

FILED
Court of Appeals
Division III
State of Washington
1/31/2018 4:32 PM

NO. 35079-7-III
35080-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

DOMINIC CUDMORE,

Appellant.

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

APPELLANT'S REPLY BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION TO REPLY 1

B. ARGUMENT IN REPLY 1

 1. **The intent was the same for possession of a stolen access device and identity theft** 2

 2. **The vague condition prohibiting association with DOC-identified drug offenders should be stricken** 3

C. CONCLUSION 5

TABLE OF AUTHORITIES

Cases

State v. Anderson, 72 Wn. App. 453, 864 P.2d 1001 (1994)..... 2

State v. Hearn, 131 Wn. App. 601, 128 P.3d 139 (2006)..... 4

Statutes

RCW 9.35.020 2

A. INTRODUCTION REPLY

As discussed in the opening brief, the two charged offenses of identity theft and possession of a stolen access device were supported by a single attempted use of a bank card. Because the possession of the bank card was a necessary component of using the card to appropriate the owner's identity, the offenses were identical in time, place, victim and intent. Therefore, the trial court abused its discretion when it found the convictions did not constitute the same criminal conduct for purposes of calculating Dominic Cudmore's offender score at sentencing.

Herein, Mr. Cudmore replies to the State's allegation that the intent for each crime was distinct.

In the opening brief, Mr. Cudmore also argued the Court should strike the community custody condition prohibiting "contact with DOC ID'd drug offenders except in treatment setting" because it is vague and violates Mr. Cudmore's constitutional right to freedom of association. In response, as pointed out below, the State relies on inapplicable cases and unavailing argument.

B. ARGUMENT IN REPLY

1. The intent was the same for possession of a stolen access device and identity theft.

The trial court abused its discretion and misapplied the law in finding that Mr. Cudmore's intent was distinct by reasoning that the possession charge required mere possession but the identity theft charge required Mr. Cudmore to take the additional step of using the access device. The State continues to argue this fallacy in its response brief. Resp. Br. at 7-8.

Mr. Cudmore's objective intent in possessing the stolen access device and in appropriating Ms. Urann's identity coincided here. The overall objective underlying the acts was to obtain items without having to provide one's own money. Both acts furthered the goal of purchasing items at the convenience store. Possessing the stolen access device was necessary to and furthered the identity theft. *See State v. Anderson*, 72 Wn. App. 453, 464, 864 P.2d 1001 (1994) (same criminal conduct where defendant would have been unable to commit one crime without the other).

Contrary to the State's assertion, identity theft can be premised on mere possession. *Compare* RCW 9.35.020 ("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.”) *with* Resp. Br. at 7-8. Identity theft does not require use. The State’s argument falls apart because it depends upon use being the basis for the identity theft.

The record shows that Mr. Cudmore’s possession and use of the access device coincided at the convenience store: the only moment of possession or use was when Mr. Cudemore used Brittani Urann’s bank card to make a purchase at the convenience store. CP 4 (probable cause statement); RP 74 (court reviewed probable cause statements). Consequently, the intent was the same.

Because the crimes were committed against the same victim, as part of a single event and with the same criminal purpose, the trial court abused its discretion in finding the offenses did not constitute the same criminal conduct. The sentences for both sets of charges should be reversed and remanded for resentencing under the correct offender score.

2. The vague condition prohibiting association with DOC-identified drug offenders should be stricken.

The sentencing court imposed a condition of community custody as follows: “no contact with DOC ID’d drug offenders except in treatment setting.” CP 41, 45. The condition is unconstitutionally vague. If interpreted broadly, the condition could infringe on Mr.

Cudmore's ability to obtain employment where any persons with drug convictions also work. It could limit Mr. Cudmore's ability to belong to religious institutions, to attend a neighborhood association meeting, or to serve on the board of a not-for-profit organization where former drug offenders could also be. Because the condition is vague and broadly restricts Mr. Cudmore's freedom of association, it should be stricken.

In response, the State relies on *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006). Resp. Br. at 9-10. However, the case is inapposite because this Court did not address whether the condition was vague.

The State also claims the condition is not speculative because DOC is "a state agency governed by statutes and administrative code provisions." Resp. Br. at 13. But the State fails to indicate where, when or who at DOC identifies offenders as "drug offenders." The State does not cite any provision that limits DOC's "identification" of "drug offenders." The fact that DOC is a state agency does not narrow the scope of the condition.

Next, the State justifies the condition by claiming it is limited to drug offenders under DOC supervision. Resp. Br. at 14 ("Certainly, the

Department of Corrections does not arbitrarily determine that the offenders it supervises are ‘drug offenders;’ that determination must be made based on each offender’s crime(s) of conviction.”). Notably, the condition does not contain that limitation. CP 41, 45.

C. CONCLUSION

The Court should remand for resentencing where the offenses of possession of a stolen access device and identity theft constitute the same criminal conduct. Additionally, the Court should order stricken the vague community custody condition prohibiting Mr. Cudmore from associating with DOC-identified drug offenders.

DATED this 31st day of January, 2018.

Respectfully submitted,

s/ Marla L. Zink
Marla L. Zink, WSBA 39042
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
T: (206) 587-2711
F: (206) 587-2710
marla@washapp.org

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35079-7-III
)	
DOMINIC CUDMORE,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JANUARY, 2018, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GRETCHEN VERHOEF	()	U.S. MAIL
[SCPAappeals@spokanecounty.org]	()	HAND DELIVERY
SPOKANE COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA PORTAL
1100 W. MALLON AVENUE		
SPOKANE, WA 99260		

[X] DOMINIC CUDMORE	(X)	U.S. MAIL
330287	()	HAND DELIVERY
AIRWAY HEIGHTS CORRECTIONS CENTER	()	_____
PO BOX 2049		
AIRWAY HEIGHTS, WA 99001		

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JANUARY, 2018.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

January 31, 2018 - 4:32 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35079-7
Appellate Court Case Title: State of Washington v. Dominic Luis Cudmore
Superior Court Case Number: 13-1-03078-1

The following documents have been uploaded:

- 350797_Briefs_20180131163151D3678911_8639.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.org_20180131_161137.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- gverhoef@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Marla Leslie Zink - Email: marla@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180131163151D3678911