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No. 86530-2

RECEIVED BY E-MAIL *by*

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JULIO CESAR ALDANA GRACIANO,

Respondent.

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

The Honorable Kitty-Ann Van Doornick

SUPPLEMENTAL BRIEF OF ^{PETITIONER} ~~RESPONDENT~~,
JULIO GRACIANO

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ORIGINAL

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LAW REVIEW

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A. ISSUES PRESENTED

1. Whether the standard for review of a trial court's conclusion regarding same criminal conduct should be *de novo* where the trial court's act is an application of law to a set of facts found by the trial court?

2. Assuming this Court rejects the Court of Appeals' conclusion that review is *de novo*, whether Mr. Graciano's two molestation counts constituted the same criminal conduct under Division Two of the Court of Appeals' decision in *State v. Dolen*, 83 Wn.App. 361, 364-65, 921 P.2d 590 (1996)?¹

B. STATEMENT OF THE CASE

Julio Graciano was charged with two counts of first degree child molestation and four counts of child rape involving E.R. CP 1-4, 62-65. He was also charged with one count of first degree child molestation involving J.R. *Id.* The counts arose from a period of time when Mr. Graciano lived with his cousin, Sergio Robles, Sergio's wife Martha Robles, and their two children, nine year old E.R. and seven year old J.R. *Id.*

¹ The State did not petition this Court to review the propriety of the *Dolen* decision nor the Court of Appeals' conclusion that the molestation offenses were the same criminal conduct. The State only petitioned the standard of review the Court of Appeals applied to the same criminal conduct decision. *See Answer to Petition for Review at 2, 12-14.*

Following a jury trial, Mr. Graciano was convicted of the six counts involving E.R. and acquitted of the count involving J.R. CP 93-99. At sentencing, Mr. Graciano moved the court to find all of the counts constituted the same criminal conduct in light of the State's inability to identify specific acts or times for the counts.

1/22/2010RP 34. The trial court refused, stating:

I'm going to deny the defense motion. I think that the Instructions were clear that there needed to be separate and distinct acts. And that that's – and based on the record of testimony, that there was certainly sufficient evidence for each and every one of the counts to be separate and distinct. I know this was repeatedly objected to or made a record of, in terms of defense point of view, and I appreciate that and the objection is still noted for the Court of Appeals. So that can still be an issue.

1/22/2010RP 6.

In an unpublished opinion, the Court of Appeals agreed with Mr. Graciano and reversed the trial court's refusal to find the two molestation counts the same criminal conduct. Slip at _____. In so doing, the Court of Appeals reviewed the trial court's ruling *de novo*, adopting the reasoning of Division Three in *State v. Torngren*, 147 Wn.App. 556, 196 P.3d 742 (2008). The Court of Appeals rejected Mr. Graciano's other issues and affirmed his convictions. *Id.*

C. ARGUMENT

The Same Criminal Conduct Analysis Is An Application Of A Set Of Facts To The Law Which Is Traditionally Reviewed By This Court *De Novo*

1. Standard of review defined.

A working definition of the standard of review is: “[T]he criterion by which the decision of a lower tribunal will be measured by a higher tribunal to determine its correctness or propriety.”

Kelly Kunsch, *Standard Of Review (State And Federal): A Primer*, 18 Seattle U. L. Rev. 11, 14 -15 (1994).

The different standards look to different components of the decision-making process in their analysis. For instance, “substantial evidence” looks to the evidence in the lower tribunal’s record in support of the finding. *See State v. Galisia*, 63 Wn.App. 833, 838, 822 P.2d 303, 306 (1992). By contrast, “abuse of discretion” looks to the decision-maker and his or her actions or inactions. *See, e.g., State v. Aguirra*, 73 Wn.App. 682, 871 P.2d 616 (1994). “*De novo*” looks to the appellate tribunal, describing how it can review the finding. *See Ski Acres, Inc. v. Kittias County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). Finally, “clearly erroneous” and “arbitrary or capricious” look at the overall big picture of what happened below, beyond the lower tribunal’s record. *Norway Hill Preservation and Protection Ass’n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976).

Id. at 14, 49.

Thus, as the Court of Appeals recognized here, the *de novo* standard is utilized when the appellate court is in as good a position as the trial court to judge the evidence. *Id.* at 11, 37.

2. The facts were uncontroverted following the jury trial.

In calculating a defendant's sentencing range under the Sentencing Reform Act (SRA), the trial court must determine a defendant's offender score, which reflects the "length and seriousness of the defendant's criminal history." *State v. Dunaway*, 109 Wn.2d 207, 212, 743 P.2d 1237, 749 P.2d 160 (1987). When a defendant is sentenced for multiple offenses, the defendant's offender score for each conviction is calculated from prior convictions and "other current offenses." RCW 9.94A.525(1), RCW 9.94A.589(1)(a). However, if the sentencing 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" for purposes of calculating the defendant's offender score. RCW 9.94A.589(1)(a).

[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: 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).

Where the relevant facts are undisputed and the parties dispute only the legal effects of those facts, the standard of review is *de novo*. *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn.App. 81, 88, 173 P.3d 959 (2007), *review denied*, 164 Wn.2d 1009 (2008); *Hogan v. Sacred Heart Med. Ctr.*, 101 Wn.App. 43, 49, 2 P.3d 968, *review denied*, 142 Wn.2d 1014 (2000).

In *Dunaway, supra*, this Court held that the test in determining whether multiple current offenses are the same criminal conduct is “an objective one, not dependent on the [defendant’s] intent.” 109 Wn.2d at 214.

Therefore, in deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.

Id.

Subsequently in *Torngren, supra*, utilizing the objective test announced in *Dunaway*, the Court of Appeals adopted a *de novo* standard in affirming a trial court’s decision refusing to find two

prior juvenile adjudications and two adult prior convictions to be the same criminal conduct:

It seems to us, then, that we are in as good as a position as the sentencing court to apply these objective standards to uncontroverted facts. A *de novo* standard of review of the question "same criminal conduct" would, then, seem more appropriate. See *State v. Ustimenko*, 137 Wn.App. 109, 115, 151 P.3d 256 (2007) (applying *de novo* standard to objective custodial interrogation test); see also *In re Marriage of Hunter*, 52 Wn.App. 265, 268, 758 P.2d 1019 (1988) (appellate court reviews uncontroverted written record independently).

147 Wn.App. at 562-63.

Torngren involved the determination of whether prior convictions sentenced at the same time constituted the same criminal conduct under RCW 9.94A.525(5)(a)(1). 147 Wn.App. at 563. This determination required application of the same test used in determining whether other *current* offenses constitute the same criminal conduct. See RCW 9.94A.525(5)(a)(1) ("The current sentencing court shall determine with respect to other prior adult offenses for 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) . . .") (emphasis added). These authorities

indicate that the Court of Appeals below applied the correct standard of review.

Further, this Court has stated that in general, the *de novo* standard is best applied when the appellate court stands in the same position as the trial court and may make a determination as a matter of law, while the abuse of discretion standard is applied when the trial court is in the best position to make a factual determination. *State v. Garza*, 150 Wn.2d 360, 366, 77 P.3d 347 (2003) (for instance, this Court reviews the trial court's factual determination for abuse of discretion, and its calculation of the offender score *de novo*). In addition, the trial court's decision whether to consider a prior conviction a first strike for the purposes of POAA is also reviewed *de novo*. *State v. Carpenter*, 117 Wn.App. 673, 679, 72 P.3d 784 (2003); *State v. Keller*, 98 Wn.App. 381, 383, 990 P.2d 423 (1999), *aff'd*, 143 Wn.2d 267, 19 P.3d 1030 (2001), *cert. denied*, 534 U.S. 1130 (2002).

For example, in *Garza, supra*, this Court was called upon to determine whether a defendant voluntarily absented himself from trial thus waiving his constitutionally protected right to be present. In deciding the standard of review, this Court held:

[h]ere, because the determination of whether a defendant was voluntarily absent from trial is

dependent upon an inquiry into the facts and the totality of the circumstances, the trial court is in a better position to pass on the question. Therefore, abuse of discretion is the correct standard of review for a trial court's determination of whether the defendant's absence is voluntary and, thus, a waiver of the right to be present at one's trial.

Garza, 150 Wn.2d at 366.

Here, the decision of whether current offenses are the same criminal conduct is not dependent on a determination of facts, since those have already been found by the jury, but an application of the law to those facts, subject to a *de novo* review. Similarly, the Court of Appeals here, after recognizing that many courts applied the abuse of discretion standard, found the "excellent reasoning in *Torngren*" to be persuasive and adopted the *de novo* standard of review. *Graciano*, slip op. at 8 fn.3. This is especially true since here, like in *Dunaway* and *Torngren*, the trial court was applying the same criminal conduct statute to uncontroverted facts as found by the jury. Under an "objective" standard, the appellate court was in as good a position as the sentencing court since the trial jury had already found the facts. The Court of Appeals did not err in reviewing the sentencing court's decision *de novo*.

3. Alternatively, a finding of same criminal conduct is a mixed question of law and fact which this Court has traditionally reviewed *de novo*.

Alternatively, a finding that the current offenses constitute the same criminal conduct is a mixed question of law and fact which this Court has traditionally reviewed *de novo*. See *Rasmussen v. Department of Employment Security*, 98 Wn.2d 846, 849, 658 P.2d 1240 (1983) (for mixed questions of law and fact, the proper standard of review is *de novo*). Here, the appellate court was applying the law to a set of facts found by the sentencing court, resulting in a mixed question of law and fact.

An example of the application of this standard is in this Court's decision in *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994). In *Dearbone*, the trial court found good cause to reopen the period for service of a notice to seek the death penalty pursuant to RCW 10.95.040 on three grounds: (1) the deputy prosecutor's efforts to accommodate the defense were a partial cause of the failure to serve, (2) defendant had actual notice of the State's intent, and (3) defendant suffered no prejudice as a result of the delay. 125 Wn.2d at 177-78. This Court analyzed this issue as a mixed question of law and fact and used a *de novo* standard:

This court will review *de novo* the trial court's finding of good cause under RCW 10.95.040. We analyze the

trial court's ruling in two parts. First, we construe the definition of good cause as it appears in RCW 10.95.040. Because this is a legal question, we review the trial court's ruling on the issue *de novo*. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991) (*de novo* review for issues involving questions of law).

Second, we determine whether the unique factual circumstances of this case constitute good cause as it is used in the statute. The Legislature's adoption of special pretrial procedures for seeking the death penalty implies that a finding of good cause is not a matter left solely to the trial court's discretion. Because the determination of good cause under RCW 10.95.040 is a mixed question of fact and law, centered on the meaning of the legal standard of good cause, we review the trial court's ruling on the issue *de novo*. *United States v. Spillone*, 879 F.2d 514, 520 (9th Cir.1989), *cert. denied*, 498 U.S. 878 (1990) (trial court's ruling on mixed questions reviewable *de novo*); *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993) (mixed question of law and fact under *Frye* test reviewed *de novo*); *State v. Tatum*, 74 Wn.App. 81, 86, 871 P.2d 1123 (1994) (“[w]hen the trial court bases an otherwise discretionary decision solely on application of a court rule or statute to particular facts, the issue is one of law, which is reviewed *de novo*”).

Id.

To the extent that the decision of whether offenses are same criminal conduct is discretionary, and thus, should be reviewed under an abuse of discretion standard, that argument should be rejected. Other decisions by the trial court that are discretionary and involve factual findings by the court also support *de novo* review here.

A prime example of a discretionary ruling that is reviewed under the mixed question *de novo* standard are CrR 3.6 motions to suppress evidence. A defendant who does not move in the trial court to suppress improperly obtained evidence waives the right to raise the issue on direct appeal. *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). Nevertheless, even though this ruling is discretionary, this Court still reviews the legal conclusions of the trial court *de novo*. The ruling on a suppression motion, like the same criminal conduct ruling, is a mixed question of law and fact which is reviewed *de novo*. *Franklin County v. Sellers*, 97 Wn.2d 317, 329-30, 646 P.2d 113 (1982); *State v. Solomon*, 114 Wn.App. 781, 787-88, 60 P.3d 1215 (2002).²

Division One of the Court of Appeals has acknowledged that, even though the question of whether offenses constitute the same criminal conduct is discretionary, the determination is a mixed question of law and fact. *See State v. Nitsch*, 100 Wn.App. 512, 523-25, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000) (same criminal conduct requires factual determination and

² This Court reviews the disputed findings of fact of the trial court under a substantial evidence standard. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

application of correct legal rules).³ The *Nitsch* Court noted the determination of same criminal conduct is not mandatory but requires an affirmative request by the defendant, like a CrR 3.6 motion to suppress. *Id.* at 523.

A finding of same criminal conduct involves both a factual determination and an application of those facts to the law. This is a mixed question of law and fact, which as argued, is reviewed *de novo*. This Court should rule consistent with its decision on standards of review that a determination on a same criminal conduct request is a mixed question and review it *de novo*.

4. The cases applying an abuse of discretion standard to the same criminal conduct determination should be reexamined.

The cases applying an abuse of discretion standard to the same criminal conduct analysis trace their genesis to this Court's decision in *State v. Collicott*, 112 Wn.2d 399, 771 P.2d 1137 (1989). *Collicott* followed *Dunaway* and applied the principles of same criminal conduct to a particular set of facts. In determining whether other current offenses constitute the same criminal conduct, this Court stated:

³ However, the *Nitsch* Court ruled this analysis is reviewed for an abuse of discretion, which is contrary to traditional mixed question issues which are reviewed *de novo*. *Nitsch*, 100 Wn.App. at 520, 523.

Matters of sentencing traditionally have been within a trial judge's discretion. The Washington Sentencing Reform Act of 1981 altered this traditional formula, but the Legislature did not do away with judicial discretion: the SRA "structures, but does not eliminate, discretionary decisions affecting sentences . . ." RCW 9.94A.010. Thus, within the SRA's guidelines, a trial judge's discretion in sentencing matters remains intact. *Cf. State v. Ammons*, 105 Wn.2d 175, 181, 713 P.2d 719, 718 P.2d 796 (1986). On matters within SRA guidelines, an appellate court will not reverse a trial judge's sentencing decision within his discretion unless it finds a clear abuse of that discretion or misapplication of the law. *State v. McAlpin*, 108 Wn.2d 458, 467, 740 P.2d 824 (1987) (exceptional sentence excessive only if discretion abused); *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986) (same); *State v. Tunell*, 51 Wn.App. 274, 284, 753 P.2d 543 (1988) (same).

We give similar deference to a judge when he or she considers the factors which determine a defendant's offender score. The determination of what constitutes the same criminal conduct is a necessary inquiry in assessing the offender score. We uphold the trial court's decision because we find neither a clear abuse of discretion nor a misapplication of the law.

Collicott, 112 Wn.2d at 404.

As argued *supra*, the fact that the decision of whether offenses are the same criminal conduct is discretionary does not mandate a different standard of review. This Court reviews other decisions of the trial court under a mixed question, which calls for *de novo* review of the application of the law to the fact found by the trial court. See section (3), *supra*.

Further, in *Collicott*, this Court ignored its decisions in cases where the review of trial court decisions requiring application of the law to a set of facts, a mixed question, that were traditionally reviewed by this Court *de novo*. See section (3) *supra*. This Court should reexamine *Collicott* in light of these decisions.

5. Even under an abuse of discretion standard, the trial court erred in failing to find the two molestation counts constituted the same criminal conduct.

If this Court rejects the *de novo* standard and instead determines the abuse of discretion standard applies, the trial court erred in failing to find the molestation counts to be the same criminal conduct.

“An appellate court will not reverse the decision of a trial court within that court's discretion unless it finds a clear abuse of discretion or misapplication of the law.” *State v. Burns*, 114 Wn.2d 314, 316-17, 788 P.2d 531 (1990), citing *Collicott*, 112 Wn.2d at 404-05. Similar deference will be given to the trial court's determination of what constitutes the same criminal conduct when assessing the appropriate offender score. *Id.*

Even if this Court follows the *Collicott* Court's abuse of discretion standard, under Division Two's decision in *State v. Dolen*, 83 Wn.App. 361, 921 P.2d 590 (1996), the trial court erred in failing

to find that the two molestation counts would not constitute the same criminal conduct.

Mr. Graciano was convicted of four counts of child rape and two counts of child molestation. At sentencing, Mr. Graciano requested the court to find all of the counts constituted the same criminal conduct in light of the State's inability to identify specific acts or times for the counts under *Dolen*, 83 Wn.App. at 365. In *Dolen*, the court looked at the evidence presented (six different incidents in which Mr. Dolen engaged in sexual intercourse and/or sexual contact with a child) and determined it was unclear from the record whether the jury convicted him of the two offenses in a single incident or in separate incidents. *Dolen*, 83 Wn.App. at 365. The Court reasoned that if Mr. Dolen had been convicted of two offenses from a single incident, then they would have encompassed the same criminal conduct. *Id.* The court held: "Here, we hold that Dolen's crimes, committed through continuous sexual behavior over a short period of time, also involved the same objective criminal intent — present sexual gratification." *Id.* The Court went further, noting that "the record does not tell us whether the jury convicted Dolen of committing the two offenses in a single incident or in separate offenses." *Id.* Thus, the Court concluded:

Here, the State failed to prove that Dolen committed the crimes in separate incidents. Consequently, the trial court's finding that the two convictions did not constitute the same criminal conduct is unsupported. The trial court erred in treating each conviction as a prior offense in determining Dolen's offender scores and criminal sentences. We vacate the sentences and remand for resentencing.

Dolen, 83 Wn.App. at 365.

Mr. Graciano's case is almost identical to *Dolen*. Although the testimony showed different means of committing the rape and molestation, and different dates, it is unclear from the record whether the jury convicted Mr. Graciano for committing the offenses in a single incident or in separate incidents. E.R. testified Mr. Graciano inappropriately touched her and also made her touch Mr. Graciano inappropriately on many occasions during the two year charging period, but was unable to specify the time and place.

The evidence as presented does not eliminate the circumstance of the acts occurring during a single incident. *Dolen*, 83 Wn.App. at 365. Without a special verdict setting out the specific times and places, it is impossible to find the State had proven the acts all occurred at different times.

To avoid the different criminal conduct, the State needed to show the incidents occurred at different times. *Id.* The defense had asked a number of times for specificity as to the acts charged and

were denied that clarification. The fact the Court gave the unanimity instruction does not provide assurance that the offenses occurred at separate times. CP 65; *State v. Petrich*, 101 Wn.2d 566, 572-73, 683 P.2d 173 (1984). All that the *Petrich* instruction guaranteed is that the jury agreed the acts were separate acts. It did not eliminate the fact the acts could have occurred during a single incident as in *Dolen*. 83 Wn.App. 365.

In sum, "the record [here] does not tell us whether the jury convicted [Mr. Graciano] of committing the two offenses in a single incident or in separate incidents." *Dolen*, 83 Wn.App. at 365.

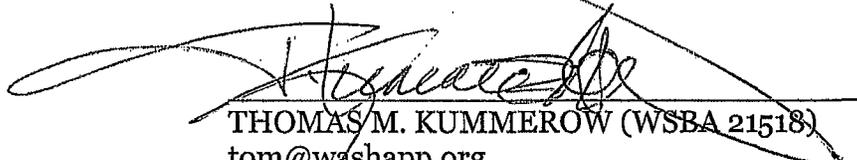
"[T]he State [then] failed to prove that [Mr. Graciano] committed the crimes in separate incidents." *Id.* In light of the well-reasoned decision in *Dolen*, the Court of Appeals did not abuse its discretion in concluding the molestations counts constituted the same criminal conduct.

D. CONCLUSION

For the reasons stated, Mr. Graciano requests this Court affirm the conclusion of the Court of Appeals and find *de novo* review is the appropriate standard of review for same criminal conduct rulings and affirm the Court of Appeals.

DATED this 29th day of February 2012.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

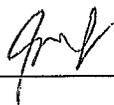
STATE OF WASHINGTON,)	
)	
APPELLANT,)	
)	NO. 86530-2
v.)	
)	
JULIO GRACIANO,)	
)	
RESPONDENT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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