

FILED
Court of Appeals
Division II
State of Washington
10/3/2018 3:57 PM

NO. 51788-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

KYLE SMITH,

Appellant.

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

The Honorable Toni Sheldon, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
<u>INTRODUCTION</u>	1
A. <u>ASSIGNMENTS OF ERROR</u>	2
<u>Issues Pertaining to Assignments of Error</u>	3
B. <u>STATEMENT OF THE CASE</u>	4
1. <u>Charges</u>	4
2. <u>Verdicts</u>	5
3. <u>Sentence</u>	5
4. <u>State’s Case</u>	7
5. <u>Defense Case</u>	10
C. <u>ARGUMENTS</u>	13
1. THE FORGERIES AND THE TRAFFICKING IN STOLEN PROPERTY OFFENSES SHOULD HAVE BEEN TREATED AS ONE OFFENSE FOR PURPOSES OF CALCULATING SMITH’S OFFENDER SCORE BECAUSE THE OFFENSES ENCOMPASSED THE SAME CRIMINAL CONDUCT.	13
a. <i>Where some or all current offenses encompass the same criminal conduct, the offenses are only counted as one crime for purposes of calculating an offender score.</i>	14
b. <i>The three forgeries and the trafficking in stolen property offenses were the same criminal conduct.</i>	15
c. <i>A resentencing hearing is necessary because the standard range sentences were based on an incorrectly calculated offenders score.</i>	20

TABLE OF CONTENTS (CONT'D)

	Page
2. THE DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN UNDER STATE V. RAMIREZ.	22
3. THE \$100 DNA FEE SHOULD ALSO BE STRICKEN.	26
4. A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.	27
D. <u>CONCLUSION</u>	28

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Personal Restraint of Mayer</u> 128 Wn. App. 694, 117 P.3d 353 (2003).....	27
<u>Presidential Estates Apartment Assoc. v. Barrett</u> 129 Wn.2d 320, 917 P.2d 100 (1996).....	27
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	22, 23, 25
<u>State v. Dunaway</u> 109 Wash.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987)	19
<u>State v. Garza–Villarreal</u> 123 Wn.2d 42, 864 P.2d 1378 (1993).....	19
<u>State v. Graciano</u> 176 Wn.2d 531, 295 P.3d 219 (2013).....	14
<u>State v. Haddock</u> 141 Wn.2d 103, 3 P.3d 733 (2000).....	22
<u>State v. Lessley</u> 118 Wn.2d 773, 827 P.2d 996 (1992).....	19
<u>State v. Lewis</u> 115 Wn.2d 294, 797 P.2d 1141 (1990).....	19
<u>State v. Lindsey</u> 177 Wn.App. 233, 311 P.3d 61 (2013) <i>review denied</i> , 180 Wn.2d 1022 (2014).....	16
<u>State v. Owens</u> 180 Wn.2d 90, 323 P.3d 1030 (2014).....	16
<u>State v. Priest</u> 100 Wn. App. 451, 997 P.2d 452 (2000).....	27

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Ramirez</u> 2018 WL 4499761 (September 20, 2018)	2, 4, 22, 23, 24, 25, 26, 27
<u>State v. Simmons</u> 113 Wn.App. 29, 51 P.3d 828 (2002).....	16
<u>State v. Walker</u> 143 Wn. App. 880, 181 P.3d 31 (2008).....	14
<u>State v. Williams</u> 135 Wn.2d 365, 957 P.2d 216 (1998).....	19

RULES, STATUTES AND OTHER AUTHORITIES

Black's Law Dictionary, 434 (7th ed.1999)	16
Former RCW 9.94A.400.....	19
Former RCW 10.01.160	24
GR 34.....	23
House Bill 1783	23, 25, 26, 27
Laws of 2001, ch. 10, § 6.....	19
Laws of 2018, ch. 269, § 6.....	3, 23, 24
Laws of 2018, ch. 269, § 17.....	24
Laws of 2018, ch. 269, § 18.....	26
RCW 9.94A.400	19
RCW 9.94A.510	21
RCW 9.94A.515	21

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9.94A.525	20
RCW 9.94A.589	1, 13, 14, 19, 20
RCW 9A.60.020	16
RCW 9A.82.010	15
RCW 9A.82.050	15
RCW 10.101.010	24, 25
RCW 36.18.020	24
RCW 43.43.754	26
RCW 43.43.7541	26

INTRODUCTION

Kyle Smith sold three junk cars belonging to Maxwell Guy and his father, Donald Guy, to Skylar Askay for \$400. Before Askay would purchase the cars, he insisted on a Department of Licensing lost title affidavit releasing interest in the cars, which the jury found Smith gave him after signing Donald Guy's name on the affidavits. In one transaction Smith gave Askay the affidavits, Askay gave Smith \$400 and then Askay removed the junk cars from Donald Guy's property. That one transaction was the basis for all seven charged offenses. Those offenses were three counts of theft of a motor vehicle, three counts of forgery and one count of first degree trafficking in stolen property. The jury acquitted Smith of the three theft of a motor vehicle charges but found him guilty of the lesser included offense of third degree theft for each of the three junk cars, guilty of forging the three affidavits and trafficking in stolen property--which was the three cars Smith sold to Askay.

Under RCW 9.94A.589(1)(a) multiple offenses encompass the same criminal conduct if the crimes involve the same objective criminal intent, time and place, and victim. Where there are multiple offenses they only count as one crime for sentencing purposes if the offenses are found to be the same criminal conduct. The State's evidence showed all the offenses shared the same objective criminal intent. That intent was to sell the junk

cars belonging to the Guys. The forged affidavits were an inseparable part of the sale because Askay would not purchase the junk cars without them. The victims of the trafficking offense and forgeries were the same. Maxwell Buy and Donald Guy because they lost their junk cars, and Askay because he lost \$400 when he purchased the junk cars in exchange for the affidavits releasing interest in the cars. The transaction occurred at the same time and place. Nonetheless, the trial court concluded the forgeries and the trafficking were not the same criminal conduct. Smith asks this Court to find that on this record the forgeries and trafficking were the same criminal conduct and remand for a resentencing hearing.

As part of the judgment and sentence the trial court imposed several discretionary costs and fees even though Smith is indigent. Under the Washington State Supreme Court's holdings in State v. Ramirez, and amendments to the statutes governing discretionary costs and fees, the trial court abused its discretion in imposing the costs and fees that it did. Smith asks this Court to strike those costs and fees.

A. ASSIGNMENTS OF ERROR

1. The court erred when it concluded the forgery convictions and trafficking in stolen property conviction were not the same criminal conduct for sentencing purposes.

2. The court erred in imposing certain discretionary costs and fees as part of appellant's sentence.

3. The court erred in imposing the DNA fee as part of appellant's sentence.

4. A scrivener's error in the judgment and sentence should be corrected.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of three counts of third degree theft, three counts of forgery, and one count of trafficking in stolen property. The trial court dismissed one of the theft convictions and found two of the forgery convictions were the same criminal conduct for sentencing purposes. The record shows the three forgery convictions and the trafficking in stolen property conviction occurred at the same time and place and involved the same victims. It also shows the forgeries and trafficking offenses involved the same objective criminal intent because the forgeries were committed to further the trafficking offense and were necessary and inseparable from the trafficking offense. Did the court err in concluding the forgeries and trafficking offenses were not the same criminal conduct?

2. Despite appellant's indigency the court imposed \$1,943.97 in discretionary legal financial obligations, which included a \$200 filing fee. Under the Laws of 2018, ch. 269, § 6(3) and the Washington State Supreme

Court's holding in State v. Ramirez, 2018 WL 4499761 (September 20, 2018) did the court erroneously impose the legal financial obligations or, alternatively, did the court fail to make the required inquiry regarding appellant's present and future ability to pay legal financial obligations?

3. The court also imposed a \$100 DNA fee in addition to other costs and fees. Where appellant has undoubtedly paid a \$100 DNA fee as part of his prior judgments and sentences, did the court erroneously impose that fee?

4. Should the inaccurate offender score in the judgment and sentence be corrected to reflect appellant's correct offender score?

B. STATEMENT OF THE CASE¹

1. Charges

Kyle Smith was charged by an amended information with three counts of theft of a motor vehicle (Counts I, II and III), three counts of forgery (Counts IV, V, and VI) and one count of first degree trafficking in stolen property (Count VII). CP 19-22. Count I charged Smith with taking a Subaru RX belonging to Max Guy. Counts II and III charged Smith with taking a Subaru Brat (Count II) and a Subaru wagon (Count II), both belonging to Donald Guy. CP 19-20. Counts IV, V and VI, charged Smith

¹ RP refers to the verbatim reports of proceedings for March 1, 2, 5, 6, 7, and 29, 2018, which are in three volumes sequentially paginated.

with forging a separate Department of Licensing Affidavit of Loss Title corresponding to each Subaru. CP 20-21.

2. Verdicts

A jury found Smith not guilty of the three theft of a motor vehicle charges but guilty of the lesser included offenses of third degree theft. CP 90-95; RP 432-433. The jury also found Smith guilty of the three forgery and the trafficking in stolen property charges. CP 96-98; RP 442-433.

3. Sentence

At his sentencing hearing Smith argued the three misdemeanor third degree theft convictions were one unit of prosecution and that two of those convictions should be dismissed. RP 443-446. The court denied the motion to dismiss two of the thefts but dismissed one of the theft convictions related to one of the two Subarus owned by Donald Guy finding that the two thefts related to Guy's two Subarus merged. It found the theft related to the Subaru owned by Max Guy was a separate offense and did not merge with the other thefts. RP 448-450.

Smith also argued that for sentencing purposes the three forgeries and trafficking in stolen property were the same criminal conduct. RP 451-454, 457-458. He argued that all three forged Department of Licensing documents were made at the same time and place and that because all three were forged with Donald Guy's signature that he was the victim of the three

forgeries. RP 453-454. He argued three forged documents furthered the trafficking in stolen property and all the offense involved the same objective criminal intent. RP 454, 457-458.

The court found the two forgeries corresponding to the two Subaru owned by Donald Guy were the same criminal conduct, but that the forgery corresponding to the vehicle owned by Max Guy was not. RP 460. The court found that none of the forgeries were the same criminal conduct as the trafficking in stolen property conviction. RP 461-462. Thus, in calculating Smith's offender score, the two forgeries corresponding to Donald Guy's Subarus were counted as one current offense, the forgery corresponding to Max Guy's vehicle and the trafficking in stolen property each counted as one offense. RP 461-462. Given his prior convictions, that gave Smith an offender score of seven. RP 462.

Based on an offender score of seven, the standard range for the trafficking in stolen property conviction is 43 to 57 month and the standard ranges for the forgeries is 14 to 18 months. RP 462. The court sentenced Smith to concurrent sentences of 56 months on the trafficking in stolen property, 18 months on each forgery, and 364 days on each of the two remaining third degree thefts. RP 467-468; CP 119.

The court also imposed mandatory and discretionary costs and fees in the amount of \$2,543.97. CP 121.

4. State's Case

On March 9, 2016, Skylar Askay responded to an ad on Craigslist that offered several Subaru cars that were being parted out for sale. RP 69; Ex. 4. On March 12, 2016, Askay and Jean Fosnaugh, a fellow Subaru enthusiast who belonged to a Subaru club with Askay, met Smith at Smith's grandmother's house and they followed Smith and his mother-in-law to some wooded property in Mason County to view the cars. RP 69-73, 108-109, 116-117.

The property, located on California Road, is owned by Donald Guy. RP 120. Scattered throughout the property were several junk cars, including Subarus, and junk mobile homes and trailers. RP 88, 134. Askay and Fosnaugh were "overwhelmed" by how many cars were on the property. RP 74, 111. Smith told Askay that Donald Guy owned the cars. According to Askay, Smith told him that he did some work for Guy and Guy told him to sell parts from the cars to pay for the work Smith had done for him. RP 74, 106. Askay, however, told police something different. He told police Smith said Guy wanted to clean up the property and Guy gave Smith permission to sell some of the junk on the property. RP 90.

Askay and Fosnaugh walked the property for hours looking at the cars. RP 74, 112. The following day, March 13th, Askay texted Smith and told him what cars he wanted to purchase. Smith allegedly told Askay he

had permission to sell the cars Askay wanted but not any other cars. RP 103. Askay wanted to meet Smith at the property the following weekend to work on the cars to make them movable to enable him to trailer them off the property. RP 75. None of the cars had been operable for years and they had no tires. RP 76, 114. Smith told Askay he was not available that weekend to meet with him. RP 94, 105.

The following weekend Askay and Fosnaugh went back to the property. According to both, Smith did show up at the property despite telling Askay earlier he was not available, and Askay offered Smith \$400 for three of the cars: a 1978 Subaru wagon, a 1987 Subaru RX and a 1980 Subaru Brat. RP 76, 114. Because none of the cars were titled, Askay asked Smith for paperwork releasing interest in the cars to Askay. RP 77, 85. Askay and Fosnaugh testified that Smith returned later that day with three Department of Licensing loss title affidavits, one for each Subaru. The signature on the affidavits bore the name Donald Guy. RP 77-78, 114; Exs. 1, 2, and 3. However, according to Askay, there was no description of the cars in the affidavits. Askay admitted he filled in the descriptive information in each of the affidavits. RP 78.

Askay and Fosnaugh then spent the rest of that weekend moving the cars. They were able to tow the Brat and RX off the property, but the wagon was wedged between some trees. They dug the wagon out and moved it to

near the entrance to the property intending to come back later and pick it up. RP 79-80, 114. Before they could pick up they wagon, they were contacted by the Mason County Sheriff's office. RP 80, 114. They were told the cars they took were stolen and they were asked to bring them to the Sheriff's office, which they did. RP 43, 82-83.

A Department of Licensing representative testified records showed all three Subarus had been destroyed for scrap so there were no current registered owners. RP 143. Records showed the last known owner of the RX was Maxwell (Max) Guy and the last known owner of the wagon was Donald Guy. RP 144-145. There was no previous owner information for the Brat. RP 145.

Guy testified that he met Smith in 2015 when Smith contacted him about somebody hauling scrap from the trailers parked on Guy's California Road property. RP 120-121. The two became friends and constantly phoned and texted each other during the following months. RP 123. Guy said he made a deal with Smith that if Smith kept an eye on the property and worked on some cars Guy owned Guy would give Smith a jeep. RP 122-123, 125. Guy also testified he talked with Smith about moving some of the cars off the property and setting up two modular homes on the property. Smith and his wife would live in one of the homes and Guy and

his brother would live in the other. RP 135. At some point Guy gave Smith a jeep and a Ford Bronco. RP 122, 125-126.

Guy testified the RX was owned by his son, Max Guy, and he owned the Brat and wagon. RP 124, 133. On March 20, 2016, Guy's two sons, Max Guy and Chase Guy, contacted the Sheriff's office and reported the three cars as stolen. RP 166. Mason County Sheriff's office Sargent William Reed then had Guy sign a document indicating the three cars were stolen because he wanted to compare the signatures on the three lost title affidavits retrieved from Askay with Guy's signature. RP 41. He opined the signatures were not the same. Id.

Guy denied he gave Smith permission to sell the cars or to sell parts from the cars. RP 124, 136. Guy said he did not sign the three affidavits and Smith never gave him any money. RP 128, 138. Guy admitted he was confused about what happened. RP 137.

5. Defense Case

Smith too testified he met Guy in 2015. RP 276. Guy wanted Smith to help him clean up his California Road property as well as Guy's Black Lake property where Guy lived. RP 277. There were over 30 junk cars and motor homes on the California Road property and Guy told Smith he wanted to store the cars that were worth saving and get rid of the others. RP 249, 279. Smith's wife testified the once when she was with Smith at Guy's

Black Lake property she heard Smith and Guy discuss selling parts from some of the cars and getting rid of the cars that were not operable. RP 320.

Smith asked his wife to post an ad on Craigslist for the sale of parts from some of the cars on Guy's property. Smith admitted he did not have permission to sell any of the cars, just parts, but his wife made a mistake in the ad which stated there were cars for sale by owner. RP 280, 298-299. When he was contacted by Askay in response to the ad, Smith told Askay he was only selling parts and not any cars. RP 281.

Smith and Askay arranged to meet at Smith's grandmother's house on March 12th. Askay and Fosnaugh met Smith at the house and then followed him to Guy's California Road property. Smith had injured his arm which prevented him from driving, so Smith's mother-in-law, Tammy Herring, drove Smith to the property. RP 281-282. Herring confirmed that on March 12th Askay and Fosnaugh met Smith at Smith's grandmother's house. She then drove Smith to the California property and Askay and Fosnaugh followed them. RP 196-197.

Smith and Herring testified they walked the property with Askay and Fosnaugh. RP 200, 282. Contrary to Askay's and Fosnaugh's testimony, the next day, March 13th, Smith met Askay and Fosnaugh at the property with his father-in-law, Guy Herring. RP 248, 283. Askay wanted to buy some of the cars but Smith told them he would have to check with

Donald Guy to see if Guy wanted to sell any cars and not just parts. RP 283. Smith testified that it was agreed that Askay and Fosnaugh would pull parts from some of the junk cars and they would then contact Smith and he would check what they took. RP 283-284. However, he told them the RX and wagon were not for sale and none of the parts from the RX, Brat and wagon were for sale. RP 283, 300. Herring confirmed that Smith told Askay and Fosnaugh that he had to check with Donald Guy to see what Guy was willing to sell. RP 252.

Herring and Smith left Askay and Fosnaugh at the property and later that afternoon Askay and Fosnaugh texted Smith and they arranged to meet at a tavern Smith's family owned. RP 284. When Askay and Fosnaugh met Smith at the tavern, Smith checked the parts the two had taken, and Askay and Smith agreed on a price of \$400 for the parts. RP 285. Askay and Fosnaugh had something to eat at the tavern and then left. Smith never saw them again. Id. Smith's wife also testified that when Askay and Fosnaugh showed up at the tavern Smith checked the parts the two had taken and Askay gave Smith \$400 for the parts. RP 268.

Smith said on either March 15th or 16th, he and Guy went to Harbor Freight to get some supplies to repair an Opel Guy owned. Smith spent \$300 out of the \$400 he received from Askay for the supplies and Guy told him to keep the rest of the money for the work Smith was going to do on

the Opel. RP 286-287, 304. Guy testified that he remembered going to Harbor Freight with Smith and that Smith purchased some equipment. RP 139.

Smith denied he met Askay and Fosnaugh the weekend following their initial meetings on March 12th and 13th, when Askay and Fosnaugh said he met them at the property and gave them the affidavits. RP 288, 303. He and his wife both testified they were at a birthday party for Smith's niece. RP 268, 304. Smith never gave Askay the affidavits and he did not know Askay and Fosnaugh took the Subarus until he saw a posting on Facebook on March 18th. RP 288, 291, 295, 304. Smith admitted he had prior convictions for burglary, theft and false reporting. RP 275.

C. ARGUMENTS

1. THE FORGERIES AND THE TRAFFICKING IN STOLEN PROPERTY OFFENSES SHOULD HAVE BEEN TREATED AS ONE OFFENSE FOR PURPOSES OF CALCULATING SMITH'S OFFENDER SCORE BECAUSE THE OFFENSES ENCOMPASSED THE SAME CRIMINAL CONDUCT.

The forgeries and trafficking offenses occurred at the same time and place, involved the same set of victims, and encompassed the same objective intent. Under RCW 9.94A.589(1)(a) and relevant case law, the offenses were the same criminal conduct and should have been treated as

one offense in calculating Smith's offender score. The trial court's conclusion the offenses were not the same course of conduct was wrong.

a. Where some or all current offenses encompass the same criminal conduct, the offenses are only counted as one crime for purposes of calculating an offender score.

For purposes of calculating an offender score, current offenses are treated as prior convictions unless the court finds "that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a). "Multiple offenses encompass the same criminal conduct if the crimes involve the same (1) objective criminal intent, (2) time and place, and (3) victim." State v. Walker, 143 Wn. App. 880, 890, 181 P.3d 31 (2008); RCW 9.94A.589(1)(a). This Court reviews the sentencing court's determinations of same criminal conduct "for abuse of discretion or misapplication of law." State v. Graciano, 176 Wn.2d 531, 535, 295 P.3d 219 (2013). If the record supports the conclusion that the offenses encompass the same course of conduct, the sentencing court abuses its discretion "in arriving at a contrary result." Id. at 537-38. The burden is on the defendant to "establish the crimes constitute the same criminal conduct." Id. at 539.

c. *The three forgeries and the trafficking in stolen property offenses were the same criminal conduct.*

Here, the court correctly determined the two forgeries corresponding to the two affidavits related to Donald Guy's two Subaru's were the same course of conduct. However, all three forgeries and the trafficking in stolen property were the same course of conduct and the court's determination they were not was an abuse of its discretion.

"A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree" RCW 9A.82.050(1). "Traffic" is defined as "to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." RCW 9A.82.010(19). Stolen property is defined as "property that has been obtained by theft, robbery, or extortion." RCW 9A.82.010(16).

The statute, RCW 9A.82.050(1), identifies two alternative means of committing the offense: "(1) facilitating the theft of property so that it can be sold and (2) facilitating the sale of property known to be stolen." State v. Lindsey, 177 Wn.App. 233, 244, 311 P.3d 61 (2013) *review denied*, 180

Wn.2d 1022 (2014); State v. Owens, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014). Smith’s jury was instructed on the second means. CP 83 and 85. Traffic was defined for the jury as meaning “to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person.” CP 84.

Under RCW 9A.60.020 “(1) A person is guilty of forgery if, with intent to injure or defraud: (a) He or she falsely makes, completes, or alters a written instrument or; (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.” “Subsections (a) and (b) of RCW 9A.60.020(1) identify alternative means of committing forgery, differentiating between the creation of a forged instrument and passing it off to another as valid.” State v. Simmons, 113 Wn.App. 29, 31, 51 P.3d 828 (2002). “Defraud” is not defined by statute. Resorting to the dictionary definition of defraud, this Court has held in the context of forgery “defraud” means to mean “[t]o cause injury or loss to ... by deceit.” Id. at 32 (citing Black's Law Dictionary, 434 (7th ed.1999)).

In Smith’s case, the to convict instructions for each of three forgery counts required the jury to find he committed the offense under RCW 9A.60.020(1)(b). See CP 80 (“possessed or offered or disposed of or put off as true...”). The instructions were identical except the written

instrument specified was the lost title affidavit corresponding to each Subaru. CP 80, 81 and 82.

The State's evidence showed that none of the Subarus were titled. Askay wanted the lost title affidavits releasing interest in the Subarus before he purchased them. RP 85. When there is no title to a car the affidavit releases the owner's interest in the car. RP 142. Askay gave Smith the \$400.00 for the three Subarus and in exchange Smith gave Askay the three affidavits, purportedly signed by Donald Guy, for each of the Subarus. RP 76-77, 114. Immediately after the exchange, Askay and Fosnaugh removed two of the Subarus and moved the third, which they intended to haul away later. RP 79-80, 114.

The court correctly found that all three forgeries were committed at the same time and involved the same intent. RP 460. As the court found there were "multiple victims" of the forgeries:

There's Max Guy as to the count alleging his car had a lost title that was forged, and there's Donald Guy in that two counts allege that Donald Guy had a lost title forged. And there's also Mr. Askay, who gave out money in the reliance on the fact that these documents were appropriate.

RP 460.

The trafficking offense also occurred at the same time and place as the forgeries. The victims of both the forgeries and trafficking offenses were also the same.

Smith's act of selling the three Subarus to Askay was the basis for the trafficking in stolen property offense. Smith provided Askay with the three loss title affidavits for each Subaru at the same time and place that he sold Askay the Subarus. The victims of the forgeries and trafficking offense were also the same. The forged affidavits defrauded Max Guy, Donald Guy and Askay because each suffered a loss through Smith's deceit. Max Guy and Donald Guy lost their Subarus because Askay purchased the Subarus on the strength of the affidavits. Askay in turn lost \$400 when he purchased the Subarus in exchange for the affidavits. That sale of the Subarus to Askay (the trafficking offense) resulted in the same loss suffered by all three (Askay, Max Guy and Donald Guy) as the loss they suffered because of the forgeries.

The court, however, determined the forgeries and trafficking offenses were not the same criminal conduct finding the intent factor was not met. RP 461. The court reasoned that forgery requires the intent to defraud and trafficking requires the intent to pass on or sell property that a person knows is stolen, thus it concluded the two offenses were not the same criminal conduct. *Id.* The court's analysis was misplaced because it focused exclusively on the intent element of each offense and failed to consider whether the offenses were committed with same objective criminal intent.

The same criminal conduct test was first enunciated in State v. Dunaway, 109 Wash.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987). That test was codified as former RCW 9.94A.400(1)(a). State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); see State v. Lessley, 118 Wn.2d 773, 777–78, 827 P.2d 996 (1992) (Dunaway test “entirely consistent” with the statute as amended). RCW 9.94A.400(1)(a) was recodified as RCW 9.94A.589 by Laws of 2001, ch. 10, § 6 . The Dunaway Court stated that in determining whether the offenses were part of the same criminal intent for purposes of a same criminal conduct analysis, courts are to “focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next ... part of this analysis will often include the related issues of whether one crime furthered the other” Dunaway, 109 Wn.2d at 215; see also State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (same) and State v. Garza–Villarreal, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993) (same).

Smith’s overarching objective criminal intent in both the forgeries and trafficking offenses was to sell the Subarus belonging to Max Guy and Donald Guy, as evidenced by the Craigslist ad. It was the transaction with Askay that was the basis of the trafficking in stolen property offense. The forged affidavits were a necessary and integral part of the transaction because, as the court found, it was Askay’s reliance on the affidavits that

induced him to give Smith \$400 for the Subaru. The State's theory itself supports that conclusion. In his closing argument to the jury the deputy prosecutor pointed out that Askay told Smith he needed paperwork (the affidavits) before he would purchase the cars. RP 398-399. "The moment he [Smith] to - - exchanged money for the vehicles and then also passed off those documents [affidavits], he trafficked in stolen property." RP 400 (emphasis added). The three forged affidavits not only facilitated the sale to the Subaru in furtherance of the trafficking offense; they were an inseparable part of the transaction. The record shows the objective criminal intent for both the forgeries and trafficking offenses was the same.

The three forgery and trafficking offenses occurred at the same time and place. The victims of the trafficking offense were the same as the victims of the forgeries. The objective criminal intent for the forgeries and trafficking offenses was to sell the stolen property. Thus, the forgeries and the trafficking offenses were the same criminal conduct.

d. A resentencing hearing is necessary because the standard range sentences were based on an incorrectly calculated offenders score.

Under RCW 9.94A.525(1) the forgeries and trafficking offense are "other current offense." Other current offenses are treated as prior offenses under RCW 9.94A.589(1)(a) unless they encompass the same criminal conduct, in which case they are treated as one offense. The court correctly

found the two forgeries corresponding to Donald Guy's Subarus counted as one offense in calculating Smith's offender score. But, because the forgeries and trafficking offense were the same course of conduct, the court incorrectly found that those forgeries the forgery corresponding the Max Guy's Subarus counted as a "other current offense" each for purposes of calculating Smith's offender score on the trafficking conviction, and that the trafficking offense counted as a "other current offense" in determining the offender score for each of the forgeries.

Because the forgeries were counted as other current offenses against the trafficking offense but are the same criminal conduct as that offense, Smith's offender score for the trafficking offense should be five and not seven, making the standard range standard range for that offense 36 to 48 months. See RCW 9.94A.515 (trafficking in stolen property is a seriousness level IV offense) and RCW 9.94A.510 (sentencing grid). Because the trafficking offense counted as an "other current offense" against the forgeries, Smith's offender score should be six and not seven, making the standard range for those offenses 12 to 14 months. See RCW 9.94A.515 (forgery is a seriousness level I offense) and RCW 9.94A.510 (sentencing grid).

This court should remand to the trial court for a resentencing based on the correct offender score. State v. Haddock, 141 Wn.2d 103, 115–116, 3 P.3d 733 (2000).

2. THE DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN UNDER STATE V. RAMIREZ.

As part of Smith’s judgement and sentence the trial court imposed \$1,943.97 in legal financial obligations (LFOs). In addition to a \$500 victim assessment fee and a \$100 DNA fee, the court imposed certain discretionary fees and costs and a \$200 criminal filing fee. The other fees and costs were: \$373.97 for witness costs, \$1,120 for sheriff service fees and a \$250 jury demand fee. CP 121. Smith is indigent under the applicable statutory criteria. These discretionary fees and costs should be stricken under the recent Ramirez decision.

In Ramirez, an appellant challenged discretionary LFOs arguing the trial court had not engaged in an appropriate inquiry regarding his ability to pay under State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). State v. Ramirez, 2018 WL 4499761 (September 20, 2018) at *2. The Supreme Court agreed and provided detailed instructions regarding the appropriate inquiry. Id. at *4-6. The Court summarized the appropriate inquiry as follows:

Trial courts must meaningfully inquire into the mandatory factors established by Blazina, such as a defendant's incarceration and other debts, or whether a defendant meets the GR 34 standard for indigency. Trial courts must also consider other "important factors" relating to a defendant's financial circumstances, including employment history, income, assets and other financial resources, monthly living expenses, and other debts. Under this framework, trial courts must conduct an on-the-record inquiry into the mandatory Blazina factors and other "important factors" before imposing discretionary LFOs.

Id. at *8

The Ramirez Court explained that Laws of 2018, ch. 269, § 6(3) ("House Bill 1783") made substantial modifications to several facets of Washington's LFO system. In doing so, the legislature "address[ed] some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction." Ramirez, 2018 WL 4499761 at *6.

For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction, and provides that a court may not sanction an offender for failure to pay LFOs *unless* the failure to pay is willful. Ramirez, 2018 WL 4499761 at *6 (citing Laws of 2018, ch. 269, §§ 1, 18, 7). It prohibits

imposing the \$200 filing fee on indigent defendants. Ramirez, 2018 WL 4499761 at *6 (citing Laws of 2018, ch. 269, § 17).²

It also amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Ramirez, 2018 WL 4499761 at *6 (citing Laws of 2018, ch. 269, § 6(3)). The Ramirez Court held a trial court “shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” Ramirez, 2018 WL 4499761 at *7 (quoting Laws of 2018, ch. 269, § 6(3)). Thus, indigency may established by three objective criteria. “Under RCW 10.101.010(3)(a) through (c), a person is ‘indigent’ if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.” Ramirez, 2018 WL 4499761 at *7.³

² RCW 36.18.020(2)(h) now provides that:

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

³ If none of these criteria apply, only then must the trial court engage in an individualized inquiry into current and future ability to pay. Ramirez, 2018 WL 4499761 at *7.

The Court held that the House Bill 1783 amendments applied prospectively to cases not yet final on appeal. Ramirez, 2018 WL 4499761 at *7-8 (citing State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)).⁴

Here, the record shows Smith is indigent under RCW 10.101.010(3). In his declaration of indigency Smith averred he did not own any assets, did not receive any income from interest or dividends, has no income, and is not employed. CP 133-137. At sentencing Smith stated he did not have a job and could not get a job because of this case. RP 470. House Bill 1783 applies prospectively to Smith case. Because Smith is indigent House Bill 1783, as a matter of law, “prohibits the imposition of discretionary LFOs.” Ramirez, 2018 WL 4499761 at *8. This Court should remand and order the trial court to strike the discretionary LFOs, including the \$200 filing fee.

Even if Smith were not indigent under RCW 10.101.010(3), remand for a resentencing hearing on his current and future ability to pay discretionary LFOs would be necessary because the trial court failed to conduct the individualized inquiry required under Blazina. The trial court asked defense counsel to comment on Smith’s “past and future ability to

⁴ In Ramirez, the Court concluded that the trial court impermissibly imposed discretionary LFOs, as well as the \$200 criminal filing fee. The Court remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. Ramirez, 2018 WL 4499761 at *8.

pay.” RP 469. Counsel informed the court that Smith has not had any gainful employment since his release from prison. Id. Smith told the court he had not worked because of his current court matters. RP 470. The trial court did not inquire about his present employment and past work experience, income, assets and other financial resources. Nor did the court inquire about his monthly expenses, debts (including other LFOs), health care costs, or education loans, which is required before the court decides to impose discretionary LFOs. Ramirez, 2018 WL 4499761 at *5. Where the trial court imposes discretionary LFOs but fails “to conduct an individualized inquiry into the defendant’s financial circumstance” it is a per se abuse of discretion. Ramirez, 2018 WL 4499761 at *4. The trial court’s failure to conduct that inquiry would entitle Smith to a resentencing hearing on his present and future ability to pay.

3. THE \$100 DNA FEE SHOULD ALSO BE STRICKEN.

RCW 43.43.7541, the statute controlling the imposition of a DNA fee, was also amended under House Bill 1783.

The statute now provides:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender’s DNA as a result of a prior conviction.*

RCW 43.43.7541 (emphasis added.); Laws of 2018, ch. 269, § 18.

Smith has a criminal history that includes convictions for burglary and theft. CP 116. Clearly, the State has previously collected his DNA. As a result, the DNA fee must be considered a discretionary LFO, which may not be imposed on an indigent defendant. Thus, this Court should also strike the DNA fee under House Bill 1783 and Ramirez.

4. A SCRIVENER'S ERROR IN THE JUDGEMENT AND SENTENCE SHOULD BE CORRECTED.

If this Court disagrees that the offenses constitute the same criminal conduct and does not grant Smith a resentencing on that issue, the judgment and sentence should nonetheless be corrected because it contains a scrivener's error. A "scrivener's error" is synonymous with a "clerical mistake." See In re Personal Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2003). "A clerical mistake is one that when amended would correctly convey the intention of the court based on other evidence." State v. Priest, 100 Wn. App. 451, 455, 997 P.2d 452 (2000) (citing Presidential Estates Apartment Assoc. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)).

The judgment and sentence states that Smith's offender score for the forgery and trafficking offense (Counts IV, V, VI and VII) is "8." CP 117. The offender score for those offenses should be seven. RP 462. The remedy is remand for correction of the error. Mayer, 128 Wn. App. at 701-02.

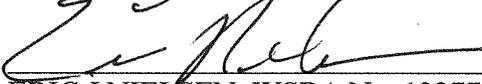
D. CONCLUSION

This Court should find Smith's offender score was calculated incorrectly because the trial court failed to find some of the current offenses were the same criminal conduct. Further, this Court should find the trial court erroneously imposed discretionary LFOs and that there is a scrivener's error in the judgment and sentence that should be corrected. This Court should remand for a resenting hearing.

DATED this 2 day of October, 2018

Respectfully submitted,

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October 03, 2018 - 3:57 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Kyle Smith, Appellant
Superior Court Case Number: 16-1-00110-6

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