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Washington Court of Appeals, Division Three
By _____

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

COLE W. SHALE, PETITIONER

NO. _____

MOTION FOR DISCRETIONARY REVIEW

COLE W. SHALE, PETITIONER

COLE W. SHALE #877026
PO. BOX 2019
AIRWAY HEIGHT'S, WA.
99001-2019

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I. IDENTITY OF PETITIONER

Cole W. Shale, petitioner, would ask this court to accept review of the decision shown in the following portion of this motion.

II. DECISION OF APPELLATE COURT

Division III of the Court of Appeals entered an order dismissing personal restraint petitions on January 5, 2006 under consolidated case number 24046-1-III. The petitioner would first like this court to review the Appellate Courts analysis of the " a person " and " the person " language set forth by the legislature under **RCW 9A.56.320(2)(a)(i) UNLAWFUL POSSESSION OF PAYMENT INSTRUMENTS.**

Next, the petitioner would like this court to review the Appellate Courts decision that " rejects as frivolous " the petitioner's arguement as to whether or not **RCW 9.94A.589(1)(a) " SAME CRIMINAL CONDUCT "** analysis should have been applied to all cause numbers sentenced on November 16, 2004. This court should reconsider the dismissal of this petition in accordance with **RAP 13.5 (b)(2).**

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals, Chief Judge err by ruling all three convictions of unlawful possession of payment instruments as separate units of prosecution?

2. Did the Court of Appeals, Chief Judge err by " rejecting as frivolous " Mr. Shale's arguement that he should receive a remand for resentencing, because some of his crimes should have been considered " **SAME CRIMINAL CONDUCT** " under **RCW 9.94A.589 (1)(a)** and counted as a single offense?

3. Did the Court of Appeals, Chief Judge err by ruling that all Mr. Shale's crimes involved separate victims and/or differant dates such that all of his offender scores remain at 9+?

IV. STATEMENT OF THE CASE

Cole W. Shale seeked relief from personal restraint imposed from his 2004 Spokane County convictions upon pleas of guilty to a total of 12 crimes in 7 differant superior court cases. Mr. Shale initially filed this matter as multipile CrR 7.8 motions to modify and vacate his sentences in superior court, which transferred the matters to Division III of the Court of Appeals for consideration as personal restraint petitions pursuant to CrR 7.8(c)(2). This matter was then considered by the Chief Judge of the Court of Appeals, and dissmised pursuant to RAP 16.11(b).

All facts relevent to this motion are set forth by attachment to this motion, or by attachments previously filed before the court by the petitioner or respondant, and incorporated herin by reference.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. In the recently decided case State v. Ose, Wn.2d, P.3d, (No. 76425-5, December 15, 2005) this court ruled that by the Legislature using " a " in a statute, they define the unit of prosecution. In the order dismissing personal restraint petition (attach. A) the Chief Judge of the Court of Appeals applied this analysis to the crime of unlawful possession of payment instruments.

RCW 9A.56.320(2)(a)(i) provides:

A person is guilty of unlawful possession of payment instruments if he or she possesses two or more checks or other payment instruments, alone or in combination:

(i) In the name of a person or entity, or with the routing number or account number of a person or entity, without the permission of the person or entity to possess such payment instrument, and with intent either to deprive the person of possession of such payment instrument or to commit theft, forgery or identity theft.

If this court concedes with the lower courts application of this analysis with the case at bar, that the " a person " and " the person " language unambiguously defines each victim as a single unit of prosecution, then surely this court would agree the statute also, unambiguously states that you must have two or more payment instruments per victim to support each charge.

In the instant case the petitioner was convicted of three

counts of unlawful possession of payment instruments. Under the ruling set forth by the Chief Judge, the petitioner would have to have possession of six or more payment instruments, belonging to three different victims, in order to support three counts of unlawful possession of payment instruments.

In the supplemental response to personal restraint petition ordered by the Chief Judge, the state asserts that there are three victims involved with this cause number. (supp. rsp. pg. 1-3) If the petitioner would have been provided an opportunity to reply to this brief, it would have been clearly shown, not only by the Judgement and Sentence, (initial rsp. attach. E) but also the verbatim report of proceedings. (pg. 5 ln. 15-25 and pg. 6 ln. 1-17) The petitioner only stipulated to two victims. (Hackett and Bassen) It was agreed upon by all parties involved that the other alleged victim (Malmsten) could be " handled by Idaho if they want ". (RP. pg. 6 ln. 10-11)

In report number 04-213002, relating to victim Bassen (supp. rsp. attach. A) it alleges that the petitioner had possession of a checkbook with over ten checks. In report number 04-212747, relating to victim Hackett, it alleges the petitioner had possession of a checkbook, (with an undisclosed amount of checks) but only makes reference to one check. By Legislature using the " two or more " language, and this courts analysis

of the " a person " language, together would imply that a defendant must have two, but could have any number of payment instruments belonging to " a person or entity ", and still only be guilty of one count of unlawful possession of payment instruments.

Under this analysis, in the case at bar, the State must have relied upon combined payment instruments, belonging to two different victims, to satisfy the " two or more " requirement to support three separate charges.

2. Cause number 04-1-02713-7 two amended counts of possession of stolen property in the first degree, which were initially charged as two counts of possession of stolen firearm. In the order dismissing the personal restraint petition, ordered by the Chief Judge, he asserts that these charges were not controlled by State v. McReynolds, 117 Wn App. . However, if this court agrees that these charges were separate units of prosecution, then this court would agree that these charges are controlled by RCW 9.94A.589(1)(a) " **SAME CRIMINAL CONDUCT** ". Both counts satisfy the three part requirement of, same time, same place , same victim. It shows in (initial rsp. attach. I) that both firearms belonged to the same victim, were possessed at the same time, at the same place. (victim Hobbs)

Next, in cause number 04-1-02714-5, which were two counts of forgery and one count of second degree identity theft. These charges also satisfy the three part requirement of the same criminal conduct. All three counts relate to the same victim (Latham),(initial rsp. attach. K). Therefore, one point should be applied to the first count of forgery, and another point applied to the second count of forgery, and the identity theft.

Finally, cause number 04-1-02816-8, three counts of unlawful possession of payment instruments. If this court does not agree with the petitioner's first argument, then the record will show that these charges also satisfy the three part requirement of same criminal conduct. There were only two victims agreed to under this cause number. (RP. pg. 6), (Hackett and Bassen) Therefore, count one should be a point, and count two and three should be a point. With a point applied to all of the remaining four cause numbers, the result would be a combined total of 9 points.

3. In an analysis of the language of RCW 9.94A.589(1)(a) it provides that only prior offenses and other current offenses merit a point addition. Thus, the offense for which the offender is being sentenced does not count toward the offender score. State v. Haddock, 141 Wn.2d, 103, P.3d, 733

VI. CONCLUSION

This court should reverse in part, the ruling set forth by Division III of the Court of Appeals for the reasons indicated in parts 1-3 of this motion and remand for resentencing under the proper offender scores of 7 or 8 points.

January 25, 2006

Respectfully submitted,



Cole W. Shale