

66623-1

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No. 66623-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT ALLISON,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court erred in partially denying Mr. Allison's motion to modify his sentence because the proper offender score is six, not nine.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Multiple prior offenses count as one crime for offender score purposes if they constituted the "same criminal conduct," – i.e., if they were committed at the same time and place, against the same victim, with the same intent. On December 22, 2005, Mr. Allison used Vince Cruse's checkbook to purchase items from Lowe's, K-Mart, and Barnes & Noble. He was convicted of three counts of forgery and one count of identity theft for this incident. Did the sentencing court err in counting these prior offenses separately for scoring purposes?

C. STATEMENT OF THE CASE

Appellant Scott Allison was convicted of one count of second-degree assault following a jury trial. CP 53. At sentencing, Mr. Allison's attorney said he agreed with the State that the offender score was 10, resulting in a standard range of 63 to 84 months. Mr. Allison's attorney said that even though multiple prior forgeries were under one cause number, "they have different

victims and therefore the court has to find them as separate offenses.” 1/28/11 RP 3. The court imposed a term of incarceration of 73 months. CP 56; 1/28/11 RP 9.

Mr. Allison filed a motion to modify or correct the judgment and sentence. CP 134-36. He stated his offender score was incorrectly calculated and that the proper score was six, because several prior convictions constituted the same criminal conduct under RCW 9.94A.589. CP 135. The State filed a response, arguing that Mr. Allison’s prior convictions did not constitute the same criminal conduct. CP 62-73. The State attached certified copies of prior informations, guilty pleas, and judgments. CP 74-133. Mr. Allison filed a reply, and attached the relevant affidavits of facts. CP 137-55.

The trial court granted the motion in part, reducing the offender score from ten to nine after concluding that two convictions for acts occurring on July 14, 2006 constituted the same criminal conduct. 8/29/11 RP 13-14; CP 156. But the court denied the motion as to the four offenses occurring on December 22, 2005. 8/29/11 RP 14; CP 156. Mr. Allison appeals. CP 52.

D. ARGUMENT

BECAUSE THE FOUR PRIOR CONVICTIONS FOR ACTS OCCURRING ON DECEMBER 22, 2005 CONSTITUTED THE SAME CRIMINAL CONDUCT, THE TRIAL COURT ERRED IN PARTIALLY DENYING THE MOTION TO CORRECT SENTENCE.

a. The sentencing court has a statutory duty to calculate the correct offender score prior to imposing a sentence. The Sentencing Reform Act (“SRA”) creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant’s offender score. RCW 9.94A.505, .510, .520, .525, .530; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525.

But not all prior convictions count in the offender score. Multiple offenses which constituted the “same criminal conduct” are counted as one offense. RCW 9.94A.525(5)(a)(i). “Same criminal conduct” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). “The current sentencing court shall determine with respect to other prior adult offenses ... whether those offenses shall be counted as one offense or as separate offenses using the ‘same criminal conduct’ analysis found

in RCW 9.94A.589(1)(a).” RCW 9.94A.525(5)(a)(i). “The sentencing court is obligated to calculate the correct offender score.” In re the Personal Restraint of Call, 144 Wn.2d 315, 334, 28 P.3d 709 (2001).

This Court reviews de novo the sentencing court’s calculation of the offender score. State v. Rivers, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

b. The sentencing court erred in calculating an offender score of nine because the four convictions for crimes committed on December 22, 2005 constituted the same criminal conduct. As noted in Mr. Allison’s memorandum in the trial court, his correct offender score is six, not nine, because several prior convictions constituted the same criminal conduct. CP 137-47.

The four convictions entered under Spokane County cause number 06-1-01895-9 constituted the same criminal conduct and should have been counted as one point rather than four. See CP 74-103, 148-51. Mr. Allison was convicted of three counts of forgery and one count of identity theft based on conduct that occurred on December 22, 2005. Mr. Allison had a checkbook that belonged to a man named Vince Cruse, and he used it to pay for items from Lowe’s, K-Mart, and Barnes & Noble. Because these

crimes were committed at the same time and place, with the same intent, against the same victim, they should have been counted as one offense. RCW 9.94A.589(1)(a).

This case is governed by State v. Calvert, 79 Wn. App. 569, 903 P.2d 1003 (1995). In Calvert, the defendant obtained a checkbook that had been stolen from his mother-in-law and deposited two forged checks from that account into his own account on the same day. Id. at 572, 574. This Court affirmed the sentencing court's determination that the two forgeries constituted the same criminal conduct and counted as one offense for scoring purposes. Id. at 577. Because the checks were deposited on the same date, the "time and place" requirement was satisfied. Id. at 574. Furthermore, the victims were the same for each: the bank, and the person from whom the checkbook had been stolen. Id. at 580. As to the "same intent" requirement, the State argued the two offenses should be counted separately because one forgery did not "further" the other. Id. This Court rejected the argument and concluded, "Although possession and presentation of one forged check did not 'further' the possession or presentation of the other, both were deposited in Mr. Calvert's account on the same day, as

part of the same scheme, with the same criminal objective: to defraud.” Id. at 578.

The State argues Calvert is inapposite because in that case the victim was the bank for both counts but in this case the victims are the stores to whom the checks were written. CP 64-65. That is incorrect. Both in Calvert and in this case, the victims were the bank and the holder of the stolen account. Calvert, 79 Wn. App. at 580. The fact that Mr. Allison wrote the checks to different stores is of no moment; the stores were paid from Vince Cruse’s bank account, and therefore Vince Cruse and/or the bank were victims, but the stores were not.¹

The trial court concluded the stores were victims because their security personnel had to spend some time dealing with the issue. 8/29/11 RP 14. But by that logic, stores would be victims of any crime occurring on their premises, whether the crime was identity theft, assault, rape, or murder. Mr. Allison is unaware of any support in caselaw for that proposition.

As to time and place, the State acknowledged that “simultaneity is not a requirement.” CP 65 (citing State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997)). Indeed, in Porter, the

¹ If the stores were not paid, they were victims of a different crime: theft. But no theft counts are at issue in this case.

Supreme Court held that multiple drug transactions on the same day constituted the same criminal conduct for sentencing purposes even though the defendant sold different drugs in each transaction and the transactions occurred sequentially. Porter, 133 Wn.2d at 183-84. And in Calvert, the Court held that forged checks deposited on the same day were the same criminal conduct regardless of whether they were deposited at the same moment. Calvert, 79 Wn. App. at 574, 578. Under Porter and Calvert, the “same time” requirement is satisfied.

The State’s argument that “the offenses were all committed at different places” should be rejected. CP 66. Although the payee for each check was different, it is artificial to assign a physical location to an economic crime. Just as the “victim” of a drug crime is the indeterminate “public at large,” cf. Porter, 133 Wn.2d at 181, the “place” of an economic crime is an indeterminate computer server transferring funds. The closest approximation of a physical location of the crime would be the bank. It certainly should not matter whether Mr. Allison wrote all three checks at his kitchen table and mailed them in, or wrote the checks at the stores. The crimes are the same either way – a continuing course of conduct on

December 22, 2005 during which Mr. Allison fraudulently used Vince Cruse's checking account to buy things.

Calvert is dispositive on the intent issue as well. Again, this Court held the separate forgeries counted as one because "both [checks] were deposited in Mr. Calvert's account on the same day, as part of the same scheme, with the same criminal objective: to defraud." Calvert, 79 Wn. App. at 578. Similarly here, all three checks were drafted on the same day, as part of the same scheme, with the same criminal objective: to defraud. Indeed, an even more specific intent was common to all four crimes in this case: to use Vince Cruse's money to buy things.

Vike is also instructive on this point. State v. Vike, 125 Wn.2d 407, 885 P.2d 824 (1994). There, the defendant had two prior convictions for possession of a controlled substance based on his possession of two different drugs. The State argued the intent for each crime was different "because the objective in possessing heroin was distinct from the objective in possessing clonazepam." Id. at 411. The Supreme Court rejected that argument and held there was "one overall criminal purpose," which was "an intent to [possess] any controlled substance." Id. (citing State v. Garza-Villarreal, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993)). "The fact that

the two charges involved different drugs does not by itself evidence any difference in intent.” Similarly here, the fact that the three forgery charges involved the purchase of different items does not evidence any difference in intent. The “overall criminal purpose” was the same for all of the forgeries, namely, to use Vince Cruse’s money to buy things.²

In sum, the four crimes under cause number 06-1-01895-9 constituted the same criminal conduct and should have counted as one point instead of four. The sentencing court erred in denying the motion to modify as to these offenses.

c. The remedy is reversal of the sentence and remand for resentencing. As explained above, the four prior offenses committed on December 22, 2005 should have counted as one point instead of four. Mr. Allison’s offender score is six, not nine. This Court should reverse the sentence and remand for resentencing under the proper offender score. Vike, 125 Wn.2d at 413.

² Furthermore, the ID theft count was clearly the same criminal conduct as the forgeries, because the use of Vince Cruse’s checkbook was necessary to the forgeries and furthered all of them. Mr. Allison’s intent in stealing the checkbook, like his intent for the forgeries, was to use Vince Cruse’s money to buy things. Furthermore, the victims of the ID theft were the same as the victims of the forgery: Vince Cruse and the bank.

E. CONCLUSION

For the reasons set forth above this Court should reverse
Mr. Allison's sentence and remand for resentencing.

DATED this 30th day of September, 2011.

Respectfully submitted,


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Washington Appellate Project
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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 66623-1-I
)	
SCOTT ALLISON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF SEPTEMBER, 2011, 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] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
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[X] SCOTT ALLISON	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2011.

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