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DEC 18 2009

King County Superior
Appellate Court

NO. 63243-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GARY STREITLER,

Appellant.

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

The Honorable Michael J. Fox, Judge

REPLY BRIEF OF APPELLANT

2009 DEC 18 PM 12:55
COURT REPORTER
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A. ARGUMENT IN REPLY

IT IS REASONABLY PROBABLE THE COURT WOULD HAVE DEEMED STREITLER'S OFFENSES THE SAME CRIMINAL CONDUCT IF COUNSEL HAD RAISED THE ISSUE.

The State argues the trial court was within its discretion to find these offenses were separate, both based on its analysis of Streitler's intent and on the burglary anti-merger statute. Brief of Respondent at 12. But this is not the issue. First, the court did not actually exercise its discretion. Second, even if the court made an "implicit determination," the record still shows the court could and likely would have made a different determination if counsel had raised and argued the issue.

a. The Trial Court Made No Implicit Determination the Offenses Were Not the Same Criminal Conduct.

The State argues this Court should presume the trial court exercised its discretion to find Streitler's offenses were not the same criminal conduct and to apply the burglary anti-merger statute even though there was no discussion of this issue in the briefing or on the record. Brief of Respondent at 8-9. In support of this assertion, the State cites to State v. Channon, 105 Wn. App. 869, 877, 20 P.3d 476 (2001). Channon is inapposite to this case for several reasons.

First, Channon involved a challenge to the court's exercise of discretion, rather than, as here, to counsel's failure to request that discretion be exercised. Id. at 876, 878. Unlike Channon, Streitler need not show the

court abused its discretion in order to prevail. Counsel was ineffective if there is a reasonable probability the court would have come to a different conclusion if the issue had been raised. Channon sheds little light on that analysis.

Second, Channon does not support the State's argument. The separate offenses in Channon occurred on different dates. 105 Wn. App. at 877-78. The Channon court also relied on State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998), in which the crimes occurred blocks apart. The Channon court specifically relied on the clear temporal/spatial separation in finding an implicit determination of same criminal conduct: "The record reflects, however, that these offenses occurred on different dates, which, under the Anderson rationale, we treat as the trial court's 'implicit determination' that these prior offenses did not constitute the same criminal conduct for purposes of calculating Channon's offender score." Channon, 105 Wn. App. at 878. No such facts support an implied determination here, where the offenses were separated only by moments and feet.

Finally, Channon does not account for the fact that in this case, counsel expressly stipulated to the offender score. 4RP 2-3. Given counsel's stipulation, the trial court in this case had no reason to determine, implicitly or otherwise, whether that score could or should have been

different. This court should conclude that no “implicit determination” of same criminal conduct was made.

b. It Is Reasonably Probable the Court’s Determination Would Have Been Different Had Counsel Raised the Issue.

Even if the court impliedly determined Streitler’s offenses were not the same criminal conduct, the record shows that determination would probably have been different had counsel raised the issue. As noted in the Brief of Appellant, the court had discretion to find same criminal conduct. State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). The offenses were “part of a continuous transaction or in a single uninterrupted episode.” State v. Young, 97 Wn. App. 235, 984 p.2d 1050 (1999). And the record shows the court was inclined to be lenient. 4RP 6. Thus, Streitler was denied effective assistance of counsel despite any implied determination.

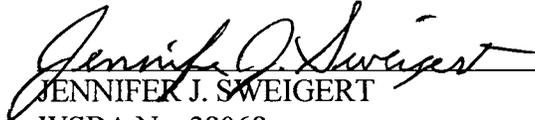
B. CONCLUSION

For the foregoing reasons and the reasons stated in the Brief of Appellant, Streitler respectfully requests this court remand this case for a new sentencing hearing.

DATED this 17th day of December, 2009.

Respectfully submitted,

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