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IN THE SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

BURNICE R. THOMPSON,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 74134-9-I
Appeal from the Superior Court for Thurston County
The Honorable Christine Schaller, Judge
Cause No. 13-1-01072-4

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is BURNICE R. THOMPSON, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the unpublished opinion in the Court of Appeals, Division I, cause number 74134-9-I, filed February 8, 2016. No Motion for Reconsideration has been filed in the Court of Appeals.

A copy of the unpublished opinion is attached hereto in the Appendix at A1-A8.

C. ISSUE PRESENTED FOR REVIEW

> Whether the trial court violated Thompson's double jeopardy rights by entering judgment against her for two counts of Medicaid false statement where the offenses merged with her conviction for theft in the first degree?

D. STATEMENT OF THE CASE

As provided in Thompson's Brief of Appellant, which sets out facts and law relevant to this petition and is hereby incorporated by reference, she was convicted of two counts of Medicaid false statement and one count of theft in the first degree. On appeal, she argued that the two false statement offenses merged with her convictions for theft in the first degree. Division I affirmed, reasoning that even if it accepted

Thompson's argument that the offenses merged [Slip Op. at 7], it would still affirm "because the legislature intended to consider theft and Medicaid false statement to be separate crimes and punished accordingly." [Slip Op. at 7]. This reasoning ignores the unique facts in this case.

E. ARGUMENT

It is submitted that the issue raised by this Petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions, and raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

THOMPSON MAY NOT BE CONVICTED OF TWO COUNTS OF MEDICAID FALSE STATEMENT WHERE THE OFFENSES MERGED WITH HER CONVICTION FOR THEFT IN THE FIRST DEGREE.

The double jeopardy clauses of the state and federal constitutions prevent the imposition of multiple punishments for the same offense. U.S. Const. amend. 5; Const. art. 1, § 9; North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969); In re Fletcher, 113 Wn.2d 42, 46-47, 776 P.2d 114 (1989). A concurrent sentence does not cure the violation. Ball v. United States, 470 U.S. 856, 865, 84 L. Ed. 2d 740, 105 S. Ct. 1668 (1985); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d

1072 (1998); State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). This court reviews double jeopardy claims de novo. State v. Hughes, 166 Wn. 2d 675, 681, 212 P.3d 558 (2009). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. Calle, 125 Wn.2d at 772; In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 2004).

While Washington courts employ a three-prong analysis to determine legislative intent, In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 895, 46 P.3d 840 (2002), at issue here is whether there is evidence that the Legislature intended to treat the relevant conduct as a single offense for double jeopardy purposes. Id; State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). This merger doctrine "is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy...." Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. Calle, 125 Wn.2d at 778; State v. Vladovic, 99 Wn.2d 413, 418-19, 662 P.2d 853 (1983). If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on "some injury to the person or property

of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms the element." State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

The trial court denied Thompson's post-trial motion to dismiss her two convictions for Medicaid false statement under the merger doctrine, holding:

> ... I do not find that the merger doctrine applies in this case or double jeopardy, because even if the crimes would merge if there was an independent purpose or effect to each, they may be punished as separate offenses. And I find that the Legislature intended to punish Medicaid false statement and theft separately, and therefore merger does not apply, and I deny the defense motion.

[RP 09/24/15 18].

When the conduct of one offense elevates the degree of the second offense, the offenses merge to avoid double jeopardy. State v. Vladovic, 99 Wn.2d at 419. Example: In State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), our Supreme Court determined that the Legislature did not intend to impose separate punishments for first degree robbery and second degree assault where the threat to use force—the assault—elevated the robbery to a first degree offense. Id. at 805.

In charging Thompson with theft in the first degree, the State alleged that between December 1, 2012 and April 30, 2013, she wrongfully obtained property belonging to the State of Washington "by

color or aid of deception by committing a series of transactions which were part of a criminal episode and/or a common scheme or plan in which the sum value of all said transactions exceeded $5,000.00." [CP 168]. For the two counts of Medicaid false statement, which occurred on December 31, 2012 and February 4, 2013, it was further alleged for each respective count that Thompson "knowingly made a false statement or represented a material fact in an application for payment under a medical care program ... and/or having knowledge of the occurrence of an event affecting ... the initial or continued right to payment ... concealed or failed to disclose such event with an intent to fraudulently secure such payment either in greater amount or quantity than was due or when no such payment was authorized." [CP 95-96]. On September 11, 2014, the court entered findings and conclusions that Thompson was guilty as charged. [CP 203-226].

Reasoning that the statutes criminalizing Medicaid fraud and theft serve different purposes—protection of public health and welfare in connection with providing health service in the first instance, and protection of individuals and their private property in the latter—Division I, further noting the statutes are found in different RCW titles and chapters, concluded that the legislature intended to treat the offenses of

Medicaid false statement and theft "as separate crimes and punished accordingly." [Slip Op. at 7].

Division I's reasoning misses the point. As charged in this case, theft in the first degree required the wrongful taking of property of another by color or aid of deception through a series of transactions in which the sum exceeded $5,000. Thompson did this by committing two counts of Medicaid false statement, with each instance resulting in a loss less than $5,000. But by linking the two counts with the allegation in count I of theft in the first degree by a series of transactions that were part of a criminal episode and/or a common scheme or plan, the State elevated the theft to a first-degree offense by employing the same dynamic rejected in Kier, supra.[1] Under these unique facts, it cannot be claimed that the Legislature intended to impose separate punishments for both offenses. See State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and reverse and dismiss Thompson's convictions for Medicaid false statement and to remand for resentencing.

//

[1] Theft of property or services which exceeds $750 but not $5,000 constitutes theft in the second degree, a class C felony. RCW 9A56.040. Theft of property which exceeds $5,000 constitutes theft in the first degree, a class B felony. RCW 9A.56.030.

DATED this 9th day of March 2016.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above supplemental memorandum on this date as follows:

Yarden F. Weidenfeld
yardenw@atg.wa.gov

Burnice R. Thompson
7418 45th Ave. South
Seattle, WA 98118

DATED this 9th day of March 2016.

Thomas E. Doyle

THOMAS E. DOYLE
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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 74134-9-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
BURNICE RENEE THOMPSON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: February 8, 2016

SPEARMAN, C.J. — Burnice Thompson was convicted of two counts of Medicaid false statement and one count of theft in the first degree. She appeals, claiming that the trial court violated her right against double jeopardy because the two false statement offenses merged with her conviction for theft in the first degree. We disagree and affirm the convictions.

FACTS

Beginning in 2010, Burnice Thompson provided in-home care services for her grandmother Tressie Henderson through the Medicaid funded Community Options Program Entry System (COPES). From 2012 to 2013, Thompson was authorized to provide 304 hours of care per month at $10.46 per hour through the Department of Social and Health Services (DSHS). She submitted monthly invoices through the Social Services Payment System. In the event of Henderson's death, Thompson was

required to report the incident within twenty-four hours. She was also required to provide written notification of death to Henderson's case manager within seven days.

Henderson passed away on November 24, 2012, and Thompson reported her passing to the Social Security Department. Three days later Thompson left a message for the case manager but did not submit the required written notification.

On December 31, 2012, Thompson submitted a telephonic invoice to DSHS for services for that month. She received a payment in the amount of $2,725.47 on January 5, 2013. On February 4, 2013, Thompson submitted another telephonic invoice for January under the contract, for which she also received payment of $2,726.07. Additionally, Thompson submitted an invoice for vacation pay in January 2013, for which she was paid $65.28.

During this time Thompson also submitted weekly claims for unemployment compensation. In her application she indicated that she had been a COPES individual provider through November 24, 2012, the date of her grandmother's death. In an interview in June 2013, Thompson admitted to submitting telephonic invoices for services to DSHS for December 2012 and January 2013, knowing that Henderson was deceased.

Thompson was charged with and convicted of two counts of Medicaid false statement and one count of theft in the first degree. Prior to sentencing she moved to dismiss the false statement counts on double jeopardy grounds, arguing they merged with the theft count. The trial court denied the motion, concluding the merger doctrine was inapplicable because each crime had an independent purpose and effect. The court imposed a standard range sentence. Thompson appeals.

DISCUSSION

Thompson contends that the trial court violated her constitutional right against double jeopardy by convicting her of the two counts of Medicaid false statement. She argues that the two false statement offenses merged with her conviction for theft in the first degree. The State argues that there is no double jeopardy violation because the legislature intended for the crimes of theft and Medicaid false statement to be punished as separate crimes.[1]

We review constitutional challenges de novo. State v. Esparza, 135 Wn. App. 54, 61, 143 P.3d 612 (2006) (citing State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005)). Article I, section 9 of the Washington Constitution and the Fifth Amendment to the federal constitution protect persons from a second prosecution for the same offense and from multiple punishments for the same offense imposed in the same proceeding. In re Pers. Restraint of Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003) (citing State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995)). Nevertheless, the legislature may constitutionally authorize multiple punishments for a single course of conduct. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing Whalen v. United States, 445 U.S. 684, 688, 100 S. Ct. 1432, 1436, 63 L. Ed. 2d 715 (1980)).

[1] Relying on State v. Wright, 183 Wn. App. 719, 734, 334 P.3d 22 (2014) the State also contends that the two crimes constituted separate criminal acts. In Wright, we declined to consider the crimes of theft and Medicaid false statement to be the "same criminal conduct" for sentencing purposes. But it is well established that a double jeopardy violation claim "is distinct from a 'same criminal conduct' claim and requires a separate analysis." State v. French, 157 Wn.2d 593, 611, 141 P.3d 54 (2006). "The double jeopardy violation focuses on the allowable unit of prosecution and involves the charging and trial stages. The 'same criminal conduct' claim involves the sentencing phase and focuses instead on the defendant's criminal intent." Id. Accordingly, we reject this argument.

Washington courts use a three-step analysis to determine whether the legislature authorized multiple punishments for one course of conduct. In re Pers. Restraint of Burchfield, 111 Wn. App. 892, 895, 46 P.3d 840 (2002). We first consider express or implicit legislative intent based on the criminal statutes involved. Calle, 125 Wn.2d at 776. If the statutory language is silent, we turn to the "same evidence" test, which asks if the crimes are the same in law and fact.[2] Id. at 777-78. In other words, whether, as charged, each offense includes elements not included in the other and whether proof of one offense would also prove the other. Id. at 777 (citing State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Third, if applicable, the merger doctrine may help determine legislative intent, where the degree of one offense is elevated by conduct constituting a separate offense. State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). But even if two convictions would appear to merge on an abstract level under this analysis, they may be punished separately if the defendant's particular conduct demonstrates an independent purpose or effect of each. Id. (citing Freeman, 153 Wn.2d at 771).

In this case, it is undisputed that the legislature has made no express statement regarding separate punishments for the crimes of first degree theft and Medicaid false statement. And Thompson concedes, as she must, that the same evidence test is unavailing because the two offenses contain different elements and require proof of different facts. But she argues that the merger doctrine applies to her

[2] The test is set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and its origin, names, and various applications are discussed at length in In re Orange, 152 Wn.2d 795, 815-21, 100 P.3d 291 (2004).

convictions because, in her view, the aggregation of the two counts of Medicaid false statements elevated the charge of theft from second to first degree. Thompson contends that as charged in this case, the first degree theft charge required proof that she wrongfully took the property of another by color or aid of deception in a sum which exceeded $5000. She further contends that the State proved she committed the theft by engaging in conduct amounting to two counts of Medicaid false statement and that she obtained a combined amount exceeding $5000 by committing those crimes. Finally, she contends the State linked the theft charge with the Medicaid offenses by alleging and proving that the theft charge resulted from a series of transactions that "were part of a criminal episode and/or a common scheme or plan." Brief of Appellant at 9-10.

In support of her argument, Thompson relies primarily on Kier, 164 Wn.2d 798. In Kier, the defendant was involved in a carjacking which resulted in convictions of second degree assault, committed by means of a deadly weapon, and first degree robbery based on the theft of the car during which he was armed with or displayed what appeared to be a deadly weapon. Id. at 808-09. The court noted that to prove the assault, the State had to prove that Kier's conduct caused a reasonable apprehension or fear of harm in the victim. The State alleged that the means by which Kier did so was by being armed with or displaying a deadly weapon. The court held that because the proof of this conduct established both second degree assault and elevated the robbery from second to first degree, the two crimes merged. Id. at 806.

Kier is of no help to Thompson. Thompson does not argue that proof of the conduct that resulted in her conviction of Medicaid false statement elevated the crime of theft to a higher degree, nor could she. The crime of Medicaid false statement does not require proof that any amount of money be obtained.[3] Instead, she argues that merger results because aggregation of the amounts obtained as a result of the two crimes elevated the theft to first degree. Thompson cites no authority for this proposition and we are aware of none.

But even if we were to accept the argument and conclude that the crimes merged, we would still reach the same result. Two convictions, which might otherwise merge, may still be punished as separate offenses if there is an independent purpose or effect to each. Freeman, 153 Wn.2d 773 (citing State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996)). To determine whether this exception to the merger doctrine applies, we employ relevant principles of statutory construction, review the pertinent legislative history, ascertain whether the crimes involve different victims and whether the statutes at issue are located in different chapters of the criminal code. See Calle, 125 Wn.2d at 780-81 (finding the legislature intended to punish rape and incest as separate crimes based on the statutes' distinct purposes, their locations in different criminal code chapters, and the long-held belief that they constitute separate offenses).

[3] To prove Medicaid false statement as charged in this case, the State must prove that the accused "ha[d] knowledge of the occurrence of any event affecting (a) the initial or continued right to any payment," and "conceal[ed] or fail[ed] to disclose such event with an intent to fraudulently to secure such payment either in a greater amount or quantity than is due or when no such payment is authorized[.]" RCW 74.09.230(3).

In this case, a review of the language in other Medicaid related statutes shows an intent to regulate the provision of services and to prevent and deter fraudulent claims. RCW 74.09.200 states"[t]he legislature finds and declares it to be in the public interest and for the protection of the health and welfare of the residents of the state of Washington that a proper regulatory and inspection program be instituted in connection with the providing of medical, dental, and other health services to recipients of public assistance and medically indigent persons." The Legislature also enacted the Medicaid Fraud False Claims Act, chapter 74.66 RCW, to "provide this state with another tool to combat [m]edicaid fraud." LAWS OF 2012, ch. 241, § 101. Thus, while the statutes criminalizing Medicaid fraud seek to protect public health and welfare in connection with providing health services, the theft statutes protect individuals and their private property. See State v. Denny, 173 Wn. App. 805, 809-10, 294 P.3d 862 (2013) (distinguishing the crimes of theft and possession of controlled substances); RCW 74.09.200. Furthermore, the two statutes are also found in different RCW titles and chapters. Accordingly, we conclude that the legislature intended to consider theft and Medicaid false statement to be separate crimes and punished accordingly.

We hold that Thompson's convictions for theft in the first degree and Medicaid false statement are separate crimes and may be punished as such. The trial court did not err in doing so.

Affirmed.

Spearman, C.J.

WE CONCUR:

Leach, J.

Ian, J.