

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 OPENING BRIEF

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A. SUMMARY OF ARGUMENT

A single attempted use of a bank card supported convictions for identity theft and possession of a stolen access device. The offenses were identical in time, place, victim and intent, because the possession of the bank card was a necessary predicate to and furthered using it to appropriate the owner's identity. 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.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it found possession of a stolen access device and identity theft did not constitute the same criminal conduct for purposes of calculating Mr. Cudmore's offender score.

2. The community custody condition prohibiting "contact with DOC ID'd drug offenders except in treatment setting" is vague and

infringes on Mr. Cudmore's constitutional right to freedom of association. CP 41, 45;^{1, 2} U.S. Const. amend. I.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where multiple crimes arise from the "same criminal conduct," they count as a single offense for purposes of calculating the individual's offender score. Offenses constitute the same criminal conduct at sentencing if the crimes were committed at the same time and place, involved the same victim, and involved the same criminal intent. Where the possession of a stolen access device, another's bank card, coincided with Mr. Cudmore's possession or use of the bank card as an act of identity theft, did the offenses arise from the same criminal conduct and did the trial court abuse its discretion in finding otherwise?

2. Community custody conditions violate due process if they are susceptible to arbitrary enforcement and fail to give adequate notice of proscribed conduct. Offenders on community custody retain their First Amendment right to freedom of association. Should the

¹ Unless otherwise noted, all references to the clerk's papers are to those filed in appeal No. 35079-7. The single-volume verbatim report of proceedings is the same for both appeals (Nos. 35079-7 and 35080-1) and is referred to as "RP."

² The same condition was imposed in the judgment and sentence underlying appeal No. 35080-1 and can be found at CP 33, 36 in that case.

community custody condition prohibiting contact with DOC-identified drug offenders be stricken because it is vague and restricts Mr. Cudmore's right to free association?

D. STATEMENT OF THE CASE

Brittani Urann reported her bank card stolen after items were taken from an unlocked school locker room. CP 3-4. The card was cancelled, but someone tried to use it at a convenience store that same day. CP 4. Through surveillance video, that person was determined to be Dominic Cudmore. CP 4-5. The State charged Mr. Cudmore with one count of second degree possession of stolen property for the bank card and one count of second degree identity theft. CP 1-2.

Dominic Cudmore is a veteran who struggles with mental health issues and substance abuse. RP 7-9. Due to post-traumatic stress disorder, he "finds it very difficult to engage in social situations, to maintain employment, [and] to engage in any type of leisure activities." RP 7; *accord* RP 16-18. He entered drug court to resolve the issues underlying these charges, as well as those in two other cases: the first related to property stolen from his brother and subsequently sold to a pawn shop, and the second related to possession of a controlled

substance.³ RP 2-6; CP 6-9. The facts underlying the charges for identity theft and possession of a stolen access device are the only ones relevant to this appeal.

Mr. Cudmore was transferred from drug court to mental health court. RP 3-6; CP 14-19. His mental health issues led to difficulty engaging in treatment, and he was eventually terminated from mental health court. RP 8-9, 28-31, 48-49, 70.

Based on the probable cause statements, the trial court found Mr. Cudmore guilty of the charged counts. RP 74-78. At sentencing, Mr. Cudmore argued the identity theft and possession of a stolen access device offenses constitute the same criminal conduct because they were premised on the possession of a single bank card and they occurred at the same time and place. CP 28-31; RP 81, 82-83. Mr. Cudmore was charged with both crimes after he presented Ms. Urann's bank card for a purchase at a convenience store. CP 3-4. No other facts relating to his obtaining, possessing or using the bank card or Ms. Urann's identity

³ The identity theft and possession of a stolen access device counted as two separate points in Mr. Cudmore's offender score for the charges relating to theft from his brother. Mr. Cudmore appeals the sentence for those stolen property charges at Cause No. 35080-1. The information is contained in the clerk's papers for that appeal at pages 1-2 and the affidavit of probable cause at pages 3-4.

were presented. Agreeing with the State, the court found the two crimes were not the same criminal conduct because the intent for each crime was different. RP 84, 89. The offenses carried different intents according to the State because possession of a stolen access device depends upon mere possession but identity theft requires the defendant to have used the access device. RP 84; CP 32-34.

The trial court's finding resulted in an offender score of "9" for all the property charges in the two cases. RP 82-83, 92; CP 29. A finding of same criminal conduct would have reduced his offender score to an "8." *Id.* Mr. Cudmore was sentenced to an in-custody drug offender sentencing alternative (DOSA) sentence. CP 35-48.

E. ARGUMENT

1. Dominic Cudmore's possession of the bank card coincided with and furthered his possession or use of the bank card such that the crimes of possession of a stolen access device and identity theft were the same criminal conduct.

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. RP 84, 89 (court agrees with State's argument in finding

same criminal conduct). Identity theft does not depend on “use” but can also be premised on mere possession. 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.”). The record shows that Mr. Cudmore’s possession and use of the access device coincided at the convenience store; the acts were indistinguishable. Based on the probable cause statements, which was the only evidence before the trial court, Mr. Cudmore committed a single act relevant to these two charges: he used Brittani Urann’s bank card to make a purchase at a convenience store. CP 4 (probable cause statement); RP 74 (court reviewed probable cause statements).

- a. Multiple offenses constitute the same criminal conduct where the time, place, victim and intent coincide or when one crime furthers the other.

A person’s offender score may be reduced if the court finds two or more of the current offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). 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.” *Id.* Thus, when determining same criminal conduct for purposes of calculating an

offender score, courts look for the concurrence of intent, time and place, and victim.

The trial court's determination that multiple offenses do not constitute the same criminal conduct is reviewed for an abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 533, 535-37, 295 P.3d 219 (2013).

- b. The intent for both counts coincided where Mr. Cudmore used the stolen access device to make a purchase.

In determining whether the criminal intent element of the same criminal conduct analysis is satisfied, the question is whether the defendant's criminal intent, objectively viewed, changed from one crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). To constitute separate conduct, there must be a substantial change in the nature of the criminal objective. *State v. Calloway*, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985).

As used in this analysis, intent "is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Each crime is not viewed solely

on the basis of the statute but in the objective context of the facts of the case. The proper examination focuses on to “what extent did the criminal intent, when viewed objectively, change from one crime to the next.” *Tili*, 139 Wn.2d at 123. For example, “the unlawful possession of property taken in a theft is a mere continuation of the thief’s act of depriving the true owner of his or her right to possess their property.” *State v. Haddock*, 141 Wn.2d 103, 112, 3 P.3d 733 (2000).

Objective intent may be found when one crime furthered the other or if both crimes were part of a recognizable scheme or plan. *Graciano*, 176 Wn.2d at 540 (citing *Dunaway*, 109 Wn.2d at 215); *State v. Israel*, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002). One crime furthers another where the first crime facilitates commission of the other crime. *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004); *State v. Collins*, 110 Wn.2d 253, 263, 751 P.2d 837 (1988).

Mr. Cudmore’s objective intent in possessing the stolen access device and in appropriating Ms. Urann’s identity coincided here. Both acts furthered the goal of purchasing items at the convenience store. *See State v. Garza-Villareal*, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993) (possession of different controlled substances with intent to deliver constituted same criminal conduct because both furthered the same

overall objective of delivering controlled substances in the future). The overall objective underlying the acts was to obtain items without having to provide one's own money. 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); *Haddock*, 141 Wn.2d at 113 (same intent for purposes of same criminal conduct where a single intent to possess stolen property motivated the conduct underlying convictions for possession of stolen property and firearms).

The trial court agreed with the State, finding the intent underlying each offense differed because possession of a stolen access device requires possession but Mr. Cudmore had to take an additional step to use the device to commit identity theft. RP 84, 89; CP 33-34 (State's sentencing brief). The court's finding is based on a misunderstanding of the law and the facts. The crime of identity theft does not require use. RCW 9.35.020. Mere possession is sufficient. *Id.* The trial court misapplied the law to find that identity theft required an additional step of use. Furthermore, the evidence before the trial court did not show possession of the access device other than at the

moment when Mr. Cudmore presented it at the convenience store to make a purchase. CP 3-4; *see* CP 32-33 (State sets forth the same in sentencing brief). Thus the possession and use for both counts coincided. The single intent was to use the stolen access device to purchase items at the convenience store. The evidence did not show that the possession and use of the access device were distinct.

- c. The owner of the bank card was the single victim of both offenses.

In addition to intent, the victim was the same for both counts. Ms. Urann's bank card was the object underlying both the possession of stolen property and the identity theft counts. *See id.*; CP 1-2 (information). Ms. Urann was the victim of both counts. *See Haddock*, 141 Wn.2d at 111 (owner of the property is victim of possession of stolen property); *State v. Berry*, 129 Wn. App. 59, 67-68, 117 P.3d 1162 (2005) (person whose financial or other sensitive, personal information is appropriated is victim of identity theft); *see also State v. Leyda*, 157 Wn.2d 335, 349, 138 P.3d 610 (2006) (recognizing same), *superseded by statute on other grounds* RCW 9.35.020(4).

- d. The possession and identity theft also occurred at the same time and place.

The evidence underlying both counts was that Mr. Cudmore used Ms. Urann's stolen bank card to make a purchase at a convenience store. CP 4. The evidence of possession thus occurred when Mr. Cudmore tried to make a purchase with the bank card at the convenience store, and the evidence of identity theft also occurred there and then. The time and place, therefore, was precisely the same for each count.

This element is satisfied even if the evidence pointed to some separation between the possession of the bank card and the identity theft. Even separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). Multiple offenses need not occur simultaneously in order to meet the "same time and place" requirement of the same criminal conduct analysis. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998). A mere pause between criminal acts does not prevent a finding of same criminal conduct. *State v. Palmer*, 95 Wn. App. 187, 975 P.2d 1038 (1999). Where the crimes occur sequentially, the question is whether they

“occurred in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme.” *Williams*, 135 Wn.2d at 368 (*Porter*, 133 Wn.2d at 185-86).

Because both offenses occurred when Mr. Cudmore proffered Ms. Urann’s bank card for a purchase at the convenience store, the time and place element is satisfied.

- e. The trial court abused its discretion in finding the offenses did not constitute the same criminal conduct.

In sum, 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 refusing to find same criminal conduct. The sentences for both sets of charges should be reversed and remanded to the trial court for resentencing under the correct offender score.

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

The community custody condition prohibiting “contact with DOC ID’d drug offenders except in treatment setting” should be stricken because it is vague and infringes on Mr. Cudmore’s

constitutional right to freedom of association. CP 41, 45;⁴ U.S. Const. amend. I.

Limitations on fundamental constitutional rights during community custody must be “reasonably necessary to accomplish the essential needs of the state and the public order.” *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). Additionally, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal, and the condition must provide ascertainable standards to protect against arbitrary enforcement. U.S. Const. amend. XIV; Const. art. I, § 3; *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). Offenders on community custody retain their rights to free expression and association, even though some limitations are permitted. U.S. Const. amend. I; *Riles*, 135 Wn.2d at 346-47 (offenders retain right to freedom of association); *see Procunier v. Martinez*, 416 U.S. 396, 408-09, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail).

The right to associate freely with others may be limited during community custody, but such limitations must be authorized by the

⁴ *See also* No. 35080-1, CP 33, 36 (imposing same condition).

Sentencing Reform Act. *Riles*, 135 Wn.2d at 347. Moreover, any infringement upon a convicted person's constitutional rights during community custody must be necessary to accomplish the goals of punishment and protection of the public. *Riles*, 135 Wn.2d at 350; *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

The State bears the burden to demonstrate a condition of community supervision is statutorily authorized. *United States v. Weber*, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case).

A broadly stated condition subject to arbitrary enforcement is unconstitutionally vague. *State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010). As a matter of due process, a person sentenced to community custody must be given fair warning of proscribed conduct and conditions imposed must be reasonably limited to impermissible conduct. *Id.* at 794.

The sentence states, as part of Mr. Cudmore's community custody conditions, "no contact with DOC ID'd drug offenders except in treatment setting." CP 41, 45. In relation to the DOSA-treatment program, the court might be able to impose some reasonable, limited

restrictions on Mr. Cudmore's engagement with controlled substances and other persons engaged in substance abuse. However, the condition imposed here is vague, being susceptible to arbitrary enforcement and failing to provide fair warning of proscribed conduct. For example, the condition does not specify how DOC identifies "drug offenders." CP 41, 45. The condition does not set forth criteria delineating "drug offenders." *Id.* It also does not state whether, when or how Mr. Cudmore will be informed who DOC considers to be a drug offender. *Id.*

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 churches or fitness centers where persons with drug convictions also attend.

Because the condition is vague and broadly restricts Mr. Cudmore's freedom of association, it should be stricken.

F. CONCLUSION

Because the trial court misapplied the law and abused its discretion in finding the offenses of possession of a stolen access device and identity theft were not the same criminal conduct, the sentence should be stricken and the matter remanded for resentencing. In addition, the vague condition prohibiting Mr. Cudmore from associating with DOC-identified drug offenders should be stricken.

DATED this 5th day of October, 2017.

Respectfully submitted,

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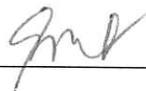
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