

71999-8

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NO. 71999-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW BROOKS,

Appellant.

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

The Honorable David R. Needy, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.589 3, 5

A. ASSIGNMENT OF ERROR

Appellant's prior convictions for Forgery and Unlawful Possession of Payment Instruments involve the "same criminal conduct" for sentencing purposes and should have been scored as a single offense.

Issue Pertaining to Assignment of Error

Appellant's prior crimes involve the same victim, same time and place, and same objective intent. Did the sentencing court err when it failed to find they constituted the "same criminal conduct" for purposes of appellant's offender score?

B. STATEMENT OF THE CASE

Andrew Brooks was one of three men charged in connection with the June 2011 death of Kenneth Stewart. CP 1-2, 38-43. Ultimately, Brooks entered an Alford¹ plea to (count 1) Manslaughter in the Second Degree, with a deadly weapon enhancement, and (count 2) Robbery in the First Degree. CP 3-4, 185-199; 1RP² 54-61.

Although the parties agreed on Brooks' past convictions, they

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

² This brief refers to the verbatim report of proceedings as follows: 1RP – January 17 and April 4, 2014; 2RP – May 1, 2014.

disputed his offender score. The defense contended that two pairs of prior crimes involved the same criminal conduct: (a) two 1997 convictions for Unlawful Possession of a Firearm and (b) 2006 convictions for Forgery and Unlawful Possession of Payment Instruments. CP 231.

At sentencing, the Honorable David Needy agreed the two 1997 convictions involved the same criminal conduct and scored them accordingly. 2RP 7. However, Judge Needy found that the 2006 convictions were separate offenses because they are “quite different crimes in terms of their nature” and “perhaps even different in their intent.” 2RP 7-8, 39. Based on these findings, the Judgment lists Brooks’ offender score as 11 on both counts. CP 8.

For Manslaughter (count 1), Judge Needy imposed 120 months (112 months plus the 12-month deadly weapon enhancement). For Robbery (count 2), he imposed 168 months. The total sentence was 180 months (168 on count 2 plus the 12-month consecutive enhancement on count 1). CP 10. Brooks timely filed a Notice of Appeal. CP 23-37.

C. ARGUMENT

BROOKS' 2006 CONVICTIONS ARE "THE SAME CRIMINAL CONDUCT" FOR PURPOSES OF HIS OFFENDER SCORE.

"[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" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a). "Same criminal conduct" means crimes that involve the same intent, were committed at the same time and place, and involved the same victim. Id.

The issue is reviewed for an abuse of discretion or misapplication of the law, and the defendant bears the burden to show two crimes involve the same criminal conduct. State v. Graciano, 176 Wn.2d 531, 535-539, 295 P.3d 219 (2013).

The facts surrounding Brooks' 2006 offenses are found in the Defendant's Memorandum On Offender Score. CP 231-306. Defense counsel summarized the evidence against Brooks as follows:

In Snohomish County cause number 06-1-02437-5 the affidavit of probable cause showed that on September 20, 2006 the defendant was again stopped for a traffic violation, Mr. Brooks had several outstanding warrants, and he was arrested. In a search of his car they found a checkbook in the name of Mike Wichers, and in a purse on the passenger floor a drivers license in the name of Mike Wichers, but with the defendant's photo, and also a BF Goodrich ID in the name of Mike Wichers, but with the defendant's photo. They also found a piece of paper that contained cocaine.

CP 233.

The two offenses at issue were charged in the 2006 information as (count 2) Forgery and (count 3) Unlawful Possession of Payment Instruments. CP 285, 294. Concerning these two charges, in his 2006 Statement of Defendant on Plea of Guilty, Brooks wrote:

I, Andrew Brooks, in Snohomish County Washington

.....

2. on September 20th 2006 did with intent to defraud and knowing it to be forged, did possess and put off as true a forged written instrument, Driver's license of Michael Wichers bearing my photograph; and
3. on September 20th 2006, did possess two payment instruments in the name of a person and with the routing and account numbers of that person without that person's permission, and with intent to deprive the person of those instruments; and that I did so with intent to commit theft, forgery, and identify theft;

CP 291.

The State argued that the 2006 offenses did not meet the test for same criminal conduct because they involved different intents. See Supp. CP ___ (sub no. 97, State's Sentencing Brief, at 6).

Applying the test in RCW 9.94A.589(1)(a), Brooks' two offenses occurred at the same time and place – September 20, 2006, in the car he was driving when stopped. Moreover, both of Brooks' crimes involved the same victim – Michael Wichers, the true owner of the driver's license, checkbook, and B.F. Goodrich card.

The only remaining question is if the two crimes involved the same intent. Although not entirely clear, it appears the State may have relied exclusively on the statutory mens rea for each offense to declare the intents different. This is not the proper analysis. While the same statutory mens rea can support a finding of same intent, the inquiry is not limited to statutory requirements. This Court also reviews the defendant's objective criminal purpose in committing the crimes. State v. Davis, 174 Wn. App. 623, 642, 300 P.3d 465 (citing State v. Adame, 56 Wn. App. 803, 785 P.2d 1144 (1990), review denied, 178 Wn.2d 1012, 311 P.3d 26 (2013); see also State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987) (kidnapping and robbery same criminal conduct where former furthered commission of latter; robbery was objective criminal intent for both).

“The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). This includes whether the crimes were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996). “The test takes into consideration how intimately related the crimes committed are” and whether one crime furthered the other. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

Here, both 2006 crimes were part of the same scheme and involved the same objective – to commit a financial crime by passing himself off as Wichers to draw on Wichers’ checking account and use the B.F. Goodrich card. The driver’s license, checkbook, and card were all tools in this scheme; the forged license facilitated use of the payment instruments. Thus, the two crimes should have been treated as a single offense at sentencing.

“A correct offender score must be calculated before a presumptive or exceptional sentence is imposed.” State v. Tili, 148 Wn.2d 350, 358, 60 P. 3d 1192 (2003). However, the sentencing court need not calculate a precise offender score that exceeds 9 points unless considering an exceptional sentence.

State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002, 113 P.3d 482 (2005). Typically, remand for resentencing is unnecessary where it is apparent the sentencing court would simply impose the same sentence again. Id. (citing State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)). Remand also is generally unnecessary where a standard range sentence was imposed and the error does not impact that range. State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996).

Despite these rather forgiving standards, remand is necessary. Although not required to do so, Judge Needy determined a precise score above 9, that score is wrong, and it is inscribed on Brooks' judgment for consideration in any future cases. This is error. Under RCW 9.94A.441, "[a]ll disputed issues as to criminal history shall be decided at the sentencing hearing." It is safe to presume the Legislature intended all disputed issues to be decided correctly whether they impact the overall sentence or not.³

³ Recently, this Court remanded for resolution of a same criminal conduct dispute even though it was apparent the outcome would not impact the defendant's mandatory life sentence. See State v. Salinas, 169 Wn. App. 210, 279 P.3d 917 (2012) (same criminal conduct issue must be properly resolved even where any impact depends on some future reversal of convictions), review denied, 176 Wn.2d 1002, 297 P.3d 67 (2013).

Thus, minimally, the offender score should be corrected on the judgment.

Moreover, it is impossible to conclude that Judge Needy would necessarily have imposed the same sentence with the reduced offender score. Brooks received a low-end sentence on count 1 (Manslaughter) plus the 12-month deadly weapon enhancement. That will not change whether his score is 11 or 10. But defense counsel also sought a sentence near the low-end of the standard range on count 2 (Robbery) of 129 months based on assistance Brooks provided law enforcement, his acceptance of responsibility, his support in the community, and notions of proportionality. See CP 202-205; 2RP 24-30.

In contrast, the State requested 159 months on count 2 and may have asked for even longer had it not committed itself to this number as part of the plea agreement. See CP 189; 2RP 12-13. In asking Judge Needy not to follow the defense request, the State specifically relied on, among other factors, “the defendant’s significant criminal history which actually exceeds the scoring grid . . .” Supp. CP ____ (sub no. 97, State’s Sentencing Brief, at 12). It is impossible to conclude with confidence that the erroneous calculation of Brooks’ offender score on count 2 did not impact the

168-month prison sentence Judge Needy imposed. Thus, remand for reconsideration of the sentence on count 2 is the proper course.

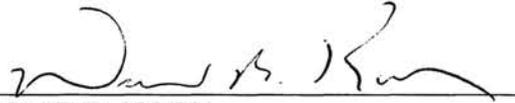
D. CONCLUSION

Brooks' proper offender score is 10, not 11. The judgment should be amended to reflect this score and Brooks should be resentenced.

DATED this 25th day of November, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71999-8-1
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ANDREW BROOKS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF NOVEMBER 2014.

x *Patrick Mayovsky*