69962-8

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No. 69962-8-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MUHAMMED TILLISY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court improperly refused to permit Muhammad Tillisy to represent himself in violation of the Sixth Amendment and Article I, section 22.

2. Mr. Tillisy's convictions in Counts 1 and 2 of second degree identity theft violate the double jeopardy provisions of the Fifth Amendment and Article I, §section 9.

3. The trial court erred in refusing to grant Mr. Tillisy's motion to dismiss the charges.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments and Article I, section 22 guarantee a criminal defendant the right to represent himself so long as the request is timely, unequivocal, and knowingly and voluntarily made. Well before trial began, Mr. Tillisy made a knowing and unequivocal request to represent himself. Did the Court improperly deny Mr. Tillisy his right to represent himself?

2. The double jeopardy clauses of the federal and state constitutions bar multiple convictions based upon a single unit of prosecution. The unit of prosecution is the behavior or act which the legislature intends to criminalize. The Legislature has stated the unit of

prosecution of identity theft is the obtaining, possession, or transfer of each means of identification. Where Mr. Tillisy was convicted of two separate counts for his single act of possessing the financial information of a single victim, do his convictions violate double jeopardy protections?

3. A trial court may dismiss a facially valid information following the State's opening statement if that statement omits an allegation as to a necessary fact. Here, in its opening statement, the State did not allege any of the acts occurred in Washington. Did the trial court have authority to dismiss the charges?

C. STATEMENT OF CASE

Aware of an outstanding arrest warrant for Mr. Tillisy, Edmonds Police Corporal Josh McClure spent the better part of his shift parked near Mr. Tillisy's home waiting for him. 11/26/12 RP 82-83. When Mr. Tillisy eventually drove by, the corporal stopped him and arrested him. *Id.* 85.

A search of Mr. Tillisy and the car led to the discovery of numerous checks each containing the same routing number. However, some listed "Honda of Fife" and others were blank. 11/27/12 RP 122-

23. Also found was a scrap of paper with the same routing number listed on it as well as the words "Honda of Fife." 11/23/12 RP 93.

Police also found a checkbook belonging to Ok Kyang with several unused checks. 11/27/12 RP 144-45.

The owner of Honda of Fife testified that while the recovered checks did not look like his company's check, the routing number was real and belonged to Honda of Fife. 11/27/12 RP 162.

The State charged Mr. Tillisy with two counts of second degree identity theft and two counts of forgery for Mr. Tillisy's possession of the checks containing the Honda of Fife routing number. CP 278-80. The State alleged a third count of identity theft and one count of unlawful possession of a payment instrument for Ms. Kyang's checks. *Id.*

A jury convicted Mr. Tillisy as charged. CP 69-74.

D. ARGUMENT

1. The trial court erred in refusing to address Mr. Tillisy's request to proceed pro se.

a. A criminal defendant has the absolute right to represent himself if he makes a timely and unequivocal request.

Article I, section 22 of the Washington Constitution explicitly guarantees a defendant the right to "appear and defend in person, or by

counsel." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The United States Supreme Court has recognized the Sixth Amendment implicitly provides a right to self-representation. *Faretta v. California,* 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

A valid waiver of counsel requires the trial court ensure the accused knowingly, voluntarily, and intentionally relinquishes this fundamental constitutional right. *Johnson v. Zerbst*, 304 U.S. 456, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Unlike the right to a fair trial, the right of self-representation includes the right to forgo trained legal assistance, and even embraces the "personal right to be a fool." *State v. Fritz*, 21 Wn. App. 354, 359, 585 P.2d 173 (1978). It is the defendant who suffers the consequences of a conviction, and,

> It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. . . . his choice must be honored out of the respect for the individual which is the lifeblood of the law.

Faretta, 422 U.S. at 834 n.46 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1978)).

The trial court's discretion to grant a criminal defendant's request for self-representation "lies at a continuum" based on the timeliness of the request:

> (a) if made well before the trial ... and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial ... is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial ... the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Vermillion, 112 Wn. App. 844, 855, 51 P.3d 188 (2002) (quoting *Fritz,* 21 Wn. App. at 361).

b. Mr. Tillisy made a timely and unequivocal request to represent himself.

Mr. Tillisy made a request to represent himself a week prior to the start of trial. Mr. Tillisy had two separate causes pending. Mr. Tillisy was represented by the same appointed attorney in both matters. Mr. Tillisy had previously moved to have his appointed attorney replaced. 7/19/12 RP 4-5. Mr. Tillisy made that motion contending his attorney had not provided him copies of discovery he had requested and had not spent sufficient time meeting with Mr. Tillisy. *Id.* While the motion was only filed in one of the two pending case, Judge Appel made clear that if he were to make any determination of appointed counsel's ability to represent Mr. Tillisy "it would apply to any case." *Id.* at 14. The court then denied the motion. *Id.* at 22.

On November 8, 2012, Mr. Tillisy renewed his previous motion. As before, that motion was made in only one of the two cases. But Mr. Tillisy explained that his attorney, who still represented him on both pending matters, had not met with him for a sufficient amount of time to review discovery in both cases. Supp. RP 17. Mr. Tillisy explained he had only received a portion of the discovery in one of the cases.

Stating his belief that his attorney no longer wanted to work with him, Mr. Tillisy requested the court remove his attorney and provide him new counsel. Supp. RP 2. Alternatively, Mr. Tillisy requested to proceed pro se. *Id.* at 14, 21. "[A]n unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel." *Madsen*, 168 Wn.2d at 507 (citing *State v. Stenson*, 132 Wn.2d 668, 741, 940 P.2d 1239 (1997)).

The trial court engaged in a lengthy but largely irrelevant conversation with Mr. Tillisy centering on various technical aspects of trial. For example, the court pressed Mr. Tillisy to explain the exceptions to the hearsay rule. Supp. RP 37-38. The court quizzed Mr. Tillisy on the intricacies of jury selection and instruction. *Id.* at 41-42. But Mr. Tillisy response to such questions does not demonstrate the

requisite knowledge, or lack thereof, relevant to the his waiver of counsel. As the Supreme Court explained:

> We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

Faretta, 422 U.S. at 836.

Mr. Tillisy plainly stated "I know what I am getting into." Supp. RP at 40. The record illustrates that he did indeed.

Nonetheless, the court concluded that Mr. Tillisy did not truly understand simply because Mr. Tillisy had been pressed into saying that if things got too difficult he would retain counsel. Supp. RP 51. But when told that he would not have the ability to do that, Mr. Tillisy clarified "Obviously, I'm not going to present future motions. My motion at this point is to proceed pro se." *Id.* at 47. Again, Mr. Tillisy explained that he understood the consequences of his decision. There was no basis to conclude otherwise.

Mr. Tillisy's timely and unequivocally requested to represent himself. The trial court erroneously concluded he lacked the necessary understanding of the consequences of that choice. This Court should reverse Mr. Tillisy's convictions.

2. Double Jeopardy protections do not permit Mr. Tillisy's two convictions of second degree identity theft.

a. The federal and state constitutions prohibit multiple punishments for the same offense.

The Double Jeopardy Clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. amend. V; Const. Art. I, § 9. The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

The double jeopardy provisions of the state and federal constitutions protect against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

b. <u>The unit of prosecution of identity theft is the possession, use or transfer of another's information</u>.

Focusing on the third of these, the prohibition on multiple punishments, the Supreme Court has said

> When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.

State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). A person may not be convicted more than once under the same criminal statute if only one "unit" of the crime has been committed. *State v. Leyda*, 157 Wn.2d 335, 342, 138 P.3d 610 (2006), overruled in part by staute, Laws 2008, ch. §§ 1-3;[1] *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)).

The unit of prosecution is designed to protect the accused from overzealous prosecution. *State v. Turner*, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

> The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the

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[1] Following *Leyda* the Legislature added language to RCW 9.35.001 indicating the unit of prosecution is "each use" of another's information. That language is discussed in more detail below.

> charges. *Brown v. Ohio,* 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."); [*Ex parte Snow*, 120 U.S. 274, 282, 7 S. Ct. 556, 30 L. Ed. 658 (1887)] (if prosecutors were allowed arbitrarily to divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum, resulting in hundreds of charges).

Adel, 136 Wn.2d at 635.

The unit of prosecution, the punishable conduct under the statute, may be an act or a course of conduct. *Tvedt*, 153 Wn.2d at 710. It is determined by examining the statute's plain language. *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007); *Leyda*, 157 Wn.2d at 342; *Westling*, 145 Wn.2d at 610. If the legislature has failed to specify the unit of prosecution in the statute, or if its intent is not clear, the court resolves any ambiguity in favor of the defendant. *Tvedt*, 153 Wn.2d at 711.

RCW 9.35.020(1) provides:

> No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

RCW 9.35.001 states in part:

> . . . .The unit of prosecution for identity theft by use of a means of identification or financial information is each individual unlawful use of any one person's means of identification or financial information. Unlawfully obtaining, possessing, or transferring each means of identification or financial information of any individual person, with the requisite intent, is a separate unit of prosecution for each victim and for each act of obtaining, possessing, or transferring of the individual person's means of identification or financial information.

In Mr. Tillisy's case there was a single victim of both Count 1 and Count 2, Honda of Fife. The punishable conduct, then, was his singular possession of the financial information of Honda of Fife. The fact that that information was separately printed on several cheeks is irrelevant. Mr. Tillisy never used those checks. Had he done so, RCW 9.35.001 would permit each use to be separately prosecuted. But nothing in that statute suggests the Legislature meant each "intended use" to constitute a separate offense. Mr. Tillisy's possession of Honda of Fife's financial information involved a single victim and a single act of possession. Thus, the court must dismiss one of the identity theft convictions involving Honda of Fife.[2]

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[2] This argument does not pertain to Identity Theft in Count 5 as that offense involved a seperate victim.

3. The trial court abused its discretion in denying Mr. Tillisy's motion to dismiss.

Following the State's opening statement, Mr. Tillisy moved to dismiss the charges, noting the State in its opening statement did not contend the acts occurred in Washington. 11/26/12(Opening Statement) RP 6-7.[3] The State acknowledged that omission but argued it was immaterial. *Id.* at 9.

The trial court denied the motion concluding it lacked authority to dismiss the case based upon the State's opening statement. 11/26/12(Opening Statement) RP 11.

In *State v. Gallagher*, 15 Wn. App. 267, 549 P.2d 400 (1976), the Court affirmed the dismissal of charges where the prosecutor's opening statement omitted an essential element to of the offense. The Court said "when some fact is clearly stated or admission is expressly made, leaving only an isolated and determinative issue of law, the court may resolve that issue." *Id.* at 270. Applying that rule, the Court affirmed the dismissal the charges following opening statements in which the prosecutor stated that the defendant misused

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[3] Because the opening statement was transcribed separately and another volume contains the remainder of the proceedings of November 26, 2012, the volume containing opening statements and the arguments on this motion will be cited as "11/26/12(Opening Statement) RP."

public fund for a "purpose not authorized by law" but did not say that he profited from that use. Because only the latter is criminal in Washington the trial court had authority to dismiss the charges.

In response to Mr. Tillisy's motion, the State contended that the rule in *Gallagher* applied only where there were omissions in the charging document. 11/26/12(Opening Statement) RP 9. However, in *Gallagher* this Court made clear the information was "valid on its face." 15 Wn. App. at 268. That is, the information alleged each element of the offense. In fact the Court framed the question as "whether a trial court may dismiss an Information, **valid on its face**, at the conclusion of the prosecution's opening remarks to the jury prior to the presentation of evidence." *Id.* (Emphasis added.)

What occurred in *Gallagher* is no different than what occurred here. There, in opening his statement, the prosecutor omitted any mention of profit from the misuse of funds. Here, the prosecutor asserted Mr. Tillisy did several things, but never asserted that he did so in Washington. Just as in *Gallagher*, only if the last fact is proved are the acts subject to conviction. Because the State was not seeking to prove the offense occurred in the State of Washington there was no

need to go further. Absent such proof, Mr. Tillisy could not be convicted of any offense.

Gallagher makes clear the trial court had authority to dismiss the prosecution. The trial court's mistaken belief to the contrary is an abuse of discretion.

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Tillisy's convictions.

Respectfully submitted this 21st day of November, 2013.

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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69962-8-I
	)	
	)	
MUHAMMED TILLISY,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________
[X]	MUHAMMED TILLISY 11100-085 FDC-SEATAC PO BIX 13900 SEATTLE, WA 98198	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON, THIS 21ST DAY OF NOVEMBER, 2013.

X

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