Supreme Court No. 94395-8
Division III, No. 33987-4-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SHANE SAYER MORGAN,
Appellant.

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF
KITTITAS COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00072-1

RESPONSE TO PETITION TO REVIEW

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A. IDENTITY OF THE RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is the Respondent herein. The State is represented by the Kittitas County Prosecutor's Office.

B. RESPONSE TO ISSUES PRESENTED FOR REVIEW

The trial court did not find that counts 5 and 7 were the "same criminal conduct. Division Three of the Court of Appeals agreed. The decision. The fact that petitioner disagreed with the decision reached by the Court of Appeals does not mean that this case meets the criteria for review found in RAP 13.4 (b).

C. STATEMENT OF THE CASE

Maureen Webb had a Chase Bank credit card. (VRP 89-90, 96). On June 11, 2014, Maureen let her teenage daughter Elizabeth Webb use this credit card to purchase gas for her car. (VRP 90, 9-97). Elizabeth left work around 5:30 or 6:00 pm, stopped and purchased gas, and went home. (VRP 97-98, 100).

Maureen later received a text message from Chase Bank fraud protection, asking if she made a purchase at Fred Meyer in Ellensburg. (VRP 90-92, 102). Maureen then contacted Elizabeth, who informed Maureen she did not have the credit card. (VRP 91, 97). Elizabeth had not gone to Fred Meyer in Ellensburg. Elizabeth remembered putting the card

in her wallet, and thought either she dropped the card at the pump or someone entered her car and got it; but she did not give the defendant or Mr. Snyder permission to use the card at any time. (VRP 98-99). Maureen called the police to report the credit card as stolen. (VRP 92-93). Maureen did not make any of the charges on the date in question, nor did she give the defendant or Mr. Snyder permission to use her card. (VRP 93-95)

City of Cle Elum Police Officer Jennifer Rogers worked with Maureen to obtain records for Maureen's credit card from Chase Bank. (VRP 102 – 104). From these records, Officer Rogers identified two approved transactions and two declined transactions at Fred Meyer. (VRP 108-109). He first transaction was the purchase of two drinks for $4.61 at a self-checkout kiosk; and the second was a purchase of clothing and shoes for $538.92 from a cashier. The declined purchases were both for an attempted purchase of an iPad for $538.92. (VRP 115-119, 139-140, 142, 181-182). Officer Rogers requested and received surveillance video from Fred Meyer for the four transactions. (VRP 109-111).

Fred Meyer Loss Prevention Specialist Perry Lomax provided Officer Rogers with the surveillance footage. (VRP 140-141). In retrieving the footage, Lomax was able to track the defendant and Mr. Snyder together throughtout the store. (VRP 141). He tracked the two men through the apparel department, through the main part of the store without splitting up, through the cold beverage coolers, and through the photo-

electronics department. (VRP 142, 154-155, 160).

The surveillance video of the first transaction showed the defendant and Joshua Snyder at a self-checkout kiosk. M. Snyder scans two beverages, slides the card, and the defendant is shown pushing buttons to complete the transaction. Then each grab one of the drinks and walk away. (VRP 111-112).

The surveillance video of the second transaction shows Mr. Snyder and the defendant purchasing clothing and shoes at a check out area; and whiled the defendant does not help with the check out process because it is not self checkout, he is close to the check out counter. (VRP 112).

Officer Rogers interviewed Mr. Snyder during her investigation, and that interview was recorded. During the interview, Mr. Snyder indicates that he isn't friends with the defendant, and that he doesn't really remember going shopping with the defendant, doesn't remember anything about the card, and offers general denial of the events, including denying that the defendant was involved. (VRP 122-132).

The defendant was charged as a principle or accomplice via an amended information of 16 counts: Theft in the Second Degree (Count 1); Identity Theft in the Second Degree (Counts 2,5,7,9,11,13,15); Theft in the Third Degree (Counts 3, 4); Attempted Theft in the Third Degree (Counts 6,8,10,12,14,16). (CP 303-307).

The case proceeded to jury trial. (VRP 51-324). The witnesses

testified to the events as stated. Mr. Snyder testified at trial that he found the card sitting on top of a gas pump and took the card for his own use. (VRP 175-177). Mr. Snyder also testified that he went and picked up the defendant and hung out. He also testified that the defendant did not know the credit card was stolen and that it was a random occurrence that they went to Fred Meyer, that it was the one and only time they had ever been shopping together. He testified he had been friends with the defendant for about ten years and they would hang out a couple times a year. (VRP 170-175, 177-181, 197, 199). He admitted that he purchased two drinks at the self checkout kiosk and that the defendant assisted him with the check out, but that he couldn't remember why he needed assistance. (VRP 181-182, 189, 197, 199, 201). He testified that himself and the defendant were shopping throughout the store together, and that they were together when the clothes and shoes were purchased with the credit card. (VRP 183, 197).

During the jury instruction conference, the State discussed an amendment to the information to include the alternate means. The court gave the to convict instruction for the alternate means of committing theft. (VRP 234).

The defendant was convicted of counts 1-8 and found not guilty of counts 9-16. (RP 319-320).

At sentencing, the State argued that the convictions were not the

same criminal conduct. The sentencing court heard argument, and the following day issued a ruling that indicated the felony convictions were not the same criminal conduct, stating "each use of the credit card was a distinctive act that furthered a different, distinct criminal purpose." (CP 590).

The court imposed a sentence of 57 months confinement and 12 months of community custody. (CP 551-552, 591). The judgment and sentence includes the notation "combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. (CP 552).

The defendant timely filed an appeal, and the Court of Appeals Division III issued an opinion on March 21, 2017. The Appellant/Petitioner timely filed this motion for review.

D. ARGUMENT

RAP 13.4(b) states:

> Consideration Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision by the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial publis interest that should be determined by the Supreme Court.

The petitioner alleges that the decision by the Court of Appeals is in conflict with a Supreme Court decision.

State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997) nor *State v. Tili*, 139 Wn. 2d 107, 985 P.2d 365 (1999) do not set a brightline rule of how much time elapses between two acts before they become separate acts.

Both cases do take into account that a short time frame supports a conclusion that the acts were same criminal conduct; however neither case rules that if two acts happen within a very short period of time then they are the same criminal conduct.

The question of timing becomes a question for the trial court, and subsequently the Court of Appeals. As the opinion states, "A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent of an abuse of discretion or misapplication of the law." *Opinion* 33987-4-III at 17 *quoting State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). The Court of Appeals cites the same case that the appellant argues the opinion is in conflict with. The opinion also cites *State v. Porter* to discuss the concept of a continuing and uninterrupted sequence of conduct.

The opinion further addresses the fact that if "an offender has time to 'pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,' and makes the decision to proceed, he or she has formed new intent to commit the second act." *Opinion* 33987-4-III at 17 quoting *Munoz-Rivera*, 190 Wn. App at 889. The Court of Appeals specifically determined "because 22 seconds is a sufficient pause to consider the criminality of one's actions, we conclude the trial court did not abuse its discretion when it determined that both swipes were not the same criminal conduct for the purposes of sentencing." *Opinion* 33987-4-III at 18.

E. CONCLUSION

The decision made by the Court of Appeals is not in conflict with a decision made by the Supreme Court. None of the criteria for review found in RAP 13.4 (b) has been met; therefore, the Petition for Review should be denied.

Respectfully submitted this 17th day of May, 2017

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