

62866-6

62866-6

NO. 62866-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GEORGE EARL VERKLER,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PARIS K. KALLAS

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

A foreign conviction should be included in a defendant's offender score if it is comparable to a Washington felony. A defendant commits the Washington felony of Identity Theft in the First Degree when he knowingly used another person's identification or financial information with the intent to commit any crime, and obtains money in an aggregate of over \$1,500. Verkler pled guilty to two federal felonies whose elements are similar to Identity Theft in the First Degree, and in doing so, he specifically acknowledged that he used the names and social security numbers of at least 91 individuals—without their knowledge or consent—to file fraudulent tax returns, thereby defrauding the federal and several state governments out of over \$75,000 on one count, and over \$43,000 on another. Would this conduct constitute Identity Theft in the First Degree if committed in Washington, such that Verkler's federal convictions are comparable?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On November 9, 2007, the State charged appellant George Verkler with one count of Assault in the Second Degree. CP 1. After some delay

while Verkler claimed he was incompetent, CP 50-64, Verkler ultimately pled guilty as charged. CP 75-85.

Pursuant to the plea agreement, Verkler specifically acknowledged that he had previously been convicted of two counts of False Means of Identification, a federal offense under 18 U.S.C. 1028(a)(7) and 18 U.S.C. 2, but disputed that the two convictions were comparable to Washington Class B felonies and objected to their inclusion in his offender score. CP 91. The sentencing court reviewed copies of Verkler's federal Information, Plea Agreement, and Judgment, and concluded that the two convictions were in fact each comparable to the Washington Class B felony of Identity Theft in the First Degree, and included them in his offender score. RP 15-16; CP 151-88. The court then sentenced Verkler to one year and a day in prison, the low end of the standard range based on the resulting score. CP 197-205. Verkler appealed. CP 206.

## **2. SUBSTANTIVE FACTS**

On September 13, 2007, Mary Cummings, a 76 year old woman, was driving her BMW southbound on I-5 near the Northgate area of Seattle. Verkler was driving in the same area in his Dodge Caravan. In an apparent fit of road rage, which Verkler later claimed was because Cummings nearly forced him into a truck, he rammed his Caravan into

Cummings's BMW. She dropped back in traffic, but Verkler then got behind her, rammed her car again, and followed her off the highway. When Cummings started to pull into a gas station, Verkler rammed her car a third time. Cummings got out of her car to talk to him and try to exchange information; instead of cooperating, he drove at her, forcing her to jump out of the way to avoid being hit. Verkler then left the scene and, a few hours later, called the police to falsely report his car stolen. Cummings got his license plate number, reported the assault to the police, and picked Verkler out of a photo montage as her assailant. CP 2.

**C. ARGUMENT**

Verkler complains that the sentencing court should not have found that his two federal convictions for False Means of Identification were factually comparable to the Washington felony of Identity Theft in the First Degree, and that it therefore erred in including them in his offender score. This argument should be rejected. First, as Verkler has completed his sentence, his claim is moot. Second, the lower court properly found Verkler's two federal convictions for False Means of Identification were comparable to Washington's Identity Theft in the First Degree, based on his own admissions in his plea to the federal crimes. This court should affirm the lower court's calculation of his offender score.

**1. VERKLER'S OBJECTION TO HIS OFFENDER SCORE CALCULATION IS MOOT.**

An issue is moot if a court can no longer effect a remedy or relief. State v. Harris, 148 Wn. App. 22, 26, 197 P.3d 1206 (2008) (citing State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004)). If a sentencing court miscalculates an offender score, resulting in an excessive sentence, two forms of relief are typically available: shortening of the sentence, or if the prisoner has already been released, shortening of the period of community custody to account for the excess time spent in custody. Harris, 148 Wn. App. at 26-27 (citing In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005); State v. Jorgenson, 48 Wn. App. 205, 208, 737 P.2d 1277 (1997); RAP 12.2). If a defendant has been released from incarceration and community custody, the issue of his offender score is moot. Harris, 148 Wn. App. at 26-27.

Here, Verkler was sentenced to 12 months and a day in prison, to commence no later than December 26, 2008. He was given credit for time served, plus 15 days he had spent at Western State Hospital. Community custody was ordered for a period of 18 to 36 months, to follow his incarceration. CP 197-205. Verkler has now completed his term of incarceration, and will not be supervised by the Department of Corrections, so is effectively not on community custody. CP \_\_\_\_

[sub no. 65]; Declaration of Erin H. Becker<sup>1</sup>; see also RCW 9.94A.501(5).

Because Verkler has completed his sentence, this Court cannot order effective relief.

Nonetheless, this Court does have the power to decide a moot case in order to resolve issues of continuing and substantial public interest, if guidance would be helpful and the issue is likely to recur. Harris, 148 Wn. App. at 28 (citing In re Dalluge, 162 Wn.2d 814, 819, 177 P.3d 675 (2008)). A decision on Verkler's offender score does not meet this standard. As discussed below, the inclusion of Verkler's two federal convictions for False Means of Identification essentially turns on an examination of Verkler's admissions to those crimes in his guilty plea. There is no substantial public interest in determining whether particular facts admitted to by Verkler constitute the Washington felony of Identity Theft in the First Degree. Verkler's appeal should be dismissed as moot.

**2. VERKLER'S TWO CONVICTIONS FOR FALSE MEANS OF IDENTIFICATION WERE PROPERLY INCLUDED IN HIS OFFENDER SCORE.**

The Sentencing Reform Act ("SRA") prescribes sentencing ranges for each felony offense based on a defendant's offender score, which is

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<sup>1</sup> The State has contemporaneously filed a Supplemental Designation of Clerk's Papers, designating sub no. 65, and a Declaration.

essentially a measure of the defendant's criminal history. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999) (citing State v. Wiley, 124 Wn.2d 679, 880 P.2d 983 (1994)). An out-of-state or federal conviction is included in a defendant's offender score if the offense is comparable to a Washington felony.<sup>2</sup> RCW 9.94A.525(3); Wiley, 134 Wn.2d at 683. To include a foreign conviction in a defendant's offender score, the State bears the burden of proving by a preponderance of the evidence both the existence of the prior conviction and its comparability to a Washington crime. Ford, 137 Wn.2d at 479-80; State v. Jackson, 129 Wn. App. 95, 104, 117 P.3d 1182 (2005). A challenge to a finding of comparability is reviewed de novo. Jackson, 129 Wn. App. at 106 (citing State v. Beals, 100 Wn. App. 189, 196, 997 P. 2d 941 (2000); State v. McCorkle, 88 Wn. App. 485, 493, 945 P.2d 735 (1997)); State v. Bush, 102 Wn. App. 372, 377-78, 9 P.3d 219 (2000).

To make a comparability determination, the sentencing court must first compare the elements of the out-of-state offense with the elements of

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<sup>2</sup> There is one exception: no comparability analysis is required if "there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction." RCW 9.94A.525(3). In that situation, the offense is scored as a class C felony if the crime was a felony under the relevant federal statute. RCW 9.94A.525(3). However, because Class C felonies wash after five crime-free years in the community, RCW 9.94A.525(2), and Verkler spent five crime-free years in the community from his release in 2001 until the commission of this crime in 2007, his prior federal convictions only count in his offender score if they are comparable to a Washington Class A or B felony. RCW 9.94A.525(2).

the potentially comparable Washington crime (“legal comparability”). State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the elements are not identical, the sentencing court may then look to the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the potentially comparable Washington offense (“factual comparability”). Morley, 134 Wn.2d at 606. In looking at that record, the court may consider only those facts that were admitted, stipulated to, or proved beyond a reasonable doubt in the prior proceeding. In re Lavery, 154 Wn.2d 249, 256-58, 111 P.3d 837 (2005). The classification of the crime in the other jurisdiction is irrelevant; the only question for the sentencing court is under what Washington statute the defendant could have been convicted if he had committed the same acts in Washington. Bush, 102 Wn. App. at 377-78 (citing McCorkle, 88 Wn. App. at 495). If the foreign conviction is comparable, it is included in a defendant's offender score as if it were the Washington offense. Morley, 134 Wn.2d at 606.

Here, the sentencing court engaged in a comparability analysis, and concluded that the State met its burden of proving that Verkler's two prior convictions for False Means of Identification were each comparable to the Washington felony of Identity Theft in the First Degree. RP 15-16. Copies of the federal Information, Plea Agreement, and Judgment were all

provided to the lower court, and were the only documents (beyond copies of the relevant statutes) or evidence that the court reviewed in making its determination of comparability.<sup>3</sup> CP 151-88.

Verkler's two convictions for False Means of Identification were pursuant to 18 U.S.C. 1028(a)(7) and 18 U.S.C. 2. CP 151-63, 180-88.

Section 1028(a)(7) provides, in relevant part:

(a) Whoever, in a circumstance described in subsection (c) of this section—

...

(7) knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law;

shall be punished as provided in subsection (b) of this section.

...

(c) The circumstance referred to in subsection (a) of this section is that--

(1) the identification document or false identification document is or appears to be issued by or under the authority of the United States or the document-making implement is designed or suited for making such an identification document or false identification document;

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<sup>3</sup> Pursuant to the Plea Agreement, Verkler stipulated to the fact of each conviction—and the authenticity and admissibility of the proffered documents—and challenged only their comparability to a Washington Class B felony. CP 91.

(2) the offense is an offense under subsection (a) (4) of this section [involving intent to defraud the United States]; or

(3) either--

(A) the production, transfer, possession, or use prohibited by this section is in or affects interstate or foreign commerce; or

(B) the means of identification, identification document, false identification document, or document-making implement is transported in the mail in the course of the production, transfer, possession, or use prohibited by this section.

Section 2 merely deals with accomplice liability. See CP 190-94 for copies of the relevant federal statutes. Washington's statute defining Identity Theft in the First Degree provides:

(1) 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.

(2) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

RCW 9.35.020. While the federal statute under which Verkler was convicted and the relevant Washington statute both address similar conduct, they are plainly not identical. Of most significance here, the

federal statute is broader in that it does not require that the defendant benefit from his conduct, while the Washington crime requires proof that the defendant obtained over \$1500 of value.

Because the federal statute and the Washington statute do not have identical elements, the sentencing court then properly turned to an examination of Verkler's conduct to determine whether his conduct would have constituted Identity Theft in the First Degree under Washington law. That examination turned solely on a review of Verkler's conduct as specifically admitted by Verkler in his Plea Agreement for the federal offenses, so the lower court did not engage in any of the factfinding that Lavery cautioned against. RP 15-16. Specifically, with respect to each count of False Means of Identification, Verkler admitted that he:

(1) knowingly used a means of identification of another person, living or dead (See CP 175-76, including the admission that "VERKLER used the names and social security numbers of at least 91 individuals without their knowledge or consent.");

(2) did so with the intent to commit, or to aid or abet, any crime (See CP 175-76, detailing Verkler's scheme to fraudulently obtain income tax refunds, and his related pleas to Mail Fraud and Making a False Claim); and

(3) obtained an aggregate total of property valued over \$1,500 for each count (See CP 175-76, which includes the statement that "VERKLER specifically admits to filing each of the fraudulent tax returns listed in Counts 3 and 4 of the Superseding Information; that on the returns he falsely and without authority used the names and Social

Security Numbers of the alleged filers; [and] that he received . . . the corresponding tax return checks”; count 3 alleges total gains to the defendant of over \$75,000, CP 153-60, and count 4 alleges total gains of over \$43,000, CP 160-62).<sup>4</sup>

Clearly, the facts that Verkler admitted to as described above establish that he committed two counts of Identity Theft in the First Degree under Washington law.

Instead of directly challenging the lower court’s conclusion that Verkler’s convictions were comparable to Identity Theft in the First Degree, Verkler instead frames his argument on appeal as a complaint that the sentencing court failed to make a factual “finding” of comparability, and that that failure requires the conclusion that the State failed to carry its burden of proof on the issue. Brief of Appellant at 8. This argument is specious; it confounds the concepts of factfinding and a conclusion of law regarding factual comparability. “Factfinding” requires a trier of fact to reach conclusions about factual matters, which often involves weighing differing testimony and making credibility determinations. Here, the lower court had no factfinding to do. There was no factual dispute for the court to resolve. Rather, the parties stipulated to the record of Verkler’s

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<sup>4</sup> Counts 3 and 4 are distinguished by date; the acts constituting count 3 occurred in 1999, and the acts alleged in count 4 occurred in 2000. CP 153, 160.

prior convictions, and that record is all that the lower court considered.

CP 91.

Instead of factfinding, the lower court here was required to make a legal conclusion about “factual comparability.” An analysis of factual comparability, as discussed above, involves an examination of whether the facts proven in the foreign jurisdiction—here proven by Verkler’s own admissions—constitute the elements of a Washington offense. Factual comparability is distinguished from legal comparability not because it involves factfinding, but because it involves a comparison of proven facts to the Washington statute, as opposed to a comparison of the foreign law to the Washington statute. The lower court engaged in this analysis, and although the oral record is not detailed, it concluded—as it should have—that Verkler’s conduct met the elements of Identity Theft in the First Degree. RP 16. Verkler does not even argue otherwise.

In any event, appellate review of this issue is de novo. Jackson, 129 Wn. App. at 106. As such, any of the lower court’s “findings” may be rejected or adopted by this Court on review. Accordingly, the nature of such findings, or their existence at all, is material to this Court’s decision only insofar as it determines whether the Court will append the word “affirmed” or “reversed” at the conclusion of its own analysis.

**D. CONCLUSION**

Because Verkler has been released from custody and will not be subject to further supervision on community custody, his appeal should be dismissed as moot. Further, the lower court correctly concluded, based on Verkler's admitted conduct, that his prior federal convictions for False Means of Identification were comparable to the Washington felony of Identity Theft in the First Degree. Thus, the prior convictions were properly included in Verkler's offender score. Verkler's sentence should be affirmed.

DATED this 8<sup>th</sup> day of October, 2009.

Respectfully submitted,

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King County Prosecuting Attorney

By:   
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Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
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Respondent, )  
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vs. )  
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GEORGE VERKLER, )  
Appellant. )  
)  
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No. 62866 - 6 - I  
DECLARATION OF ERIN H. BECKER

FILED  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON  
2009 OCT -9 PM 4:29

I, Erin H. Becker, hereby declare as follows:

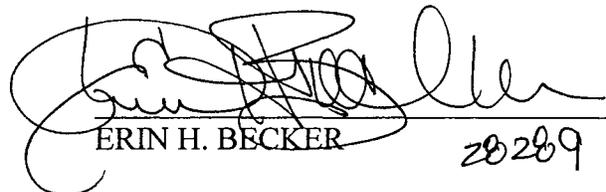
1. I am a senior deputy prosecutor for the King County Prosecuting Attorney's Office ("PAO"). I am an attorney duly licensed to practice law in the State of Washington. I have primary responsibility for the above-captioned case. This declaration is based on my personal knowledge.
2. In working on this appeal, I of course reviewed the electronic court file. There, I observed that the Department of Corrections had filed a notice of closure of their supervisory interest in the case. Knowing that Verkler had been sentenced to one year and a day in custody and was ordered to surrender by December 26, 2008, and that a defendant could earn up to one-third

1 good time credit on the offense of Assault in the Second Degree, I thought it was likely that Verkler  
2 had completed his sentence and had been released.

3 3. I directed my paralegal to find out if Verkler was still incarcerated or had been  
4 released. She provided me with the attached document, a printout from FORS (the Washington  
5 Felony Offender Reporting System), showing that Verkler was no longer in the custody of the  
6 Department of Corrections. Specifically, it shows his location as "Community," and shows his  
7 period of incarceration at DOC as "12/30/2008 – 8/14/2009."

8 4. To confirm the accuracy of this information, I called DOC myself at (206) 254-4830.  
9 Through a check of DOC's internal records (i.e. not through FORS), the representative I spoke with  
10 confirmed that Verkler was no longer in DOC custody on this offense.

11 Under penalty of perjury under the laws of the State of Washington, I certify that the  
12 foregoing is true and correct. Signed and dated by me this 8<sup>th</sup> day of October, 2009, at Seattle,  
13 Washington.

14   
15 ERIN H. BECKER 20209



**FORS**

**NO WA DOC JURIS: VERKLER, George**



Home DOC Number: SID Number: Current Status: Current Location:  
 Search For An Offender 326231 WA24220327 NO WA DOC JURIS COMMUNITY

**Offender**

**Offender Movement History**

General Information CCO: CCO Telephone: CCO Location:  
 Conviction Information (Non-Law Enforcement)  
 Offender Movement History Latest Projected Release Date: Last Release From:

**Help**

FORS User's Guide (.pdf)

Stafford Creek Corrections Center

**Movement History**

Status	Date	Status	Date	Status	Date
NO WA DOC JURIS	8/14/2009 - PRESENT				
PRISON	12/30/2008 - 8/14/2009				