

04-1-02713-7, 04-1-02714-5, 04-1-02816-8, 04-1-02817-6, 04-1-02873-7 and 04-1-02897-4. The seven causes were given seven different numbers by the Court of Appeals and consolidated under 24046-1-III. The Court of Appeals dismissed the petitioner's Personal Restraint Petition. *See* Ruling of January 5, 2006.

The petitioner then sought review in this Court which assigned Supreme Court No. 78254-7.

This Court issued a ruling on April 5, 2006 asking the State to respond to three questions: (1) whether the three charges of unlawful possession of payment instruments in cause number 04-1-02816-8 involves only two victims, and if so, whether the two charges involving one victim constitute a single unit of prosecution and/or the "same criminal conduct" for the purposes of offender scoring; (2) whether the two charges of first degree possession of stolen property in cause number 04-1-02713-7, together with the charge of first degree possession of stolen property in cause number 04-1-02897-4 constitute a single unit of prosecution and (3) whether those charges constitute "same criminal conduct."

The State submits this response in compliance with the orders of the Court.

IV.

ARGUMENT

A. THE ISSUES RAISED BY THE PETITIONER ARE MOOT, AS HE HAS NOT ASKED FOR AN AVAILABLE REMEDY.

Beginning with the Court's question on cause number 04-1-02816-8, the State has reviewed the relevant pages in the transcript as mentioned by this Court. It does appear that the original three victims on this case were winnowed to two victims on the three counts of unlawful possession of payment instruments. RP 5-6. However, this does not decide the issue.

The difficulty in determining whether or not there is a double jeopardy issue is that the facts indicate multiple items were taken from the victim in counts II and III. *See* Attach. A. The defendant's agreement to plead guilty resulted in a "short circuiting" of the fact-finding process. There was no trial, or request for a bill of particulars, so there was no election by the State regarding which items upon which it would proceed. There is no record showing exactly which items the State would have used at trial and there was no hearing upon these issues or findings of fact because the defendant did not raise these issues at (or before) the entry of his pleas.

The defendant has placed this court in the position of deciding issues with a lack of “found” facts. The defendant agreed to plead guilty in a large “package deal” that resulted in no trial being had on these cases. Since there was no trial, there is no record, nor an appeal dealing with these issues. Since the petitioner never objected, (rather he agreed and abetted the formation of this situation) he should not now be allowed to take advantage of the situation.

As a practical matter, the defendant was sentenced as a “9+.” If the two counts on this cause number were to be counted as “1,” the petitioner would still be a “9.”

The plea negotiations in these cases covered several different causes and counts. The defendant agreed to an offender score of “9.” RP 14-15. While it might be interesting, from an academic point of view, to discuss the legalities of the questions raised by the petitioner, the State notes that the petitioner is trying to backtrack on his agreement to a particular sentencing score in order to receive a more favorable sentencing situation. Plea bargains are a type of contract between the State and the defendant. *State v. Hardesty*, 129 Wn.2d 303, 318, 915 P.2d 1080 (1996). Such contracts cannot be enforced in a piecemeal fashion. “We hold that a trial court must treat a plea agreement as indivisible when pleas to

multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding.” *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). *See also State v. Ermels*, 156 Wn.2d 528, 540 (2006).

The plea negotiations in these cases ended with pleas to all of the counts on the various causes being made at one time and accepted at one time. It is true that the charges are described in a separate plea statement and judgment and sentence for each cause, simply because there were separate cause numbers being pled simultaneously. An examination of the transcript shows that both parties intended to treat the plea bargain as indivisible. “Absent objective indications to the contrary in the agreement itself, we will not look behind the agreement to attempt to determine divisibility. Such a determination, after the fact, would not serve the plea negotiation process.” *Turley, supra* at 400.

Turning to the next issue for which the Court seeks input, the original charges in 04-1-02713-7 were based on two separate counts of possession of stolen firearms. See Attach. B. The counts involved two different black powder pistols.

Pursuant to the plea negotiations, these charges were reduced to the generic crimes of first degree possession of stolen property. The decision

to reduce the crimes did not change the underlying factual bases for the original charges. In other words, the State lowered the charged crime but did not re-write the original factual bases underlying the original charges.

There can be no issue of *McReynolds*¹ and unit of prosecution in 04-1-02713-7. The legislature has made the unit of prosecution quite clear for possession of stolen firearms in 9.41.040(7). “Each firearm unlawfully possessed under this section shall be a separate offense.” RCW 9.41.040(7).

As for the count in 04-1-02897-4, the Court is misinformed as to the charge in that cause. It was originally first degree burglary. The original charge was reduced to second degree burglary. *See* Attach. C. It is difficult to see how a second degree burglary and two possession of stolen property charges could be subject to a unit of prosecution analysis.

The Court next asks, if the charges previously mentioned do not constitute a single unit of prosecution, are the two charges in 04-1-02713-7 the “same criminal conduct?”

“Same criminal conduct” is defined in RCW 9.94A.589(1)(a) as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.”

1 *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003).

Division Three of the Court of Appeals recently released an opinion stating that the defendant cannot claim error on the issue of “same criminal conduct” when the situation involves a plea bargain. *State v. McDougall*, No. 23451-7-III slip op. (April 25, 2006). The reason for this is that a decision on “same criminal conduct” is a discretionary one. *State v. Anderson*, 92 Wn. App. 54, 62, 960 P.2d 975 (1998). If the defendant does not request that the trial court exercise its discretion (because of a plea bargain), the defendant cannot then claim on appeal that the trial court erred. *Id.*

There are an additional two reasons why the petitioner’s contest of his sentencing score cannot prevail on this question. The issue of whether or not two crimes are the “same criminal conduct” is a question the petitioner should have raised before he pled guilty. *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000) (defendant cannot raise “same criminal conduct” challenges for the first time on appeal).

The record does not indicate any disagreement over the offender score. In any event, the trial court would not have accepted the pleas if there were still unresolved issues. The defendant cannot now raise such an issue.

The second reason the challenge cannot prevail is related to the first: there would have to be a factual determination that the two firearm possession charges constitute the “same criminal conduct” before the defendant could hypothetically be resentenced.

It cannot be shown that the requisite facts exist as a matter of law. It is acknowledged by the State that possession of two firearms can be deemed “same criminal conduct.” *State v. Simonson*, 91 Wn. App. 874, 960 P.2d 955 (1998).

The factual affidavit submitted with the information indicates that one firearm was found in the bed of the petitioner’s pickup truck and the second firearm was found concealed behind a panel in the cab area of the truck. See Attach. B. These facts indicate that these two convictions are not “same criminal conduct” as they did not occur in the same place.

This issue would need to be analyzed and decided by the trial court, not as a matter of law. The putative facts show that this issue should have been presented to the trial court so that this case would not be in its present form without the necessary factual findings. The reason for the lack of findings is the petitioner’s agreement to plead guilty.

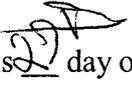
As pointed out, the discussion above is largely irrelevant because the bargain in this case was indivisible. The remedy on these causes is to

either uphold all of the pleas, as entered, or send the entire batch back for trial. The defendant did not ask for specific enforcement of the entire agreement or to withdraw his pleas. Since the defendant did not ask for either remedy available to him under the law, his Personal Restraint Petition is pointless and should be dismissed.

V.

CONCLUSION

For the reasons stated, the Personal Restraint Petition should be dismissed.

Respectfully submitted this  day of April, 2006.

STEVEN J. TUCKER
Prosecuting Attorney


Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent