

NO. 38889-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

LORIN HUBBARD

Appellant.

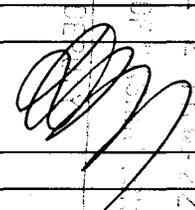
FILED
COURT OF APPEALS DIVISION 2
STATE OF WASHINGTON
2009 JUN 30 PM 3:47

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

The Honorable Kitty-Ann Van Doorninck, Judge

09 JUN -2 PM 11:22
STATE OF WASHINGTON
BY

BRIEF OF APPELLANT


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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it found that appellant's convictions for Unlawful Manufacturing of a Controlled Substance and Possession of Pseudoephedrine and/or Ephedrine With Intent to Manufacture Methamphetamine did not involve the same criminal conduct.

2. Trial counsel rendered ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Following a jury trial, appellant was convicted of both offenses. The acts involve the same time and place, the same victim, and the same intent. Because these crimes involve the "same criminal conduct" for sentencing purposes, did the trial court miscalculate appellant's offender score and standard range?

2. At sentencing, defense counsel presented argument that Hubbard's convictions should be counted as 1 point rather than 2. But instead of citing the proper cases discussing "same criminal conduct," defense counsel confused the issue by arguing only that scoring the offenses separately violated double jeopardy. Was the failure to cite the proper legal standard and supporting authority ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County Prosecuting Attorney charged Lorin Hubbard with one count of Unlawful Manufacturing of a Controlled Substance, to-wit: Methamphetamine, and one count of Possession of Pseudoephedrine and/or Ephedrine With Intent to Manufacture Methamphetamine. CP 3-4. The information alleges that both crimes were committed on October 16, 2007. CP 3-4. The case went to trial in January 2009 and a jury found Hubbard guilty on both counts. CP 45-46.

Hubbard filed a pre-sentence memo arguing that double jeopardy precluded him from being punished separately for both charges since they involved the same act. CP 71-73. Hubbard requested that the sentencing court find that both counts involve the same criminal conduct. CP 74. At sentencing, defense counsel again asserted that since both charges involved the same underlying acts, the court should "find that those should be punished as the same conduct." 5RP¹ 307. The trial court ruled

¹ 1RP is January 20, 2009; 2RP is January 21, 2009; 3RP is January 22, 2009; 4RP is January 26, 2009; 5RP is February 13, 2009.

that the offenses were separate and did not count as a single point for sentencing purposes. 5RP 307-08; CP 107-08.

With an offender score of 4, Hubbard's standard range was 68 to 100 months. CP 108. The court granted Hubbard's request for a DOSA and sentenced him to 42 months of confinement. CP 111. Hubbard filed a timely notice of appeal. CP 119.

2. Trial Testimony

On October 16, 2007, police received a call from a Rite-Aid pharmacy regarding a suspicious purchase of pseudoephedrine. 3RP 78. A police officer testified that Hubbard was a "person of interest" because of his prior purchases of pseudoephedrine. 3RP 78. Police officers went to the store where Hubbard had recently made his purchase and began to follow Hubbard at a distance as he continued shopping. 3RP 78-79. Hubbard made additional stops at Value Village and Fred Meyer, and then entered an undeveloped, wooded area in a Tacoma park. 3RP 88.

Police followed Hubbard into the wooded area and eventually found him inside a tent at a remote campsite. 3RP 89-91. The tent door was closed, but police could see Hubbard through the screen door. 3RP 91. Police ordered Hubbard out of the tent in order to arrest him. 3RP 92. As Hubbard unzipped the

tent door, police saw loose pills in a pot. 3RP 95. Police believed that Hubbard was beginning to grind up pseudoephedrine pills in order to make methamphetamine. 3RP 95.

C. ARGUMENT

HUBBARD'S CONVICTIONS INVOLVED THE "SAME CRIMINAL CONDUCT" FOR SENTENCING PURPOSES.

"[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a).

"Same criminal conduct" means crimes that require the same intent, were committed at the same time and place, and involved the same victim. RCW 9.94A.589(1)(a). The test is an objective one that:

takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective. Also relevant is whether one crime furthered the other.

State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990) (citation omitted). The issue is reviewed for an abuse of discretion or

misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

The same time and place requirement is met when there is a “continuing sequence of criminal conduct.” State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); accord State v. Porter, 133 Wn.2d 177, 183, 186, 942 P.2d 974 (1997) (looking for “continuing, uninterrupted sequence of conduct” and rejecting “simultaneity” requirement); State v. Young, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999) (“separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted episode over a short period of time.”).

Here, Hubbard committed both crimes at the same time and place on October 16, 2007. CP 3-4. The evidence the State relied on during closing argument to show that Hubbard had possessed pseudoephedrine was that police found him crouched over a pot of pseudoephedrine pills in his tent at the campsite in the woods. 4RP 273, 276. The State relied on the presence of other household items at Hubbard’s campsite, such as coffee filters, Drano, and tubing, to demonstrate that he was in the process of

manufacturing methamphetamine. 4RP 272. The actions giving rise to the criminal charges occurred at the same time and place.

The crimes involved the same victim, namely the public. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994) (public was victim where charges involved possession of controlled substances).

The crucial inquiry is whether Hubbard had a singular intent during the commission of both crimes. “The SRA’s single criminal conduct analysis has approached a single intent as entailing numerous offenses committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective.” Lewis, 115 Wn.2d at 302. In Lewis, the defendant sold marijuana to a police informant on three separate occasions over a two month period, and attempted a fourth delivery before his arrest. Lewis, 115 Wn.2d at 296-97. The Supreme Court held that the acts “were not part of a single criminal conduct because the commission of one drug deal did not further the commission of the other drug deals, and they were not part of a recognizable scheme or plan.” Lewis, 115 Wn.2d at 302.

Similar to Lewis, in Burns the court concluded that delivery of cocaine and possession of cocaine with the intent to deliver were

not the same criminal conduct because the additional cocaine stash was “indicative of an independent objective to make other deliveries in the future.” Burns, 114 Wn.2d at 319.

Unlike Lewis and Burns, the State used the exact same evidence to prove that Hubbard committed both crimes. The crimes were not carried out on separate dates. Hubbard’s act of possessing pseudoephedrine and emptying 46 pills in a pot are acts that furthered his scheme of manufacturing methamphetamine. The State’s own closing argument demonstrates that the crimes are intimately related and prove that Hubbard had a singular objective intent: “He has pseudoephedrine. Why does he have it? It’s the main ingredient to produce methamphetamine.” 4RP 269. The State also acknowledged in closing argument that Hubbard possessed the pseudoephedrine for the sole purpose of furthering his manufacturing scheme: “It’s the State’s argument he possessed that pseudoephedrine with one purpose only, and that was to make methamphetamine.” 4RP 279.

The Supreme Court has directed trial courts to consider whether “there is ‘one overall criminal purpose’” connecting the two crimes. Vike, 125 Wn.2d at 411 (simultaneous possession of two different controlled substances should be scored as the same

criminal conduct for sentencing purposes); State v. Garza-Villarreal, 123 Wn.2d 42, 48-49, 864 P.2d 1378 (1993) (two convictions for delivery of different controlled substances derived from the same criminal conduct for sentencing purposes).

Because the crimes of possession of ephedrine with intent to manufacture methamphetamine and manufacturing methamphetamine are intimately related, the trial court erred by concluding that they were not the same criminal conduct. The court abused its discretion by scoring the crimes separately.

Moreover, defense counsel's failure to cite the proper cases analyzing same criminal conduct at sentencing denied Hubbard his right to effective representation. An appellate court reviews claims for ineffective assistance of counsel de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). To establish a claim of ineffective assistance of counsel, Hubbard must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant, meaning a reasonable probability the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); In re Fleming, 142 Wn.2d 853, 865-866, 16 P.3d 610 (2001).

Here, defense counsel presented the argument that Hubbard's two convictions should be scored as one point for sentencing purposes: "One of the major issues here is whether or not the unlawful manufacture of controlled substance or unlawful possession with intent to manufacture a controlled substance merge for sentencing purposes, making it 1 point as opposed to 2." 5RP 306. But in the briefing presented to the court, counsel presented the issue solely as a double jeopardy argument, as opposed to same criminal conduct. If defense counsel had set forth the proper legal standard, as discussed above, the trial court could have engaged in meaningful analysis and would have concluded that Hubbard's two convictions amounted to the same criminal conduct.

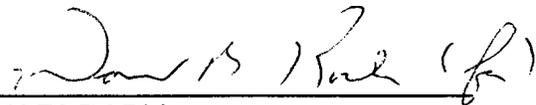
D. CONCLUSION

Hubbard's offender score is 3. His case should be remanded for a new sentencing hearing.

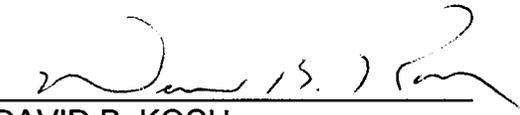
DATED this 31st day of June 2009.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF JUNE 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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BY 
COURT OF APPEALS
DIVISION II

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JUNE 2009.

x *Patrick Mayovsky*