

NO. 72418-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

SHAWN L. SCHULZE,

Appellant.

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STATE COURT
JAN 11 2015
[Handwritten Signature]

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

The Honorable Joseph P. Wilson, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The sentences for four of appellant's convictions exceed the statutory maximum penalty.

Issues Pertaining to Assignment of Error

Appellant was convicted of several crimes, including four that are class C felonies with a statutory maximum penalty of 60 months. Did the sentencing court exceed its authority where it:

1. Imposed a prison sentence of 63 months, plus 12 months' community custody, for two of these convictions?
2. Imposed a prison sentence of 57 months, plus 12 months' community custody, for two other convictions?

B. STATEMENT OF THE CASE

Shawn Schulze, along with two co-defendants, pled guilty to 21 counts of Identify Theft in the First Degree (counts 1-21), two counts of Attempted Identify Theft in the First Degree (counts 22-23), and two counts of Identity Theft in the Second Degree (counts 24-25), and agreed there were valid grounds to impose an exceptional sentence on counts 1 through 4. 1RP¹ 2-37, 41-44, 47; CP 22-33, 38-47. In return, the State agreed not to prosecute the men for a

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – June 19, 2014; 2RP – August 13, 2014.

substantial number of uncharged related crimes. CP 50-55.

At sentencing, the Honorable Joseph Wilson imposed 104-month sentences on counts 1-4; 84-month sentences on counts 5-21; 63-month sentences on counts 22-23; and 57-month sentences on counts 24-25. 2RP 53; CP 8. Only the sentences on counts 1-4 are exceptional. CP 6, 8. All sentences are concurrent. 2RP 53; CP 8. And, all include 12 months' community custody following the prison term. 2RP 53; CP 9. Schulze timely filed his Notice of Appeal. CP 1-2.

C. ARGUMENT

SCHULZE'S SENTENCES ON COUNTS 22-25 ARE UNLAWFUL BECAUSE THEY EXCEED THE STATUTORY MAXIMUM.**Error! Bookmark not defined.**

1. Counts 22 and 23

In counts 22 and 23, Schulze was convicted of Attempted Identity Theft in the First Degree. RCW 9A.28.020(1); RCW 9.35.020(1)-(2). This is a class C felony with a maximum authorized sentence of 60 months. RCW 9A.28.020(3)(c); RCW 9.35.020(2); RCW 9A.20.021(1)(c). Thus, the 63-month prison sentence imposed on these counts is unlawful and must be reduced to 60 months or less.

The additional 12 months of community custody is unlawful for the same reason (it is beyond the statutory maximum) and an additional reason. Unlike Identify Theft in the First and Second Degrees, *Attempted* Identify Theft is not “a crime against persons” and, therefore, is not even subject to community custody. See RCW 9.94A.701(3)(a); RCW 9.94A.411(2); In re Postsentence Review of Leach, 161 Wn.2d 180, 183-188, 163 P.3d 782 (2007) (anticipatory offenses excluded from “crimes against persons”).

2. Counts 24 and 25

In counts 24 and 25, Schulze was convicted of Identity Theft in the Second Degree, which also is a class C felony with a maximum authorized sentence of 60 months. RCW 9.35.020(1), (3); RCW 9A.20.021(c). The combination of prison time (57 months) plus community custody (12 months) exceeds this limitation and is unlawful.

In preprinted language, the Judgment and Sentence indicates, “The combined term of community custody and confinement shall not exceed the statutory maximum.” CP 9. This is not sufficient, however. Rather, under W 9.94A.701(9), the term of community custody “shall be reduced by the court whenever an offender’s standard range term of confinement in combination with

the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.”

Judge Wilson was required to expressly reduce Schulze’s community custody on counts 24 and 25 so that the combination of confinement and supervision did not exceed 60 months. See State v. Boyd, 174 Wn.2d 470, 471-473, 275 P.3d 321 (2012); State v. Franklin, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

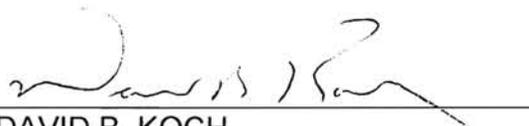
D. CONCLUSION

On counts 22 and 23, Schulze must be resentenced to 60 months or less, and community custody must be stricken. On counts 24 and 25, Judge Wilson must expressly reduce community custody so that the term imposed, when combined with the term of confinement, does not exceed 60 months.

DATED this 30th day of December, 2014.

Respectfully submitted,

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)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

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- [X] SHAWN SCHULZE
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WASHINGTON CORRECTIONS CENTER
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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2014.

x *Patrick Mayovsky*