

NO. 33153-9-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROMAN LEE BONE, APPELLANT

FILED
Nov 09, 2015
Court of Appeals
Division III
State of Washington

Appeal from the Superior Court of Grant County
The Honorable Evan E. Sperline

No. 14-1-00783-6

Brief of Respondent

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

1. By failing to object at sentencing, did defendant waive his right to challenge whether his prior convictions constitute the same criminal conduct?
2. Under *State v. Blazina*, whether defendant may challenge for the first time on appeal the imposition of legal financial obligations when the sentencing court verbally inquired about his long-term ability to pay, and he responded that he could?

B. STATEMENT OF THE CASE.

On December 1, 2014, the Grant County Prosecuting Attorney's Office ("State") charged Roman Lee Bone ("defendant") with one count of burglary in the second degree, RCW 9A.52.030(1). CP 1–2. On January 26, 2015, defendant waived his right to a jury trial on the case, so the parties proceeded to a nonjury trial on January 29, 2015 before the Honorable Evan E. Sperline. CP 17.

After hearing the testimony in the case, the court found defendant guilty of burglary in the second degree and entered findings of fact and conclusions of law accordingly. CP 31–33. On February 23, 2015, it sentenced defendant to 53 months in custody based on defendant's offender score of 8—which is now disputed on appeal.¹ CP 34–48.

Defendant's offender score was calculated by including two convictions for "Possession C/S by Prisoner" from November 4, 2009.

¹ With an offender score of 8, defendant had a standard range of 43-57 months in custody. CP 37 (paragraph 2.3).

CP 36 (Judgment and sentence, paragraph 2.2, crimes 2 and 3). The court noted that these two convictions “(did not encompass)” on the judgment and sentence. CP 36. Defendant did not object or present any evidence to contest the court’s finding that the prior convictions did not constitute the same criminal conduct. *See* RP 37–45.²

The court also imposed \$1450 of legal financial obligations (“LFOs”) as part of defendant’s sentence, of which \$950 appear to be discretionary.³ CP 40–41 (paragraph 4.3).

Defendant timely filed a notice of appeal. CP 52.

C. ARGUMENT.

1. BY FAILING TO OBJECT AT SENTENCING, DEFENDANT WAIVED HIS RIGHT TO CHALLENGE WHETHER HIS PRIOR CONVICTIONS CONSTITUTE THE SAME CRIMINAL CONDUCT.

When computing a defendant’s offender score, multiple prior convictions are counted separately except:

- (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for

² The verbatim report of proceedings is contained in two different volumes. The first volume contains defendant’s pretrial hearings and the sentencing hearing on February 23, 2015. The other volume is a transcript of defendant’s nonjury trial—which occurred on January 28, 2015. That volume is not relevant to this appeal.

³ The court imposed a mandatory \$500 victim assessment, as well as discretionary court costs (filing fee of \$200) and a fee (\$750) for a court appointed attorney. CP 40.

which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

RCW 9.94A.525(5)(a)(i).

A sentencing court’s determination of same criminal conduct is reviewed for an abuse of discretion. *State v. Aldana Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013) (“[W]e have repeatedly observed that a court’s determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law.”). At sentencing, it is the defendant’s burden to prove his prior convictions constituted the same criminal conduct. *Id.* at 538–41.

In *State v. Williams*, 176 Wn. App. 138, 307 P.3d 819 (2013), this court remanded a case for sentencing because the sentencing court erred in applying the burglary antimerger statute instead of engaging in a same-criminal-conduct analysis. It held:

If a prior sentencing court found multiple offenses “encompass the same criminal conduct,” the current sentencing court must count those prior convictions as one offense. If the prior sentencing court did not make this

finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must independently evaluate whether those prior convictions “encompass the same criminal conduct” and, if they do, must count them as one offense.

Id. at 141. In that case, however, there was no indication from the sentencing court that it had considered a same-criminal-conduct analysis.

Unlike *Williams*, where the record failed to show the sentencing court considered whether the defendant’s prior convictions constituted the same criminal conduct, the record in this case indicates the sentencing court at least considered the issue. By noting that defendant’s prior convictions of possessing a controlled substance by prisoner “did not encompass,” the court clarified that each prior conviction would count as a point towards defendant’s offender score. *See* CP 36.

In response to the court’s finding, defendant failed to argue or present any evidence to the contrary. Defendant failed his burden to challenge the sentencing court’s determination. In fact, defendant and his attorney signed the judgment and sentence acknowledging the court’s finding. *See* CP 47. In hindsight, defendant now challenges his offender score notwithstanding his absolute failure to satisfy his burden below. Defendant thus waived his right to challenge whether his prior convictions constitute the same criminal conduct.

Admittedly, the record from sentencing contains nothing further on the issue (probably because defendant never attempted to satisfy his burden and even question the sentencing court on the issue). This court must thus consider, really, to what extent a sentencing court must conduct a same-criminal-conduct test on the record in light of defendant's failure to "establish the crimes constitute the same criminal conduct." *Aldana Graciano*, 176 Wn.2d at 539.

If this court finds the trial court's actual, *unchallenged* findings on the judgment and sentence that defendant's prior convictions "did not encompass" to be sufficient, then the State respectfully requests this court to affirm defendant's conviction and sentence. If the record is insufficient, however, then the State requests the issue be remanded for resentencing for clarified findings regarding defendant's prior convictions.

2. UNDER *BLAZINA*, DEFENDANT MAY NOT CHALLENGE—FOR THE FIRST TIME ON APPEAL—THE IMPOSITION OF LFOs WHEN THE COURT INQUIRED ABOUT HIS LONG-TERM ABILITY TO PAY, AND HE RESPONDED THAT HE COULD.

An appellate court may refuse to review any claim of error which is not raised in the trial court. RAP 2.5(a). Specifically, "[a] defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, 182

Wn.2d 827, 832, 344 P.3d 680 (2015). A court at sentencing “must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Id.* at 834.

In *Blazina*, two different sentencing courts relied on boilerplate language in the judgment and sentence to impose LFOs against two defendants and failed to inquire whether they actually had the current or future ability to pay them. *See id.* at 831–32. Even though the defendants failed to object at sentencing, the State Supreme Court specially granted review to consider the merits of a “broken LFO system” in that case—leaving the court of appeals to “make its own decision to accept discretionary review.” *Id.* at 835. Notwithstanding several recommendations for the courts at sentencing, the State Supreme Court held that a court must consider the defendant’s current or long-term ability to pay LFOs before imposing the fees. *See id.* at 832–39.

In this case, the sentencing court satisfied its duty under *Blazina* by specifically questioning defendant about his long-term ability to pay:

JUDGE: Does Mr. Bone have a long term financial---or ability to pay legal financial obligations?

[Defense counsel]: Let’s say very long term.

RP 41. Moreover, the judgement and sentence included standard language that “[t]he court has considered the total amount owing, the defendant’s present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change.” CP 37 (paragraph 2.5).

Although the “boilerplate” language from the judgement and sentence is insufficient under *Blazina*, the court in this case coupled that language with a direct inquiry—even if brief—into defendant’s future ability to pay legal financial obligations. Defendant, through his counsel, informed the court that defendant indeed possessed the ability to ultimately pay his obligations in the long run. RP 41. The court did not need to inquire about defendant’s current ability to pay because defendant was going to be in prison for the next 53 months.

The court specifically inquired into defendant’s future ability to pay: this verbal inquiry satisfies the express holding of *Blazina*. Importantly, despite this verbal inquiry—an inquiry lacking in both of the sentencings considered by the State Supreme Court in *Blazina*—defendant did not object. The court raised the issue and defendant agreed he could pay. Because defendant did not object when the court specifically inquired about his ability to pay, the State requests this court to deny review of this issue under RAP 2.5(a).

D. CONCLUSION.

Defendant waived his right to challenge his offender score because he failed his burden to challenge the court's finding that his prior convictions "did not encompass." But even if this court determined the trial court abused its discretion or misapplied the law, then the matter should be remanded for resentencing.

Additionally, defendant failed to object at sentencing when the sentencing court specifically inquired into his long-term ability to pay LFOs. The court satisfied the inquiry under *Blazina*, and defendant cannot now challenge the imposition of LFOs for the first time on appeal.

DATED: November 9, 2015.

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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) No. 33153-9-III
)
 vs.)
)
ROMAN LEE BONE,) DECLARATION OF SERVICE
)
 Appellant.)

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

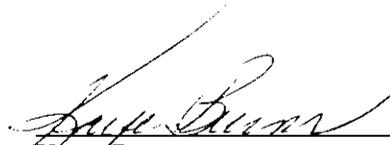
That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Dated: November 9, 2015.



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