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NO. 69962-8-I

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

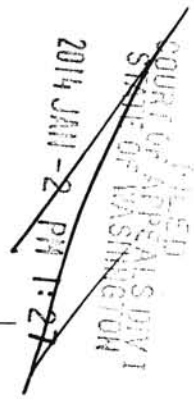
STATE OF WASHINGTON,

Respondent,

v.

MUHAMMED Z. TILLISY,

Appellant.



BRIEF OF RESPONDENT

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1. Did defendant request to represent himself in the present case?

2. The State concedes that defendant's convictions for second degree identity theft in count I and count II violated double jeopardy. Is the proper remedy a remand for the trial court to vacate one of the underlying convictions?

3. Was the trial court's denial of defendant's motion to dismiss because the prosecutor did not say the acts occurred in the State of Washington in opening statement an abuse of discretion?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

On May 30, 2012, Officer Josh McClure of the Edmonds Police Department was advised that the proactive patrol division had an arrest warrant for Muhammad Tillisy, defendant. Officer McClure was given a description of the gold Chevy Tahoe driven by defendant and an Edmonds address where defendant was known to associate. Just after midnight Officer McClure checked the address and defendant was not there. Officer McClure waited to see if defendant returned. In the early morning hours of May 31, 2012, Officer McClure observed defendant driving the Tahoe,

stopped the vehicle and arrested defendant. Defendant was searched incident to his arrest. Seven bank checks were located in defendant's pockets. All of the checks had the same format; some had defendant as the payee, some had defendant as the account holder, some had Honda of Fife as the account holder. However, all of the checks had the same bank account number. RP[1] 81-88, 119-125.

Officer Hardwick asked defendant about several of the checks. Defendant said that he owns a business and checks showing him as both the payee and the account holder were used to pay himself. Defendant explained that it was a good month so he paid himself twice. Defendant said that the checks with Honda of Fife as the account holder were for a rebate. RP 129-130.

The Tahoe was impounded and a search warrant was obtained. Two more check with the same bank account number as the checks found on defendant's person were located in the vehicle along with a piece of paper with the same bank account number and Honda of Fife written on it. Also located in the vehicle was a

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[1] RP references the two volume consecutively paginated verbatim report of proceedings for July 19, 2012, November 26, 27 and 28, 2012, January 17 and 28, 2013, February 20, 2013, and March 27, 2013.

checkbook for the Chase Bank account of Ok Kyung Yang. RP 89-95, 100-101, 131-132, 136-141, 143-149.

The checks found on defendant's person along with the two checks found in the vehicle had Honda of Fife's bank account number on them. None of those checks were authorized or issued by Honda of Fife. Defendant did not have permission to use or possess Honda of Fife's bank account number. The checkbook found in the vehicle belonging to Ok Kyung Yang was stolen from her vehicle on May 8. Defendant did not have permission to use or possess Yang's checkbook or bank account number. RP 160-175.

B. PROCEDURAL HISTORY.

On June 5, 2012, defendant was charged with Second Degree Identity Theft while on Community Custody. CP 323-324. On October 26, 2012, a six count amended information charged defendant with three counts Second Degree Identity Theft while on Community Custody, two counts Forgery, and one count Unlawful Possession of Payment Instruments. CP 314-316. The community custody allegations were dropped in the second amended information filed on November 26, 2012. CP 278-280; RP 62-63.

On July 19, 2012, defendant brought a motion to have his assigned counsel replaced. The court found defendant had not

demonstrated a conflict of interest or a breakdown in communication with his assigned counsel. The court denied the motion. RP 4-22.

On November 8, 2012, under Snohomish County Superior Court case number 12-1-01574-5, defendant brought a motion to have his assigned counsel replaced, or in the alternative, to represent himself. Supp. RP[2] 3-4, 13-24, 35. The court found that defendant had not established a reason to remove counsel and denied the motion to replace counsel. Supp. RP 30-35. The court then considered defendant motion to represent himself. Supp. RP 35-49. The court found that defendant had not made a knowing, voluntary and intelligent waiver of his right to counsel and denied the motion. Supp. RP 49-53.

The case proceeded to trial on November 26-28, 2012. The Jury found defendant guilty on all six counts. CP 220-225; RP 285-289.

Defendant was sentenced on February 20, 2013. The court found: counts I, II and III were the same criminal conduct counting as one crime for determining defendant's offender score; counts V

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[2] On November 27, 2013, Commissioner Kanazawa granted defendant's motion to supplement the record with the transcript of a November 8, 2012 hearing that took place in Snohomish County Superior Court case number 12-1-01574-5.

and VI were the same criminal conduct, but separate from counts I, II and III, counting as one crime for determining defendant's offender score; count IV was separate conduct from counts I, II and III and from counts V and VI. CP 4; 2/20/13 RP 314.

Defendant was sentenced to 49 months on counts I, II and V; 25 months on counts III and VI; and 22 months on count IV. Counts I, II and III were concurrent to each other, but consecutive to count IV; counts I—IV were consecutive to counts V and VI; counts V and VI were concurrent to each other. Defendant's total confinement was 120 months. CP 6; 2/20/13 RP 371-373.

Defendant appealed.

III. ARGUMENT

A. DEFENDANT DID NOT ASK TO REPRESENT HIMSELF IN THE PRESENT CASE.

Defendant assigns error to the trial court's refusal to permit him to represent himself. Brief of Appellant 1, 3-7. Defendant did not bring a motion to represent himself in the present case, Snohomish County Superior Court case number 12-1-01246-1. Rather, defendant brought a motion to represent himself in a

different case, Snohomish County Superior Court case number 12-1-0574-5.[3] Supp. RP 3.

The only reference during the November 8, 2012 hearing to the present case, number 12-1-01246-1, was when the prosecutor informed the court that defendant had another case pending. Supp. RP 27. During the hearing on defendant's motion to represent himself, the prosecutor requested clarification regarding which case was before the court. Supp. RP 49. The trial court confirmed that the only case before the court at the November 8, 2012 hearing was number 12-1-01574-5. Supp. RP 49. Defendant did not request to represent himself in the present case, number 12-1-01246-1.

A defendant's request to proceed pro se must be both timely made and stated unequivocally. State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997); State v. DeWeese, 117 Wn.2d 369, 376–377, 816 P.2d 1 (1991). Defendant's November 8, 2012 request was made in a different case. Defendant did not make a timely, unequivocally request to represent himself in the present case.

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[3] Defendant has filed a separate appeal in case number 12-1-01574-5; Court of Appeal case number 70654-3-I. Any issue regarding the trial court's denial of defendant's motion to represent himself can be addressed under that case.

Generally, an appellant may not raise for the first time on appeal an issue not argued below. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Scott, 48 Wn. App. 561, 568, 739 P.2d 742 (1987). A party may raise for the first time on appeal a "manifest error affecting a constitutional right" under RAP 2.5(a)(3). However, this limited exception provided by the rule should not be construed too broadly.

> First, it should be understood that RAP 2.5(a)(3) in no way affects the discretion of this court to refuse review of issues not raised below. The rule merely enunciates our long-standing practice of addressing error where justice clearly demands we do so. This discretion will generally be exercised in favor of review when there exists "manifest error affecting a constitutional right." ... RAP 2.5(a)(3) may not be invoked merely because defendant can identify a constitutional issue not litigated below.

Scott, 48 Wn. App. at 568, quoting, State v. Valladares, 31 Wn. App. 63, 75-76, 639 P.2d 813 (1982), rev'd in part on other grounds, 99 Wn.2d 663, 664 P.2d 508 (1983). Defendant did not request to represent himself in this case. He cannot raise an issue litigated in a different case in this appeal.

B. DEFENDANT'S CONVICTIONS FOR SECOND DEGREE IDENTITY THEFT IN COUNTS I AND II VIOLATED DOUBLE JEOPARDY.

The State concedes that under the facts of the present case defendant's convictions for second degree identity theft in counts I

and II violated double jeopardy. The double jeopardy clause of the Fifth Amendment protects a defendant from being punished multiple times for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The Washington Constitution provides the same protection. State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005); Adel, 136 Wn.2d at 632. Even when sentences for multiple offenses are served concurrently, double jeopardy protection remains applicable because of the other adverse consequences of multiple convictions. State v. Calle, 125 Wn.2d 769, 773, 888 P.2d 155 (1995). A double jeopardy challenge may be raised for the first time on appeal. Adel, 136 Wn.2d at 632. The question of whether a defendant's double jeopardy protection has been violated is a question of law reviewed de novo. State v. Frodert, 84 Wn. App. 20, 25, 924 P.2d 933 (1996).

To successfully prevail on his double jeopardy challenge, defendant must affirmatively establish that he has been twice punished for the same offense. Although the protection against multiple punishments is constitutional, the Legislature has the power to determine what type of conduct is prohibited under the law and to determine the appropriate punishment. Calle, 125 Wn.2d at 776. The inquiry thus becomes whether the Legislature intended to

authorize multiple punishments for the actions which led to defendant's convictions. State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003); State v. Leming, 133 Wn. App. 875, 882, 138 P.3d 1095 (2006).

1. Express Or Implicit Legislative Intent.

> Because the question largely turns on what the legislature intended, we first consider any express or implicit legislative intent. Sometimes the legislative intent is clear, as when it explicitly provides that burglary shall be punished separately from any related crime. RCW 9A.52.050. Sometimes, there is sufficient evidence of legislative intent that we are confident concluding that the legislature intended to punish two offenses arising out of the same bad act separately without more analysis. E.g., Calle, 125 Wn.2d at 777–778 (rape and incest are separate offenses).

State v. Freeman, 153 Wn.2d 765, 771-772, 108 P.3d 753 (2005). "The legislature specifically intends that each individual who obtains, possesses, uses, or transfers any individual person's identification or financial information, with the requisite intent, be classified separately and punished separately as provided in chapter 9.94A RCW." Laws 2008 Wash 207 § 1 (expressly rejecting the interpretation of State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006)).

2. Identity Theft.

> Unlawfully obtaining, possessing, or transferring each means of identification or financial information of any individual person, with the requisite intent, is a separate unit of prosecution for each victim and for each act of obtaining, possessing, or transferring of the individual person's means of identification or financial information.

RCW 9.35.001.

> 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.

RCW 9.35.020(1). Here, defendant possessed nine separate checks with Honda of Fife's financial information. Under counts I and II, defendant was twice convicted of second degree identity theft for possessing the financial information of Honda of Fife.

3. Remedy.

Courts may not exceed legislative authority by imposing multiple punishments for the same offense. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007); State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). "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 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 case for the trial court to vacate one of the underlying convictions. State v. Knight, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008); Womac, 160 Wn.2d at 660; State v. Weber, 159 Wn.2d 252, 265–266, 149 P.3d 646 (2006).

C. THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO DISMISS WAS NOT ABUSE AN ABUSE OF DISCRETION.

Defendant argues that the trial court abused its discretion by not granting his motion to dismiss because the prosecutor did not say during opening statement that the acts occurred in the State of Washington. Appellant's Brief 12-14. The premise underlying defendant's argument is flawed.

The purpose behind a prosecutor's opening statement is merely "to outline the material evidence the State intends to introduce." State v. Kroll, 87 Wn.2d 829, 834, 558 P.2d 173 (1976). As explained by one commentator:

> The opening statements of counsel are not intended to be a full and complete statement of the case but rather have the purpose of informing the court and jury of the nature of the case and any defenses so that the evidence may be better understood. Counsel may state their case as briefly or as generally as they see fit. It is not necessary to include every ultimate

> fact that counsel must prove in order to establish his or her case.

13 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 4202, at 216 (3d 2004). The opening statement is based upon the anticipated evidence and the reasonable inferences which can be drawn therefrom. Kroll, 87 Wn.2d at 835. The State is not necessarily bound by comments made during an opening statement. State v. Layne, 196 Wash. 198, 202–203, 82 P.2d 553 (1938) (shift in State's theory of the case from opening argument was not reversible error). "In other words, charges frame the issues; statements of counsel do not." State v. Gallagher, 15 Wn. App. 267, 270, 549 P.2d 499 (1976).

Defendant's reliance on State v. Gallagher, both here and below, is misplaced. Gallagher was charged with Private Use of Public Funds. The complaint asserted that Gallagher knowingly, willfully, and feloniously directed, authorized, and encouraged the use of public money "for a purpose not authorized by law;" it did not allege use of public money for Gallagher's profit. Id., at 271. The court held that the crime requires the actor to profit personally from using public money. Id., at 275. The prosecutor's opening statement alleged that the public money was used for the benefit of

someone other than Gallagher. Id., at 271. The Court of Appeals found it was clear beyond doubt that the prosecutor's opening statement affirmatively included factual matters which constituted a complete defense to counts 2 through 6 of the information and affirmed the trial court's dismissal of those five counts after the prosecutor's opening statement. Id., at 275. The court in Gallagher held:

> [W]hen a prosecutor chooses to make an opening statement to a jury, a defense motion to dismiss the charges may be granted *only* when it is clear beyond doubt that the statement *affirmatively includes* fact matter which constitutes a complete defense to the charge or *expressly excludes* fact matter essential to a conviction.

Gallagher, 15 Wn. App. at 270 (emphasis added).

In the present case, the prosecutor's opening statement did not *affirmatively include* factual matters constituting a complete defense to the charges, nor did the prosecutor's opening statement *expressly exclude* facts essential to a conviction. 11/26/12 (Opening Statement) RP 2-5. "A criminal charge should not be dismissed upon the prosecution's opening statement if the fact matter asserted will support a conviction of the basic crime charged under one or more methods or modes of violating the statute." Gallagher, 15 Wn. App. at 278. The trial court cannot presume to

resolve factual issues if the charge is sufficient on its face. State v. Knapstad, 107 Wn.2d 346, 352, 729 P.2d 48, 52 (1986). "Evidence provides the basis for the jury's verdict; statements of counsel do not." Gallagher, 15 Wn. App. at 278. The trial court did not abuse its discretion in denying defendant's motion to dismiss.

IV. CONCLUSION

For the above reasons the appeal should be denied. The case should be remanded for the trial court to vacate one of the underlying convictions in counts I or II.

Respectfully submitted on December 27, 2013.

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