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SUPREME COURT
STATE OF WASHINGTON
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NO. 103992-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JACOB WALTERS KOSKI,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Dakota Black, Deputy Prosecuting Attorney for Ryan P. Jurvakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS' DECISION

The Court of Appeals' decision that Koski waived his challenge to his offender score is correct. The Respondent respectfully requests this Court deny review of *State of Washington v. Jacob Koski*, Court of Appeals No. 58233-3-II.

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals' decision involve a matter of substantial public interest when it found:

- (1) Koski failed to contest same criminal conduct and affirmatively acknowledged his offender score, waiving his challenge?

IV. STATEMENT OF THE CASE

In 2016, Jacob Koski was charged with one count of possessing stolen property in the second degree and three

counts of theft in the third degree in Cowlitz County Superior Court Cause No. 16-1-01219-9. (Clerk's Papers) CP 95-96. In 2017, Koski entered *in re Barr* pleas to four amended charges of criminal impersonation in the first degree pursuant to a plea agreement. These were scored separately. (Clerk's Papers) CP 105-116. Koski did not appeal or file a collateral attack on his judgement.

In 2020, Koski was charged with possession with intent to deliver and two counts of possession of a controlled substance. CP 1-2. Koski entered a guilty plea to Possession with Intent to Deliver pursuant to an agreement. CP 3-13, RP 14-21 (Report of Proceedings). His 2016 offenses were scored separately. In his statement on plea of guilty, Koski affirmatively acknowledged his offender score was seven with a range of 60+-120 months. CP 4. When Koski pled guilty, he stated: "[i]n Considering the Consequences of My Guilty Plea, I Understand That: "...[e]ach crime with which I am charged carries a ... Standard Sentence Range as follows:" and stated

there was an offender score of seven with a standard range of actual confinement of 60+-120 months. CP 4. He also stated that "[t]he prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have a different statement, I agree that the prosecuting attorney's statement is correct and complete. . . ."CP 4.

Koski acknowledged his "lawyer had previously read to him or her the entire statement above and that the defendant understood it in full " CP 13. Both Koski and his attorney signed the statement. CP 13. Pursuant to the plea agreement, Koski received a benefit as charges were dismissed. CP 2, CP 53. During his guilty plea colloquy, the trial court specifically asked if Koski understood that his offender score was seven, and Koski stated "yes." RP 16 at 14-19.

The court granted a FOSA (Parental Sentencing Alternative) sentence. CP 34 at 2-3. The court would later enter a judgment & sentence in the matter without objection. CP 38-39. The judgment & sentence included Count I with an offender

score of seven with a standard range of 60+-120 months. CP 50. The judgement was filed September 1, 2021. CP 49.¹ Koski was later revoked from the FOSA program on May 23, 2022. RP 78.

At that time, the trial court modified Koski's previously entered judgment & sentence to a prison-based Drug Offender Sentencing Alternative (DOSA) and sentenced him to 45 months prison and 45 months community custody. RP 81; CP 70-71. The State indicated that Koski's sentence would be half the midpoint of the standard range, which is 90 months, and that 45 months prison and 45 months of supervision should be the sentence. RP 81 at 5-7. Koski's counsel asserted that the State's range was accurate. RP 77, at 18. When the documents were signed, his attorney indicated that Koski was sentenced to a prison-based DOSA for 45 months and, when the judgment was entered, asserted that he signed the judgment and that it

¹ It should be noted that Koski obtained a few additional convictions after the 2017 pleas and before the present case. A few of his convictions were invalidated due to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021); CP 51-52.

reflected the proper amount. RP 84, at 9-18. No adjustments to the offender score from the original judgement & sentence were made, and there were no objections to the scoring or range.

On March 13, 2023, despite his agreement, Koski filed a motion for resentencing. CP 75-81. Koski, for the first time, contested his offender score based on the scoring of his 2017 convictions. The matter was heard with argument on April 17, 2023, in a CrR 7.8 motion. The trial court denied Koski's motion. CP 88.

The court indicated it reviewed the files and record, and the 2016 case where Koski had pled guilty in 2017. RP 89. The court had reviewed the minutes from the date of sentencing and did not find anything to show that the crimes would be treated as other than separate and distinct. RP 89-90, at 25-30. The court concluded that "[e]verything by the Court shows it was the intent of the State and the intent of the Defense and the intent of the Court that these crimes were treated, at all times, as separate and distinct from each other." RP 90, at 4-7. The court

referred to RCW 9.94A.525 for the offender score and indicated that all prior convictions are counted separately except those found at the initial sentencing to be same criminal conduct. RP 90, at 7-12. The court ruled the defendant failed to meet the burden of proving the convictions were same criminal conduct and denied the motion. RP 90, at 13-17.

Koski did not collaterally attack or appeal the judgment. Instead, he filed a motion to resentence and now appeals the denial of that motion. The Court of Appeals affirmed the trial court's decision and determined that Koski had affirmatively acknowledged his offender score and waived his challenge. Koski petitions this Court for Review.

A. THIS COURT SHOULD DENY REVIEW
BECAUSE THE COURT OF APPEALS' RULING
DOES NOT PRESENT A PROPER MATTER
FOR REVIEW.

Because Koski waived his challenge to offender score, and his petition fails to demonstrate the matter involves a matter of substantial public interest or conflict with this Court,

it should be denied. Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Koski contends only that the Court of Appeals misapplied the law and that this is a matter involving an issue of substantial public interest under RAP 13.4(b)(4). Koski also cites RAP 13.4(b)(1), but he does not provide support or argument that the decision of the Court of Appeals conflicts with this Court. He does not argue for any other grounds under RAP 13.4.

In considering a potential matter of substantial public interest, "[c]riteria to be considered in determining the

'requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrences of the question.'" *In re Personal Restraint of Mattson*, 166 Wn.2d 730, 736, 214 P.3d 141 (2009) (quoting *People ex. Rel. Wallace v. Labenz*, 411 Ill. 618, 622, 104 N. E.2d 1206 (1988)). These are decisions that have the "potential to affect a number of proceedings in the lower courts [which] may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (Mem) (2016) (citing *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)). This exception is primarily utilized to overcome the mootness doctrine. *Mattson*, 166 Wn.2d at 736.

Koski argues that this Court should review this matter to decide whether someone who enters a guilty plea is prohibited from challenging an offender score as well as review a court's

obligation to conduct a same criminal conduct analysis and to evaluate Koski's offender score. In doing so, Koski alleges these are matters of substantial public interest and conflict with this Court. However, the Court of Appeals did not hold that Koski waived his challenge due to entering a guilty plea, but instead that he waived his challenge by affirmatively acknowledging his offender score and failing to ask the sentencing court to conduct a same criminal conduct analysis at sentencing.

The Court of Appeals followed established precedent in determining that Koski had waived his challenge. As such, the court did not need to address the claimed offender score error. Precedent is clear that a trial court at sentencing need not *sua sponte* conduct a same criminal conduct analysis, and an individual may waive his or her challenge to an offender score based on same criminal conduct when they affirmatively agree to the offender score. Koski fails to demonstrate that his waiver

and his same criminal conduct allegations raise a matter of substantial public interest or conflict with this Court.

B. THE COURT OF APPEALS' DECISION THAT KOSKI AFFIRMATIVELY ACKNOWLEDGED HIS OFFENDER SCORE AND WAIVED HIS CHALLENGE TO SAME CRIMINAL CONDUCT DOES NOT PRESENT A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

Because Koski affirmatively acknowledged his offender score and failed to raise the issue at sentencing, he waived the issue by the time he moved for resentencing. For offender score, waiver does not apply due to a legal error resulting in an excessive sentence, but "waiver *can be found* where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter for trial court discretion." *In re Shale*, 160 Wn.2d 489, 494, 158 P.3d 588 (2007) (emphasis original) (citing *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 873, 50 P.3d 618 (2002)). The "application of the same criminal conduct statute involves both factual determinations and the exercise of discretion." *State v. Nitsch*,

100 Wn. App. 512, 523, 997 P.2d 1000 (2000). An affirmative acknowledgement of offender score can waive the issue. *See id.* at 512.

Here, Koski entered a plea pursuant to an agreement. He did not waive nor did the Court of Appeals rule that he waived, as Koski asserts, a challenge to his offender score just by entering a plea. Instead, as the Court of Appeals determined, he affirmatively acknowledged his offender score by his conduct. He did so orally and in writing and re-affirmed his sentencing ranges when his sentence was modified after a termination from his FOSA.

Koski cites *State v. Harris*, 148 Wn. App. 22, 197 P.3d 1206 (2008), to argue that he "did not agree to his offender score simply by entering a guilty plea." But the Court of Appeals did not rule that he waived his appeal purely by entry of a guilty plea and *Harris* presents a different situation than that of Koski. In *Harris*, the defendant entered a guilty plea but disputed his offender score. *Id.* at 25. He opposed the use of

several out-of-state convictions. *Id.* The court noted this was a "rare situation in which the defendant did not waive his objection to his offender score when he pleaded guilty." *Id.* Furthermore, the court noted in his agreement that his criminal history was to be determined later. The criminal history was filed after the guilty plea, but he did not in any way stipulate or sign the document. *Id.* at 29.

Here, Koski's statement on plea of guilty included an offender score and a range. It did not have the statement of criminal history attached. The court accepted his guilty plea based on that but did not immediately sentence him. The court set over the hearing for an evaluation. RP 19. The court later orally sentenced him to a FOSA. RP 34. The court later finalized the sentence by entering a judgement and sentence with his offender score, range, and the statement of criminal history included. CP 21-59. Koski signed the judgment which included the criminal history and did not raise an issue. RP 38-39, CP 58. In addition to Koski stating he understood the

offender score, range, and agreeing that criminal history was correct and complete, Koski was specifically asked by the court if he understood his score at seven with a range of 60+-120 months, and he indicated "yes." RP 16 at 14-19; CP 4. Additionally, when he failed his FOSA and his sentence was modified, his attorney asserted the State's range was accurate and that the judgement reflected the proper amount. RP 77, 84. This would not have been possible with the score that Koski only now asserts.

Koski's case is akin to *Shale*. While *Shale* dealt with scoring other current offenses, the same logic applies. The defendant pled guilty in seven different cause numbers. *Shale*, 160 Wn.2d at 491. He later moved to vacate, claiming, in part, errors in his offender score. *Id.* The case was ultimately transferred as a personal restraint petition, as unfortunately should have occurred here. *Id.*

In the trial court, Shale was asked if he understood his ranges and offender score:

The Court: Did Mr. Krzyminski [Shale's attorney] go over all of these standard sentencing ranges with you?

The Defendant: Yes.

The Court: Do you understand that the standard sentencing range is derived by looking at any prior countable criminal history in addition to looking at any concurrent offenses charged?

The Defendant: Yes, ma'am.

The Court: Do you understand or—I am going to explain to you what my understanding is and you tell me if this is your understanding. You had no prior felony history; is that correct?

The Defendant: None.

The Court: And that the reason we are looking at an offender score of 9 here is because of all of the concurrent offenses; is your [sic] understanding?

The Defendant: Yes.

The Court: All right. You understand that an offender score of 9 puts you at the top end of the standard sentencing ranges for all of these offenses?

The Defendant: Yes.

Id. at 495.

In addition to the colloquy, this Court noted that Shale signed a guilty plea in each of the cases and in those documents acknowledging his offender score calculation and failed to contest the issue or ask the trial court to conduct a same criminal conduct analysis. *Id.* at 496. As such, "he agreed to his offender scores as part of his plea bargain, and he did not challenge the offender score computation." *Id.* at 495.

Koski argues that he did not affirmatively acknowledge his offender score. But this is disingenuous in light of *Shale* and all other actions he and his attorney took during the case regarding his offender score, including the failure to challenge the issue at sentencing.

Because Koski did not merely fail to object, but affirmatively acknowledged his offender score, he waived the issue by the time of his CrR 7.8 hearing. Courts have repeatedly ruled this constitutes waiver. Koski does not point out or demonstrate that his waiver to a challenge of same criminal

conduct is a matter of substantial public interest nor that it conflicts with this Court.

C. KOSKI FAILED TO RAISE SAME CRIMINAL CONDUCT AT SENTENCING AND THE COURT OF APPEALS' DECISION DOES NOT PRESENT A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

Koski pled guilty pursuant to an agreement in exchange for a recommendation. In doing so, he decided to affirmatively acknowledge his offender score orally and in writing in-line with the recommendation. In addition, Koski did not raise the issue of same criminal conduct for the trial court at sentencing. Rather, he waited until a later date to raise the issue in a motion. The motion should have been transferred as a personal restraint petition (PRP), but ultimately became an appeal of the trial court's denial of a motion to resentence. Koski's failure to present an issue at sentencing but to later allege error in the CrR 7.8 is akin to an appeal. Because of his acknowledgement and failure to put the matter at issue at sentencing, the trial court did not err in calculating his offender score at sentencing, and the

trial court did not err in denying the motion in reviewing the matter.

The statute indicating that "the sentencing court 'shall' conduct a 'same criminal conduct analysis regarding certain prior offenses, RCW 9.94A.525(5)(a)(i), does not relieve the defendant of the burden to identify a factual dispute regarding 'same criminal conduct' and to request an exercise of the court's discretion. *State v. Jackson*, 28 Wn. App.2d 654, 664, 538 P.3d 284 (2023) review denied 2 Wn.3d 1027, 544 P.3d 34 (table) (Court must conduct sentencing analysis when defendant meets the burden.). In assessing offender score, '[w]hen a defendant has not sought to overcome the SRA's presumption that offenses are counted separately, the sentencing court meets its obligation pursuant to the SRA by giving credence to that presumption." *Id.* at 664. It is the defendant's burden to demonstrate that offenses should be counted as one crime. *Id.* at 666-67. As a result, a court is not required to *sua sponte* conduct a same criminal conduct analysis. *See id.* at 664-67. A

defendant is not entitled to raise the issue of same criminal conduct for the first time on appeal. *See Nitsch*, 100 Wn. App. at 519.

Yet, Koski raised the issue for the first time on appeal by bringing it in the form of a collateral attack. When he was sentenced and judgement was entered, he did not raise the issue for the court. Instead, he later raised the issue in his CrR 7.8 motion that occurred over a year from his initial sentencing and determination of his offender score. His motion was denied on the merits, and he argued the matter to the Court of Appeals.

Because Koski affirmatively acknowledged his offender score and did not raise a same criminal conduct issue at sentencing, he cannot dispute or argue about same criminal conduct later. At the time of the motion for resentencing, the court properly reviewed the facts and evidence. It determined there was never an intent to treat the convictions as same criminal conduct, and Koski had not provided information to meet his burden or challenge the score. Because there is

established precedent regarding a court not needing to *sua sponte* review same criminal conduct, the matter does not rise to the level of substantial public concern.

D. THE TRIAL COURT DID NOT MISAPPLY THE LAW AND ITS HOLDING DID NOT CREATE A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

Despite Koski waiving his challenge, Koski now asks this Court to review the trial court's 2023 offender score calculation anyway, arguing that the Court needs to review the plain language of RCW 9.94A.589(1)(a) and RCW 9.94A.525(5)(a)(i). However, Koski does not provide a specific issue of statutory interpretation for this Court that has not been addressed, and courts have repeatedly ruled on a sentencing court's requirements. The trial court also ruled on the merits as offenses are presumed to be separate conduct.

Sentencing in this matter had already passed and Koski failed to identify a legal error on the face of the judgement. The trial court reviewed the record and determined that there was no indication of an intent of the parties from 2017 to have the

convictions be treated as anything other than separate, and that Koski did not meet his burden to show that his criminal impersonation convictions should be counted as one point for resentencing. RP 90. Koski asserts that the trial court in 2023 had an obligation to conduct a same criminal conduct analysis when "a request is made at any sentencing hearing." Pl. Pet. at 11. But the 2023 trial court was not conducting a sentencing hearing. Koski never raised the issue of same criminal conduct at sentencing, and, as the Court of Appeals ruled, had already waived his argument by the time of the hearing. The sentencing court's obligation to conduct a same criminal conduct analysis is not *sua sponte*, rather, Koski was required to raise the issue at sentencing. He affirmatively acknowledged his score and failed to raise same criminal conduct at his initial sentencing or his sentencing modification. As such, he waived the issue by the time of the hearing and fails to raise a substantial issue of public interest or conflict with this Court.


V. CONCLUSION

Because the petition does raise grounds for review under RAP 13.4(b)(1), or (4), it should be denied.

CERTIFICATE OF COMPLIANCE

I certify under RAP 18.17(b) that excluding appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images, the word count of this document is 3,462 words, as calculated by the word processing software used. Font is 14 pt.

Respectfully submitted this 21st day of April 2025.



Dakota Black, WSBA #54090
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I, Jacqueline Renny, do hereby certify that the **RESPONSE TO PETITION FOR REVIEW** was filed electronically through the Supreme Court Portal to:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 21, 2025.



Jacqueline Renny

COWLITZ COUNTY PROSECUTORS OFFICE

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