IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 63480-1-I
	)	DIVISION ONE
RICHARD ALLEN DUNN,	)	UNPUBLISHED OPINION
Petitioner.	)	FILED: August 9, 2010

Spearman, J.—Richard Dunn was convicted of one count of first-degree kidnapping, one count of first-degree child molestation, and six counts of possession of child pornography. In this personal restraint petition Dunn raises a number of issues challenging his sentence, including whether (1) he was punished multiple times for the same unit of prosecution as to the child pornography convictions; (2) the kidnapping and molestation convictions constituted the same criminal conduct; and (3) the trial court had the authority to empanel a jury to decide the aggravating factors of particularly vulnerable victim and deliberate cruelty. For the reasons described herein, we grant the petition in part, deny it in part, and remand for proceedings consistent with this opinion.

FACTS

On June 20, 2001, Dunn grabbed a six-year-old Asian boy, D.C., from an apartment complex, put him in a car, and drove him to his own apartment. Dunn bound and gagged D.C. with a necktie, and hit him with a belt. At his apartment,

Dunn molested D.C. When police broke into Dunn's apartment on the night of June 21 they found D.C. tied up on a bed. Police found Dunn's semen on D.C.'s underwear and on his perineum. Police determined that a computer found in the apartment was used to download child pornography, including an image entitled "Asian boys nude."

The State charged Dunn with one count of first-degree kidnapping, one count of first-degree child molestation and six counts of possession of depictions of minors engaged in sexually explicit conduct. With respect to the kidnapping and possession of child pornography counts, the State alleged an aggravating circumstance that Dunn committed the crimes with sexual motivation. With respect to the kidnapping and child molestation counts, the State also alleged aggravating circumstances of deliberate cruelty and particularly vulnerable victim.

On November 8, 2004, a jury found Dunn guilty on all charges. After the verdict, the trial court provided the jury with additional instructions on the aggravating factors. The jury found that the State had proved all the aggravating factors beyond a reasonable doubt. The standard range for the one count of kidnapping and the one count of child molestation was 149 to 198 months for each. The standard range for each of the possession of child pornography counts was 0 to 12 months. On December 28, 2004, the court imposed exceptional sentences of 360 months on the kidnapping and child molestation counts, and 60 months on each of the possession counts, based on the special verdicts finding that Dunn committed the kidnapping with sexual motivation, and that the child

molestation involved deliberate cruelty and a vulnerable victim.

Dunn filed this personal restraint petition collaterally attacking various aspects of his convictions and sentence. Three issues were referred to this panel for consideration: (1) the alleged ineffective assistance of counsel based on counsel's failure to argue Dunn's convictions for kidnapping and child molestation constituted the same criminal conduct; (2) the unit of prosecution issue with respect to the multiple convictions for possession of child pornography; and (3) the trial court's submission of the aggravating circumstances of deliberate cruelty and particularly vulnerable victim to a jury before the legislature had authorized such a procedure. All other issues raised in Dunn's petition were dismissed.

DISCUSSION

Unit of Prosecution

In State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009), the Supreme Court held that the proper unit of prosecution under former RCW 9.68A.070 (1990) was one count per possession of child pornography, without regard to the number of images possessed or the number of minors depicted in the images. Sutherby, 165 Wn.2d at 882. Multiple convictions under former RCW 9.68A.070, based upon possession of more than one image, violate double jeopardy by punishing a defendant multiple times for the same unit of prosecution. Sutherby, 165 Wn.2d at 878, 882.

Here, Dunn contends his six convictions for possession of child pornography run afoul of Sutherby. The State concedes error on this issue. The

concession is well taken. We vacate five of Dunn's six convictions for possession of child pornography and remand for further proceedings. We address additional sentencing issues below.

Same Criminal Conduct

Dunn contends that he received ineffective assistance of counsel based on his attorney's failure to argue that Dunn's convictions for kidnapping and child molestation constituted the same criminal conduct. To prevail, Dunn must show that (1) defense counsel's performance was deficient and (2) the trial court likely would have likely found his convictions constituted the same criminal conduct. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). For the reasons described herein, we agree with Dunn, and grant his petition with respect to the same criminal conduct argument.

Where a defendant is sentenced on two or more current offenses, the offender score for each current offense includes all other current offenses unless the court finds the current offenses involved the same criminal conduct. RCW 9.94A.589(1)(a). "Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. If any one of these elements is missing, the offenses are not the same criminal conduct, and they must be counted individually to determine the offender score. See State v. Garza-Villarreal, 123 Wn.2d 42, 46-48, 864 P.2d 1378 (1993). An appellate court will reverse a sentencing court's

determination of "same criminal conduct" only upon a showing of "abuse of discretion or misapplication of the law." State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Citing State v. Longuskie, 59 Wn. App. 838, 847, 801 P.2d 1004 (1990), Dunn argues the kidnapping and child molestation constituted the same criminal conduct. In Longuskie, the defendant, a grade school teacher, took one of his students to multiple motels and molested the student. The defendant was convicted of first-degree kidnapping and third-degree child molestation. This court sua sponte held that the kidnapping and the molestation constituted the same criminal conduct because "child molestation was the objective intent," and the kidnapping "furthered that criminal objective and the crimes were committed at the same time and place." Longuskie, 59 Wn. App. at 847.

Here, as in Longuskie, Dunn kidnapped D.C. for the purpose of molesting him. Dunn possessed child pornography on his computer, specifically including an image entitled "Asian boys nude." Dunn took D.C. to his apartment, tied him up, and molested him. The location of the kidnapping and molestation were the same, and the kidnapping was committed in furtherance of the molestation. As such, they constituted the same criminal conduct.

The State argues that Dunn's ineffective assistance claim should be rejected because, even if Dunn's trial attorney had raised the same course of conduct issue, it would have been denied by the trial court. The State relies on State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992), which it contends is

factually comparable to this case. We disagree. In Collicott, the Supreme Court held that convictions for burglary, rape, and kidnapping did not constitute the same criminal conduct. The defendant in that case broke into a counseling center and began stealing electronic equipment. Collicott, 118 Wn.2d at 650 n.4. The disturbance awoke the victim and she attempted to call the police. Only then did the defendant assault and rape her. Id. On these facts, the Court concluded that the defendant's intent changed from one crime to the next, and as a result, did not constitute the same criminal conduct. Id. at 667-69. Thus, Collicott is factually distinguishable and is of no assistance in this case.

In short, Dunn's kidnapping and molestation convictions constituted the same criminal conduct, and defense counsel's failure to raise this issue below was deficient. Accordingly, Dunn is entitled to relief on this claim. We therefore remand for imposition of the correct offender score on resentencing.

Determination of Aggravating Factors

Citing State v. Doney, 165 Wn.2d 400, 198 P.3d 483 (2008), Dunn next argues he is entitled to relief from his exceptional sentences because the trial court lacked statutory authority to submit the aggravating factors of deliberate cruelty and particularly vulnerable victim to a jury. In Doney, the defendant pled guilty to first degree murder during the course of his jury trial. Doney, 165 Wn.2d at 402. He did not admit, however, to the charged aggravating factors. The State empanelled a sentencing jury in light of 2005 legislation authorizing trial courts to submit aggravating factors to juries. Id. at 403. The jury found that Doney acted

with deliberate cruelty, and that the victim was particularly vulnerable. The court imposed an exceptional sentence. Id. at 402-03. Doney appealed.

While Doney's appeal was pending, the Supreme Court issued its decision in State v. Pillatos, 159 Wn.2d 459, 465, 150 P.3d 1130 (2007), holding that the 2005 legislation did not authorize trial courts to empanel sentencing juries in cases where the defendant was tried or pled guilty before the legislation's effective date of April 15, 2005. Id. at 403. After receiving supplemental briefing on Pillatos, the Court of Appeals affirmed the exceptional sentence on grounds that any error was harmless, because 2007 legislation now authorized a trial court to empanel a sentencing jury in cases where the defendant was tried before April 2005, and the evidence of those factors in Doney's case was overwhelming. Doney, 165 Wn.2d at 403. The Supreme Court reversed the Court of Appeals, holding the issue was "not ripe for review" because "no attempt [had] yet been made to invoke the 2007 statute, and … it [was] not certain that the State [would] again seek an exceptional sentence." Id. at 404.

According to Dunn, Doney is directly on point, and requires reversal of the aggravating factors found by the jury. As the State correctly observes, however, Doney was a case decided on direct appeal. The standard of review in this case, a personal restraint petition, is different. Generally, a personal restraint petition alleging a constitutional error must show "actual and substantial prejudice" for the petitioner to obtain relief. In re Pers. Restraint of Cook, 114 Wn.2d 802, 810, 812, 792 P.2d 506 (1990). But where the alleged error is not constitutional, a more

strict standard applies, and the personal restraint petition must show "a fundamental defect which inherently results in a complete miscarriage of justice." In re Cook, 114 at 812. The error alleged here, that the trial court did not have statutory authority to submit aggravating circumstances to the jury, is not constitutional. See In re Pers. Restraint of Moore, 116 Wn.2d 30, 33, 803 P.2d 300 (1991) (applying non-consitutional standard where trial court did not have statutory authority to impose a sentence of life without parole).

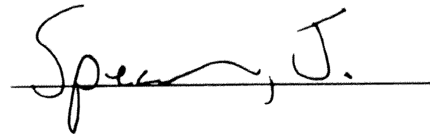
The question is thus whether submission of aggravating circumstances of deliberate cruelty and particularly vulnerable victim to the jury in the absence of statutory authority amounts to "a fundamental defect which inherently results in a complete miscarriage of justice." In re Cook, 114 at 812; In re Moore, 116 Wn.2d at 33. In light of Supreme Court case law, we hold it does.

The State makes a policy argument, contending there is no "complete miscarriage of justice" where the trial court was attempting to ensure Dunn's constitutional rights under Blakely[1] by having a jury determine the aggravating factors. The case law on this issue, however, constrains us to hold otherwise. Specifically, our Supreme Court has held that a sentence "not authorized by statute" is a basis for granting collateral relief. See In re Pers. Restraint of Fleming, 129 Wn.2d 529, 533-34, 919 P.2d 66 (1996); In re Moore, 116 Wn.2d at 33; In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). In Moore, the trial judge erroneously imposed a sentence of life without the

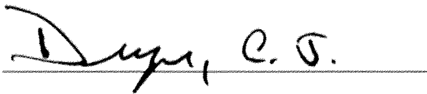
[1] Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

possibility of parole, even though state law permitted such a sentence only following a jury trial. The Supreme Court held that because the sentence "was not authorized by statute," it was a fundamental defect which inherently resulted in a complete miscarriage of justice. Moore, 116 Wn.2d at 33. Here, too, the court had no authority to empanel a jury for the purpose of determining the aggravating factors of particularly vulnerable victim and deliberate cruelty. Thus, as in Moore, Dunn's sentence was not authorized by statute. Accordingly, Dunn has shown a fundamental defect which inherently resulted in a complete miscarriage of justice, and we grant relief as to those two aggravating factors.[2]

We grant the petition in part, deny it in part, and remand to the trial court for proceedings consistent with this opinion.



WE CONCUR:



[2] Dunn concedes, however, that the trial court had statutory authority to empanel a jury to consider whether he committed the crimes of possession of child pornography and kidnapping with sexual motivation. Accordingly, on remand the trial court may properly consider this aggravating circumstance with regard to these two offenses.