

63647-2

63647-2

NO. 63647-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILSON TILLMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZÁLEZ

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

MICHAEL J. PELLICCIOTTI
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

2010 JAN 27 PM 2:50
FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL HISTORY	1
2. TRIAL FACTS	3
C. <u>ARGUMENT</u>	5
1. TILLMAN HAS WAIVED ANY CLAIM TO CHALLENGE HIS STANDARD RANGE	5
2. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED CrR 3.5 FINDINGS	8
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Pers. Restraint of Goodwin, 146 Wn.2d 861,
50 P.3d 618 (2002)..... 5

State v. Bergstrom, 162 Wn.2d 87,
169 P.3d 816 (2007)..... 5, 6

State v. Ford, 137 Wn.2d 472,
973 P.2d 452 (1999)..... 6

State v. Hillman, 66 Wn. App. 770,
832 P.2d 1369, rev. denied,
120 Wn.2d 1011 (1992)..... 8, 9

State v. McGary, 37 Wn. App. 856,
683 P.2d 1125, rev. denied,
102 Wn.2d 1024 (1984)..... 8, 9

State v. Nitsch, 100 Wn. App. 512,
997 P.2d 1000 (2000)..... 5, 6

State v. Smith, 68 Wn. App. 201,
842 P.2d 494 (1992)..... 8, 9

Statutes

Washington State:

RCW 9.94A.370 6

RCW 9.94A.525 5

RCW 9.94A.530 6

RCW 9.94A.537 6

RCW 9A.36.031 5

Rules and Regulations

Washington State:

CrR 3.5..... 2, 8, 9

Other Authorities

Sentencing Reform Act 6

A. ISSUES

1. A defendant can waive an appellate claim that his standard range is wrong when he agreed to the range at sentencing. In this case, Tillman agreed to his standard range both on the record and in his presentence memorandum. Has he waived his claim that his convictions are of the same criminal conduct?

2. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court during the appeal and are consistent with the trial court's oral ruling. Has the trial court properly submitted written findings in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Defendant Wilson Tillman was charged by amended information with five counts: (1) Assault in the Third Degree; (2) Assault in the Third Degree; (3) Malicious Mischief in the Second Degree; (4) Malicious Mischief in the Second Degree; and

(5) Attempted Theft of Motor Vehicle. Supp. CP __ (Sub 70B, Amended Information). These charges arose after Tillman assaulted two police officers, damaged their police vehicle, damaged a Jeep, and tried to steal the Jeep on October 28, 2008.

Id.

The trial began on May 4, 2009, before the Honorable Steven González. 2RP¹ 1-4. A jury found Tillman guilty as charged on May 7, 2009. 2RP 1-4; CP 10-14. As a part of the trial, Judge González denied a motion to suppress Tillman's statements following the CrR 3.5 hearing. 2RP 6-46. The trial court's written findings of fact for the CrR 3.5 hearing were filed on November 24, 2009. Supp. CP __ (Sub 105, Findings of Fact / Conclusions of Law).

On June 5, 2009, Judge González sentenced Tillman based on an offender score of 9 for the first four counts, and on an offender score of 15 for count five. 5RP 2-6. This resulted in a standard sentencing range of 51 to 68 months² on counts one and two, 22 to 29 months on counts three and four, and 32 ¼ to 42 ¾

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (01/30/09); 2RP (05/04/09); 3RP (05/05/09); 4RP (05/06/09); 5RP (05/07/09); and 6RP (06/05/09 sentencing hearing).

² The maximum sentence under this Class C felony is 60 months. 6RP 4; CP 95.

months on count five. 6RP 4. At sentencing both parties agreed to these standard ranges on the record and in their respective presentence memoranda. 6RP 3-4; CP 79-80, 95; Supp. CP ___ (Sub 85, Statement of Prosecuting Attorney). Judge González sentenced Tillman to a standard range sentence. 6RP 6; CP 95-97. Tillman now appeals his sentence. CP 82-93.

2. TRIAL FACTS

On the afternoon of October 28, 2008, John Flodin was leaving work in the Pioneer Square area of Seattle on his way to an appointment. 4RP 75-76, 78-79. As he got in his car, he could see Wilson Tillman trying to get into the driver's side door of a Jeep Cherokee about 15-20 feet away. 4RP 79-80. Tillman was wearing a bike helmet and had a bike lying next to him. 4RP 79. Flodin saw Tillman go from the driver's door to the passenger door, pounding his fist against each window 3-4 times in order to get into the car. 4RP 86. Flodin knew that there were easier ways to get into a car, and determined that if Tillman were locked out of his car he would not break a window to enter it. 4RP 87. He called 911. 4RP 86.

Flodin saw Tillman with a screwdriver in his hand and then saw him get in to the Jeep. 4RP 85-86, 88. Tillman was lying flat along the seats, when the Jeep's car alarm went off. 4RP 83-84. Tillman did not react to the alarm. 4RP 84. Seattle police officers arrived on scene and saw Tillman in the Jeep with the screwdriver in his hands. 4RP 92-93, 136-38. They took Tillman into custody. 4RP 99-100. The ignition was broken and there was visible damage to the passenger side door, where the lock was forced. 4RP 100. The steering column was broken and cracked. 4RP 103.

The police attempted to escort Tillman into the police car. 4RP 116. Tillman would not comply. 4RP 117-18. Three officers tried to bring Tillman into the backseat of the police car; he kicked the officers, slamming one into the car door, and immobilizing her arm for weeks. 4RP 180-82. Tillman then bit another officer causing his hand to bleed. 4RP 119-20. Tillman was tased, but continued to fight with police. 4RP 122-26. Even after Tillman was forced into the backseat of the police car, he continued to kick and growl. 4RP 120. Through his repeated kicking, Tillman eventually shattered the window of the police car. 4RP 120, 126, 185-87. Ultimately, police had to call a padded transport wagon to take Tillman to jail. 4RP 127, 130, 189-90.

C. ARGUMENT

1. TILLMAN HAS WAIVED ANY CLAIM TO CHALLENGE HIS STANDARD RANGE.

Tillman argues for the first time on appeal that the trial court erred in not finding, sua sponte, that his Second Degree Malicious Mischief (Jeep) and Attempted Theft of Vehicle convictions were the same criminal conduct. He contends that counting these two offenses as the same criminal conduct would lower his offender score one point and change his standard range on his Third Degree Assault convictions.³ However, because Tillman affirmatively agreed to the State's calculation of the proper standard range for these convictions at sentencing, he has waived the right to now challenge the convictions as being the same criminal conduct.

A defendant waives the right to argue on appeal that his crimes constitute the same criminal conduct after the defense agrees in the defendant's own presentence memorandum that the criminal history as reported is correct. State v. Bergstrom, 162 Wn.2d 87, 94, 169 P.3d 816 (2007) (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002); State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000)).

³ Lowering his offender score from 9 points to 8 points would lower his standard range from 51-60 months to 43-57 months. RCW 9A.36.031(1); 9.94A.525(7).

If the State and defense agree that a particular standard range is correct, and that range is based on an offender score of 9 or above, then both parties have agreed the offender score was 9 or above. See Bergstrom, 162 Wn.2d at 95; Nitsch, 100 Wn. App. at 522. The "Sentencing Reform Act permits the sentencing court to rely on unchallenged facts and information." Nitsch, 100 Wn. App. at 521 (citing State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999); RCW 9.94A.370(2)). The Sentencing Reform Act specifically provides:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing.

RCW 9.94A.530(2).

Not only did Tillman fail to object, he affirmatively agreed to the standard sentencing ranges in his presentence report, and on the record. 6RP 3-5; CP 79-80. This Court has held that "the circumstances here present a textbook example of the problems flowing from review of this issue without benefit of a trial court's consideration." Nitsch, 100 Wn. App. at 524. Because the

application of the same criminal conduct statute involves factual determinations and the exercise of discretion, this is different from a mere calculation error or a dispute about the comparability of an out-of-state conviction. Id. at 523 (holding that a defendant waives an appeal alleging that current offenses were the same criminal conduct when he agrees to their standard ranges at sentencing).

The State indicated that the correct offender score was at least 9 points as to each count. 6RP 3-4; Supp. CP __ (Sub 85). When sentencing on each count, the trial court confirmed that both parties agreed to the standard ranges based on these offender scores. 6RP 3-4. The trial court also referenced the defense presentence report that agreed to these standard ranges. CP 79-80.

Because the defendant agreed to these standard ranges on the record, as well as in his presentence report, he has acknowledged that his offender score is correct and accurately reflects his criminal history. This affirmative agreement to these calculations waives any appellate argument that his current convictions constitute the same criminal conduct.

2. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED CrR 3.5 FINDINGS.

Tillman asserts that the trial court failed to enter Findings of Fact and Conclusions of Law as required by CrR 3.5(c). On November 24, 2009, the trial court entered the required written findings. Supp. CP __ (Sub 105).

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced thereby. State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369, rev. denied, 120 Wn.2d 1011 (1992); State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125, rev. denied, 102 Wn.2d 1024 (1984).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, this Court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992).

However, unlike Smith, here the court entered findings that have not delayed resolution of Tillman's appeal. There is no resulting prejudice. Hillman, 66 Wn. App. at 774; McGary, 37 Wn. App. at 861.

Tillman cannot establish unfairness or prejudice resulting from the delayed entry of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. Supp. CP __ (Sub 105). The language of the findings follows the trial court's oral ruling. 3RP 2-4. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. Supp. CP __ (Sub 106, 12/01/2009 Trial Prosecutor Declaration).

In light of the above, Tillman cannot demonstrate an appearance of unfairness nor resultant prejudice. The trial court's CrR 3.5(c) findings of fact and conclusions of law are now properly before this Court.

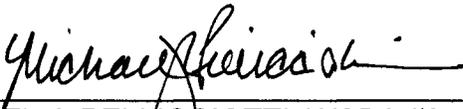
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Tillman's convictions and sentence.

DATED this 27th day of January, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
MICHAEL J. PELLICCIOTTI, WSBA #35554
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielsen, the attorney for the appellant, at 1908 East Madison, Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V. WILSON TILLMAN, Cause No. 63647-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

1-27-10
Date