

**NO. 42508-4-II**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TAMMY LYNN TAYLOR, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank E. Cuthbertson

No. 10-1-03401-5

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**Response Brief**

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

1. Did the trial court properly deny defendant's motion to withdraw guilty plea because it found that a same criminal conduct analysis was not a direct consequence of pleading guilty?
2. Does a defendant waive a challenge to her offender score under a same criminal conduct analysis where the defendant signs a plea agreement acknowledging the score, and fails to ask the sentencing court to consider the matter?

B. STATEMENT OF THE CASE.

On August 3, 2010, 77-year old N. Wilson, a customer at Wells Fargo Bank in Gig Harbor, reported questionable activity on her account.<sup>1</sup> CP 6. While speaking on the telephone with a representative of the bank, she discovered that there had been four unauthorized withdrawals, totaling \$37,600. CP 6. Each of the withdrawals had been processed by Tammy Lynn Taylor, hereinafter "defendant," who worked as a teller for the drive-thru at the bank. CP 6.

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<sup>1</sup> The facts of this case are taken from the declaration of probable cause, filed on August 10, 2010. CP 6-7.

A day later, defendant admitted to a service manager at the bank that she had forged Ms. Wilson's signature and processed the withdrawal slips. CP 6. Defendant initially claimed that she had taken only \$19,000. CP 6. She later admitted that she was unsure about the amount after the service manager told her that the actual amount totaled \$37,600. CP 6. Defendant turned herself into the police later that day. CP 6. She told the police that she had stolen the money because her brother was addicted to drugs and had asked her for help. CP 7.

Defendant made four unauthorized withdrawals from Ms. Wilson's account: (1) \$10,000 on March 31, 2010; (2) \$10,000 on May 29, 2010; (3) \$9,600 on July 1, 2010; and (4) \$8,000 on July 31, 2010. CP 6. Defendant said that she had picked Ms. Wilson to steal from because Ms. Wilson was elderly, and because she could replace the money before Ms. Wilson discovered the transactions. CP 7. Defendant forged the slips at her teller window, put the money in an envelope, and carried the envelope home after her shifts. CP 6.

On April 10, 2010, the Pierce County Prosecuting Attorney's Office charged Tammy Lynn Taylor (defendant) with four counts each of identity theft in the first degree, theft in the first degree, and forgery. CP 1-5. One of the identity theft charges included an aggravating factor of a particularly vulnerable victim. CP 1. Pursuant to defendant entering a plea of guilty, the State amended the charges by dropping the aggravator. CP 8-12.

Defendant entered a guilty plea on January 10, 2011. CP 14–23. The Honorable Frank E. Cuthbertson accepted defendant’s plea. CP 23. The court sentenced defendant to 63 months, the low end<sup>2</sup> of the standard range. CP 31.

Defense counsel withdrew from the case after sentencing and defendant retained a new attorney. CP 41. Defendant filed a motion to withdraw her guilty plea on July 1, 2011. CP 42–96. The court heard the motion<sup>3</sup> on August 5, 2011. RP 1.

Defendant argued that she was misinformed during plea negotiations because her counsel had failed to inform her that in the event she went to trial and was convicted, she might be able to ask the sentencing court to reduce her offender score under a same-conduct analysis. RP 2–13. The court denied the motion because it found that applying a same criminal conduct analysis was a discretionary decision for the sentencing court. RP 22–25; CP 141 (Conclusions of Law IV). The court further determined that a same criminal conduct analysis would not

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<sup>2</sup> Defendant had an offender score of 11, giving her a standard range of 63–84 months. CP 24–38 (Judgment and sentence, paragraphs 2.2–2.3).

<sup>3</sup> Under CrR 4.2(f), “[i]f the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.” *Id.* As discussed in *State v. Lamb*, 163 Wn. App. 614, 262 P.3d 89 (2011), the State recognizes that it may have been more appropriate for the court to transfer defendant’s CrR 7.8 motion to the Court of Appeals for consideration as a personal restraint petition, absent a determination by the trial court that it had authority to consider the merits of the motion. *Id.* at 627–28. However, because no party raised the issue below, the State’s response is limited to the issues raised on direct appeal.

likely have been applicable even if defendant had gone to trial, and that her counsel provided effective assistance. RP 22–25. This appeal timely follows. CP 134–136.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED  
DEFENDANT’S MOTION BECAUSE A POSSIBLE  
FINDING OF SAME CRIMINAL CONDUCT IS NOT A  
DIRECT CONSEQUENCE OF A GUILTY PLEA

This Court reviews a trial court’s denial of a motion to withdraw guilty plea under an abuse of discretion standard. *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). A court abuses its discretion when it bases its decision on clearly untenable or manifestly unreasonable grounds. *State v. Jamison*, 105 Wn. App. 572, 590, 20 P.3d 1010 (2001).

After the court accepts a plea of guilty, it “shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f). (2007). A manifest injustice occurs in the following circumstances: (1) the denial of effective assistance of counsel, (2) the defendant’s failure to ratify the plea, (3) the plea is involuntary, or (4) the prosecution breaches the plea agreement. *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006).

A plea is considered involuntary where the defendant is misinformed about direct consequences of the plea. *See id.* at 587–88. A sentencing consequence is direct when it has a “*definite, immediate and largely automatic effect* on the range of the defendant’s punishment.” *Id.* at 588 (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)) (emphasis added). Definite, immediate, and automatic consequences of a plea include the defendant being informed about mandatory community custody, *State v. Ross*, 129 Wn.2d 279, 288, 916 P.2d 405 (1996), the statutory maximum sentence for the charged crime, *In re Stockwell*, 161 Wn. App. 329, 335, 254 P.3d 899 (2011), restitution, *State v. Cameron*, 30 Wn. App. 229, 233, 633 P.2d 901 (1981), or the proper offender score, *see Mendoza*, 157 Wn.2d at 592.

On the other hand, the defendant does not need to be advised about a plea’s collateral consequences, “ancillary or consequential results” that are “peculiar to the individual.” *Cameron*, 30 Wn. App. at 233 (quoting *United States v. Sambro*, 454 F.2d 918, 920 (D.C. Cir. 1971)). Collateral consequences include losing one’s right to possess firearms, *In re Ness*, 70 Wn. App. 817, 823–24, 855 P.2d 1191 (1993), the duty to register as a sex offender, *State v. Ward*, 123 Wn.2d 488, 513–14, 869 P.2d 1062 (1994), the possibility of future confinement as a sexually violent predator, *In re Paschke*, 80 Wn. App. 439, 444–45, 909 P.2d 1328 (1996), or the possibility of a habitual criminal proceeding, *Barton*, 93 Wn.2d at 305–06.

Under RCW 9.94A.589(1)(a), a sentencing court has discretion to determine whether two or more current offenses encompass the same criminal conduct and count them as one crime when calculating an offender score:

Except as provided in (b) or (c) of this subsection, whenever 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: *PROVIDED, 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 . . .* “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 . . . .”

RCW 9.94A.589(1)(a) (emphasis added).

To find that multiple charges constitute same criminal conduct for purposes of sentencing, the court must find that the defendant’s crimes had (1) the same objective criminal intent, (2) the same time and place, and (3) the same victim. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). If any of the three elements is missing, the offenses “cannot be said to encompass the same criminal conduct,” and “must be counted separately in calculating the offender score.” *Lessley*, 118 Wn.2d at 778. Courts construed RCW 9.94A.589(1)(a) narrowly to disallow most assertions of same criminal conduct. *See, e.g., State v. Wilson*, 136 Wn. App. 596, 613, 150 P.3d 144 (2007); *see also State v. Flake*, 76 Wn. App.

174, 180, 883 P.2d 341 (1994) (finding that “[t]he Legislature intended the phrase ‘same critical conduct’ to be construed narrowly”). The reviewing court will reverse the sentencing court’s conclusions only for an abuse of discretion or misapplication of the law. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

The trial court in this case properly denied defendant’s motion to withdraw guilty plea because she failed to show how her alleged misinformation implicated a direct consequence of her plea. The court below found that “[t]he defendant has not demonstrated that she was not advised of *all direct consequences* related to her guilty plea.” CP 140 (Findings of Fact XV). Particularly, the trial court found defendant’s argument unpersuasive because “[a] ‘same course of conduct’ argument is *discretionary by the sentencing court.*” CP 141 (Conclusions of Law IV). The trial court properly denied defendant’s motion only after making a determination that defendant had been apprised of all of the direct consequences of her plea.

Whether the sentencing court would have applied a same criminal conduct analysis is neither a definite nor automatic consequence of pleading guilty. Defendant’s very statement that the “application of RCW 9.94A.589 *could result* in a [lower] sentencing range” turns her argument on its head; defendant fails to show how a potential, discretionary decision

by the sentencing court qualifies as a direct consequence of a guilty plea. Brief of Appellant at 9. As argued below, one court explained that application of the same criminal conduct statute “involves both factual determinations and the exercise of discretion.” *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). The court thus reasoned that “the same criminal conduct statute is not mandatory, and sound reasons exist for the implicit grant of discretion contained in the legislative language.” *Id.* Indeed, the statutory language underlying defendant’s argument confirms that a same criminal conduct argument is up to the discretion of the sentencing court. *See* RCW 9.94A.535(1)(a).

Defendant’s claim falls within the line of cases where courts have considered that factual and discretionary determinations, made at separate proceedings after a defendant pleads guilty, are “collateral” consequences. *See, e.g., Paschke*, 80 Wn. App. at 444–45; *see also Barton*, 93 Wn.2d at 305–06. Her argument relies on a discretionary decision by the court in a future proceeding from the time she pleaded guilty. This determination does not automatically flow from her decision to plead guilty.

Defendant alleges that the trial court erred because it “ignored” defendant’s claim of misinformation in favor of ruling that defendant’s counsel was effective. Brief of Appellant at 9. On the contrary, the trial court considered whether defendant’s counsel had provided effective

assistance of counsel *in addition to* defendant's claim of misinformation. Each of the court's findings of fact show that the court considered both the actions of the court—in case of misinformation—and her counsel—in case of ineffective assistance of counsel—when informing defendant of the direct consequences of her plea. CP 137–141 (Facts I–XVI).

It appears the trial court assessed both arguments due to the defendant's ambiguous motion. During her motion to withdraw, defense counsel told the court that the basis for defendant's motion was that the “plea was not fully, knowing and voluntary *considering that possible sentencing implications were not fully explained to her.*” RP 2–3. Defense counsel then referred to an affidavit by her original counsel, who claimed that he could not recall discussing the issue with her. RP 3; CP 42–96 (Declaration of Donald W. Winskill at 2). Given the somewhat ambiguous premise to defendant's argument, it seems only proper that the trial court afforded consideration of defendant's arguments under both misinformation and effective assistance of counsel.

The trial court properly concluded that a same criminal conduct analysis by the sentencing court was not a direct consequence of defendant's plea. There is nothing manifestly unreasonable or untenable about the trial court denying defendant's motion after finding that defendant had failed to prove that she had been misinformed about a direct consequence of her plea.

2. DEFENDANT WAIVED ANY CHALLENGE TO HER OFFENDER SCORE UNDER A SAME CRIMINAL CONDUCT ANALYSIS BECAUSE SHE FAILED TO RAISE THE ISSUE AT SENTENCING

A challenge to the application of a same criminal conduct analysis must be raised to the sentencing court else the defendant waives the right to appeal the issue. *State v. Jackson* 150 Wn. App. 877, 892, 209 P.3d 553 (2009). The Washington State Supreme Court has specifically held that when a defendant signs a plea agreement, acknowledging his offender score, and then fails to object to the computation at sentencing for purposes of same criminal conduct, it will not consider the issue on appeal. *In re Shale*, 160 Wn.2d 489, 494–96, 158 P.3d 588 (2007). In *Nitsch*, the court offered several reasons why a defendant must raise this specific issue at trial:

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 [of the offender score] problem, or a question of whether the record contains sufficient evidence to support [other] convictions in the offender score . . . [T]he same criminal conduct statute is not mandatory, and sound reasons exist for the implicit grant of discretion contained in the legislative language . . . .

100 Wn. App. at 523. The court continued:

[T]he effect of permitting review for the first time on appeal is to require sentencing courts to search the record to ensure the absence of an issue not raised. In the same criminal conduct context, such a search requires not just a review of the evidence to support the State's calculation, or a review to ensure application of the correct legal rules, but an examination of the underlying factual context in every sentencing involving multiple crimes committed at the same time. . . . The trial court thus should not be required, without invitation, to identify the presence or absence of the issue and rule thereon.

*Nitsch*, 100 Wn. App. at 524–25.

In *Jackson*, the defendant argued that the sentencing court erred by failing to exercise its discretion to determine whether his convictions for DUI and reckless driving were the same criminal conduct. 150 Wn. App. at 892. The reviewing court, however, dismissed the claim because the defendant did not ask the court at sentencing to exercise such discretion.

*Id.*

Like the defendant in *Jackson*, defendant here failed to ask the sentencing court to exercise its discretion to consider her crimes as same criminal conduct and therefore, the issue has not been preserved for appeal. CP 42–96 (1/21/2011 RP 1–20).<sup>4</sup> The first time defendant raised this issue was at her motion to withdraw her plea; she made no objection to the sentencing court when it calculated her offender score. CP 42–96

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<sup>4</sup> The transcript for defendant's sentencing hearing on January 21, 2011, is attached to defendant's motion to withdraw guilty plea, which was designated as CP 42–96.

(1/21/2011 RP 3–4, 8–14).

Similar to the defendant in *Shale*, the defendant signed her written plea agreement, acknowledging her offender score before pleading guilty. CP 15–16, 22–23. By considering the merits of defendant’s argument, the court would require sentencing courts moving forward to conduct “an examination of the underlying factual context in every sentencing involving multiple crimes committed at the same time”—a scenario the court in *Nitsch* expressly warned against. 100 Wn. App. at 524–25. The case authority on this matter is clear, and requires the defendant to raise this issue at the trial level in order to preserve it on appeal.

Finally, defendant’s final three arguments<sup>5</sup> all question the merits of whether the trial court properly applied a same criminal conduct analysis. But the court does not have to sua sponte make a same criminal conduct analysis. *See, e.g., Nitsch*, 100 Wn. App. at 523–25. Moreover, these arguments attempt to prove the merits of an argument that the trial court did not substantively consider because it dismissed the argument on other grounds: the same criminal conduct analysis was a discretionary decision for the sentencing court. CP 141 (Conclusions of law IV) (finding that it was “questionable” whether the sentencing court would have applied a same criminal conduct analysis). Because defendant failed to

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<sup>5</sup> Brief of Appellant at 10–16.

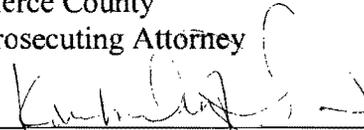
preserve this issue below, the State respectfully requests this Court to dismiss her claim.

D. CONCLUSION.

This Court should dismiss defendant's challenge to her offender score because the trial court properly denied defendant's motion to withdraw after determining that she had been adequately informed of the direct consequences of her plea. Its discretion was neither based on untenable nor unreasonable grounds. Furthermore, defendant waived the issue when she failed to raise it to the sentencing court. The State respectfully requests that this Court affirm defendant's convictions.

DATED: May 3, 2012.

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# PIERCE COUNTY PROSECUTOR

**May 03, 2012 - 2:51 PM**

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