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

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| **STATE OF WASHINGTON,** | ) | **No. 28686-0-III** |
| **Respondent,** | ) | |
| | ) | |
| **v.** | ) | **Division Three** |
| | ) | |
| **SEAN L. WATSON,** | ) | |
| | ) | **UNPUBLISHED OPINION** |
| **Appellant.** | ) | |
| | ) | |

Sweeney, J. — Crimes amount to the same criminal conduct when they share the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). A defendant's criminal intent for multiple offenses is *not* the same when the defendant "has the potential to commit distinct drug crimes in the present *and* in the future with the substances found." *State v. Porter*, 133 Wn.2d 177, 184, 942 P.2d 974 (1997). Here, packaged cocaine found in the defendant's room shows the defendant intended to deliver drugs in the future, but his roommate's possession of cocaine and use of the defendant's car show that he also intended to deliver drugs in the present. The defendant's intent for the crimes of use of a building for unlawful drug

purposes and conspiracy to deliver a controlled substance was not the same. The sentencing judge correctly concluded that the crimes do not amount to the same criminal conduct, and we affirm his sentence.

FACTS

Sean Watson was convicted in November 2002 of two counts of vehicular assault, one count of second degree driving with a suspended license, and one count of involving a minor in drug dealing. In January 2003, a sentencing judge found aggravating factors and imposed an exceptional sentence. Mr. Watson appealed the sentence. He argued, in part, that two of his prior offenses—conspiracy to deliver a controlled substance and use of a building for unlawful drug purposes—should have been considered the same criminal conduct when calculating his offender score. This court concluded that the prior offenses involved different victims and affirmed Mr. Watson's sentence. *State v. Watson*, noted at 120 Wn. App. 1017, 2004 WL 295662, *review denied*, 152 Wn.2d 1027 (2004).

Mr. Watson then petitioned for relief from personal restraint. He contended and the State conceded that his exceptional sentence was invalid under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), *abrogated by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Clerk's Papers (CP) at 3, 5-6. We accepted the concession and remanded for resentencing.

On remand, Mr. Watson stipulated to

an aggravating factor in support of an exceptional sentence. At resentencing, he again contended that his prior offenses—conspiracy to deliver a controlled substance and use of a building for unlawful drug purposes—encompassed the same criminal conduct. The State argued that each offense had a different criminal intent and cited a probable cause affidavit as proof:

> On 12/21/01 the SPD/SIU, Patrol, and SWAT executed a search warrant at 2027 East Bismark. Preraid surveillance was set and did observe a vehicle arrive that was listed in the search warrant. The subject, later identified as TORRENCE, then left in a vehicle registered to defendant WATSON. This vehicle was stopped in the area of Nevada and North. During the stop, defendant TORRENCE was observed dropping an item, which was later field-tested as crack cocaine.
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> The SPD SWAT team then executed a search warrant at the residence. Defendants WATSON, CRUZ, and CHEBATAH were located inside of the residence. In the main floor northwest bedroom where CHEBATAH was located were several prepackaged baggies of crack cocaine along with scales and packaging materials. There was also paperwork in the room for defendant WATSON. . . .
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> In the main floor southwest bedroom there was paperwork for defendant TORRENCE. Also in this room was additional prepackaged crack cocaine.

CP at 73-74.

The court noted that the judgment and sentence for the prior offenses did not indicate that the offenses were the same criminal conduct. It concluded that it was bound by that judgment and sentence and that it believed the offenses were not the same criminal conduct, in any event:

> I think that if there is a legal principle that governs this, it is a very old and very basic principle; namely, the principle of final estoppel or res judicata, that there is identity of parties, identity of jurisdictions, et cetera, that I think yield the result that the court is bound by the earlier determination of the sentencing court back in 2002.
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> Now, to the extent that, you know, a secondary reason needs to be given, I think the court can look at the affidavit of probable cause that is part of the record on the 2002 case. I would simply find that I agree with what Judge Schroeder's determination was when this matter was originally sentenced on the vehicular assault case before him that those do not constitute the same course of conduct and, therefore, they should be considered [separate] criminal history for our purposes today.

Report of Proceedings (RP) (Dec. 11, 2009) at 18. The court then counted the prior offenses separately and sentenced Mr. Watson to 100 months of confinement.

## DISCUSSION

Mr. Watson contends his prior offenses for conspiracy to deliver a controlled substance and use of a building for unlawful drug purposes encompass the same criminal conduct.

A sentencing court calculates an offender score, in part, by totaling the defendant's prior convictions for felonies and certain juvenile offenses. RCW 9.94A.525(5)(a)(i); *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). It is required to count all prior convictions separately, unless (1) a prior court concluded the offenses encompassed the same criminal conduct, or (2) the current court decides concurrent prior adult offenses or consecutive prior juvenile offenses constitute the same criminal conduct. RCW

9.94A.525(5)(a)(i). RCW 9.94A.525(5)(a)(i), then, binds a sentencing court to any prior determination that prior offenses encompass the same criminal conduct. But it "*must* apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct." *State v. Torngren*, 147 Wn. App. 556, 563, 196 P.3d 742 (2008).

The court that originally sentenced Mr. Watson for the conspiracy and use of a building offenses concluded that the offenses were *not* the same criminal conduct. *Watson*, 2004 WL 295662 at *4. The sentencing court here was not bound by this conclusion. RCW 9.94A.589(1)(a); *Torngren*, 147 Wn. App. at 563. It had to apply the same criminal conduct test to those prior offenses to determine whether they encompassed the same criminal conduct. RCW 9.94A.589(1)(a). A sentencing court *must* determine whether multiple prior convictions that have concurrent sentences and that have not already been found to amount to the same criminal conduct encompass the same criminal conduct. *Torngren*, 147 Wn. App. at 563.

Here, the court referenced the earlier conclusion that these crimes were not the same criminal conduct. But it also went on to independently conclude that Mr. Watson's prior offenses for conspiracy and use of a building do not encompass the same criminal conduct. We review this latter decision.

Whether or not these prior crimes are the same criminal conduct is a question of law that we will review de novo. *Torngren*,

147 Wn. App. at 562-65. The conclusion of same criminal conduct requires that the defendant show that the crimes have the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). All three elements are required. *Porter*, 133 Wn.2d at 181.

A defendant's criminal intent for multiple offenses is the same when, viewed objectively, it did not change from one offense to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). For instance, a defendant who simultaneously possesses two types of drugs has a single criminal objective of delivering the drugs sometime in the future. *State v. Garza-Villarreal*, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993). But intent for multiple offenses is *not* the same when the defendant "has the potential to commit distinct drug crimes in the present *and* in the future with the substances found." *Porter*, 133 Wn.2d at 184. The court's discussion in *Porter* illustrates the latter rule:

> [I]n *State v. Maxfield*, 125 Wn.2d 378, 886 P.2d 123 (1994), police searched the defendant's house and discovered a marijuana grow operation and a large quantity of dried, packaged marijuana contained in zip-lock bags. The defendant was charged with manufacture of an illegal substance and with possession with intent to deliver, and the trial court treated the two charges as separate criminal conduct. We affirmed, finding the defendant's grow operation showed a *past and present intent* to grow marijuana, while his possession of the packaged drug showed an intent to deliver marijuana *in the future*. *Maxfield*, 125 Wn.2d at 403.
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> Likewise in *State v. Burns*, 114 Wn.2d 314, 788 P.2d 531 (1990), a defendant sold cocaine to an undercover officer from a parked van. The defendant was arrested while still in the van, and additional drugs were

> found in the vehicle. The defendant was charged with delivery for selling drugs to the officer and possession with intent to deliver the drugs found in the van. The large quantity of drugs in the van supported a finding that the defendant intended to sell drugs *in the future*, and this intent was distinct from the defendant's intent to sell drugs to the officer *in the present*. *Burns*, 114 Wn.2d at 319-20. The two charges thus constituted separate criminal conduct.

133 Wn.2d at 184.

Mr. Watson argues that the packaged drugs in his bedroom show he conspired to deliver cocaine and used his bedroom for one purpose—to sell drugs in the future. The several packages of cocaine in Mr. Watson's room, indeed, show he intended to sell cocaine in the future. But the record also suggests that his roommate was driving his car to another location to deliver a single baggie of crack cocaine in the present. The evidence here, then, shows Mr. Watson had the potential to commit distinct drug crimes in the present and in the future.

Moreover, by definition, the intent necessary for use of a building for unlawful drug purposes is different from the intent necessary for conspiracy to deliver drugs. Use of a building requires proof that the defendant *knowingly* made a room, space, enclosure, or building available for manufacturing, delivering, selling, storing, or giving away a controlled substance. RCW 69.53.010(1). A person acts knowingly when he is aware or reasonably should be aware that existing facts constitute an offense. RCW 9A.08.010(1)(b)(i), (ii). On the other hand, conspiracy to deliver requires proof that the defendant acted with *intent* to deliver the

drug. RCW 69.50.401(1); RCW 69.50.407; *State v. Smith*, 65 Wn. App. 468, 473, 828 P.2d 654 (1992). "Intent" is "act[ing] with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

We can infer that Mr. Watson knowingly used his bedroom to manufacture and store a controlled substance from the scales, packaging materials, and prepackaged baggies of crack cocaine found in his bedroom. There is no evidence, however, that suggests he *sold* the drugs from his room or the house. The roommate's use of Mr. Watson's car to deliver drugs shows Mr. Watson intended to deliver the drugs to someone at another location. Mr. Watson's prior offenses, then, do not encompass the same criminal conduct because they do not share the same criminal intent. *Porter*, 133 Wn.2d at 184.

We affirm Mr. Watson's sentence.

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

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Siddoway, J.