

NO. 37383-1

COURT OF APPEALS  
DIVISION II

00 DEC 17 PM 2:08

STATE OF WASHINGTON

BY Cm  
DEPUTY

---

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT THOMAS YOUNG, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie A. Arend

No. 06-1-04018-1

---

**BRIEF OF RESPONDENT**

---

GERALD A. HORNE  
Prosecuting Attorney

By  
MELODY M. CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Did the trial court err in ruling that forgery and theft did not constitute the same criminal conduct where the crimes do not have the same intent, did not occur at the same time and place and are not the same in law and fact? ..... 1

    2. Did the trial court err in ordering defendant to undergo alcohol, drug, and mental health evaluations and treatment when defendant was sentenced as a first time offender under RCW 9.94A.650 and the statute allows for such treatment? ..... 1

B. STATEMENT OF THE CASE. .... 1

    1. Procedure..... 1

    2. Facts ..... 3

C. ARGUMENT..... 6

    1. THE COURT DID NOT ERR IN FINDING THAT FORGERY AND THEFT IN THE SECOND DEGREE WERE NOT THE SAME CRIMINAL CONDUCT AS THEY HAVE DIFFERENT INTENTS, OCCURRED AT DIFFERENT TIMES AND PLACES, AND ARE NOT THE SAME IN LAW AND FACT..... 6

D. CONCLUSION. .... 11

## Table of Authorities

### State Cases

<i>State v. Calle</i> , 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).....	8
<i>State v. Flake</i> , 76 Wn. App. 174, 180, 883 P.2d 341 (1994) .....	6
<i>State v. Goodlow</i> , 27 Wn. App. 769, 773, 620 P.2d 1015 (1980).....	8
<i>State v. Haddock</i> , 141 Wn.2d 103, 3 P.2d 733 (2000).....	7
<i>State v. Hernandez</i> , 95 Wn. App. 480, 484, 976 P.2d 165 (1999) .....	7
<i>State v. Johnson</i> , 97 Wn. App. 679, 682-3, 988 P.2d 460 (1999).....	10
<i>State v. Lessley</i> , 118 Wn.2d 773, 777, 827 P.2d 996 (1992).....	6
<i>State v. Vladovic</i> , 99 Wn.2d 413, 423, 662 P.2d 853 (1983).....	8

### Statutes

RCW 9.94A.589(1)(a).....	6
RCW 9.94A.650 .....	1, 9
RCW 9.94A.650(2).....	9, 10
RCW 9.94A.650(2)(b).....	10
RCW 9A.56.020(1)(a).....	7, 8
RCW 9A.60.020(1)(a)(b) .....	7, 8

### Rules and Regulations

CrR 3.5.....	2
CrR 3.6.....	2

**Other Authorities**

Black’s Law Dictionary, Fifth Edition, 381, 1979 .....7  
Black’s Law Dictionary, Revised Fourth Edition, 1968 .....7

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court err in ruling that forgery and theft did not constitute the same criminal conduct where the crimes do not have the same intent, did not occur at the same time and place and are not the same in law and fact?

2. Did the trial court err in ordering defendant to undergo alcohol, drug, and mental health evaluations and treatment when defendant was sentenced as a first time offender under RCW 9.94A.650 and the statute allows for such treatment?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Robert Young, on August 28, 2006 with one count of theft in the first degree and one count of forgery. CP 1-2. The State amended the charges on May 31, 2007 to add eight additional counts of forgery and one count of bail jump. CP 6-10. The State again amended the charges on December 5, 2007 which changed the eight counts of forgery back to one count of forgery. CP 24-25; RP 5-8.<sup>1</sup>

---

<sup>1</sup> The verbatim report of proceedings is contained in six volumes. The five sequentially paginated volumes will be referred to as RP. The proceeding on January 25, 2008 will be referred to as 1/25/08 RP.

Trial commenced on December 5, 2007 in front of the Honorable Stephanie Arend. RP 5. CrR 3.5 and CrR 3.6 motions were held on December 6, 2007. RP 35- 171. On December 12, 2007, the jury found defendant not guilty of theft in the first degree, but guilty of the lesser included charge of theft in the second degree as well as guilty of forgery and bail jumping. RP 626, CP 141-145.

Sentencing was held on January 25, 2008. 1/25/08 RP 5. Defendant's offender score was determined to be a two which encompassed the current offenses. CP 172-183. Defendant's sentencing range was 2-5 months on the theft and forgery charges and 4-12 months on the bail jumping charge. CP 172-183. Defense counsel argued that the theft and forgery charges should merge as they were the same criminal conduct. 1/25/08 RP 7. The court ruled that the charges did not merge as theft required a loss and forgery did not. 1/25/08 RP 10.

Defense counsel also indicated that there may be substance abuse and mental health issues. 1/25/08 RP 15. Defense counsel urged the court to adopt a first time offender waiver so the court could address those issues. 1/25/08 RP 15. The court sentenced defendant under the first time offender waiver and ordered alcohol, drug, and mental health evaluation and necessary treatment as part of defendant's community custody. 1/25/08 RP 17; CP 172-183. Defendant filed the timely appeal. CP 153-165.

## 2. Facts

Defendant was employed as a work study student for the Veteran's Administration (VA). RP 198. Defendant signed a contract with the VA to work from February 18, 2003 to December 19, 2003. RP 198. When a work study student has worked 50 hours, they bring in the time sheet to the human resources office. RP 200. Human resources then faxes the time sheet to the regional office that would then in turn pay the work study student. RP 199-200. The time sheets have places for both the student and his supervisor to initial. RP 200. Once the time sheet has been turned in, it goes thru an auditing process, is entered into the Benefits Delivery Network and then the payment has to be authorized by a second person. RP 324. The money is then paid directly to the work study student and can be done by direct deposit. RP 324.

While a work study student, defendant was assigned to work in the warehouse at American Lake in 2003. RP 211, 215. His supervisor was Donald Turpin. RP 215. Mr. Turpin was also in charge of the mailroom and defendant also worked there. RP 213, 222. Defendant was a good worker and Mr. Turpin let defendant study during his free time at work. RP 216. Defendant worked for Mr. Turpin until the 16<sup>th</sup> of June 2003. RP 219, 221. After that, defendant did not show up for work anymore. RP 221.

Defendant signed a second contract with the VA for January 14, 2004 to August 17, 2004. RP 267. The contract contained the language that, "Any amount of work-study allowance paid to me for which I fail to satisfactorily perform equivalent hours of service in accordance with the terms of this agreement shall be declared an overpayment for which I shall be liable to the United States. Any such overpayment shall, unless waived by VA, be recovered in the same manner as any other debt due the United States." RP 269.

In March 2004, the VA received a time sheet from defendant that was faxed from off site of the installation. RP 281. Time sheets were to be hand delivered to the human resources office. RP 281. The exception was that time sheets could be faxed from inside the installation. RP 281.

Defendant was told he could not fax a timesheet directly to the regional office from off the installation. RP 304. At that time, Virginia Weber, who worked in HR, noticed that the supervisor's initials did not look the same as past timesheets. RP 307. Ms. Weber showed the timesheets to defendant's supervisor. RP 310-311.

The initials on defendant's time sheets appeared to be Mr. Turpin's but they looked different. RP 239-240, 307. Mr. Turpin testified that the initials on defendant's time sheets after June 16, 2003 were not his. RP 220. If Mr. Turpin was gone, he would have had a worker called a Wage

Grade 5 sign defendant's time sheet but they were only allowed to sign there own initials, not Mr. Turpin's. RP 232, 546. No one was allowed to sign for a supervisor without their permission and no one had authority to sign Mr. Turpin's initials. RP 282, 546.

The initials of defendant's supervisor appeared to have been forged from June 16, 2003 to the end of February 2004. RP 327. The timesheets that had the false initials were used to pay defendant. RP 312. Defendant had submitted time sheets for 1,050 hours and was paid \$7,383. RP 349. Defendant was not paid for any more time after February 19, 2004. RP 353.

In March 2005, defendant admitted to a vocational counselor that he had added hours to a time sheet and had received money he was not entitled to. RP 362-4. This had occurred while had had worked at the VA Medical Center at American Lake. RP 364.

Special Agent James Eckrich contacted defendant in January 2006. RP 374. Defendant told Agent Eckrich that Mr. Turpin had not given him permission to sign for him. RP 381, 391. Defendant also admitted that he had faxed time sheets from off of the VA premises. RP 381. Defendant admitted that from June 2003 to February 2004 the initials were not his supervisor's initials. RP 382. Defendant indicated that had started to make the initials for Mr. Turpin. RP 383. Defendant admitted that the

initials were falsified by him and that he did not perform work for the VA during the hours listed on the time sheets. RP 390. Defendant said he had put down his supervisor's initials so that he could get money. RP 443.

At trial, defendant admitted that the hours were exaggerated in that he had put down hours that he had not worked but claimed that someone else had signed for Mr. Turpin. RP 483, 488, 525. Defendant denied ever using Mr. Turpin's initials. RP 488.

C. ARGUMENT.

1. THE COURT DID NOT ERR IN FINDING THAT FORGERY AND THEFT IN THE SECOND DEGREE WERE NOT THE SAME CRIMINAL CONDUCT AS THEY HAVE DIFFERENT INTENTS, OCCURRED AT DIFFERENT TIMES AND PLACES, AND ARE NOT THE SAME IN LAW AND FACT.

Under RCW 9.94A.589(1)(a), two crimes shall be considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *Lessley*, 118 Wn.2d at 778. An appellate court will generally defer to a trial court's decision on whether

two different crimes involve the same criminal conduct, and will not reverse absent a clear abuse of discretion or a misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 3 P.2d 733 (2000).

Intent is assessed objectively, rather than subjectively. *State v. Hernandez*, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). In making this assessment, the court must objectively view each underlying statute and determine whether the required intents are the same or different for each count. *Id.* If the intents are different, the offenses will count as separate offenses. *Id.* If the intents are the same, the court then objectively views the facts usable at sentencing to determine whether a defendant's intent was the same or different with respect to each count. *Id.*

Forgery and theft do not constitute the same criminal conduct. First, the two crimes do not share the same intent. Under RCW 9A.56.020(1)(a) the intent for theft requires the intent to deprive the owner of property. Under RCW 9A.60.020(1)(a)(b), the intent for forgery is the intent to injure or defraud. Defraud is defined as "to make a misrepresentation of an existing material fact, knowing it to be false or making it recklessly without regard to whether it is true or false, intending one to rely and under circumstances in which such person does rely to his damage." Black's Law Dictionary, Fifth Edition, 381, 1979. In contrast, deprive is defined as "to take." Black's Law Dictionary, Revised Fourth Edition, 1968. The intent elements of the two crimes are not the same.

Second, the time and place of the crimes is not the same.

Defendant completed the forgery when he presented his timesheet with forged initials and incorrect hours to human resources. The theft was not committed until defendant received the funds, which happened after the timesheet was processed and the money was paid to defendant. RP 199-200, 324. This did not occur at the same time or the same place. The time and place of these crimes was different.

In addition, the two crimes are not the same in law and facts. The legislature intended to punish the crimes of forgery and theft separately. Under the same evidence test, a defendant cannot be convicted of crimes that are the same in law and fact. *See State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). However, if an element of each offense is not included in the other and if it is not necessary to prove one crime in order to prove another, then the convictions remain. *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). In the instant case, the crimes of forgery and theft contain different elements. The crime of forgery does not actually require a proof of loss like theft which requires a specific dollar amount. *See* RCW 9A.56.020(1)(a) and RCW 9A.60.020(1)(a)(b). Forgery requires a falsely made written instrument while theft does not. *Id.* The State did not have to prove forgery in order to prove the elements of theft. *State v. Goodlow*, 27 Wn. App. 769, 773, 620 P.2d 1015 (1980). The crimes are not the same in law and fact.

Further, even if the court finds error, defendant cannot show he was prejudiced by the courts determination of his offender score as the court sentenced defendant as a first time offender. 1/25/08 RP 17. While the standard sentencing range is affected by whether two counts constitute the same criminal conduct, the range under a first time offender option is not. RCW 9.94A.650(2). Defendant's range under the first time offender waiver was 0-90 days regardless of whether the court treated the two counts as same criminal conduct or not. Thus, defendant has suffered no prejudice.

As the crimes did not involve the same intent, take place at the same time or place, and are not the same in law and fact they cannot be said to encompass the same criminal conduct. The trial court did not err. Further, even if the court finds an error, defendant's sentence would not change. Any potential error in this instance was harmless.

2. THE COURT DID NOT ERR IN ORDERING DEFENDANT TO OBTAIN ALCOHOL, DRUG AND MENTAL HEALTH EVALUATIONS SINCE THE COURT SENTENCED DEFENDANT AS A FIRST TIME OFFENDER UNDER RCW 9.94A.650 WHICH ALLOWS FOR SUCH TREATMENT.

The court in the instant case sentenced defendant under the first time offender waiver contained in RCW 9.94A.650. The statute provides that in addition to up to ninety days of jail time, the court may also sentence a defendant to a term of community custody or community

supervision. RCW 9.94A.650(2). The statute specified that the term of community custody “*in addition to crime-related prohibitions*, may include requirement that the offender perform any one or more of the following: ...undergo available outpatient treatment for up to the period specified in subsection (3) of this section...” RCW 9.94A.650(2) and RCW 9.94A.650(2)(b)(emphasis added). Conditions imposed pursuant to a first time offender waiver do not need to be crime related. *State v. Johnson*, 97 Wn. App. 679, 682-3, 988 P.2d 460 (1999).

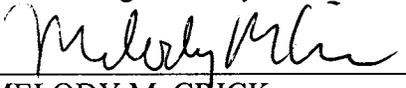
The court did not abuse its discretion in ordering defendant to undergo alcohol, drug, and mental health evaluations and recommended treatment. As the court sentenced defendant as a first time offender, the court was authorized to order such treatment. 1/25/08 RP 17. In addition, there was evidence adduced at trial that defendant had been seeing a mental health counselor and had been in mental health treatment since 2001. RP 491. At sentencing, his own attorney indicated that there may be mental health and substance abuse issues. 1/25/08 RP 15. The court was within its discretion to order the condition of treatment.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions and sentence below.

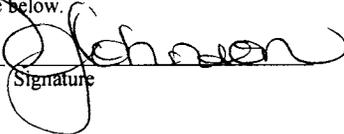
DATED: DECEMBER 16, 2008

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
MELODY M. CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail of ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/16/08   
Date Signature

COPIED 17 BY 2:08  
STATE OF WASHINGTON  
BY  DEPUTY  
COURT REPORTERS  
J. P. HENNING