IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TAMMY L. TAYLOR, Appellant.	No. 42508-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Tammy Taylor pleaded guilty to four counts of first degree identity theft, four counts of first degree theft, and four counts of forgery. After sentencing, Taylor filed a CrR 7.8 motion to withdraw her guilty plea, arguing that she entered the guilty plea without knowing that her current offenses could have been considered the same criminal conduct by the sentencing court. The trial court denied her motion. Taylor appeals. Because the alleged miscalculation of an offender score based on failure to request a same criminal conduct analysis is not grounds for withdrawing a guilty plea under CrR 7.8(b)(1), we affirm.

FACTS

On four different occasions, Taylor withdrew large sums of money from N. Wilson's bank account without authorization. The State charged Taylor with one count each of first degree identity theft, first degree theft, and forgery for each unauthorized transaction. The original

information included "particularly vulnerable victim" as an aggravating factor, but the State agreed to amend the information by removing the aggravating factor allegation if Taylor would plead guilty to the remaining charges.

On January 10, 2011, Taylor pleaded guilty to all 12 counts charged in the amended information. The State calculated her offender score as 11—one point for each current offense. Based on an offender score of 11, Taylor's standard sentencing range was 63 to 84 months. The plea agreement permitted Taylor to argue for the low end of the sentencing range. On January 21, 2011, the trial court sentenced her to 63 months on each charge to run concurrently.

On August 5, 2011, the trial court heard Taylor's motion to withdraw her guilty plea under CrR 7.8 and CrR 4.2. Taylor argued that she was not informed that the charges for each unauthorized transaction could be considered the same criminal conduct under RCW 9.94A.589, reducing her offender score from 11 to 3.[1] Taylor argued that the misinformation rendered her plea involuntary constituting a manifest injustice that required the trial court to grant her motion to withdraw her guilty plea. The trial court denied her motion because it determined that based on all the information Taylor had at the time, her plea was voluntary. Taylor timely appeals only the trial court's denial of her motion to withdraw her guilty plea based on what she characterizes as a miscalculation of her offender score.

ANALYSIS

As an initial matter, Taylor's manifest injustice claim must fail. Both here and at the trial court, Taylor argues that her motion to withdraw her guilty plea should be granted based on a

[1] Taylor's standard sentencing range would have been 13 to 17 months if her offender score had been calculated at 3 rather than 11 points.

manifest injustice argument. Under CrR 4.2(f), the trial court "shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." However, motions to withdraw a guilty plea after the judgment and sentence have been entered are governed by CrR 7.8, not CrR 4.2. Under CrR 7.8(b), a defendant may withdraw a guilty plea based on proof of

> (1) [m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) The judgment is void; or
> (5) Any other reason justifying relief from the operation of the judgment.

Recently, we held that CrR 7.8(b)(5) does not incorporate CrR 4.2(f)'s manifest injustice basis for withdrawing a guilty plea. *State v. Lamb*, 163 Wn. App. 614, 627-28, 262 P.3d 89 (2011), *aff'd in part, rev'd in part on other grounds*, 175 Wn.2d 121, 285 P.3d 27 (2012).[2] Therefore, Taylor's argument that the trial court abused its discretion by denying her plea withdrawal motion based on a manifest injustice under CrR 4.2(f) fails because CrR 4.2(f) manifest injustice is not grounds for granting a postjudgment motion to withdraw a guilty plea under CrR 7.8.

Because manifest injustice is not grounds for withdrawal of a guilty plea under CrR 7.8

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[2] In *Lamb*, our Supreme Court stated,

> While correction of a manifest injustice is a sufficient basis to permit withdrawal of a guilty plea under CrR 4.2(f), withdrawal of Lamb's guilty plea must also meet the requirements set forth in CrR 7.8 since the motion was made after judgment was entered. . . .
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> . . . .
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> . . . A finding of "manifest injustice" does not automatically establish that relief is available under CrR 7.8(b)(5).

175 Wn.2d at 128.

and Taylor only appeals the denial of her motion to withdraw her guilty plea based on the alleged miscalculation of her offender score, the only question before this court is whether an alleged miscalculation of an offender score based on a sentencing court's failure to sua sponte perform a same criminal conduct analysis is grounds to withdraw a guilty plea under CrR 7.8.[3] We conclude that it is not. Accordingly, we affirm the trial court's denial of Taylor's CrR 7.8 motion to withdraw her guilty plea.

A motion to withdraw a guilty plea based on an alleged miscalculation of the defendant's offender score is considered a mistake under CrR 7.8(b)(1).[4] *State v. Zavala-Reynoso*, 127 Wn. App. 119, 123, 110 P.3d 827 (2005). We review a trial court's denial of a CrR 7.8(b)(1) motion to withdraw a guilty plea for an abuse of discretion. *State v. Crawford*, 164 Wn. App. 617, 621, 267 P.3d 365 (2011) (citing *State v. Gomez-Florencio*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997), *review denied*, 134 Wn.2d 1026 (1998)). Miscalculation of an offender score based on a mistake of law is grounds for granting a CrR 7.8(b)(1) motion to withdraw a guilty plea. *See In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). But "where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion" the error may be waived if not timely raised and is not grounds for granting a CrR 7.8(b)(1) motion. *Goodwin*, 146 Wn.2d at 874.

Miscalculation of an offender score is a mistake of law when the offender score is based

[3] In her statement of additional grounds (SAG), Taylor argues that the trial court was required to sua sponte perform a same criminal conduct analysis. RAP 10.10. Because we hold that the trial court's failure to sua sponte perform a same criminal conduct analysis is not grounds for granting Taylor's motion to withdraw her guilty plea, we do not address Taylor's SAG claim separately.

[4] A motion to withdraw a guilty plea based on CrR 7.8(b)(1) must be filed within one year of the date judgment was entered. Taylor filed her motion less than eight months after the court entered her judgment and sentence, therefore Taylor's motion is timely under CrR 7.8(b).

upon convictions that could not have been considered when properly calculating the defendant's offender score. *See Crawford*, 164 Wn. App. at 623 (miscalculation of offender score was legally erroneous because perjury conviction could not, under the statute, be counted as one point for purposes of calculating offender score); *Goodwin*, 146 Wn.2d at 866-67 (miscalculation of offender score was legally erroneous because his juvenile convictions could not have been included in proper calculation of offender score). But concurrent convictions that are allegedly the same criminal conduct are properly counted separately *unless* the trial court determines that they should be counted as only one point. RCW 9.94A.589. Furthermore, whether convictions should be considered same criminal conduct is (1) a factual question for the sentencing court to resolve, and (2) an issue that is waived if not raised. In *State v. Nitsch*, 100 Wn. App. 512, 524-25, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000), we rejected the argument that the trial court had the responsibility to independently perform a same criminal conduct analysis. Therefore, a sentencing court's failure to consider sua sponte whether concurrent convictions constitute same criminal conduct when calculating the defendant's offender score is not a mistake of law.

Moreover, separate concurrent convictions that may be considered the same criminal conduct are properly used to calculate a defendant's offender score when counted separately. RCW 9.94A.589 presumes that current offenses *will* be counted separately *unless* the trial court determines the current offenses are the same criminal conduct. Therefore, calculating a defendant's offender score based on offenses that could have been considered the same criminal conduct does not render the offender score legally erroneous. *Cf. Crawford*, 164 Wn. App. at 623 (miscalculation of offender score was legally erroneous because perjury conviction could not,

under the statute, be counted as one point for purposes of calculating offender score); *Goodwin*, 146 Wn.2d at 866-67 (miscalculation of offender score was legally erroneous because his juvenile convictions could not have been included in proper calculation of offender score). Because calculating a defendant's offender score based on a sentencing court's failure to conduct sua sponte a same criminal conduct analysis does not render the offender score legally erroneous, it does not justify withdrawal of a guilty plea under CrR 7.8(b)(1). *See Goodwin*, 146 Wn.2d at 874.

In addition, when raised, the decision whether to consider convictions the same criminal conduct is a factual question to be resolved by the sentencing court. As the court observed in *Nitsch*, failure to argue that current offenses should be considered same criminal conduct "is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion." 100 Wn. App. at 520. Because a same criminal conduct determination is a factual matter, failure to treat current offenses as same criminal conduct for purposes of calculating an offender score may, in some cases, result in a *factually* erroneous conclusion but not a *legally* erroneous one. Therefore, even an offender score based on an improper same criminal conduct analysis would not be a mistake of law justifying withdrawal of a guilty plea under CrR 7.8(b)(1).

As stated above, a defendant may not challenge the calculation of his or her offender score because of the belief that the trial court, if asked, could have found the defendant's current offenses encompassed the same criminal conduct. *Goodwin*, 146 Wn.2d at 874; *Nitsch*, 100 Wn. App. at 520. The failure to request a same criminal conduct analysis leaves the reviewing court an insufficient record to review the required factual determinations supporting a same criminal

conduct analysis. *Nitsch*, 100 Wn. App. at 524. A defendant also waives a challenge to the calculation of his or her offender score by affirmatively agreeing to the criminal history and offender score in a plea agreement. *Nitsch*, 100 Wn. App. at 522. Because the sentencing court's failure to sua sponte calculate Taylor's offender score based on a same criminal conduct analysis, if error, is an error Taylor waived, and it is not a mistake of law for the purposes of her CrR 7.8(b)(1) motion.

Here, Taylor only appeals the trial court's denial of her CrR 7.8 motion to withdraw her guilty plea. To prevail, Taylor must demonstrate that the trial court abused its discretion by denying her CrR 7.8 motion to withdraw her guilty plea. The trial court did not abuse its discretion in denying her motion to withdraw her guilty plea based on an alleged miscalculation of her offender score resulting from the trial court's failure to conduct, sua sponte, a same criminal conduct analysis because any such error does not render Taylor's offender score legally erroneous. Because any alleged miscalculation of an offender score based on failure to sua sponte conduct a same criminal conduct analysis is not a mistake of law, the trial court did not abuse its discretion when it denied Taylor's CrR 7.8 motion to withdraw her guilty plea. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

PENOYAR, J.

JOHANSON, A.C.J.