

71999-8

71999-8

NO. 71999-8-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

ANDREW BROOKS,
Appellant.

2018 FEB 23 PM 1:27
COURT OF APPEALS
STATE OF WASHINGTON
WJ

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

The Honorable Dave Needy, Judge

RESPONDENT’S BRIEF

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ORIGINAL

TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT	1
II. ISSUES.....	1
III. STATEMENT OF THE CASE	2
IV. ARGUMENT.....	6
1. WHERE THE DEFENDANT’S PRIOR CONDUCT PERTAINED TO A DRIVER’S LICENSE AND SEPARATELY TO TWO OR MORE PAYMENT INSTRUMENTS, THE TRIAL COURT DID NOT ERR IN FINDING THE OFFENSES TO BE SEPARATE CRIMINAL CONDUCT.	6
i. Same Criminal Conduct and Offender Score Statutes.....	6
ii. Same Criminal Conduct Case Law.....	7
iii. The trial court did not abuse its discretion in finding that defendant had not established the Forgery and Unlawful Possession of Payment Instruments to be same criminal conduct.....	9
2. EVEN IF THIS COURT WERE TO DETERMINE THE TRIAL COURT ABUSED ITS DISCRETION IN THE SAME CRIMINAL CONDUCT ANALYSIS, GIVEN THE TRIAL COURT’S STATED INTENT TO PROVIDE THE SAME SENTENCE AS THE CO-DEFENDANT, REMAND FOR SENTENCING WOULD BE UNNECESSARY.....	12
V. CONCLUSION	13

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON SUPREME COURT</u>	
<i>In re Pers. Restraint of Markel</i> , 154 Wn.2d 262, 111 P.3d 249 (2005).....	7
<i>State v. Aldana Graciano</i> , 176 Wn.2d 531, 295 P.3d 219 (2013)	8, 10
<i>State v. Chambers</i> , 176 Wn.2d 573, 293 P.3d 1185 (2013).....	12
<i>State v. Mutch</i> , 171 Wn.2d 646, 254 P.3d 803 (2011)	8
<i>State v. Parker</i> , 132 Wn.2d 182, 937 P.2d 575 (1997).....	12
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003).....	9
<i>State v. Sisouvanh</i> , 175 Wn.2d 607, 290 P.3d 942 (2012).....	9
<i>State v. Tili</i> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	8
<u>WASHINGTON COURT OF APPEALS</u>	
<i>State v. Johnson</i> , 180 Wn. App. 92, 320 P.3d 197 (2014)	8, 9, 10
<i>State v. Kilgore</i> , 141 Wn. App. 817, 172 P.3d 373 (2007), <i>affirmed</i> , <i>State v. Kilgore</i> , 167 Wn.2d 28, 216 P.3d 393 (2009)	12
<i>State v. Lopez</i> , 142 Wn. App. 341, 174 P.3d 1216 (2007).....	7
<i>State v. Rodriguez</i> , 61 Wn. App. 812, 812 P.2d 868 (1991).....	8
<u>WASHINGTON STATUTES</u>	
RCW 9.94A.525	7
RCW 9.94A.535	6
RCW 9.94A.589	6, 7

I. SUMMARY OF ARGUMENT

Andrew Brooks appeals from an offender score determination at a sentencing following a guilty plea to Manslaughter in the Second Degree and Robbery in the First Degree. Brook's contention fails because he cannot establish the trial court abused its discretion in determining convictions for Forgery and Unlawful Possession of Payments were separate criminal conduct given the charges did not provide the same victim and the offenses were not considered same criminal conduct in the prior sentencing.

Furthermore, any difference in offender score would only reduce his score from an eleven to ten. Based upon the statements of the trial court, the offender score was immaterial to the sentence imposed. Thus, even if this Court determines that the offender score should be reduced, the remedy would be to correct offender score and should not include resentencing.

II. ISSUES

1. Has the defendant proved the trial court abused its discretion by finding prior convictions for Forgery and Unlawful Possession of Payment Instruments were not same criminal conduct where the victim of the charges was not established to be the same?
2. If the trial court abused its discretion, where the trial court indicated the offender score did not have any "actual effect" and

the intent to make the sentence proportional to the co-defendant,
is remand for resentencing necessary?

III. STATEMENT OF THE CASE

On July 12, 2012, Andrew Brooks was charged with Felony Murder in the First Degree, alleged to have occurred June 26, 2011. CP 1.

On April 4, 2014, Brooks plead guilty to Manslaughter in the Second Degree with a Non-Firearm Deadly Weapon Enhancement and Robbery in the First Degree. CP 181-2, CP 185-6, 4/4/14 RP 54-5.¹

Brooks agreed to the scoring included on the criminal history sheet provided by the State. CP 183-4, 4/4/14 RP 59. That history listed ten prior adult felonies and 30 misdemeanors including sufficient misdemeanors to prevent washout of any of his prior adult felony convictions when coupled with his release from prison on his last felony on September 16, 2009. CP 183-4, 311, 322.

On May 1, 2014, Brooks was sentenced. 5/1/14 RP 2-40.

The parties had briefed an issue of offender score of two sets of prior convictions of Brooks. CP 231-3, CP 308-313.

¹ The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The report of proceedings in this case are as follows:

1/14/14 RP	Arraignment on Amended and Motion to Join
4/4/14 RP	Guilty Plea Hearing
5/1/14 RP	Sentencing Hearing.

The prior convictions for Forgery and Unlawful Possession of Payment Instruments were sentenced in Snohomish County case 05-1-02437-5 on December 8, 2006. CP 335. Page 2 of the Judgment and Sentence in that case did not find that the counts were same criminal conduct. CP 336. Brooks' offender score in that case could only have reached the level of 9 as indicated in that judgment and sentence by scoring those two cases separately. CP 337. Furthermore, the Statement of Defendant on Plea of Guilty in that case described separate elements of the two separate offenses as follows:

The elements of the crime(s) are: That the defendant, (1) in Snohomish County, Washington,...

Count II:2) on or about the 20th day of September, 2006, 3) with intent to injure and defraud and knowing the same to be forged, 3) did possess, utter, offer, dispose of, and put off as true a written instrument, described as follows: Washington Driver's License in the name of Michael S. Wichers bearing a photograph of the defendant; and

Count III: 2) on or about the 20th day of September, 2006, 3) possessed two or more payment instruments, alone or in combination, 3) In the name of a person or entity, and 4) with the routing number and account number of a person or entity, 5) without permission of that person or entity to possess such instrument(s), and 6) with intent to deprive the person of such instrument, and 7) that such acts were done with the intent to commit theft (to wit: to obtain control over the property of another by color or aid of deception, with the intent to deprive such other of such property), forgery (to wit: to falsely make, complete, and alter a written instrument, and to utter, offer, dispose of, and put off such instrument as true, knowing the same to be forged, and with the intent to injure and defraud) and identity theft (to wit: to knowingly use and

transfer a means of identification of another person, with the intent to commit a felony and to aid the commission of an unlawful activity intended to harm such person):

CP 350. Additionally, the defendant's statement of facts described his actions as follows:

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, drivers 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 persons permission, and with intent to deprive the person of those instruments; and that I did so with intent to commit theft, forgery, and identity theft; and

CP 356. The attachment to the plea form also included offender scoring sheets for the two counts which included scoring for "Other current offenses which do not encompass the same conduct count in offender score." CP 366-7.

At sentencing the trial court made a determination of offender score pertaining to two counts of Unlawful Possession of a Firearm from a prior conviction and a count of Forgery and Unlawful Possession of Payment Instruments. 5/1/14 RP 7-8. The trial court found the two counts of Unlawful Possession of a Firearm in the Second Degree to be same criminal conduct, but that the Forgery and Unlawful Possession of Payment Instruments were separate criminal conduct. 5/1/14 RP 7-8. The trial court

stated: "Either way, we get to nine plus as your offender score. In other words the top of any sentencing guidelines." 5/1/14 RP 8. At the time of stating the sentence the trial court indicated:

But under the circumstances and given a slight proportion I'm at least going to keep you, Mr. Brooks, from serving more time than Mr. Kirkham. And perhaps, depending on negotiations, whether they will come about the way they are described, will sentence you to 180 months on the Manslaughter charge knowing that there are 12 months to be served either way in addition to that. And on the Robbery charge I am going to sentence you to 168 months, knowing again 12 months will follow that. Your total sentence will be 180 months. That's three months below the very top of the standard range, three months to make sure, as I indicated, that you don't serve any more than Mr. Kirkham does. That's as close to the proportion that I'm going to attempt in this case. I will tell you that _if Mr. Kirkham were facing two or they are or 400 months I would give each of you the exact same if I were in a position to do that. Without any proportionality.

5/1/15 RP 37-8. When defense counsel brought up the Forgery and Unlawful Possession of Payment instruments, the trial court also noted:

I guess that's reserved. We know it doesn't have any actual affect, but I find those are quite different crimes in terms of their nature ** occurred at the same time beyond that. They are totally different, perhaps even different in their intent. Your objection is noted.

5/1/14 RP 39.

Brooks was sentenced to 120 months on the Manslaughter in the First Degree with 12 months imposed from the deadly weapon enhancement

and 160 months on the Robbery in the First Degree. CP 9-10. The resulting sentence was 180 months. CP 10.

On May 30, 2014, Brooks timely filed a notice of appeal specifically noting the appeal was of the trial court's determination of the defendant's criminal history and offender score. CP 23.

IV. ARGUMENT

1. **Where the defendant's prior conduct pertained to a driver's license and separately to two or more payment instruments, the trial court did not err in finding the offenses to be separate criminal conduct.**

- i. **Same Criminal Conduct and Offender Score Statutes.**

RCW 9.94A.589. Consecutive or concurrent sentences

(1)(a) Except as provided in (b) or (c) of this subsection, whenever 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.** Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "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. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 9.94A.589(1)(a) (emphasis added).

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

...

(5)

(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. 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), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

RCW 9.94A.525(5)(a)(i).

ii. Same Criminal Conduct Case Law.

The Washington State Supreme Court recently made clear the burden of establishing same criminal conduct lies with the defendant.

In contrast, a “same criminal conduct” finding favors the defendant by lowering the offender score below the *presumed* score. *State v. Lopez*, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007) (“In determining a defendant's offender score ... two or more current offenses ... are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct.”); *In re Pers. Restraint of Markel*, 154 Wn.2d 262, 274, 111 P.3d 249 (2005) (“[A] ‘same criminal conduct’ finding is an exception to the default rule that all convictions must count

separately. Such a finding can operate *only* to decrease the otherwise applicable sentencing range.”). Because this finding favors the defendant, **it is the defendant who must establish the crimes constitute the same criminal conduct.**

State v. Aldana Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013)

(emphasis added).

And the Court also made clear the abuse of discretion standard in reviewing a trial court determination of offender score.

Instead, we review the sentencing court's determination of Graciano's criminal conduct for abuse of discretion or misapplication of law. Under this standard, when the record supports only one conclusion on whether crimes constitute the “same criminal conduct,” a sentencing court abuses its discretion in arriving at a contrary result. See *State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991). **But where the record adequately supports either conclusion, the matter lies in the court's discretion.**

State v. Aldana Graciano, 176 Wn.2d 531, 537-538, 295 P.3d 219 (2013)

(emphasis added).

Those standards were recently applied by the Court of Appeals in *State v. Johnson*, 180 Wn. App. 92, 320 P.3d 197 (2014).

We review an offender score calculation de novo but review a “determination of what constitutes the same criminal conduct [for] abuse of discretion or misapplication of the law.” *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011) (alteration in original) (quoting *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999)). A trial court abuses its discretion if its decision “(1) adopts a view that no reasonable person would take and is thus ‘manifestly unreasonable,’ (2) rests on facts unsupported in the record and is thus based on ‘untenable grounds,’ or (3) was reached by applying the wrong legal standard and is thus made ‘for

untenable reasons.”” *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

State v. Johnson, 180 Wn. App. 92, 100, 320 P.3d 197 (2014).

In *Johnson*, the defendant challenged an offender score determination by the trial court that included the application of an offender score which applied in a prior proceeding. The charges were forgery and possession of stolen property.

These documents show that in November 1999, Johnson was convicted of one count of second degree possession of stolen property and one count of forgery in Snohomish County cause number 97-1-01472-1. The information showed that the possession of stolen property involved two credit cards belonging to Talia Bowie. The forgery involved signing a false name to a credit card slip in payment for cab fare. The judgment and sentence contains no finding that these crimes constituted the same criminal conduct. In computing Johnson's offender score, the sentencing court treated Johnson's prior prescription forgery crimes as separate criminal conduct.

State v. Johnson, 180 Wn. App. 92, 96, 320 P.3d 197 (2014). In determining the offender score as to the current case, the *Johnson* court noted that the prior determination only affects subsequent cases if there was an explicit finding of same criminal conduct. *State v. Johnson*, 180 Wn. App. at 102-3, 320 P.3d 197 (2014).

iii. The trial court did not abuse its discretion in finding that defendant had not established the Forgery and

Unlawful Possession of Payment Instruments to be same criminal conduct.

Since there was no explicit finding of same criminal conduct in the prior judgment and sentence, it would be up to Brooks to convince the trial court here that the offenses were same criminal conduct. *State v. Aldana Graciano*, 176 Wn.2d at 539, 295 P.3d 219 (2013) (defendant carries burden); *State v. Johnson*, 180 Wn. App. at 104, 320 P.3d 197 (2014) (where no prior determination sentencing court can determine). Brooks did not carry that burden, especially considering that “where the record adequately supports either conclusion, the matter lies in the court's discretion.” *State v. Aldana Graciano*, 176 Wn.2d 531, 537-538, 295 P.3d 219 (2013).

As charged, the offenses were alleged to have occurred at the same time, but the place and the criminal intent were not established to be the same.

The Statement of Defendant on Plea of Guilty which described what Brooks admitted to have done does not establish that his crimes were same criminal conduct.

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, drivers 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 persons permission, and with intent to deprive the person of those

instruments; and that I did so with intent to commit theft, forgery, and identity theft; and ...

CP 356. Regarding the Forgery charge, Brooks admitted to possessing or putting off as true “a forged, written instrument, the driver’s license of Michael Wichers bearing my photograph.” By its terms, the victim appears to be Michael Wichers, but in fact the victim could have been an individual, bank or financial institution to whom Brooks put off as true the fake license. The possession payment instruments charge only indicated the payment instruments were in “the name of a person and with the routing and account numbers of that person.” Thus, Brooks did not acknowledge in his plea statement that the offenses involved the same victim.

Brooks cites to a portion of his counsel’s sentencing brief which makes statements of facts from the affidavit of probable cause from the case. Brief of Appellant at pages 4, CP 233. However, the affidavit of probable cause was not made part of the record in the present case. The attorney’s unsupported factual assertions are inadequate to establish the victim was the same.

In addition, the elements as provided in the plea form also failed to include that the two crimes involved the same victim. CP 350. None of the other records before the trial court here establish the victim was the same victim for the two counts.

Thus, Brooks failed to establish the forgery and unlawful possession of payment instruments involved the same victim.

- 2. Even if this Court were to determine the trial court abused its discretion in the same criminal conduct analysis, given the trial court's stated intent to provide the same sentence as the co-defendant, remand for sentencing would be unnecessary.**

The difference in offender score would only be one point reducing the score from eleven to ten. CP 8. Since the range remains with the nine or more category for each crime, resentencing is not required.

Where there is an error in offender scoring, remand for sentencing is unnecessary if the standard range remains the same. *State v. Kilgore*, 141 Wn. App. 817, 824-5, 172 P.3d 373 (2007), *affirmed*, *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009) (remand for resentencing required for reduced range as opposed to reduced offender score).

Our decision in *State v. Parker*, 132 Wn.2d 182, 937 P.2d 575 (1997) is closer to the mark. In *Parker*, the trial court imposed an exceptional sentence based on an erroneously calculated standard range. *Id.* at 186-87. We acknowledged that while remand is the appropriate remedy when the court incorrectly calculates the standard range, remand is unnecessary where “the record clearly indicates the sentencing court would have imposed the same sentence anyway.” *Id.* at 189.

State v. Chambers, 176 Wn.2d 573, 588-89, 293 P.3d 1185 (2013).

The case also involved sentence of another co-defendant and the trial court expressed the strong desire to sentence Brooks the same as the co-defendant.

Your total sentence will be 180 months. That's three months below the very top of the standard range, three months to make sure, as I indicated, that you don't serve any more than Mr. Kirkham does. That's as close to the proportion that I'm going to attempt in this case. **I will tell you that _if Mr. Kirkham were facing two or they are or 400 months I would give each of you the exact same if I were in a position to do that.**

5/1/14 RP 38 (emphasis added).

When making the initial decision about same criminal conduct, the trial court noted: "Either way, we get to nine plus as your offender score. In other words the top of any sentencing guidelines." 5/1/14 RP 8. Later upon pronouncing sentence, the trial court stated the offender score determination on same criminal conduct had no "actual effect." 5/1/14 RP 39. Thus, this court can be certain the trial court would have imposed the same sentence given a single point change in offender score.

V. CONCLUSION

For the foregoing reasons, the offender score determination and the sentence must be affirmed.

DATED this 20th day of February, 2015.

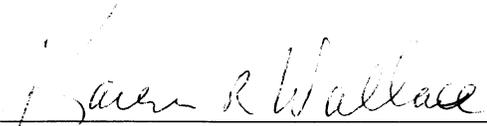
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Koch, addressed as Neilson, Broman & Koch, PLLC, 1908 E Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 20th day of February, 2015.


KAREN R. WALLACE, DECLARANT