

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 27626-1-III

Respondent,

Division Three

v.

BARBARA ANNA MARTIN,

UNPUBLISHED OPINION

Appellant.

Brown, J. — Barbara Anna Martin appeals her Benton County convictions of manufacturing controlled substances (methamphetamine and marijuana), possessing a controlled substance (methamphetamine), and bail jumping. She contends the convictions for manufacturing and possessing methamphetamine should have counted as one crime because they constituted the same criminal conduct. We disagree. Pro se, Ms. Martin also contends (1) she should have been credited with the time served for subsequent convictions; (2) the evidence does not support the possession conviction or the school zone enhancement; (3) she does not understand why she did not get a Drug Offender Sentencing Alternative (DOSA) (RCW 9.94A.660) sentence; and (4) the

offender score is out of chronological order. We again disagree. Accordingly, we affirm.

FACTS

In September 2001, officers executing a search warrant at Ms. Martin's house found materials for manufacturing methamphetamine and marijuana inside the house, outside, and in a rented storage unit. They found methamphetamine on a table in Ms. Martin's house and found her minor child in her bedroom. Ms. Martin was charged with one count of manufacturing methamphetamine (RCW 69.50.401(a)(1)), one count of unlawful possession of methamphetamine (RCW 69.50.401(d)), one count of manufacturing marijuana (RCW 69.50.401(d)), one count of second degree criminal mistreatment (RCW 9A.42.030(1)), and one count of bail jumping (RCW 9A.76.170(1)). After trial in September 2004, the jury reached a verdict of guilty on all charges with a special finding that methamphetamine was manufactured within 1,000 feet of a school bus route stop. RCW 69.50.435(a)(3).

At sentencing in February 2005, the trial court based the offender score of five on one prior drug conviction and the four other current offenses. The court rejected Ms. Martin's request for a DOSA sentence. She received standard range sentences, running concurrently (101 months), plus a 24-month school zone enhancement.

On appeal to this court, Ms. Martin argued insufficient evidence, prosecutorial

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misconduct, and ineffective assistance of counsel. *State v. Martin*, No. 23949-7-III, 2006 WL 2130666 at *1 (Aug. 1, 2006), *review denied*, 160 Wn.2d 1007 (2007). This court accepted the State's concession that the criminal mistreatment conviction was in error, reversed that conviction, affirmed the remaining convictions, and remanded for resentencing. *Id.* Pending the outcome of the appeal, Ms. Martin was convicted of two additional charges for unlawful possession of methamphetamine (Benton County No. 021006535 and Benton County No. 041005713) and served the sentences for those subsequent convictions.

At resentencing in August and October 2008, the trial court again rejected Ms. Martin's request for a DOSA sentence and denied her request for an exceptional sentence downward. The trial court added the two subsequent convictions and the one prior conviction to the four remaining 2005 convictions to reach an offender score of six. Even with the higher offender score, the trial court imposed a lower total sentence (98 months plus the 24-month enhancement) by using the low end of the standard range. Ms. Martin timely appealed from the amended judgment and sentence.

ANALYSIS

A. Offender Score Computation

The issue is whether the trial court erred in including the methamphetamine manufacturing and the methamphetamine possession counts in Ms. Martin's offender score and rejecting her same criminal conduct arguments.

In determining a standard sentence range, the trial court counts other prior and current offenses separately to determine the offender score unless one or more of the current offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a); *State v. Maxfield*, 125 Wn.2d 378, 401, 886 P.2d 123 (1995) (citing former RCW 9.94A.400(1)(a) (1990))). Separate offenses constitute the same criminal conduct if three elements are present: (1) the same criminal intent, (2) the same time and place, and (3) the same victim. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Offenses constituting the same criminal conduct are counted as one crime when calculating the offender score. RCW 9.94A.589(1)(a); *Vike*, 125 Wn.2d at 410. If any one element is missing, the offenses are counted separately. *Porter*, 133 Wn.2d at 181. We review the trial court's sentencing decision for abuse of discretion or misapplication of the law. *Id.*

The trial court did not err in separately counting each of Ms. Martin's other current convictions. The elements of same criminal intent and same time are missing. Manufacture of methamphetamine and possession of methamphetamine have different state of mind elements. The manufacture crime requires the defendant knowingly manufactured a controlled substance. *State v. Warnick*, 121 Wn. App. 737, 742, 90 P.3d 1105 (2004). But mere possession of a controlled substance has no knowledge or intent element. *State v. Bradshaw*, 152 Wn.2d 528, 539, 98 P.3d 1190 (2004). Additionally, Ms. Martin's possession of the methamphetamine was in the present, but

the presence of precursors, plastic tubing, electrical tape, piping, a vessel for pressurized ammonia, scales, small baggies, and lithium batteries showed a past and possibly future intent to manufacture methamphetamine. *See Porter*, 133 Wn.2d at 183-84; *Maxfield*, 125 Wn.2d at 403.

In ruling the two crimes did not involve the same criminal conduct, the trial court reasoned the crime elements are different, but did not separately reason through the required elements of the same criminal conduct test. *See Porter*, 133 Wn.2d at 181. Even so, the court noted the manufacturing was an ongoing process while the possession was a separate course of conduct. In effect, the trial court concluded the two crimes involved different objectives over different time frames. Thus, they did not encompass the same criminal conduct. *See id.* at 184. The court did not misapply the law or abuse its discretion in counting the two offenses separately.

B. Pro Se Additional Grounds

Ms. Martin first contends she served 22 months for the later offenses (Benton County No. 021006535 and Benton County No. 041005713) while she appealed this case and waited for resentencing. She argues the sentences for the later convictions were supposed to run concurrent with the sentence for the 2005 convictions, and therefore, she should have that time credited against her 2005 sentence.

The record does not support her contention because it contains no information regarding the sentences on the later convictions. Ms. Martin appears to blame her trial

counsel for improperly advising her to appeal. If she contends she had ineffective assistance of counsel, she must show with a preponderance of the evidence that her counsel's performance was deficient and that this deficiency prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Ms. Martin provides no evidence that she was advised to appeal. Moreover, she cannot show prejudice beyond conclusory allegations that trial counsel should have known she would be convicted of subsequent offenses and would be ordered to serve sentences concurrent with each other in this case.

Ms. Martin next contends the evidence was insufficient to support her conviction for possession and the school zone enhancement. The evidence to support the school zone enhancement was addressed and decided in her previous appeal. *Martin*, 2006 WL 2130666 at *3 ("since it is undisputed her residence is located near a school bus stop, Ms. Martin's sentence properly contained a school bus zone enhancement"). The issue will not be revisited because Ms. Martin fails to show that the jury's verdict was clearly erroneous. *State v. Gossage*, 165 Wn.2d 1, 9, 195 P.3d 525 (2008). Her additional allegation that she has new evidence to reverse her possession conviction is not properly before this court on appeal. If she wishes to raise issues that require evidence not in the existing trial record, the appropriate means is through a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Next, Ms. Martin contends she should have been granted a DOSA sentence.

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Generally the trial court's decision whether or not to grant a DOSA is not reviewable. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). A defendant may, however, challenge the procedure by which a sentence was imposed. *Id.* For instance, a court's categorical refusal to consider a DOSA sentence is a failure to exercise discretion that is subject to reversal. *Id.* at 342.

Here, the record shows that when defense counsel requested a DOSA sentence at the first sentencing, the trial court denied the request without ordering a DOSA evaluation. At resentencing, the court ordered a DOSA evaluation, but again rejected a DOSA sentence due to the size of the manufacturing operation and because Ms. Martin did not appear to be a good risk. The court noted that in the interim period between her conviction and resentencing, Ms. Martin was convicted of additional felonies and did not try to get addiction services when she had an opportunity. The trial court exercised its discretion and did not categorically deny Ms. Martin a DOSA sentence.

Finally, Ms. Martin contends she looked through her paperwork and "noticed the offender scores were all messed up." Statement of additional grounds for review at 3. We detect no offender score ambiguities or apparent error. We cannot tell what Ms. Martin's concerns may be. As discussed above, the offender score used in the amended judgment and sentence is supported by the criminal history and the number of other current offenses. In sum, no error is apparent on this record.

Affirmed.

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A majority of the panel has determined this opinion will not be printed in the

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Washington Appellate Reports, but it will be filed for public record pursuant to RCW
2.06.040.

Brown, J.

WE CONCUR:

Kulik, A.C.J.

Sweeney, J.