

COA No. 66078-1-I

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

COURT OF APPEALS
STATE OF WASHINGTON
2011 SEP 20 PM 4:12

STATE OF WASHINGTON,

Respondent,

v.

JACOB LIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Michael J. Fox

REPLY BRIEF

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TABLE OF AUTHORITIES

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State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) . 4

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A. REPLY ARGUMENT

1. MR. LIN'S TWO COURSES OF CONDUCT OF THEFT CONSTITUTED TWO UNITS OF PROSECUTION.

The unit of prosecution analysis is fact-dependent. Unit of prosecution analysis involves review of the language of the criminal statute at hand, and the facts of the particular case, in order to determine if only one unit of the crime was committed despite multiple verdicts of conviction. State v. Hall, 168 Wn.2d 726, 730, 230 P.3d 1048 (2010). As the Supreme Court has explained:

[T]he first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.

State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007) (citing State v. Bobic, 140 Wn.2d 250, 263–66, 996 P.2d 610 (2000)).¹

Based on the arguments in his Appellant's Opening Brief, Mr. Lin contends that given the State's manner of proving the instant case, the facts warranted only two "units of prosecution." The theft statutes do not clearly and unambiguously show that the Legislature

intended multiple punishments for each single check cashed by Mr. Lin. This fact-dependent determination does indeed turn on the “criminal impulse” of the accused:

Where property is stolen from the same owner and from the same place by a series of acts there may be a series of crimes or there may be a single crime, depending upon the facts and circumstances of each case. If each taking is the result of a separate, independent criminal impulse or intent, then each is a separate crime, but, where the successive takings are the result of a single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking.

(Emphasis added.) State v. Vining, 2 Wn. App. 802, 808-09, 472

P.2d 564 (1970). Here, Mr. Lin’s successive takings from the accounts of Ms. Feng, before and after his arrest, interview and warning by Bellevue Police Officer Nourse, each constituted a single, criminal impulse or intent, pursuant to his purpose in obtaining, and then continuing to obtain, funds. Counts 1 to 25 constituted one unit of prosecution, followed by a second criminal impulse motivating the takings represented by counts 26 to 29, and a second unit of prosecution.

¹ If the Legislature’s intent regarding the unit of prosecution is unclear, the

2.. THE CONVICTIONS WERE TWO COURSES OF THE “SAME CRIMINAL CONDUCT” FOR OFFENDER SCORE PURPOSES AND COUNSEL WAS INEFFECTIVE.

By raising the question whether the defendant's convictions should be counted as a single course of conduct, Mr. Lin's counsel for sentencing placed the issue of same criminal conduct before the court. CP 134. The trial court itself noted that it believed the case had been overcharged. 3RP 443-46. The question of same criminal conduct was placed before the sentencing court. Had the issue been analyzed properly by the trial court, the court would have determined that the two series of offenses before and after the defendant's arrest were each the "same criminal conduct." RCW 9.94A.589(1)(a). Alternatively, Mr. Lin's counsel was ineffective for failing to properly analyze the convictions and have the series of theft convictions before and after the defendant's arrest scored as two courses of conduct.

With regard to the question of intent, the issue whether the defendant had an opportunity to reflect on his commission of the crime before committing another offense is an aspect of the

rule of lenity requires the court to construe the ambiguity in the defendant's favor. Bobic, 140 Wn.2d at 261-62.

determination of intent for same criminal conduct purposes. Here, Mr. Lin's intent was interrupted when he was arrested and warned by the Bellevue police officer, and concededly, the thefts before and after that event constituted a different criminal intent. However, the two series of takings of small amounts are each a single course of the same conduct under RCW 9.94A.589(1)(a). Mr. Lin relies on the arguments in his Appellant's Opening Brief.

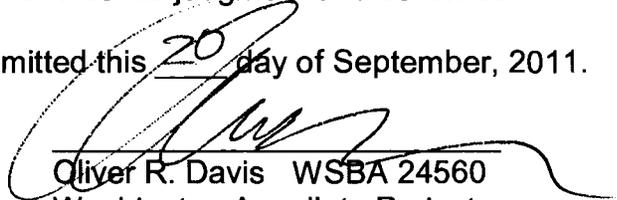
**3. THE SPECIAL VERDICT WAS OBTAINED
IN VIOLATION OF BASHAW AND MUST BE
VACATED ON APPEAL, ALONG WITH
REVERSAL OF THE THEFT CONVICTIONS.**

Mr. Lin relies on the arguments in his Appellant's Opening brief. Based on State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010), and State v. Siers, 158 Wn. App. 686, 702, 244 P.3d 15 (2010).

B. CONCLUSION

Based on the foregoing and on his Opening Brief, Mr. Lin requests that this Court reverse his judgment and sentence.

Respectfully submitted this 20 day of September, 2011.


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Attorneys for Appellant

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF SEPTEMBER, 2011.

X _____ 

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