorninck

No. 02-1-03720-0

Brief of Respondent

GERALD A. HORNE
Prosecuting Attorney

By
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....

1. Do two convictions on one count each of unlawful manufacture of a controlled substance, methamphetamine and unlawful manufacture of a controlled substance, marijuana, constitute the same criminal conduct where the intent of the crimes was different, and they occurred in different places?

2. Does the charge of unlawful manufacture of a controlled substance constitute the same criminal conduct as unlawful possession of a controlled substance where the intent of the crimes is different, and they do not occur at the same time?

B. STATEMENT OF THE CASE.

1. Procedure.....

2. Facts 1

C. ARGUMENT.....6

1. THE COURT PROPERLY HELD THAT BICKLE’S TWO CONVICTIONS FOR UNLAWFUL MANUFACTURE OF A CONTROLLED SUBSTANCE DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT. 10

2. THE COURT PROPERLY HELD THAT THE UNLAWFUL MANUFACTURING AND UNLAWFUL POSSESSION COUNTS FOR EACH SUBSTANCE (METHAMPHETAMINE AND MARIJUANA RESPECTIVELY) DID NOT CONSTITUTE THE SAME COURSE OF CONDUCT..... 13

D. CONCLUSION. 20-21

Table of Authorities

State Cases

<i>In re: Personal Restraint Petition of Bickle</i> , Slip. Op. # 36079-9-II (2007) (Unpublished opinion.)	2
<i>State v. Bickle</i> , Slip. Op. # 29584-9-II (2004) (Unpublished opinion) ...	2, 4
<i>State v. Boyer</i> , 91 Wn.2d 342, 588 P.2d 1151 (1979).....	10, 13
<i>State v. Burns</i> , 114 Wn.2d 314, 319-320, 788 P.2d 531 (1990).....	14
<i>State v. Collicott</i> , 118 Wn.2d at 649, 668-69, 827 P.2d 263 (1992)	9
<i>State v. Davis</i> , 117 Wn. App. 702, 708, 72 P.3d 1134 (2003), <i>review denied</i> , 151 Wn.2d 1007 (2004)	18
<i>State v. Dunaway</i> , 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987)	6, 7, 8, 9
<i>State v. Freeman</i> , 118 Wn. App. 365, 377, 76 P.3d 732 (2003).....	9
<i>State v. Garza-Villarreal</i> , 123 Wn.2d 42, 46, 864 P.2d 1378 (1993)	7, 8, 9
<i>State v. Hartzog</i> , 26 Wn. App. 576, 615 P.2d 480 (1980) (<i>affirmed in part</i> , <i>reversed in part on other grounds</i> at 96 Wn.2d 383, 635 P.2d 694 (1981)	10, 13
<i>State v. Hernandez</i> , 95 Wn. App. 480, 483, 976 P.2d 165 (1999)	6, 15
<i>State v. Lessley</i> , 118 Wn.2d 773, 778, 827 P.2d 996 (1992).....	6, 8, 9
<i>State v. Maxfield</i> , 125 Wn.2d 378, 402, 886 P.2d 123 (1994), <i>rev'd on other grounds</i> , <i>In re Personal Restraint Petition of Maxfield</i> , 133 Wn.2d 332, 945 P.2d 196 (1997).....	7, 8, 11, 14, 15
<i>State v. Poling</i> , 128 Wn. App. 659, 116 P.3d 1054 (2005).....	17, 18
<i>State v. Porter</i> , 133 Wn.2d 177, 184, 942 P.2d 974 (1997)	14, 17

<i>State v. Rodriguez</i> , 61 Wn. App. 812, 816, 812 P.2d 868, <i>review denied</i> , 118 Wn.2d 1006, 822 P.2d 288 (1991).....	7, 8
<i>State v. Smith</i> , 17 Wn. App. 231, 562 P.2d 659 (1977).....	10, 13
<i>State v. Soper</i> , 135 Wn. App. 89, 105, 143 P.3d 335 (2006).....	15
<i>State v. Vike</i> , 125 Wn.2d 407, 410, 885 P.2d 824 (1994).....	6, 8, 9

Statutes

RCW 69.40.401	13
RCW 69.40.401(a).....	10
RCW 69.40.4013	13
RCW 69.50.404(a)(1)(ii)	11
RCW 69.50.101(p)	20
RCW 9.94A.400 (2002).....	6
RCW 9.94A.400(1)(a)	6
RCW 9.94A.589	6
RCW 9.94A.589(1)(a)	6

Other Authorities

Comment on Knowledge, p. 964, Thompson West c. 2008.....	10, 13
The Sentencing Reform Act	6
WPIC 50.11	10, 13

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Do two convictions on one count each of unlawful manufacture of a controlled substance, methamphetamine and unlawful manufacture of a controlled substance, marijuana, constitute the same criminal conduct where the intent of the crimes was different, and they occurred in different places?
2. Does the charge of unlawful manufacture of a controlled substance constitute the same criminal conduct as unlawful possession of a controlled substance where the intent of the crimes is different, and they do not occur at the same time?

B. STATEMENT OF THE CASE.

1. Procedure

On August 12, 2002, Kevin Bickle was charged with two counts of Unlawful Manufacturing of a Controlled Substance for methamphetamine and marijuana. CP 88. An amended information was filed on October 22, 2002, that added two counts of Unlawful Possession of a Controlled Substance for methamphetamine and marijuana. CP 89. The defendant was convicted as to all four counts. CP 111-114 [90-93]. On November 1, 2002, the defendant was sentenced to a total sentence of 198 months. CP 115-131 [94-110].

Bickle initially filed an appeal, and his conviction was affirmed. *State v. Bickle*, Slip. Op. # 29584-9-II (2004) (Unpublished opinion); CP 133-141[112-120]. Bickle subsequently filed a personal restraint petition challenging his sentence. See, *In re: Personal Restraint Petition of Bickle*, Slip. Op. # 36079-9-II (2007) (Unpublished opinion.); CP 142-145[121-124]. The petition was filed after the one year time limit, but was considered by the court based upon a determination that the judgment and sentence was erroneous on its face. *In re: Bickle*, Slip. Op. # 36079-9-II, p. 3-4; CP 144-145[123-124]. The court concluded that the calculation of Bickle's offender score was erroneous and remanded the matter for resentencing. *In re: Bickle*, Slip. Op. # 36079-9-II, p. 4; CP 145[124]. Because the court remanded the case for resentencing based on the error in offender score, the court declined to reach two additional issues raised by Bickle: that his two manufacturing convictions violated double jeopardy; and that his four current convictions were the same criminal conduct. *In re: Bickle*, Slip. Op. # 36079-9-II, p. 4; CP 145[124]. Because the court did not reach those issues, it indicated that Bickle could raise them upon his resentencing. *In re: Bickle*, Slip. Op. # 36079-9-II, p. 4; CP 145[124].

Bickle was resentenced on April 23, 2008. CP 20-31. At the resentencing, Bickle did raise the challenge that the two convictions for Unlawful Manufacture of a Controlled Substance violated double jeopardy because they constituted one unit of prosecution. Bickle also argued that

all four counts constituted the same criminal conduct, and should therefore only count as one offense. CP 51-59. The court denied Bickle's motion that the two manufacturing charges constituted the same criminal conduct. RP (04-23-2008), p. 5. The court also denied Bickle's motion that all four counts constituted the same criminal conduct. RP (04-23-2008), p. 11.

The court imposed a sentence of 149 months based on an offender score of 9 on Count I. At the resentencing, the State was able to prove that one of Bickle's prior offenses was committed with sexual motivation, which had the effect of adding three additional points to his offender score, which had not been counted previously, so that his range remained the same even after the correction. RP (04-23-2008), pp.12-17 (especially p. 17, ln. 4-6); CP 1-16. However, at the resentencing, the court elected to impose the low end of the range on Count I, resulting in a reduced sentence of 149 months. RP (04-23-2008) p. 20, ln.15-24; CP 20-31.

This appeal was timely filed on April 24, 2008. CP 32-42.

On appeal, Bickle has apparently abandoned his argument that his convictions on the two manufacturing counts (Counts I and II) violated double jeopardy. *See* Br. App., p. 2.

2. Facts

The State incorporates by reference the Verbatim Report of Proceedings from *State v. Bickle*, COA# 29584-9-II. They are necessary to a proper evaluation of this case, and were cited to in the brief of the appellant. *See*, Br. App., fn. 3, 4, 5.

On August 9, 2002, Tacoma Police served a search warrant for a possible methamphetamine lab at a house in Tacoma. RP (10-23-02), p. 85, ln. 16-21; RP (10-23-02), p. 92, ln. 6-8; RP (10-23-02), p. 227, ln. 4-8. The house belonged to the defendant in the case, Kevin Bickle. RP (10-28-02), p. 322, ln. 14-25. Bickle did not respond or come out of the house, so the police conducted a tactical entry in which SWAT breached the door and the lab team entered. RP (10-23-02), p. 88-91. Upon entry, it appeared that the house had been barricaded from the inside. RP (10-23-02), p. 94, ln. 15 to p. 95, ln. 4.

Inside the kitchen, officers found what appeared to be a methamphetamine lab. RP (10-23-02), p. 95, ln. 6-23. The basement was not accessible from inside the house and could only be accessed by going outside. RP (10-23-02), p. 98, ln. 4-10. Inside the basement, officers found a marijuana grow operation. RP (10-23-02), p. 98, ln. 14-25.

Officers couldn't find anyone in the house. RP (10-23-02), p. 96, ln. 1-15. They conducted a more thorough search, and in the kitchen they noticed a ceiling access panel to the crawl space. RP (10-23-02), p.101, ln. 1-17. A piece of sheetrock was laying on top of the opening that was split in half and had a footprint in the middle of the split as if it had been kicked open. RP (10-23-02), p. 101, ln. 15-21. Officers put three canisters of an irritant gas up there to flush anyone out, and still no one came out. RP (10-23-02), p. 102, ln. 5-18. Officers remained convinced someone was up there. RP (10-23-02), p. 102, ln. 19-21. So officers obtained a chain saw from the fire department and cut at least two holes in the roof before determining that Bickle was there. RP (10-23-02), p. 6-24. Bickle continued to refuse to come out, so he was shot with a rubber device, but he still refused to come out. RP (10-23-02), p. 103, ln. 24 to p. 104, ln. 4. Officers finally obtained a long hook from the fire department and used it to pull Bickle out of the house and arrest him. RP (10-23-02), p. 104, ln. 5-8; RP (10-23-02), p. 140, ln. 2 to p. 141, ln. 5.

Upon further investigation, it was determined that there was in fact a methamphetamine lab in the main kitchen area. RP (10-23-02), p. 107, ln. 23-25; RP (10-23-02), p. 112, ln. 16. Several items tested positive for methamphetamine, and one of them had Bickle's finger print on it. RP (10-28-07). Additionally, there was marijuana in the freezer. RP 175.

C. ARGUMENT.

The Sentencing Reform Act provides that "... 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..." for purposes of calculating the offender score. RCW 9.94A.589(1)(a) (formerly RCW 9.94A.400 (2002)).

"Under the SRA, two or more crimes may be considered the same criminal conduct if they (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim." *State v. Hernandez*, 95 Wn. App. 480, 483, 976 P.2d 165 (1999) *citing* former RCW 9.94A.400(1)(a) (now codified as RCW 9.94A.589). *See also, State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). All three elements of this test must be met in order for the conduct to be considered the "same criminal conduct." *Hernandez*, 95 Wn. App. at 483, *citing State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

In *State v. Dunaway*, the court first adopted an analytic approach to interpreting the "same criminal conduct" language in the SRA. *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987). In *Dunaway*, the court held that when deciding whether "crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d at 215. The court went on to note

that part of that analysis will often include the related issues of whether one crime furthered the other, and if the time and place of the two crimes remained the same. *Dunaway*, 109 Wn.2d at 215. See also *State v. Garza-Villarreal*, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993) (quoting *Dunaway*, 109 Wn.2d at 215).

“The trial court’s determination whether two crimes require the same criminal intent is reviewed [...] for abuse of discretion or misapplication of the law.” *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994) *rev’d on other grounds*, *In re Personal Restraint Petition of Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997).

Early on, the Court of Appeals held that determining a defendant's intent involves a two-step process. *State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868, *review denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991). First, the court must objectively view each underlying statute and determine if the required intents are the same for each count. *Rodriguez*, 61 Wn. App. at 816. Where the intents are the same, the court objectively views the facts to determine whether a defendant's intent was the same with respect to each count. *Rodriguez*, 61 Wn. App. at 816. However, subsequent Supreme Court cases make no mention of *Rodriguez* and appear to have overturned or modified it *sub rosa*.

Several Supreme Court cases have come out addressing the process for determining a defendant’s intent, but they made no mention of

Rodriguez with regard to the determination of the defendant's intent. But these cases are not all fully consistent among themselves. In *Garza-Villarreal*, the court held that *Dunaway* contained a redundancy wherein the "same time and place" appears as a separate element in the statutory definition, but that *Dunaway* also treated "same time and place" as a factor in assessing whether the defendant maintained the same criminal intent.. *Garza-Villarreal*, 123 Wn.2d at 47. The court in *Garza-Villarreal*, went on to note that this redundancy had been clarified by the court's opinion in *State v. Lessley*, where it was held to be an element in the same criminal conduct analysis. *Garza-Villarreal*, 123 Wn.2d at 47 (citing *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)).

However, in *Maxfield*, the court quoted the opinion in *Garza-Villareal* where it in turn quoted *State v. Dunaway*, including the language about the analysis often including whether the time and place of the two crimes remained the same. *Maxfield*, 125 Wn.2d at 402 (quoting *Garza-Villareal*, 123 Wn.2d at 46 (but failing to cite the quote as *Dunaway*, 109 Wn.2d at 215)). The analysis in *Maxfield* made no mention to the language in *Garza-Villarreal* that *Lessley* had resolved that redundancy. See *Maxfield*, 125 Wn.2d at 402. Thereby, the opinion in *Maxfield* essentially re-introduced the redundancy into the law.

Finally, the Supreme Court last considered this issue in *State v. Vike*. *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994). In *Vike*, the court held that in construing the "same criminal intent" element, "the standard is

the extent to which the intent, objectively viewed, changed from one crime to the next.” *Vike*, 125 Wn.2d at 411 (citing *Dunaway*, 109 Wn.2d at 215). The court went on to note that, “this can in turn be measured in part by whether one crime furthered the other.” *Vike*, 125 Wn.2d at 411 (citing *Garza-Villarreal*, 123 Wn.2d at 47; *State v. Collicott*, 118 Wn.2d at 649, 668-69, 827 P.2d 263 (1992); *Lessley*, 118 Wn.2d at 778; *Dunaway*, 109 Wn.2d at 217). However, the court in *Vike* went on to state that the test of whether one crime furthered the other was difficult to apply to a simple possession case, in part because “the furtherance test lends itself to sequentially committed crimes” and that [i]ts application to crimes occurring literally at the same time is limited.” *Vike*, 125 Wn.2d at 412. The court in *Vike* had also noted that the court in *Garza-Villarreal* relied on the fact that differences in criminal intent are implicitly defined by differences in the statutory definitions.

To determine whether two crimes share the same criminal intent, court’s look at whether the defendant’s intent viewed objectively, changed from one crime to the next, and whether commission of one crime furthered the other. *State v. Freeman*, 118 Wn. App. 365, 377, 76 P.3d 732 (2003) (citing *Vike*, 125 Wn.2d at 411).

1. THE COURT PROPERLY HELD THAT BICKLE'S TWO CONVICTIONS FOR UNLAWFUL MANUFACTURE OF A CONTROLLED SUBSTANCE DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT.

Bickle claims that his conviction for Unlawful Manufacture of a Controlled Substance, Methamphetamine in Count I, constitutes the same criminal conduct as his conviction for Unlawful manufacture of a controlled substance, Marijuana, in Count II. Manufacturing of a controlled substance does not contain an express statutory intent element. *See*, RCW 69.40.401(a). However, as the commentary to WPIC 50.11 notes, the court has held that guilty knowledge is an element of delivery of a controlled substance, and dicta in several manufacturing cases imply that guilty knowledge is also a nonstatutory element of unlawful manufacture of controlled substance. *See*, Washington Practice, vol. 11, Pattern Jury Instructions Criminal, Third Ed., WPIC 50.11, Comment on Knowledge, p. 964, Thompson West c. 2008 (citing *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979)); *State v. Hartzog*, 26 Wn. App. 576, 615 P.2d 480 (1980) (*affirmed in part, reversed in part on other grounds* at 96 Wn.2d 383, 635 P.2d 694 (1981)); *State v. Smith*, 17 Wn. App. 231, 562 P.2d 659 (1977).

Moreover, the manufacturing statute specifically penalized methamphetamine separately and differently from other drugs. *See* RCW 69.50.404(a)(1)(ii) (2002). Additionally, both the jury instructions and the verdict forms for Counts I and II specified methamphetamine and marijuana respectively. CP 103-104; CP 111-112.

Even if the court were to hold that the statutory intent elements of the offenses are the same, the criminal conduct of the two manufacturing operations was nonetheless different because the criminal “objective” was not the same between the two offenses. *See, Maxfield*, 125 Wn.2d at 403. First, there is the obvious difference that the ends of the two manufacturing processes were to produce two different controlled substances. Further, as the sentencing court noted when it denied the defendant’s motion, the two manufacturing processes are different and involve different steps. RP 04-23-08, p. 5, ln. 10-17. This position is supported by the trial court record. Compare RP (10-23-02), p.144-200 with RP (10-23-02), p. 99, ln. 15 to p. 100, ln. 19. *See also* RP (10-23-02), p. 137-38; p. 228-230, especially p. 230, ln. 5-7.

Here, the manufacturing offenses also occurred in different places. The marijuana grow operation was located in Bickle’s basement, which was not accessible from inside the house and could only be reached by

going outside and entering the basement through a very tiny door. RP (10-23-02), p. 98, ln. 4; RP (10-23-02), p. 137, ln. 15-25; RP (10-23-02), p. 228, ln. 22-24. The methamphetamine manufacturing was located in the kitchen. RP (10-23-02), p. 137, ln. 7-12; p. 228, ln. 25 to p. 229, ln. 3.

Where both the manufacturing operations had occurred on an ongoing basis, and the record does not indicate particular start dates for each of them, the record is probably not sufficient to distinguish between them as to time.

The intent elements of the crimes of unlawful manufacture of methamphetamine and unlawful manufacture of marijuana were different. Although the statute does not contain an explicit intent element, it does contain such an element implicitly. That element is that the defendant particularly intended to manufacture the substance he was charged with, either methamphetamine or marijuana. Additionally, the object of the crimes was different, where the crimes used different means to produce different substances. Finally, where the methamphetamine was manufactured in the kitchen, and the marijuana was manufactured in the basement, the two substances were not manufactured in the same place. This is especially so where the only access to the basement was from outside the house and through a tiny door.

For all these reasons, the court should hold that the trial court did not abuse its discretion when it held that Counts I and II did not constitute the same criminal conduct for sentencing purposes.

2. THE COURT PROPERLY HELD THAT THE UNLAWFUL MANUFACTURING AND UNLAWFUL POSSESSION COUNTS FOR EACH SUBSTANCE (METHAMPHETAMINE AND MARIJUANA RESPECTIVELY) DID NOT CONSTITUTE THE SAME COURSE OF CONDUCT.

Neither manufacturing of a controlled substance nor possession of a controlled substance contains a statutory intent element. RCW 69.40.401; RCW 69.40.4013. However, as the commentary to WPIC 50.11 notes, the court has held that guilty knowledge is an element of delivery of a controlled substance, and dicta in several manufacturing cases imply that guilty knowledge is also a nonstatutory element of unlawful manufacture of controlled substance. *See*, Washington Practice, vol. 11, Pattern Jury Instructions Criminal, Third Ed., WPIC 50.11, Comment on Knowledge, p. 964, Thompson West c. 2008 (citing *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979)); *State v. Hartzog*, 26 Wn. App. 576, 615 P.2d 480 (1980) (*affirmed in part, reversed in part on other grounds* at 96 Wn.2d 383, 635 P.2d 694 (1981)); *State v. Smith*, 17 Wn. App. 231, 562 P.2d 659 (1977).

Therefore, the focus is on whether the criminal “objective” changed from one offense to the next. *Maxfield*, 125 Wn.2d at 403.

When two drug crimes have different objectives or intents, Washington courts have found that the crimes do not constitute the same criminal conduct. See *State v. Porter*, 133 Wn.2d 177, 184, 942 P.2d 974 (1997) (“[W]here the defendant has the potential to commit distinct drug crimes in the present and in the future with the substances found, we have held that the defendant possessed a different criminal intent for each charge.”)

The intent or “objective” is different for unlawful possession of a controlled substance and unlawful manufacturing of controlled substance. In *State v. Maxfield*, the Washington State Supreme court found that manufacturing of a controlled substance and possession of a controlled substance with intent to deliver were not the same criminal conduct for sentencing purposes because “there were different ‘objectives’; one was to grow the drug, the other was to deliver it to third persons.” *Maxfield*, 125 Wn.2d at 403. Similarly, in *State v. Burns*, the court found that possession of cocaine and delivery of different cocaine was not the same criminal conduct, because the cocaine remaining in the defendant’s possession after the first sale was “indicative of an independent objective to make other deliveries in the future.” *State v. Burns*, 114 Wn.2d 314, 319-320, 788 P.2d 531 (1990).

The “objective” for unlawful manufacturing of a controlled substance and unlawful possession of a controlled substance is different. The “objective” of unlawful manufacturing of a controlled substance is to produce a drug. *Maxfield*, 125 Wn.2d at 403. The “objective” of unlawful possession of a controlled substance is to possess the drug for personal use or for sale. Because the objective of each crime is different, the two crimes do not constitute the same criminal conduct for purposes of sentencing.

The Court of Appeals, Division Two, has reached analogous conclusions. In *State v. Hernandez*, the court found that simple possession of a controlled substance and possession of a controlled substance with intent to deliver did not constitute the same criminal conduct because “[w]here one crime has a statutory intent element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct.” *Hernandez*, 95 Wn. App. at 485. In *State v. Soper*, the court found that manufacturing of marijuana and possession of marijuana with intent to deliver does not constitute the same criminal conduct because the defendant had a different criminal objective for each offense; “[o]ne objective was to grow the marijuana; the other objective was to deliver it to third persons.” *State v. Soper*, 135 Wn. App. 89, 105, 143 P.3d 335 (2006).

Objectively, viewing the two statutes leads to the conclusion that the same intent does not exist in both statutes.

In this case, the State conceded that the third element, the victim of the offenses, is the same. CP 64. However, that concession is not to suggest that this is a victimless crime. There are often victims to the crime of unlawful manufacture of a controlled substance, which are usually the owners of the property, but may include others as well.¹ Rather, here Bickle was the owner of the property and the trial record did not suggest any other victims, so that the concession was appropriate for that reason alone. *See* RP (10-28-02), p. 322, ln. 14-25.

The State does not agree that the counts of unlawful manufacture of methamphetamine and unlawful possession of methamphetamine occurred at the same time, or in the same place. The State also does not agree that the counts of unlawful manufacture of marijuana and unlawful possession of marijuana occurred at the same time or in the same place. Nor was such a concession made at the sentencing hearing. Rather, the State's response to the defendant's sentencing memorandum noted that the time

¹ Crimes such as murder, assault and robbery always necessarily involve a real person as a victim. Crimes such as theft and malicious mischief always necessarily involve a legal person, the property owner, as a victim. Crimes such as arson, manufacture of a controlled substance, and driving under the influence of intoxicants may or may not involve damage to property, and therefore may or may not have a victim. They also may or may not involve injuries to third persons, from explosion, fire, chemical damage, etc.

and place were similar, but not the same for each count. CP 64. In oral argument at sentencing, the State reiterated that intent wasn't the only element that was at issue, that there were other elements, but that intent was the most important element. RP (04-23-08), ln. 16-19.

The defendant asserts, but does not explain or justify, the assertion that the unlawful manufacture and unlawful possession occurred at the same time and place. Br. App., p. 7. That claim is unwarranted for the following reasons.

The Washington Supreme Court has held that where a defendant has the potential to commit distinct drug crimes in the present and the future with the substances he was found to have possessed, the defendant possesses a different criminal intent for each charge. *Porter*, 133 Wn.2d at 184.

“Manufacture” means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term does not include the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance [...] [RCW 6950.101(p).]

In *State v. Poling*, the court noted “[b]ecause manufacturing is often an ongoing process involving many steps, a defendant need not possess the final product in order to meet the statutory requirements for

manufacturing.” *State v. Poling*, 128 Wn. App. 659, 116 P.3d 1054 (2005). “[A] person who knowingly plays even a limited role in the manufacturing process is guilty, even if someone else completes the process.” *Poling*, 128 Wn. App at 668 (quoting *State v. Davis*, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003), *review denied*, 151 Wn.2d 1007 (2004)).

In addition, the evidence proved that the appellants had already manufactured methamphetamine and had additional pseudoephedrine, ready to use in the next, i.e. future, cook. There was testimony that while at Bickle’s house the evidence demonstrated every stage of the manufacturing process, it was common for officers to find only one or another step in the manufacturing process, often because different stages would be completed in different locations. RP 200, ln. 24 to p. 201, ln. 13.

Evidence of the manufacture of methamphetamine was found in the defendant’s kitchen. RP (10-23-07), p. 95, ln. 6-23; RP (10-23-07), p. 107, ln. 24-25; RP (10-23-07), p. 144-200. Among the evidence was pure powdered pseudoephedrine that could be used in future attempts to manufacture methamphetamine. RP (10-23-07), p.159, ln. 12-13; RP 267, ln. 14-20; RP (10-28-07), p. 302, ln. 1-25. Several items in the kitchen tested positive for methamphetamine (items 5, 18, 19, 27). RP (10-23-07), p. 155, ln. 1-12; RP (10-23-07), p. 160, ln. 3-13; RP (10-28-07), p. 290, ln. 13-25; RP (10-28-07), p. 292, ln. 3-7; RP (10-28-07), p. 292, ln. 8 to p. 293, ln. 16. One of those items was a glass jar with powder residue that

was found on the kitchen counter (item 5), and that also had Bickle's fingerprint on it. RP (10-23-07), p. 120, ln. 19 to p. 122, ln. 17; RP (10-23-07), p. 150, ln. 18-23; RP (10-28-07), p. 277-280; RP (10-28-07), p. 290, ln. 10-12.

Evidence of the manufacturing of marijuana was found in the basement. RP (10-23-07), p. 98-100; RP (10-23-07). Marijuana plants were located in the basement, RP-98; p. 334, ln. 20-24. A box of cut marijuana buds (item 41) was found in the freezer of the defendant's kitchen. RP 175, ln. 6-11; RP (10-28-07), p. 286, ln. 1-3; RP (10-28-07), p. 295, ln. 3-22.

Here, the marijuana in the refrigerator in the kitchen was possessed in a different location from the marijuana in the basement that could only be accessed by going outside the house. Because the crimes did not occur in the same place, they are not the same criminal conduct.

The manufacture of methamphetamine and of marijuana are completely different processes for the manufacture of controlled substances. However, both are ongoing processes. Possession is a crime that exists only in the present. Accordingly, here the manufacturing and possessory crimes for each substance did not occur at the same time.

Methamphetamine does not come into existence in the first stage and a half of the manufacturing process, wherein pseudoephedrine is first extracted, and then has to be combined with iodine, hydrogen peroxide, water and red phosphorous in order to convert the pseudoephedrine to

methamphetamine. (*See* overview of methamphetamine manufacturing process. RP 283-285.) Thus, a person can commit the crime of unlawful manufacture of methamphetamine without yet possessing it.

Finally, the intent of manufacture and possession are not the same. This is especially the case where the definition of manufacture specifically refers to doing so directly or indirectly. *See*, RCW 69.50.101(p). It is not uncommon for a person to perform part of the manufacturing process for the benefit of others. This is common with pseudoephedrine extraction in methamphetamine manufacture. But it also occurs in the manufacture of marijuana where lower level assistants will aid a higher level grower in cultivating the marijuana by tending to it for a period of time. The lower level assistant will nonetheless not possess the marijuana, which remains the grower's. The intent of manufacture is to produce the methamphetamine or marijuana. The intent of possession is to have the methamphetamine or marijuana.

D. CONCLUSION.

The manufacture of methamphetamine and marijuana do not constitute the same criminal conduct where the crimes have an implicit knowledge element, and the intent is to produce two different substances. Even if the legal intent of the crimes is the same, the objective criminal intent is different where the criminal actually uses completely different means to produce completely different substances.

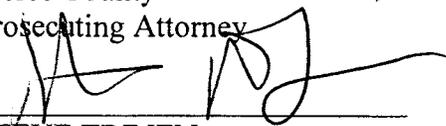
The manufacture of methamphetamine and the possession of methamphetamine do not constitute the same criminal conduct where the criminal intent of manufacture is to produce the controlled substance (but not necessarily possess it) while the criminal intent of possession is to possess the substance. Moreover, manufacture is an ongoing process, while possession occurs in the present so that the two do not occur at the same time.

The manufacture of marijuana and the possession of marijuana do not constitute the same criminal conduct, again because the criminal intent of the two crimes is different. Moreover, here the marijuana was being manufactured in one location (the basement), and was possessed in another unconnected location (the freezer in the kitchen).

For all these reasons, the defendant's motion should be denied without merit.

DATED: January 30, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



STEVE TRINEN
Deputy Prosecuting Attorney
WSB # 30925

FILED
COURT OF APPEALS
DIVISION II

09 JAN 30 PM 2:13

STATE OF WASHINGTON
BY ks
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

1/30/09 Therese K
Date Signature