IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67168-5-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
THOMAS A. SHERRILL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 19, 2011
	)	
_____	)	

Becker, J. — When calculating an offender score, a sentencing court must follow an earlier court's finding that two prior offenses were the same criminal conduct. In this case, we disagree with appellant's contention that the decision of an earlier sentencing court to count two prior offenses as one necessarily implies a determination that the two prior offenses were the same criminal conduct. We affirm the calculation of appellant's offender score as 6 rather than 5.

In 1990, Thomas Sherrill was sentenced for second degree burglary and first degree theft convictions. In the 1990 judgment and sentence, the court found that the burglary and theft were "separate and distinct offenses involving different victims. The theft of the vehicle occurred outside of the building." On

the judgment and sentence, a box stating that some current offenses encompassed the same criminal conduct was not checked.

In 1996, the same judge who presided at the 1990 sentencing sentenced Sherrill for an attempted first degree kidnapping conviction. The court found "that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360): Burglary 2, Theft 1."[1] There is no finding on the judgment and sentence stating that these two prior convictions encompassed the same criminal conduct.

In January 2009, a court sentenced Sherrill for residential burglary and first degree theft convictions. The sentencing court did not count any prior convictions as one offense.

The present appeal concerns the sentence imposed on Sherrill when, on November 30, 2009, he pleaded guilty to first degree unlawful possession of a firearm. Although Sherrill's "Statement on Plea of Guilty" listed his offender score as 6, Sherrill contended before sentencing the score should be 5. The court heard argument on April 29, 2010. Sherrill argued that the 1990 offenses should be scored as 1 point because of the scoring by the 1996 sentencing court.

The State asserted that the 1996 determination was a mistake. The court agreed that the 1990 offenses should be counted separately and sentenced Sherrill with an offender score of 6. Sherrill appeals this ruling.

[1] RCW 9.94A.360 was recodified as RCW 9.94A.525 by Laws of 2001, ch. 10 § 6.

We review a sentencing court's calculation of an offender score de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

In calculating an offender score under the Sentencing Reform Act, a court counts all convictions separately except offenses that were found to encompass the same criminal conduct:

> In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:
>
> . . . 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.

RCW 9.94.A.525(5)(a)(i) (emphasis added). As Sherrill argues, under the plain language of the statute, a current sentencing court must honor an earlier court's decision finding that prior offenses encompassed the same criminal conduct.

In 1996, the court scored the two 1990 offenses as one, but did not make a finding that the two convictions encompassed the same criminal conduct. Such a finding would have been in direct contradiction to the 1990 finding that the offenses were not the same criminal conduct.

Sherrill argues that we must treat the 1996 court's offender score calculation as an implicit finding that the two 1990 offenses were the same criminal conduct. He relies on State v. Anderson, 92 Wn. App. 54, 960 P.2d 975

(1998), review denied, 137 Wn.2d 1016 (1999). In that case, Anderson did not ask for a finding of same criminal conduct at his sentencing hearing, and the trial court did not make one. On appeal, Anderson sought to have this court classify two current offenses as the same criminal conduct. We treated the trial court's calculation of the defendant's offender score as an implicit determination that his offenses did not constitute the same criminal conduct. Anderson, 92 Wn. App. at 62.

This case is unlike Anderson. Here, the 1996 court's decision to score the two prior offenses as one was made six years after the original finding that they were separate and distinct offenses. To treat the 1996 court's scoring decision as an implied finding that the two prior convictions encompassed the same criminal conduct would contradict the finding made in 1990 when the circumstances of the two offenses were squarely before the court. It would be an unwarranted extension of Anderson to hold that a scoring decision in 1996 implicitly overruled an actual finding in 1990 that the same two convictions were for separate and distinct offenses.

Sherrill alternatively argues that his preferred result is compelled by judicial estoppel. We disagree. Judicial estoppel focuses on three factors: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive

an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Miller v. Campbell, 164 Wn.2d 529, 539, 192 P.3d 352 (2008). Here, because the court did not find in 1996 that the two 1990 offenses encompassed the same criminal conduct, there was no inconsistency.

Because the 1996 court did not find that the offenses were the same criminal conduct, Sherrill's challenge to his offender score fails. We affirm the judgment and sentence.

Becker, J.

WE CONCUR:

Dwyer, C.J.

Edlington, J.