

No. 45730-0-II

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

STATE OF WASHINGTON,

Respondent

V.

TERRY L. JACOB,

Appellant

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Appeal from the Superior Court of Mason County  
The Honorable Judge Amber Finlay

No. 11-1-00354-0

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**BRIEF OF RESPONDENT**

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MICHAEL DORCY  
Mason County Prosecuting Attorney

By  
TIM HIGGS  
Deputy Prosecuting Attorney  
WSBA #25919

521 N. Fourth Street  
PO Box 639  
Shelton, WA 98584  
PH: (360) 427-9670 ext. 417

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A. STATE'S COUNTER-STATEMENTS OF ISSUES  
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Jacob asserts that the trial court erred because when he expressed a desire for new counsel the court did not inquire into what he now describes as a conflict with his attorney. The State answers that Jacob and his attorney had an opportunity to fully address the court but there is no suggestion in the record that Jacob had an actual conflict with his attorney, he did not make a specific allegation in regard to his attorney, and the only indication was that he desired a "non-public defender" to represent him. Accordingly, the State contends that on these facts the trial court did not err and that even if error did occur, it was harmless on these facts..
2. This appeal is Jacob's second appeal of his offender score and resulting sentence. The issues raised by Jacob in the instant appeal were determined in the earlier appeal or might have been determined had Jacob raised these issues in the earlier appeal. Therefore, consideration of these issues now should be barred under the law of the case doctrine.

B. FACTS AND STATEMENT OF THE CASE

This is Jacob's second appeal to this Court from the same conviction. The underlying facts of the offense are detailed in the opinion of the Court in the first appeal at *State v. Jacob*, 176 Wn. App. 351, 353-57, 308 P.3d 800 (No. 42914-4-II, Aug. 27, 2013).

After hearing the evidence, a Mason County jury convicted Jacob of the crimes of felony driving under the influence and driving while

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license revoked in the first degree. *Id.* at 355. Sentencing occurred on December 8, 2011. *Id.*

At the time of his arrest, and at sentencing, Jacob had seven prior convictions of driving under the influence, as follows:

	Crime	Date of Crime	Date of Sentence
1	Felony DUI	01/03/09	05/11/09
2	DUI	03/06/03	07/03/03
3	DUI	01/31/01	06/05/01
4	DUI	05/17/00	06/05/01
5	DUI	11/29/99	06/05/01
6	DUI	01/26/97	08/21/97
7	DUI	08/29/88	06/05/89

*Id.* at 355-56. In addition, Jacob has a controlled substance felony conviction from 1993 and in April of 2005 was convicted of driving while license suspended in the first degree. *Id.*

Because of Jacob's 2005 conviction for DWLS, the trial court found that there was no unbroken five-year wash period between Jacob's 2003 and his 2009 convictions for DUI; thus, the trial court reasoned that

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each of Jacob's DUI convictions, to include his 1989 conviction, contributed one point to his offender score, for a total of seven points. *Id.* at 355-57. Additionally, the trial court added one point for Jacob's 1993 controlled substance felony conviction, and added one point because Jacob was on community supervision when he committed the current offense. *Id.* The court found that Jacob had, in total, an offender score of nine. *Id.*

On review, this Court held that "inclusion of [Jacob's] 1993 drug and 1989 DUI convictions was improper[.]" but the Court otherwise affirmed the trial court's sentencing score calculation. *Id.* at 357. Following consideration of Jacob's first appeal of his sentence, this Court wrote as follows: "Accordingly, we vacate Jacob's sentence and remand for recalculation of Jacob's offender score and resentencing consistent with our analysis." *Id.* at 364.

In compliance with this Court's order on remand, the trial court resentenced Jacob on November 18, 2013, RP 1-10; CP 5-19. On remand, the trial court removed Jacob's 1989 DUI conviction and his 1993 controlled substance conviction from his sentencing score calculation and, thus, reduced the score from the previous calculation of nine to a new calculation of seven. RP 6-7; CP 6.

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C. ARGUMENT

1. Jacob asserts that the trial court erred because when he expressed a desire for new counsel the court did not inquire into what he now describes as a conflict with his attorney. The State answers that Jacob and his attorney had an opportunity to fully address the court but there is no suggestion in the record that Jacob had an actual conflict with his attorney, he did not make a specific allegation in regard to his attorney, and the only indication was that he desired a “non-public defender” to represent him. Accordingly, the State contends that on these facts the trial court did not err and that even if error did occur, it was harmless on these facts.

Jacob asserts that at the resentencing hearing he “told the court that his attorney had not come to see him and they had not discussed the matter.” Br. of Appellant at 2, citing RP 1. This could be a correct statement of fact, but a review of the record reveals only that Jacob’s sole reference to this subject was as follows: “We haven’t even – we need to talk before we can do any of this.” RP 1. After Jacob made this sole comment, his trial attorney then informed the court as follows:

I corresponded with Mr. Jacob and he was going to ask the Court for another attorney on this matter. I responded back to him, advising him that – actually, he asked for two things. One, he asked for a new attorney and he asked that it be a non-public defender. I advised him that whether or not he got a new attorney wasn’t up to me and that it would not be somebody other than a public defender appointment, although if he wanted to hire an attorney he’s certainly able to do that. So, I don’t know if – I also advised him that this is pretty much an administrative matter based

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on the mandate and the Court is probably going to do the sentencing anyway. So, that's where we're at.

RP 2.

In response, the trial court judge then addressed Jacob as follows:

Okay. Let me go ahead – and Mr. Jacob, that's correct. The reason you're here today, Sir, the only reason you're here is because there was a mandate coming back and the Court then has been instructed by the Court of Appeals that we need to re-sentence you.

RP 2. The court did not inquire further into Jacob's reasons for seeking a new attorney, and there was no further discussion from any party in regard to Jacob's desire to have a different attorney who was not a public defender. *Id.* Instead, Jacob changed the subject and began to address the court directly (bypassing his attorney) in regard to his sentencing score.

RP 2-3. On appeal, Jacob now contends that the trial court "infringed [his] right to counsel by failing to inquire into the breakdown of the attorney-client relationship." Br. of Appellant at 4.

But the record does not indicate that there was any kind of breakdown of the attorney-client relationship. RP 1-10. Instead, the record indicates only that Jacob desired the appointment of a "non-public defender." RP 2. Generally, a client does not have a right to good rapport with his counsel. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 725, 16 P.3d 1 (2001). Nor does a defendant have a right to choose any particular

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advocate. *State v. Lopez*, 79 Wn. App. 755, 764, 904 P.2d 1179, 1185 (1995) *disapproved of on other grounds by State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998), citing *Wheat v. United States*, 486 U.S. 153, 159 n. 3, 108 S.Ct. 1692, 1697 n. 3, 100 L.Ed.2d 140 (1988); *State v. DeWeese*, 117 Wn.2d 369, 375–76, 816 P.2d 1 (1991).

Trial court decisions relating to attorney-client differences are generally reviewed for abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). The following three issues are considered on review of a trial court’s denial of a request for new counsel: (1) the extent of the conflict; (2) the adequacy of the trial court’s inquiry; and (3) whether the motion was timely. *Id.* at 607 (quoting *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001)).

In regard to the first consideration, the State contends that there is no indication of a conflict between Jacob and his trial counsel and that, instead, the only indication is that Jacob desired appointment of a “non-public defender.” RP 2. In regard to the third consideration (whether the motion was timely), the State contends that the motion was not timely, because it was brought at the resentencing hearing after a remand from a prior trial and resentencing. RP 1-2.

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In regard to the second consideration (adequacy of the trial court's inquiry), Jacob contends that the trial court's inquiry was inadequate. Br. of Appellant at 4-6. "[A] trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully." *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007). Here, the trial court allowed both Jacob and his attorney to speak freely. RP 1-3. When Jacob addressed the court directly, he did not mention any conflict with his attorney or ask that a different attorney be appointed; instead, he argued his opinion in regard to the correct sentencing score on remand. RP 2-3.

Jacob cites *United States v. Lott*, 310 F.3d 1231 (10th Cir. 2002), to support his assertion that "[a] trial court... abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client." Br. of Appellant at 4. But Jacob's assertion assumes a *conflict* even though the record contains no evidence of a *conflict*. And, *Lott* requires a hearing on a request for new counsel only where "a defendant makes sufficiently specific, factually based allegations in support of his request for new counsel." *Id.* at 1249 (10th Cir. 2002). But in the instant case Jacob made no allegations whatsoever in support of his request for

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new counsel, except that he desired appointment of a “non-public defender.” RP 2.

Finally, even if Jacob had made specific allegations and had alleged a conflict, which he didn't, the error would be harmless on the facts of the instant case. *State v. Lopez*, 79 Wn. App. 755, 764, 904 P.2d 1179, 1185 (1995). “The ‘peremptory denial’ of a defendant's request for new counsel is harmful only if counsel's performance actually violated the defendant's Sixth Amendment right to effective assistance of counsel.” *Id.* at 767 (citations omitted).

To prove that his trial attorney's performance was deficient, Jacob must show both that his attorney's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the result would have been different but for his attorney's deficient performance. *Id.*, citing *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). On the facts of the instant case, Jacob has not, and cannot, make this showing, because all that occurred here is that the trial court followed the mandate of the Court of Appeals on

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remand and reduced Jacob's offender score by two points when resentencing him. RP 1-10; CP 6.

2. This appeal is Jacob's second appeal of his offender score and resulting sentence. The issues raised by Jacob in the instant appeal were determined in the earlier appeal or might have been determined had Jacob raised these issues in the earlier appeal. Therefore, consideration of these issues now should be barred under the law of the case doctrine.

This appeal is Jacob's second appeal of his offender score and resulting sentence.

Under the "law of the case" doctrine, "an appellate court may reconsider only those decisions that were clearly erroneous and that would work a manifest injustice to one party if the clearly erroneous decision were not set aside." *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). The reviewing court will reconsider the same issues decided in an earlier appeal only when it determines that its earlier holdings were clearly erroneous. *Worl*, 129 Wn.2d at 425, 918 P.2d 905; *Folsom v. Spokane County*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988).

Furthermore, the doctrine also provides that "questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is

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no substantial change in the evidence at a second determination of the cause.” *Folsom*, 111 Wn.2d at 263, 759 P.2d 1196 (emphasis added) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965); *Greene v. Rothschild*, 68 Wn.2d 1, 7, 402 P.2d 356, 414 P.2d 1013 (1965)). Through applying this doctrine, the reviewing court avoids entertaining piecemeal appeals. RAP 2.5(c); see *Miller v. Sisters of St. Francis*, 5 Wn.2d 204, 207, 105 P.2d 32 (1940), *overruled on other grounds in Greene*, 68 Wn.2d 1, 414 P.2d 1013, *and on additional grounds in Pierce v. Yakima Valley Mem. Hosp. Assoc.*, 43 Wn.2d 162, 260 P.2d 765 (1953).

In his second appeal of his sentence in this case, Jacob contends that the use of the plural form of the word “conviction” in RCW 9.94A.525(2)(e) results in his 1997 conviction for DUI not counting toward his offender score because it is only one conviction, rather than two. Br. of Appellant at 7-8. The State does not agree with Jacob’s contention on this point, because when interpreting a statute, the reviewing court should determine and carry out the intent of the legislature and avoid an interpretation that would produce an unlikely, absurd, or strained result. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010); *Morris v. Blaker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992). But, still more, this

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issue is an issue that Jacob could have, but did not, raise in the first appeal of his sentencing score in this case. As such, it is subject to the law of the case doctrine. *Folsom*, 111 Wn.2d at 263.

Jacob also contends that his 1997 conviction for DUI should not be included in his offender score on resentencing because, he contends, “it is possible” that more than five years elapsed from the date of his last release from confinement or entry of judgment and sentence for any crime before he committed the 1997 DUI. Br. of Appellant at 8-9. However, no new evidence was considered at the resentencing; and, in fact, the only action taken at the resentencing is that, in obedience to this Court’s mandate following the first appeal of the sentencing score, two points were removed from the calculation of Jacob’s offender score and he was resentenced with an offender score of seven rather than the previously calculated score of nine. RP 1-10; CP 6. As such, this issue is an issue that was determined in the prior sentencing and appeal, or that might have been determined had it been raised, and it is, therefore subject to the law of the case doctrine. *Folsom*, 111 Wn.2d at 263.

Because the law of the case doctrine applies, this court should decline to engage in further analysis. *Worl*, 129 Wn.2d at 424-25.

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D. CONCLUSION

A Mason County jury convicted Jacob of felony driving under the influence and driving with a revoked license. The trial court sentenced Jacob based upon its calculation that Jacob had an offender score of nine. Jacob appealed the conviction and the sentence, to include the calculation of his offender score. On appeal, this Court found that two of Jacob's prior convictions were erroneously included in the trial court's offender score calculation. Thus, this Court remanded the case to the trial court for resentencing following the removal of the two erroneous points from the total calculation of nine.

At resentencing, Jacob's trial counsel informed the court that Jacob had, through correspondence to him, requested the appointment of a new attorney who was not a public defender. Jacob did not allege a conflict with his attorney or make any specific, factually based allegation in regard to his attorney. Therefore, the trial court was not required to inquire further in regard to any potential conflict. In any event, the trial court took no action other than to follow the order of this Court on remand, and Jacob has not shown that his attorney's representation was deficient or that the result of the resentencing would have been different had the trial court

appointed a different attorney. Therefore, even if error had occurred (which it did not), the error would have been harmless.

Finally, the offender score issues raised by Jacob in this second appeal were decided or, if they would have been raised, could have been decided in the first appeal. Accordingly, these issues are barred now by the law of case doctrine.

The State asks that the Court deny Jacob's appeal and affirm his judgment and sentence.

DATED: July 21, 2014.

MICHAEL DORCY  
Mason County  
Prosecuting Attorney

  
\_\_\_\_\_  
Tim Higgs  
Deputy Prosecuting Attorney  
WSBA #25919

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# MASON COUNTY PROSECUTOR

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