NO. 46783-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BURNICE R. THOMPSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Christine Schaller, Judge
Cause No. 13-1-01072-4

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in denying Thompson's post-trial motion to dismiss her two convictions for Medicaid false statement under the merger doctrine.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial court violated Thompson's double jeopardy rights by entering judgment against her for two counts of Medicaid false statement where the offenses merged with her conviction for theft in the first degree?

C. STATEMENT OF THE CASE

01. Procedural Facts

Burnice R. Thompson was charged by second amended information filed in Thurston County Superior Court July 16, 2014, with theft in the first degree, count I, and two counts of Medicaid false statement, counts II-III, contrary to RCWs 9A.56.020(1), 9A.56.030(1)(a) and 74.09.230. [CP 94-96].

The court denied Thompson's motion to suppress her statements given during an interview on June 18, 2013. [CP 26-30]. Following a bench trial, she was found guilty of all charges [CP 203-226], sentenced as a first-time offender, and timely notice of this appeal followed. [CP 227-235].

02. Substantive Facts: Bench Trial[1]

In March 2010, Thompson signed a contract with the Washington Department of Social and Health Services (DSHS) to provide various in-home care services for her grandmother Tressie Henderson as an individual provider through the Medicaid-funded Community Options Program Entry System (COPES). [RP 32, 36, 38-39; State's Exhibit 16].

In 2012-2013, Thompson was authorized to bill monthly for 304 hours at $10.46 per hour and for 60 miles travel expense at a rate escalating during the period from 56 to 57 cents per mile. [RP 57-58, 158, 163; State's Exhibits 3 and 19]. She would submit monthly invoices and, in the event of Henderson's death, was required to report the incident within 24 hours, in addition to providing written notification within seven days to Henderson's case manager. [RP 38-39, 316].

When Henderson died November 24, 2012 [RP 65, 241-42; State's Exhibit 10], Thompson called the police and reported the incident to the Social Security Department. [RP 284-85; State's Exhibit 14 at 24, 26, 34]. On Tuesday, November 27, she left a phone message with her grandmother's case manager that Henderson had passed [RP 285; State's

[1] Unless otherwise indicated, all references to the Report of Proceedings are to the transcripts entitled Volumes I-II.

Exhibit 14 at 26], though she did not provide the required written notification. [RP 61].

Between December 17, 2012 and April 14, 2013, Thompson submitted weekly telephonic claims for unemployment compensation, each time acknowledging that providing false or misleading information would constitute fraud. [RP 216-17, 225; State's Exhibits 35-37]. In her initial application December 13, she indicated she had been a COPES individual provider until November 24, 2012, the date of her grandmother's death. [RP 228-29; State's Exhibit 34]

On December 31, 2012, Thompson submitted a telephonic invoice for services for that month under her contract with DSHS, for which she was issued payment in the amount of $2,725.47 on January 5, 2013. [RP 155-162, 168; State's Exhibits 19-20]. Similarly, on February 4, 2013, Thompson again submitted a telephonic invoice for services for that month under the same contract, for which she was issued payment in the amount of $2,725.07 on February 6, 2013. [RP 163-64; State's Exhibits 21-22]. Additionally, on April 7, Thompson submitted a telephonic invoice for vacation pay for January 2013 under the same contract, for which she was issued payment in the amount of $65.28 on April 10, 2013. [RP 164; State's Exhibits 23-24].

During an interview June 18, 2013, Thompson admitted to submitting telephonic invoices for services as a COPES individual provider for December 2012 and January 2013, knowing Henderson was deceased, [State's Exhibit 14 at 27-30], explaining that she thought she was suppose to because she had received the invoices within the period of her contract:

> … I thought I was supposed to keep – I reported to her that – I thought I was suppose to keep doing the hours until it was over until the contract was over. Do you see what I'm saying?

[State's Exhibit 14 at 29].

> And they sent me invoices after I notified the lady so I don't know I'm confused but like – so I know I didn't provide the service I know that -

[State's Exhibit 14 at 31].

At trial, Thompson admitted she had been untruthful during her interview on June 18, saying "it just made me feel better about stealing the money." [RP 290]. She knew it was wrong when she submitted the invoices in December 2012 and January 2013 for service after her grandmother had passed on November 24. [RP 289].

> I was desperate, and I needed the money.
> ….
> I still owed the people that helped me pay for her (Henderson's) funeral - - well, not everybody. Some of the people. And so I used some of that money to pay them back. And then the other part of the money, I just spent it.

[RP 289].

D. ARGUMENT

THOMPSON MAY NOT BE CONVICTED OF TWO COUNTS OF MEDICAID FALSE STATEMENT WHERE THE OFFENSES MERGED WITH HER CONVICTION FOR THEFT IN THE FIRST DEGREE.

The double jeopardy clauses of the state and federal constitutions prevent the imposition of multiple punishments for the same offense. U.S. Const. amend. 5; Const. art. 1, § 9; North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969); In re Fletcher, 113 Wn.2d 42, 46-47, 776 P.2d 114 (1989). A concurrent sentence does not cure the violation. Ball v. United States, 470 U.S. 856, 865, 84 L. Ed. 2d 740, 105 S. Ct. 1668 (1985); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). This court reviews double jeopardy claims de novo. State v. Hughes, 166 Wn. 2d 675, 681, 212 P.3d 558 (2009). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. Calle, 125 Wn.2d at 772; In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 2004).

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses

"clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment." In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (citing State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the Medicaid false statement nor the theft in the first-degree statutes contain specific language authorizing separate punishments for the same conduct. RCW 74.09.230, 9A.56.020(1), 9A.56.030(1)(a). The offenses are thus not automatically immune from double jeopardy analysis. Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the "same evidence test," which asks "whether each offense has an element not contained in the other." Id. RCW 74.09.230, under which Thompson was convicted of Medicaid false statement, contains an element of knowingly making a false statement of material fact in an application for payment under a medical care program, which is not contained in the theft in the

first degree statute. An essential element of theft in the first degree under RCWs 9A.56.020(1) and 9A.56.030(1)(a) is obtaining property of a value exceeding $5,000 by color or aid of deception through a series of transactions which were part of a criminal episode and/or a common scheme or plan. The two offenses contain different elements and, therefore, are not established by the "same evidence test." Thus applying this test does not violate the prohibition against double jeopardy here. See State v. Zumwalt, 119 Wn. App. 126, 130, 82 P.3d 672 (2003).

Of course, the "same evidence" test is not always dispositive. Burchfield, 111 Wn. App. at 897. This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id; State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). This merger doctrine "is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy…." Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. Calle, 125 Wn.2d at 778; State v. Vladovic, 99 Wn.2d 413, 418-19, 662 P.2d 853 (1983). If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on "some injury to the person or property of the victim or others, which is

separate and distinct from and not merely incidental to the crime of which it forms the element." State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

The trial court denied Thompson's post-trial motion to dismiss her two convictions for Medicaid false statement under the merger doctrine, holding:

> ... I do not find that the merger doctrine applies in this case or double jeopardy, because even if the crimes would merge if there was an independent purpose or effect to each, they may be punished as separate offenses. And I find that the Legislature intended to punish Medicaid false statement and theft separately, and therefore merger does not apply, and I deny the defense motion.

[RP 09/24/15 18]. This reasoning is misplaced.

When the conduct of one offense elevates the degree of the second offense, the offenses merge to avoid double jeopardy. State v. Vladovic, 99 Wn.2d at 419. Example: In State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), our Supreme Court determined that the Legislature did not intend to impose separate punishments for first degree robbery and second degree assault where the threat to use force—the assault—elevated the robbery to a first degree offense. Id. at 805.

In charging Thompson with theft in the first degree, the State alleged that between December 1, 2012 and April 30, 2013, she wrongfully obtained property belonging to the State of Washington "by

color or aid of deception by committing a series of transactions which were part of a criminal episode and/or a common scheme or plan in which the sum value of all said transactions exceeded $5,000.00." [CP 168]. For the two counts of Medicaid false statement, which occurred on December 31, 2012 and February 4, 2013, it was further alleged for each respective count that Thompson "knowingly made a false statement or represented a material fact in an application for payment under a medical care program … and/or having knowledge of the occurrence of an event affecting … the initial or continued right to payment … concealed or failed to disclose such event with an intent to fraudulently secure such payment either in greater amount or quantity than was due or when no such payment was authorized." [CP 95-96]. On September 11, 2014, the court entered findings and conclusions that Thompson was guilty as charged. [CP 203-226].

As charged in this case, theft in the first degree required the wrongful taking of property of another by color or aid of deception through a series of transactions in which the sum exceeded $5,000. Thompson did this by committing two counts of Medicaid false statement, with each instance resulting in a loss less than $5,000. But by linking the two counts with the allegation in count I of theft in the first degree by a series of transactions that were part of a criminal episode and/or a

common scheme or plan, the State elevated the theft to a first-degree offense by employing the same dynamic rejected in Kier, supra.[2] Under these facts, it cannot be claimed that the Legislature intended to impose separate punishments for both offenses. See State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

E. CONCLUSION

Based on the above, Thompson respectfully requests this court to dismiss her convictions for Medicaid false statement and to remand for resentencing.

DATED this 31st day of March 2015.

Respectfully submitted,

Thomas E. Doyle

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[2] Theft of property or services which exceeds $750 but not $5,000 constitutes theft in the second degree, a class C felony. RCW 9A56.040. Theft of property which exceeds $5,000 constitutes theft in the first degree, a class B felony. RCW 9A.56.030.

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Yarden F. Widenfeld yarden@atg.wa.gov

Burnice R. Thompson
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DATED this 29th day of December 2014.

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