

FILED
Feb 19, 2016
Court of Appeals No. 73533-1-I
Division I
State of Washington

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MUHAMMED TILLISY,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Mr. Tillisy's convictions in Counts 1 and 2 of second degree identity theft violate the double jeopardy provisions of the Fifth Amendment and Article I, section 9.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The double jeopardy clauses of the federal and state constitutions bar multiple convictions based upon a single unit of prosecution. Where a conviction is vacated, as violative of double jeopardy protections, the judgment may not include any reference to the vacated offense. After this Court remanded Mr. Tillisy's case to the trial court with directions to vacate either Count I or Count II, and the amended judgment nonetheless still specifically includes both counts, should this Court again remand for entry of a judgment which does not reference the vacated offense?

C. STATEMENT OF CASE

A search of Mr. Tillisy and his car following his arrest led to the discovery of, among other things, checks with an account name of "Honda of Fife" and others were blank. CP 265. Among other charges, the State charged Mr. Tillisy with two counts of second degree identity theft for Mr. Tillisy's possession of the checks containing the

Honda of Fife routing number. CP 266. A jury convicted Mr. Tillisy as charged. *Id.*

On appeal, Mr. Tillisy argued these two convictions violated double jeopardy. CP 266. This Court agreed. *Id.* at 266-67. The Court remanded the matter with direction to vacate either Count I or Count II. CP 269.

On remand, the trial court entered an amended judgment and sentence which specifically references both Counts I and II. CP 18, 21.

D. ARGUMENT

Double Jeopardy protections do not permit Mr. Tillisy's two convictions of second degree identity theft to be include in the Judgment and Sentence.

1. *As Mr. Tillisy argued, as the State conceded, and as this Court found, Mr. Tillisy's convictions of second degree identity theft in Counts I and II violate double jeopardy protections.*

The Double Jeopardy Clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. amend. V; Const. Art. I, § 9. These provisions of the state and federal constitutions protect against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same

offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

The Supreme Court has said

When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.

State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000).

RCW 9.35.020(1) provides:

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 9.35.001 states in part:

. . . .The unit of prosecution for identity theft by use of a means of identification or financial information is each individual unlawful use of any one person's means of identification or financial information. 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.

In his initial appeal, Mr. Tillisy argued that because Counts I and II involved a single victim, the unit of prosecution was his singular possession of the financial information of that victim. The State conceded this point. This Court agreed with Mr. Tillisy’s argument and remanded the matter to the trial court to vacate either Count I or Count II. CP 266-67, 269.

2. When double jeopardy requires vacation of a conviction, the resulting judgment may not reference the vacated conviction.

The Supreme Court has said:

To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.

State v. Turner, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010).

Despite this clear direction, the amended judgment entered after remand still includes both Counts I and II as current convictions:

2.1 CURRENT OFFENSE(S). The defendant was found guilty on November 28, 2012 by jury-verdict and was re-sentenced on May 26, 2015 of:

<u>COUNT</u>	<u>CRIME</u>	<u>RCW</u>	<u>CLASS</u>	<u>INCIDENT #</u>	<u>DATE OF CRIME</u>
I	Second Degree Identity Theft	9.35.020(1) and (3)	C	EDM 1201915	5/31/12
II	Second Degree Identity Theft	9.35.020(1) and (3)	C		5/31/12
III	Forgery	9A.60.020(1)(b)	C		5/31/12
IV	Forgery	9A.60.020(1)(b)	C		5/31/12
V	Second Degree Identity Theft	9.35.020(1) and (3)	C		5/31/12
VI	Unlawful Possession of Payment Instruments	9A.56.320(1) and (2)	C		5/31/12

as charged in the Second Amended Information.

CP 18. Plainly, the judgment also sets forth sentencing information for both counts:

2.3 SENTENCING DATA.

COUNT NO.	OFFENDER SCORE	SRA LEVEL	STANDARD RANGE (not including enhancements)	*PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	15 14	II	43-57 months		43-57 months	5 years/\$10,000
II	16 14	II	43-57 months		43-57 months	5 years/\$10,000
III	16 14	I	22-29 months		22-29 months	5 years/\$10,000
IV	16 14	I	22-29 months		22-29 months	5 years/\$10,000
V	16 14	II	43-57 months		43-57 months	5 years/\$10,000
VI	15 14	I	22-29 months		22-29 months	5 years/\$10,000

CP 20.

Not until the fourth page of the amended judgment is there any hint that either offense has been vacated. On that page, rather than impose a sentence for Count II, the judgment instead includes “DIM.”

CP 21.

Further down that page the following contradictory language appears

III. JUDGMENT

- 3.1 The defendant is **GUILTY** of the counts and charges listed in Paragraph 2.1.
- 3.2 The court **DISMISSES** Count(s) II - Identity Theft 2^d.
- 3.3 The defendant was found **NOT GUILTY** of Count(s) _____.

Id. Thus paragraph 3.1 specifically states, what would seem apparent to any reader, that despite the court having nominally dismissed one of the counts, Mr. Tillisy is guilty of all the offenses listed as current offense,

which includes both Counts I and II. This sort of ambiguity is precisely why *Turner* requires that a judgment should make no reference to a vacated conviction. Not until paragraph 3.3 does the trial court actually state that the conviction was dismissed. But even that is inconsistent with the requirement of *Turner* that vacated counts should not be mentioned in any form in the judgment.

Because it still indicates Mr. Tillisy has been convicted of both Counts I and II, the Amended Judgment and Sentence must be vacated. *Turner*, 169 Wn.2d at 464-65.

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Tillisy's convictions.

Respectfully submitted this 18th day of February, 2016.

s/ Gregory C. Link

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DIVISION I**

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)	
Respondent,)	
)	NO. 73533-1-I
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MUHAMMED TILLISY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF FEBRUARY, 2016, 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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