

NO. 70310-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ELIZABETH ANNE EWING,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by counting Elizabeth Ewing's prior convictions for theft and identity theft as separate offenses in computing her SRA offender score.

2. The trial court erred by making factual findings based upon the certification for probable cause for Ms. Ewing's prior convictions in determining that they counted as separate offenses in computing her SRA offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In computing an offender score under the SRA, multiple convictions count as one point if they constitute the "same criminal conduct." RCW 9.94A.525(5)(a)(i). Ms. Ewing's prior convictions for theft and identity theft furthered each other and were both committed when Ms. Ewing possessed another person's credit card with the intent of committing forgery. Where the prior convictions had the same objective criminal intent, occurred at the same time and place, and were against the same victim, did the sentencing court incorrectly count them as two points in computing Ms. Ewing's offender score?

2. An offender has the right to a jury determination beyond a reasonable doubt of any fact that increases her penalty for a crime.

U.S. Const. amend. VI, XIV; Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013). In determining whether Ms. Ewing's prior convictions constituted the same criminal conduct, the sentencing court looked beyond the fact of the prior convictions and her guilty plea statement for those crimes and made factual findings based upon the certification of probable cause. Was Ms. Ewing's constitutional right to a jury determination of any fact that increased her sentence violated?

C. STATEMENT OF THE CASE

Elizabeth Anne Ewing pled guilty to first degree burglary and second degree identity theft in separate cause numbers that were sentenced on the same day and are consolidated on appeal. CP 63-78, 146-61; RP 2; Court Administrator/Clerk's Notation Ruling dated June 6, 2103.

The State asserted that Ms. Ewing's offender score for each offense was 5 based upon prior convictions that included July 18, 2008, convictions for second degree theft and second degree identity theft. RP 14; CP 76-78, 159-61. Ms. Ewing argued that her offender score was 4 because she received concurrent sentences for the July 2008 convictions and they constituted the same criminal conduct and thus only counted as one point. CP 71, 154; RP 4.

The Honorable Michael T. Downes determined that the two offenses were not the same criminal conduct because they involved different criminal intents and one crime was committed before the other. RP 11-12, 13-14.

Based upon an offender score of 5, the court concluded that Ms. Ewing's standard sentence was 41 to 57 months for first degree burglary and 14 to 18 months for second degree identity theft. CP 15, 99. Ms. Ewing was given concurrent sentences of 48 months for first degree burglary and 18 months of identity theft as well as 18- and 12-month terms of community custody. CP 16-17, 100-01.

D. ARGUMENT

Ms. Ewing's prior convictions for second degree identity theft for using a credit card and second degree theft of that card were the same criminal conduct for purposes of determining her offender score.

The facts Ms. Ewing admitted in her guilty plea statement for her 2008 offenses demonstrate that they were the same criminal conduct and thus should have counted as only one point in calculating her offense score. The sentencing court's determination that the crimes had different criminal intents and occurred at different times and places was incorrect. In addition, the court's determination was based upon unconstitutional judicial fact-finding after a review of the affidavit of

probable cause. Ms. Ewing's sentence must be vacated because the sentencing court's calculation of her offender score was incorrect and the court violated her constitutional right to a jury determination of the facts increasing her sentence.

1. The sentencing court must determine if prior convictions that were served concurrently constitute the "same criminal conduct" in order to correctly determine an SRA offender score. Washington's Sentencing Reform Act (SRA) creates a grid of sentence ranges based upon the statutorily-established seriousness of the current offense and the defendant's offender score. RCW 9.94A.510, .515, .525, .530; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). To properly calculate the offender score, the court must first determine the defendant's criminal history, which is defined as a list of the defendant's prior criminal convictions and juvenile adjudications. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004); RCW 9.94A.030(11). The offender score is calculated by adding a specified number of points for each qualifying prior and current convictions. RCW 9.94A.525; State v. Graciano, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013).

Not all prior convictions are included in the offender score. Multiple offenses that constituted the “same criminal conduct” are counted as one offense. RCW 9.94A.525(5)(a)(i). If a prior sentencing court determined that prior offenses encompass the same criminal conduct, the current sentencing court must count those prior as one offense. Id. If the prior sentencing court did not make that finding but the sentences were concurrent, the current sentencing court is required to determine if the offenses should be counted as one offense using the same criminal conduct analysis found at RCW 9.94A.589(1)(a). Id.; State v. Williams, 176 Wn. App. 138, 307 P.3d 819, 820 (2013); see In re Personal Restraint of Call, 144 Wn.2d 315, 334, 28 P.3d 709 (2001) (“The sentencing court is obligated to calculate the correct offender score.”).

The State must prove the existence and nature of any prior offenses by a preponderance of the evidence. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); Ford, 137 Wn.2d at 479-80; RCW 9.94A.500(1). The defendant, however, has the burden of proving if convictions encompass the same criminal conduct. Graciano, 176 Wn.2d at 539. This Court reviews the sentencing court’s

determination for an abuse of discretion or misapplication of the law.
Id. at 536-38.

2. Ms. Ewing's convictions for identity theft and theft constituted the same criminal conduct. Two or more convictions constitute the same criminal conduct if they have "the same objective criminal intent (which can be measured by determining if one crime furthered the other), the same time and place, and the same victim." State v. Lessley, 118 Wn.2d 773, 778, 837 P.2d 996 (1992); RCW 9.94A.589(1)(a); accord State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). The test was met here.

Ms. Ewing was charged in Snohomish County Cause Number 06-01352 with second degree theft for appropriating a VISA card belonging to Lise Houston and second degree identity theft for obtaining or possessing the same VISA card with the intent to commit forgery. CP 27. In her guilty plea statement, Ms. Ewing admitted:

In Snohomish County Washington, on or about April 30, 2008, I did the following:

Ct.1 – I appropriated lost property – an access device – a Visa card belonging to Lisa Houston, with intent to deprive her of that property.

Ct. 2 – I knowingly possessed a means of financial information – the Visa card belonging to Lisa Houston – with intent to commit the crime of forgery.

CP 39.¹

In the present case, the court counted the prior two offenses as separate crimes. Although each crime involved the same victim, the court concluded they had different objective criminal intents and were not committed at the same time and place. RP 11-12, 13-14.

a. *Same criminal intent.* The test for determining if two crimes have the same criminal intent “focuses on the extent to which a defendant’s criminal intent, as objectively viewed, changes from one crime to the next.” Lessley, 118 Wn.2d at 777. “Criminal intent is the same for two or more crimes when the defendant’s intent, viewed objectively, does not change from one crime to the next, such as when one crime furthers another.” State v. Davis, 90 Wn. App. 776, 781-82, 954 P.2d 325 (1998) (citing Lessley, 118 Wn.2d at 777). In this case the theft of Ms. Houston’s lost credit card furthered the crime of identity theft, as Ms. Ewing could not have possessed Ms. Houston’s credit card with the intent of committing forgery if she had not first unlawfully appropriated it.

¹ At Ms. Ewing’s sentencing for those convictions, each conviction was counted as a current offense in computing her offender score for the other, in accordance with her plea agreement with the State. CP 42, 48-49, 51-53.

The Supreme Court's decision in Vike demonstrates that Ms. Ewing's prior offenses were the same criminal conduct. State v. Vike, 125 Wn.2d 407, 885 P.2d 824 (1994). In that case, the defendant pled guilty to two counts of possession of a controlled substance based upon his possession of two different drugs. Vike, 125 Wn.2d at 409. The State argued that the intent for each crime was different "because the objective in possessing heroin was distinct from the objective in possessing clonazepam." Id. at 411. The Supreme Court rejected this argument, holding there was "one overall criminal purpose," which was "an intent to [possess] any controlled substance." Id. Similarly, Ms. Ewing took the credit card in order to use it to commit forgery; the two crimes were part of "one overall criminal purpose."

The trial court's conclusion that Ms. Ewing's criminal intent for the two crimes incorrectly focused on the statutory elements of the crime rather than the overall criminal objective and whether one crime furthered the other as required by Lessley. The court determined that the mens rea of theft is to deprive the rightful owner of property and identity theft requires the defendant to obtain, possess, or use financial information to commit the crime of forgery. RP 11. Ms. Ewing, however, took the VISA card so that she could use the information to

commit forgeries. Each crime furthered the other and thus had the same objective criminal intent.

b. *Same time and place*. Ms. Ewing took the VISA card in order to use it, and thus she committed both theft and identity theft at the moment she took possession of the card. The sentencing court, however, determined that because the crimes had different mens reas, one crime was over before the second began. RP 11. In making this determination, the sentencing court looked at the affidavit of probable cause to conclude that the theft occurred at Quiznos where the victim left her purse and the identity theft occurred “later in the day.”² RP 11-12.

The affidavit of probable cause indicates that Ms. Houston left her purse containing her credit card at the restaurant after eating lunch on April 30, 2008, and Ms. Ewing took the purse. CP 29. Ms. Ewing admitted to the police that she used the card at two stores that afternoon. CP 31. However, crimes need not be simultaneous to be the same criminal conduct. State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997) (back-to-back drug sales constituted same criminal conduct).

² Ms. Ewing’s attorney agreed the court could review the information, guilty plea statement, and affidavit of probable cause for the prior convictions. RP 5-6.

More importantly, the sentencing court engaged in unconstitutional fact-finding when it reviewed the affidavit of probable cause in order to determine the facts of the case. The Sixth Amendment guarantees a jury determination beyond a reasonable doubt of any fact that increases the penalty for crime. Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Although proof of a prior conviction may be an exception to this rule, the exception does not permit courts to find facts underlying prior convictions. See Descamps v. United States, ___ U.S. ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013).

As the Descamps Court explained, a trial court’s finding concerning the facts of a prior conviction “would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction.” 133 S. Ct. at 2288. Those serious concerns “counsel against allowing a sentencing court to ‘make a disputed’ determination ‘about what the defendant and [prior] judge must have understood as the factual basis of the prior plea,’ or what a jury in a prior trial must have accepted as the theory of the crime.” Id. (quoting Shepard v. United States, 544 U.S. 13, 25, 125 S. Ct. 1254,

161 L. Ed. 2d 205 (2005)). Thus, in determining if Ms. Ewing's prior convictions constituted the same criminal conduct, the sentencing court should not have mined the record beyond the facts admitted in her guilty plea statement.

In her guilty plea statement, Ms. Ewing admitted possessing the credit card with the intent to commit forgery. Both theft and identity theft crimes occurred at the same time and place and involved the same criminal intent.

3. Ms. Ewing's sentence should be vacated and the case remanded for a sentence within the correct sentence range. Ms. Ewing's prior convictions for theft and identity theft were the same criminal conduct for purposes of computing her SRA offender score, and the sentencing court should have counted the two convictions as one point in computing her standard sentence ranges. Based upon an offender score of 4 rather than 5, Ms. Ewing's standard sentence range for first degree burglary is 36 to 48 months, and her standard range for second degree identity theft was 12+ to 14 months. RCW 9.94A.510, .515, .525, .530; CP 78, 161. Ms. Ewing's sentence must be vacated and her case remanded for sentencing within the correct standard range. Vike, 125 Wn.2d at 413; Williams, 307 P.3d at 822.

E. CONCLUSION

Elizabeth Ewing's prior convictions for identity theft and theft of a credit card were the same criminal conduct and incorrectly counted as two points in computing her offender score. Her sentence must be vacated and the case remanded for sentencing within the correct sentence range.

DATED this 1st day of December 2013.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70310-2-I
)	
ELIZABETH EWING,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **OPENING 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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