

78254-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF  
COLE W. SHALE

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SUPPLEMENTAL BRIEF OF RESPONDENT

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COLE W. SHALE  
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I.

ISSUE PRESENTED

1. HAS THE DEFENDANT SHOWN THAT POSSESSION OF TWO FIREARMS IS ONE UNIT OF PROSECUTION IN SPITE OF THE CLEAR LANGUAGE OF THE STATUTE?
2. HAS THE DEFENDANT SHOWN THAT HIS THREE CONVICTIONS OF UNLAWFUL POSSESSION OF PAYMENT INSTRUMENTS SHOULD BE COUNTED AS “ONE” DESPITE THE CLEAR LANGUAGE OF THE STATUTE AND HIS COMPLETE SILENCE ON THE TOPIC AT SENTENCING?

II.

STATEMENT OF THE CASE

The petitioner submitted a Personal Restraint Petition to Division Three Court of Appeals on Spokane County cause numbers 04-1-2712-9, 04-1-03713-7, 04-1-02714-5, 04-1-02816-8, 04-1-02817-6, 04-1-02873-7 and 04-1-02897-4<sup>1</sup>. The seven causes were given seven different numbers by the Court of Appeals and consolidated under 24046-1-III. The Court of Appeals

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<sup>1</sup> The judgment and sentences were attached to the State’s response.

dismissed the petitioner's Personal Restraint Petition.<sup>2</sup> The following chart lists the details of the seven cases:

Spokane Superior Court Nos.	Crime	Date Committed
04-1-02817-6	Second degree PSP	6/14/2004
04-1-02713-7	First degree PSP First degree PSP	7/2/2004 7/2/2004
04-1-02873-7	First deg. PSP	7/2/2004
04-1-02712-9	Second degree PSP	7/2/2004
04-1-02714-5	Forgery Forgery Id. Theft 2 <sup>nd</sup> degree	6/29/2004 7/1/2004 6/2904 – 7/1/04
04-1-02816-8	Unl. poss. pay. inst. Unl. poss. pay. inst. Unl. poss. pay. inst.	7/2/2004 7/2/2004 7/2/2004
04-1-02897-4	Second deg. burg.	6/9/2004

The petitioner had no prior criminal history. His score, counting each conviction separately is "11."

The petitioner's PRPs alleged that the two first degree possession of stolen property convictions should have been counted as one score and the three unlawful possession of payment instrument charges should be counted as one. As noted above, Division Three rejected the petitioner's arguments and dismissed the PRPs.

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<sup>2</sup> For the convenience of the reader, the courts opinion is attached as appendix A.

The petitioner then sought review in this Court which assigned Supreme Court No. 78254-7.

### III.

#### ARGUMENT

##### A. THE UNIT OF PROSECUTION FOR POSSESSION OF FIREARMS IS ONE COUNT FOR EACH FIREARM.

The petitioner has raised double jeopardy and “same criminal conduct” issues relating to several of the seven crimes to which he pled guilty.

The petitioner pled guilty to three different counts involving first degree possession of stolen property. These would be from cause numbers 04-1-02713-7 and 04-1-2873-7.

The original charges in 04-1-02713-7 were based on two separate counts of possession of stolen firearms. The counts involved two different black powder pistols<sup>3</sup>.

Pursuant to the plea negotiations, these charges were reduced to the generic crimes of first degree possession of stolen property. The decision to reduce the crimes did not change the underlying factual bases for the original

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<sup>3</sup> The two second degree possession of stolen property charges (04-1-02817-6 and 04-1-02712-9) involved access devices and do not appear to be seriously contested by petitioner

charges. In other words, the State lowered the charged crime but did not re-write the original factual bases underlying the original charges. The petitioner, in his Statement of Defendant on Plea of Guilty, agreed that the court could use the police reports as a basis for the plea<sup>4</sup>.

There can be no issue of *McReynolds*<sup>5</sup> and unit of prosecution in 04-1-02713-7. The legislature has made the unit of prosecution quite clear for possession of stolen firearms in 9.41.040(7). "Each firearm unlawfully possessed under this section shall be a separate offense." RCW 9.41.040(7). Because firearms are specifically mentioned in the statutes as one unit of prosecution for each firearm, there is no error. The petitioner will no doubt argue that the amendment to the general possession of stolen property statute moves the petitioner's convictions out of the unambiguous firearm sections. The petitioner should not be permitted to take such a position considering that he received the benefit of the reduction in charges. *See generally In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984).

Even using the generic possession statute, RCW 9A.56.150(1) the language indicates one firearm for each unit of prosecution. "A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property other than a firearm as defined in RCW 9.41.010 which

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<sup>4</sup> See documents in his Supreme Court file.

<sup>5</sup> *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003).

exceeds one thousand five hundred dollars in value.” RCW 9A.56.150(1). The language pertaining to firearms reads, “...a firearm...” *Id.* As this Court noted in *State v. Ose*, 156 Wn.2d 140, 124 P.3d 635 (2005), the legislature’s use of the indefinite article “a” indicates the singular. *Id.* at 146. Under either set of statutes, the legislature has indicated that each firearm is a unit of prosecution.

Normally, a firearm is removed from RCW 9A.56.150 realm and prosecuted under the RCW 9.41.xxx series of statutes. That was not done in this case in order to give the defendant a “break.” This legal “slight of hand” is the purpose for pleas under *In re Barr*. *In re Barr, supra*.

Even if the petitioner were to prevail on this argument, his offender score would only drop to “9” and his ranges would not change.

**B. THE DEFENDANT HAS NOT SHOWN THAT MULTIPLE CONVICTIONS FOR UNLAWFUL POSSESSION OF PAYMENT INSTRUMENTS SHOULD BE COUNTED AS “ONE” DESPITE THE LANGUAGE OF THE STATUTE.**

The petitioner also argues double jeopardy theories in relation to his three convictions for possession of payment instruments. The petitioner asserts that all three possessions of payment instruments occurred at the same time and were therefore one unit of prosecution. It does appear that the

original three victims were winnowed down to two victims by the State's reduction of the charges. However, this does not solve the issue.

RCW 9A.56.320(2)(a) states:

(2) (a) 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; or

(ii) In the name of a fictitious person or entity, or with a fictitious routing number or account number of a person or entity, with intent to use the payment instruments to commit theft, forgery, or identity theft.

RCW 9A.56.320(2)(a).

The language used in the statute states "...a person or entity... and the person...." RCW 9A.56.320(2)(a). This language indicates that the legislature intended that each victim would constitute a separate unit of prosecution.

The petitioner did not raise the issue of double jeopardy at the trial level. In fact, the petitioner *agreed* with his offender score in each Statement of Defendant on Plea of Guilty. The petitioner agreed to an offender score of "9." RP 14-15. The petitioner signed each of these documents. Thus, the petitioner affirmatively provided the trial court with assurances that his score

was correct. The petitioner's affirmative statements distinguish the facts of this case from *State v. Anderson*, 92 Wn. App. 54, 960 P.2d 975 (1998), *review denied*, 137 Wn.2d 1016, 978 P.2d 1099 (1999) (first time on appeal review permitted.) Because the defendant did not raise the issue below, the necessary facts were not developed. "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *Id.*

Even if the defendant were to prevail on his argument related to the unlawful possession of payment instruments, at best the three scores would be collapsed into a score of two. The presence of two victims precludes counting all three convictions as one score. Thus, the defendant would have a score of 10 and there would be no change in his sentencing ranges.

C. THE DEFENDANT HAS NOT SHOWN THAT HE CAN CONTEST “SAME CRIMINAL CONDUCT” ISSUES FOR THE FIRST TIME ON APPEAL.

“Same criminal conduct” is defined in RCW 9.94A.589(1)(a) as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.”

The trial court makes the discretionary call on this issue. The petitioner did not ask the trial court to make a discretionary call on the issue of “same criminal conduct.” The petitioner has not claimed a straight calculation error, rather he now wants to argue that the facts support a finding of “same criminal conduct.” All prior criminal history is counted separately unless the trial court makes a finding of “same criminal conduct.” RCW 9.94A.400(1)(a). Without contesting the issue at the trial level and alerting the trial court to make a discretionary call, the petitioner waives his right to raise the issue now.

Division Three of the Court of Appeals released an opinion stating that a defendant cannot claim error on the issue of “same criminal conduct” when the situation involves a plea bargain. *State v. McDougall*, 132 Wn. App. 609, 132 P.3d 786 (2006). The reason for this is that a decision on “same criminal conduct” is a discretionary one. *State v. Anderson*, 92 Wn. App. at 62. If the defendant does not request that the trial court exercise its discretion (because of a plea bargain), the

defendant cannot then claim on appeal that the trial court erred. *Id. See also, State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000) (defendant cannot raise “same criminal conduct” challenges for the first time on appeal).

The record does not indicate that there was any disagreement over the offender score at the time of the pleas. In fact, the Statement of Defendant on Plea of Guilty is signed by the petitioner in each of the seven cases and those documents acknowledge the calculation of the offender score.

On a PRP, it is the petitioner’s burden to show prejudice. *In re St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). He has not done so. If the petitioner does not demonstrate actual prejudice his or her petition will be dismissed. *In re Grisby*, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

Because the trial court was not asked to make a discretionary ruling on “same criminal conduct,” it was proper to count the prior criminal history as separate crimes. The decision on “same criminal conduct” is a fact based decision. By raising this issue at the appellate level, the petitioner is asking this Court to make the decision that the trial court would have been equipped to make had the request been made. The petitioner has waived his arguments on “same criminal conduct” by failing to ask the sentencing judge to decide the issue.

The Court of Appeal's decision to dismiss the petitioner's PRPs was correct, based on existing law and should be affirmed.

IV.

CONCLUSION

For the reasons stated, the convictions of the petitioner should be affirmed.

Respectfully submitted this  day of October, 2006.

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# ATTACHMENT A

FILED

JAN -5 2006

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

In the Matter of the Personal	)	No. 24046-1-III
Restraint of:	)	<u>Consolidated With</u>
	)	Nos. 24048-7-III; 24049-5-III;
COLE W. SHALE,	)	24050-9-III; 24051-7-III;
	)	24052-5-III; 24053-3-III
Petitioner.	)	
	)	<b>ORDER DISMISSING PERSONAL</b>
	)	<b>RESTRAINT PETITIONS</b>

In these consolidated petitions, Cole W. Shale seeks relief from personal restraint imposed for his 2004 Spokane County convictions upon pleas of guilty to a total of 12 crimes in the following 7 different superior court cases sentenced on the same day: (1) **cause no. 04-1-02712-9**, second degree possession of stolen property (crime date 7/2/04); (2) **cause no. 04-1-02713-7**, two counts of first degree possession of stolen property (crime dates 7/2/04); (3) **cause no. 04-1-02714-5**, forgery (crime date 6/29/04), forgery (crime date 7/1/04), second degree identity theft (crime date 6/29/04-7/1/04); (4) **cause no. 04-1-02816-8**, three counts of unlawful possession of payment instruments (crime dates 7/2/04); (5) **cause no. 04-1-02817-6**, second degree possession of stolen property (crime date 6/14/04); (6) **cause no. 04-1-02873-7**, first degree possession

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*PRP of Shale*

of stolen property (crime date 7/2/04); and (7) cause no. 04-1-02897-4,  
second degree burglary (crime date 6/9/04).

Mr. Shale received concurrent standard range sentences on each  
file number, the longest being 57 months for the first degree possession of  
stolen property, second degree identity theft, and second degree burglary  
crimes. His offender score for all crimes was tallied at 9+.

Mr. Shale initially filed this matter as multiple CrR 7.8 motions to  
modify and vacate his sentences in the superior court, which has  
transferred the matters to this court for consideration as a personal  
restraint petition. See CrR 7.8(c)(2).

To obtain relief in a personal restraint petition, Mr. Shale must show  
actual and substantial prejudice resulting from alleged constitutional errors,  
or, for alleged nonconstitutional errors, a fundamental defect that  
inherently results in a miscarriage of justice. *In re Pers. Restraint of Cook*,  
114 Wn.2d 802, 813, 792 P.2d 506 (1990).

Relying on *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663  
(2003), Mr. Shale first claims he has been subjected to double jeopardy  
because all of his possession of stolen property crimes were actually  
committed on the same date and thus should have been considered a

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single unit of prosecution aggregated into one count of first degree possession of stolen property.

Both the Fifth Amendment and article I, section 9 of the Washington Constitution protect against multiple punishments for the same offense. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). When a defendant has been convicted of violating a statute multiple times, the proper inquiry is what “unit of prosecution” the legislature has intended under the specific criminal statute. *Id.*, at 634.

In *McReynolds*, this court held that when a defendant possesses stolen property from multiple owners at the same time, the unit of prosecution is a single count of possession of stolen property and the degree of the crime is the aggregate value of the items of stolen property. *McReynolds*, 117 Wn. App. at 338-39. Because the defendants in *McReynolds* had been convicted of first degree possession of stolen property based upon items they continuously possessed during a 15-day period, their convictions for additional counts of first-and-second degree possession of stolen property for other items possessed during that same time period violated their rights against double jeopardy and were dismissed. *Id.*, at 340.

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The *McReynolds* holding does not apply to Mr. Shale's two convictions for second degree possession of stolen property, which were both specifically for possession of a stolen access device. RCW 9A.56.160(1)(c). Recently, in *State v. Ose*, \_\_Wn.2d\_\_, \_\_P.3d\_\_, (No. 76425-5, December 15, 2005); see 2005 Wash. LEXIS 988, our Supreme Court held that by use of the language "a stolen access device," the legislature unambiguously defined the unit of prosecution in RCW 9A.56.160(1)(c) as each access device possessed by a defendant. Thus, Mr. Shale's second degree possession of stolen property convictions are properly considered separate units of prosecution.

Mr. Shale's three convictions upon plea of guilty to first degree possession of stolen property—all with crime dates of July 2, 2004—appear at first blush to be controlled by *McReynolds*. Consistent with *McReynolds*, in cases where the double jeopardy clause otherwise applies, the State is precluded from haling the defendant into court on a charge; the conviction must be set aside even if entered pursuant to a counseled plea of guilty. See *Menna v. New York*, 423 U.S. 61, 62, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975); *State v. Cox*, 109 Wn. App. 779, 782, 37 P.3d 1240, *review denied*, 147 Wn.2d 1003 (2002).

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But here, the two counts of first degree possession of stolen property in cause no. 04-1-02713-7 were initially charged as two counts of possession of a stolen firearm under RCW 9A.56.310. The legislature has unambiguously expressed that each stolen firearm possessed is a separate offense. RCW 9A.56.310(3). Mr. Shale was thus properly haled into court on these factually supported charges, not in violation of the double jeopardy prohibition. In that cause number he was also charged with a third count—second degree possession of stolen property (stolen access device).

The transcript from the plea hearing reveals that Mr. Shale fully understood the charges and plea arrangement in cause no. 04-1-02713-7. And to effectuate the plea agreement to amend the charges downward and dismiss the second degree possession of stolen property count, he stipulated for purposes of the first degree possession of stolen property charges that the value of the guns stolen in Count I and II both exceeded \$1500. (See Report of Proceedings "RP" at 6, 11, 29) Double jeopardy is not implicated in these circumstances where the initial firearm charges were proper and Mr. Shale entered a knowing, voluntary, and intelligent plea to amended charges of first degree possession of stolen property to

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take advantage of the plea deal. See *In re Pers. Restraint of Barr*, 102  
Wn.2d 265, 269-70, 684 P.2d 712 (1984).

In this situation, Mr. Shale was also properly charged with one count  
of first degree possession of stolen property in cause no. 04-1-02873-7.  
That charge and conviction is also a single unit of prosecution under the  
circumstances of his plea arrangement producing the multiple first degree  
possession of stolen property convictions.

None of Mr. Shale's possession of stolen property convictions  
implicate double jeopardy; *McReynolds* is not controlling in these cases.

Mr. Shale additionally contends his three convictions for unlawful  
possession of payment instruments should be considered a single unit of  
prosecution under RCW 9A.56.320(2)(a)(i). He appears to argue in his  
opening and reply briefs that since he was in possession of all of the  
payment instruments at the same time, the three crimes involving different  
victims must nevertheless be considered a single crime.

RCW 9A.56.320(2)(a) 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

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instrument, and with intent either to deprive *the person* of possession of such payment instrument or to commit theft, forgery, or identity theft.

(Italics added).

It is clear from the italicized “a person” and “the person” language that the statute unambiguously defines each victim as a single unit of prosecution. This conclusion is consistent with prior judicial construction of similarly worded statutes using the word “a” that punishment is authorized for each individual victim or instance of criminal conduct. See *State v. Ose*, slip op. at 8-12. Since each of Mr. Shale’s three convictions for unlawful possession of payment instruments involved a different victim, the crimes are properly considered separate units of prosecution.

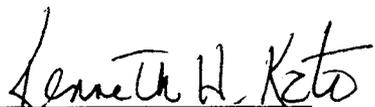
Finally, the court rejects as frivolous Mr. Shale’s additional argument that he should receive a remand for resentencing because some of his crimes should have been considered “same criminal conduct” under RCW 9.94A.589(1)(a) and counted as a single offense. His crimes all involved separate victims and/or different dates such that all of his offender scores remain at 9+.

Mr. Shale makes no showing of error in his convictions or sentences. He fails his burden under *In re Pers. Restraint of Cook*, 114 Wn.2d at 813.

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*PRP of Shale*

Accordingly, the consolidated petition is dismissed pursuant to RAP  
16.11(b). The court also denies Mr. Shale's request for appointed counsel.  
*See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250  
(1999); RCW 10.73.150(4).

DATED: January 5, 2006

  
KENNETH H. KATO  
CHIEF JUDGE

