

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 69825-7-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
STEVEN DWAYNE SYMITH,)	
)	
Appellant.)	FILED: May 12, 2014

SCHINDLER, J. — The State charged Steven Dwayne Symith with felony driving while under the influence of intoxicants (DUI), reckless driving, and driving while license suspended (DWLS) in the first degree. Symith pleaded guilty to DWLS in the first degree. A jury convicted Symith of felony DUI and reckless driving. Symith contends the imposition of a combined term of confinement and community custody on the felony DUI exceeds the statutory maximum, and the court did not have the authority to impose conditions of probation for the gross misdemeanor convictions of reckless driving and DWLS in the first degree. Symith also argues the court erred in ruling his prior convictions for vehicular assault and reckless driving and the current convictions for felony DUI and reckless driving did not constitute the same criminal conduct. The State concedes the felony DUI sentence exceeds the statutory maximum and the court did not have the authority to impose probation conditions for reckless driving and DWLS in the first degree. We accept the concession as well taken. We also conclude the prior

convictions for vehicular assault and reckless driving did not constitute the same criminal conduct, but remand to determine whether felony DUI and reckless driving constitute the same criminal conduct and correctly calculate the offender score.

FACTS

The State charged Steven Dwayne Symith with felony DUI in violation of RCW 46.61.502 and RCW 46.61.5055, reckless driving in violation of RCW 46.61.500, and DWLS in the first degree in violation of RCW 46.20.342(1)(a). Symith pleaded guilty to DWLS in the first degree. A jury convicted Symith of felony DUI and reckless driving.

Before sentencing, the State calculated Symith's offender score as an 8, and asked the court to impose a sentence of 60 months of confinement and 12 months of community custody on the felony DUI, and a consecutive 364-day sentence for the reckless driving and DWLS convictions.

Symith filed a motion to dismiss the reckless driving conviction, arguing the conviction violated double jeopardy. Symith calculated his offender score as a 6 and asked the court to impose a 41-month sentence on the felony DUI, and a concurrent sentence of 364 days for the reckless driving and DWLS convictions. Symith asserted the State incorrectly included one point for the current offense of felony DUI, and his prior convictions for vehicular assault and reckless driving and current convictions for felony DUI and reckless driving constituted the same criminal conduct.

At sentencing, the court denied the motion to dismiss the reckless driving conviction as a violation of double jeopardy. The court ruled the prior convictions for vehicular assault and reckless driving were not the same criminal conduct. The court also ruled the current convictions of felony DUI and reckless driving were not the same

criminal conduct:

I have to agree with the State that the law does not prohibit the convictions for reckless driving and DUI and I'm denying the motion based on double jeopardy. And because they have different elements they are not considered to be the same conduct under the law either, so the motion on that basis is also denied.

The State conceded the offender score should not include a point for a dismissed count of burglary or a point for the current felony DUI.¹ The court imposed a maximum standard-range sentence of 54 months of confinement and 12 months of community custody for the felony DUI. The court imposed a suspended sentence of 364 days for reckless driving to be served concurrently with the felony DUI, and a consecutive suspended sentence of 364 days for the DWLS in the first degree. The court also imposed several additional conditions of probation, including prohibiting Symith from driving without a valid license, insurance, and functioning ignition interlock device.

ANALYSIS

Symith argues the combined term of confinement and community custody for the felony DUI exceeds the statutory maximum sentence of five years. The State concedes the sentence exceeds the statutory maximum of five years. We accept the State's concession. "[A] court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime." RCW 9.94A.505(5); State v. Boyd, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012). The statutory maximum for a class C felony is five years. RCW 9A.20.021(1)(c).

Symith also argues the court did not have the authority to impose conditions of probation for the misdemeanor reckless driving and DWLS in the first degree sentence.

¹ On appeal, the State asserts the offender score should include a point for the current offense of reckless driving.

The State concedes that because the court “sentenced Symith to the maximum amount of time that it could impose on each of the gross misdemeanors (364 days),” the court “was not authorized to impose probation conditions on the gross misdemeanor sentences because it did not actually suspend any jail time.” We accept the State’s concession. A court cannot impose probation where it imposes the maximum sentence and does “not actually suspend any jail time.” State v. Gailus, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), overruled on other grounds by State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009).

Symith also asserts the court erred in ruling that neither his prior convictions for vehicular assault and reckless driving nor the current convictions for felony DUI and reckless driving constitute the same criminal conduct. “[A] court’s determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law.” State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013).

“Same criminal conduct” means two or more crimes (1) are committed at the same time and place, (2) involve the same victim, and (3) have the same criminal intent. RCW 9.94A.589(1)(a). RCW 9.94A.525(5)(a)(i) states, in pertinent part:

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.

“ ‘Convictions of crimes involving multiple victims must be treated separately. To hold otherwise would ignore two of the purposes expressed in the SRA [Sentencing

Reform Act of 1981][, chapter 9.94A RCW]: ensuring that punishment is proportionate to the seriousness of the offense, and protecting the public.’ ” State v. Hollis, 93 Wn. App. 804, 817, 970 P.2d 813 (1999)² (quoting State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). Because vehicular assault and reckless driving do not involve the same victim, the court did not abuse its discretion in ruling the two prior offenses did not constitute the same criminal conduct. The victim of vehicular assault is the individual who suffers “substantial bodily harm,” and Symith concedes reckless driving “involve[s] the public as the . . . victim.”³

However, because the court did not address whether the current convictions for felony DUI and reckless driving were committed at the same time and place, involved the same victim, and had the same objective criminal intent, we remand for the court to make that determination, correctly calculate the offender score, and amend the judgment and sentence.

WE CONCUR:

Spears, C.J.

Schindler, J.

Appelvik, J.

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² (First alteration in original.)

³ See RCW 46.61.522.