

NO. 72418-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHAWN L. SCHULZE,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

JOHN J. JUHL
Deputy Prosecuting Attorney
Attorney for Respondent

CLERK OF SUPERIOR COURT
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I. ISSUES

The State concedes the trial court erroneously imposed 63 months confinement on two class C felonies, and erroneously imposed 12 months community custody on four class C felonies. The proper remedy is remand for resentencing consistent with statutory authority.

II. STATEMENT OF THE CASE

On June 19, 2014, Shawn Lee Schulze, defendant, was found guilty by plea of four counts First Degree Identity Theft with a Major Economic Offense aggravating factor (counts I – IV), seventeen counts First Degree Identity Theft (counts V – XXI), two counts Attempted First Degree Identity Theft (counts XXII, XXIII) and two counts Second Degree Identity Theft (counts XXIV, XXV). CP 22-74; RP (6/19/14) 2-38, 41-44, 47-48. Defendant stipulated that facts existed beyond a reasonable doubt to justify an exceptional sentence outside the standard range. CP 45; RP (6/19/14) 11-12.

Defendant was sentenced on August 13, 2014. Defendant's offender score was 26 with the following standard ranges: on counts I – XXI, 63 to 84 months; on counts XXII and XXIII, 47.25 to

60 months;¹ and on counts XXIV and XXV, 43 to 57 months. The State's recommendation was for an exceptional sentence of ten years confinement on each class B felony and five years confinement on each class C felony. The State recommended no community custody if the court followed the State's recommendation, but noted that the court would need to impose community custody if less than statutory maximum sentences were imposed. CP 7, 46-47; RP (8/13/14) 3-11. Defendant's recommendation was for 73 months confinement. RP (8/13/14) 11-15.

The court found substantial and compelling reasons existed to justify an exceptional sentence above the standard range for counts I – IV. Defendant was sentenced to the following: 104 months confinement on counts I – IV; 84 months confinement on counts V – XXI; 63 months confinement on counts XXII and XXIII; and 57 months confinement on counts XXIV and XXV; followed by 12 months community custody on counts I – XXV; the sentence on all counts to be served concurrently. CP 6-11; RP (8/13/14) 45-54, 62-64.

¹ The Judgment and Sentence and the Offender Scoring attached to Defendant's Statement on Plea of Guilty incorrectly listed the standard range for counts XXII and XXIII as 47.25 to 63.0 months. CP 6, 57; RP (8/13/14) 4.

III. ARGUMENT

The State concedes the trial court erroneously imposed 63 months confinement on counts XXII and XXIII. The State also concedes the trial court erroneously imposed 12 months community custody on counts XXII – XXV. A trial court may only impose a sentence which is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). “When a sentence has been imposed for which there is no authority in law, the trial court has the Power and the duty to correct the erroneous sentence, when the error is discovered.” In re Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The case should be remand for resentencing consistent with RCW 9A.20.021(1)(c) and State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

A. COUNTS XXII AND XXIII.

Attempted First Degree Identity Theft is a class C felony punishable by a maximum confinement of 60 months. RCW 9.35.020(2); RCW 9A.28.020(3)(c); RCW 9A.20.021(1)(c). Thus, there was no authority to impose 63 months confinement. Further, a conviction for Attempted First Degree Identity Theft does not subject the offender to community custody since it is not included in “crimes against persons” under RCW 9.94A.411(2). In re Leach,

161 Wn.2d 183-188, 163 P.3d 782 (2007). “[T]he imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial. The error is grounds for reversing only the erroneous portion of the sentence imposed.” Id., at 188. Therefore, the case must be remanded to the trial court for correction of the erroneous sentence imposed on counts XXII and XXIII.

B. COUNTS XXIV AND XXV.

Second Degree Identity Theft is a class C felony punishable by a maximum confinement of 60 months. RCW 9.35.020(3); RCW 9A.20.021(1)(c). Since Second Degree Identity Theft is included in “crimes against persons” under RCW 9.94A.411(2), an offender convicted of this crime is subject to community custody. RCW 9.94A.701(3)(a). However, the sentencing court must reduce the term of community custody to remain within the statutory maximum. RCW 9.94A.701(9). Here, on counts XXIV and XXV the combined confinement of 57 months and 12 months community custody exceeds the statutory maximum. The imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial. In re Carle, 93 Wn.2d at 34. The proper remedy is to remand the cases for the trial court to

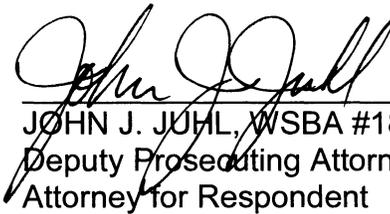
correct the erroneous term of community custody on counts XXIV and XXV. Boyd, 174 Wn.2d at 473.

IV. CONCLUSION

For the reasons stated above, the case should be remanded for resentencing.

Respectfully submitted on February 23, 2015,

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
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February 23, 2015

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**Re: STATE v. SHAWN L. SCHULZE
COURT OF APPEALS NO. 72418-5-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

JOHN U. JUHL, #18951
Deputy Prosecuting Attorney

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THE STATE OF WASHINGTON,

Respondent,

v.

SHAWN L. SCHULZE,

Appellant.

No. 72418-5-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 24th day of February, 2015, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
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SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 21st day of February, 2015.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit