

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	No. 64346-1-I
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
WILLIE RAINEY,)	
)	
Appellant.)	FILED: September 27, 2010
)	

Schindler, J. — A jury convicted Willie Rainey of one count of burglary in the first degree, one count of assault in the second degree, and two counts of felony violation of a no-contact order. On appeal, Rainey claims the court abused its discretion at sentencing by failing to determine whether the burglary and assault offenses should have been treated as the same criminal conduct for the purpose of calculating Rainey’s offender score. In his Statement of Additional Grounds for Review, Rainey argues his attorney had a conflict of interest. Because the court properly exercised its discretion in deciding whether to treat the burglary and the assault as separate criminal conduct under the burglary antimerger statute, and because Rainey’s argument lacks merit, we affirm.

FACTS

On August 5, 2007, Joseph Kisner (Kisner) hosted a party at his house in Oak Harbor. Willie Rainey (Rainey) arrived at the party, uninvited, around 9:30 p.m. Kisner and Rainey knew each other from working together on various roofing jobs. About an hour later, Kisner, who was intoxicated, heard yelling and screaming in his front yard. When Kisner went to the front of his house he found Rainey, who was also intoxicated. Kisner testified that Rainey was "pretty aggressive," and that Rainey's girlfriend, Jill Glaspie (Glaspie), was crying. At the time of the party, a no-contact order prohibited Rainey from contacting Glaspie. Kisner then saw Rainey slap Glaspie's face with his open hand. Kisner and several others intervened and separated Rainey from Glaspie. When Kisner told Rainey to leave, Rainey punched Kisner in the mouth. A fight ensued, after which Rainey left.

Kisner, his brother Kyle, Glaspie, and a friend named Patrick Metcalf were all in the kitchen when Rainey returned to the house later that evening. Rainey pointed a pistol at Kisner's face, then at the other party guests, then back at Kisner. Rainey pushed the gun to Kisner's forehead. When Glaspie said something to Rainey, he punched her in the face. Kisner dragged Glaspie out of the house and called 911. The police arrived, but Rainey had already left.

The State charged Rainey with one count of burglary in the first degree and one count of assault in the second degree, both based on the assault of Kisner in the kitchen. The State also charged Rainey with two counts of felony violation of a no-contact order.

A jury convicted Rainey as charged on the burglary in the first degree, assault in the second degree, and two felony violations of a no-contact order. The jury also found that Rainey was armed with a deadly weapon in the commission of the burglary. Based on an offender score of seven, the court sentenced Rainey to 113 months of confinement for the burglary in the first degree, which was the maximum standard sentence and included a 24 month enhancement for the deadly weapon finding. The court also sentenced Rainey to 57 months confinement for the assault in the second degree and 60 months for each felony violation of a no-contact order. All sentences were to run concurrently.

Rainey appealed, arguing that an erroneous instruction to the jury on the two counts of felony violation of a no-contact order caused a violation of his double jeopardy rights. The State conceded the error, and we remanded to the trial court to vacate one of the counts of felony violation of a no-contact order.¹

At resentencing, defense counsel raised for the first time the issue of whether the burglary and assault offenses constituted the same criminal conduct under RCW 9.94A.589(1)(a) for the purpose of calculating Rainey's offender score.² The State argued that even if the offenses did constitute the same criminal conduct, the burglary antimerger statute, RCW 9A.52.050, would allow the court to treat the burglary and the assault as separate criminal conduct for offender score calculation purposes. In accordance with the instructions on remand, the court vacated one count of felony violation of a no-contact order and resentenced Rainey based on an offender score

¹ State v. Rainey, note at 150 Wn.App. 1024 (2009).

² Rainey was sentenced based on an offender score of six, but argued that his assault and burglary convictions were the same criminal conduct, and therefore his offender score should have been four.

that counted the burglary and the assault as separate criminal conduct. Rainey appeals the resentencing.

ANALYSIS

Same Criminal Conduct

On appeal, Rainey argues the court erred in failing to exercise discretion on whether to treat the burglary and the assault as the same criminal conduct under the burglary antimerger statute, RCW 9A.52.050.³ The premise of Rainey's argument is that the burglary and assault are the same criminal conduct under RCW 9.94A.589(1)(a). Although we do not necessarily agree with Rainey's premise, we need not resolve whether the offenses are the same criminal conduct because we conclude the court properly exercised discretion.

A trial court abuses its discretion if it makes a manifestly unreasonable decision based on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court need not state the reasons for its decision. State v. Hays, 55 Wn. App. 13, 15-16, 776 P.2d 718 (1989).

Where a defendant is sentenced to two or more current offenses, the offender score for each current offense is determined using all other current and prior offenses. If, however, the court finds the current offenses involve the same criminal conduct, they are counted as one crime. RCW 9.94A.589(1)(a). Two or more crimes are considered the same criminal conduct when they involve "the same criminal intent, are committed at the same time and place, and involve the same victim." RCW

³ Rainey concedes that, under RCW 9A.52.050, the court had discretion to punish his offenses separately.

9.9A589(1)(a). However, when one offense is a burglary, even if the offenses involve the same criminal conduct, courts have discretion to punish the same criminal conduct separately under RCW 9A.52.050, the burglary antimerger statute:

Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.

The antimerger statute makes no explicit requirement that trial courts enter findings on the record in support of a decision to punish two offenses separately.

At resentencing, the State clarified the issue of same criminal conduct, stating:

However, all that argument is inapplicable by virtue of our burglary antimerger statute [RCW 9A.52.050] and that really resolves the issue. It's black letter law now in Washington that the antimerger statute which permits a defendant to be prosecuted and punished for both the burglary and the crime committed in the course of the burglary, that has been interpreted to include applying resentencing laws such that it would also score against it, not just that it could be prosecuted and convicted.

Rainey argues the State's explanation of the law is incorrect, because it implies that the court must punish the two offenses separately even when they constitute the same criminal conduct, rather than exercising discretion in determining whether to treat the offenses as the same or separate criminal conduct.

The court was correctly apprised that the antimerger statute gives the sentencing court discretion to punish the burglary and the assault separately, even when they constitute the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). The record is clear that the court adopted the State's correct articulation of the antimerger statute. In response to the State's assertion, the court said, "[a]ll right." Then, based on an offender score which counted the burglary

and the assault as separate offenses, the court sentenced Rainey at the maximum of the standard range. The court stated that the maximum confinement under the standard range was “warranted under the fairly egregious facts of this case.” This indicates an exercise of the court’s discretion, because it follows that the court counted the offenses separately so as to achieve a maximum sentence. Nothing in the State’s argument or the court’s ruling indicates that the court believed it lacked discretion.

Statement of Additional Grounds

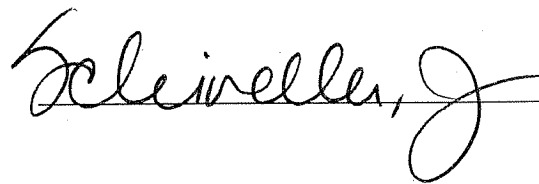
Relying on State v. Regan, 143 Wn. App. 419, 177 P.3d 783 (2008), Rainey claims he received ineffective assistance of counsel because his attorney had a conflict of interest. We review whether circumstances demonstrate a conflict of interest de novo. State v. Vicuna, 119 Wn. App. 26, 30-31, 79 P.3d 1 (2003). A conviction will be reversed if an attorney makes a timely objection to a perceived conflict of interest and the trial court does not conduct an adequate inquiry. Holloway v. Arkansas, 435 U.S. 475, 488, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). A defendant must establish that “an actual conflict of interest adversely affected his lawyer’s performance” in order to show a violation of the Sixth Amendment right to counsel based on a conflict of interest. Regan, 143 Wn. App. at 427. To show an adverse effect, a defendant must show that a plausible alternative defense strategy was available, but was not pursued because it was in conflict with the attorney’s other interests. Regan, 143 Wn. App. at 428.

The alleged conflict of interest arose from a potential suit to be brought by the

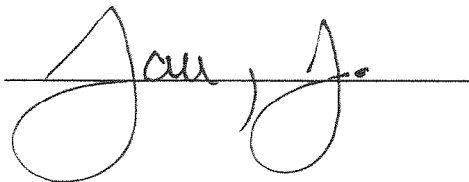
ACLU on behalf of Rainey against the prosecutor for alleged misconduct with respect to an earlier plea deal involving unrelated charges. As a negotiator in that plea deal, Rainey's attorney would be called as a witness. The trial court conducted a detailed inquiry into the nature of the potential conflict. Rainey's attorney informed the court that he had not received an Ethics Opinion on the issue and clarified that no suit was pending. The court ultimately denied defense counsel's motion to withdraw, finding that no actual conflict existed.

As the trial court correctly found, there was no actual conflict of interest because the conflicting litigation was only a potential future suit. Moreover, Rainey fails to establish that any conflict had an adverse affect on his attorney's performance. Rainey describes no alternative defense tactic that his attorney could have pursued. Indeed, he makes no mention of any impact the perceived conflict had on his attorney's performance at trial. We find no evidence in the record that the mere possibility of defense counsel being called as a witness on his client's behalf manifested itself as a conflict at trial.

We affirm.

A handwritten signature in cursive script, reading "Scheineller, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, reading "Jau, J.", written over a horizontal line.

Dupe, C. S.