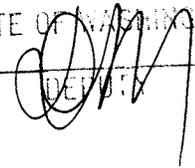


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STATE OF WASHINGTON  
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NO. 38379-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**STATE OF WASHINGTON**, Respondent,

v.

**SUZANNE MELODY AQUINO**, Appellant.

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APPELLANT'S BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. Mrs. Aquino's offender score was calculated incorrectly because the offenses should have been treated as a single offense because they were the same criminal conduct.
2. Mrs. Aquino was deprived of effective assistance of counsel when her trial counsel failed to challenge her offender score and failed to argue that the offenses should have been treated as the same offense under the same criminal conduct doctrine.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court incorrectly calculate Mrs. Aquino's offender score by failing to find that the theft convictions were the same criminal conduct as the forgery convictions and the forgery convictions were the same criminal conduct as the identity theft conviction?
2. Was Mrs. Aquino deprived of effective assistance of counsel when her trial counsel failed to challenge her offender score and failed to argue that the convictions should be treated as the same offense under the same criminal conduct doctrine?

### **III. CASE SUMMARY**

Suzanne Aquino began as a weekly cleaning lady for Myrtle and Fred Strom and became a good friend, particularly to Mrs. Strom. She went beyond her original scope of employment, visiting Mrs. Strom while she was hospitalized, providing aid and medical care to Mr. Strom, and running errands for both. At the time of her testimony, Mrs. Strom's memory had deteriorated and although she remembered that she had written Mrs. Aquino several checks and made her loans of money, Mrs. Strom did not remember authorizing Mrs. Aquino to write several checks. Mrs. Strom said that she had not authorized the seven checks. These checks became the subject of this prosecution.

### **IV. STATEMENT OF THE CASE**

Mrs. Aquino worked as a house cleaner for Frank and Myrtle Strom for over five years. RP 108. She washed their clothes, cleaned the house, cleaned up blood and stains on the carpet routinely made by Frank's foot wound. RP 220. Mrs. Aquino also did odd jobs and errands for the Stroms, including purchasing groceries and clothes at Mrs. Strom's request. RP 239, 241, 243. She also helped with the care and bandaging of Mr. Strom's ulcerated foot. RP 117.

Mr. and Mrs. Strom were still living at home until Myrtle entered the nursing home for the last time on November 16, 2006. RP 154-156. Mrs. Aquino continued to clean for them until Frank entered the nursing home in May of 2007. RP 113, 128. Frank Strom died at the nursing home on August 3, 2007. RP 50.

Mrs. Strom took care of the finances and wrote the checks. RP 111, CP 62, 64. She often directed others to fill out and even sign the check for her. CP 89, 107. Mrs. Strom identified her signature on several checks to Mrs. Aquino, often with Mrs. Aquino's writing on the rest of the check. CP 89, 91, 93. One such check was written on November 19, 2006, to Mrs. Aquino, for \$421. CP 117.

Mr. and Mrs. Strom's son and daughter-in-law, Joe and Jorene Strom, visited Frank and Myrtle at their home on average twice each month. RP 54-55. They did not help Frank and Myrtle with their finances or care at all until the old couple went into the nursing home. RP 108. When Frank Strom went into the nursing home in May of 2007, he and Myrtle assigned the responsibility of their finances to Joe and Jorene. RP 65.

When Jorene Strom began to balance the account for the prior month, she found that there were checks to Mrs. Aquino that she did not know about. RP 69-70, 73. She closed the account and reported these

checks to the police as forged. RP 72, 76. Jorene did not know that Myrtle Strom had others sign checks for her, and she believed that Frank Strom was in charge of the finances. RP 76, 108.

Both Joe and Jorene knew that Mrs. Aquino had helped Frank Strom with his foot in that she had changed his bandages and that Mrs. Aquino continued to do Myrtle Strom's laundry even after she went into the nursing home. RP 58, 84, 117. Mrs. Aquino had continued to clean the house for Mr. Strom after Mrs. Strom had gone into the nursing home. RP 88, 128.

At the time of her deposition, Mrs. Strom could not remember the address of the house she had lived in for more than 30 years or even what it looked like. CP 78, 82. She did not remember that Mrs. Aquino had visited her frequently while she was in the nursing home. CP 124. Mrs. Strom's mental state was affected by the strong pain medication she was taking. RP 53, 112.

At first, Mrs. Strom did not remember that she had ever written checks to Mrs. Aquino. RP 137. Then, in her deposed testimony, Mrs. Strom identified many checks for varying amounts that she had authorized Mrs. Aquino to write or had written to her. CP 83, 85, 86, 87, 89, 91, 93, 109, 114, 116, 117. Included in these checks were two loans for \$341,

made in 2005, and one check for \$421, made in November of 2006 (after she entered the nursing home). CP 91, 109, 117.

Mrs. Strom testified that she had not authorized or signed seven checks made out to Mrs. Aquino between November 30, 2006 and June 5, 2007. CP 118-24.

Mrs. Aquino freely admitted to the police that she had filled out the checks. RP 178. She said that these checks were reimbursement for errands she did for the Stroms and purchases she had made on their behalf. RP 178-79.

An official from Columbia Bank testified that the bank had not reimbursed the Stroms for any of the allegedly forged checks because the Stroms did not submit a claim within 90 days of the checks being cashed. RP 208.

Mrs. Aquino was charged with the following crimes:

<u>Count</u>	<u>Charge</u>	<u>Date</u>	<u>Check #</u>
I	Identity Theft	11/30/06—6/5/07	
II	Theft 2	11/30/06—1/16/07	(#3653)
III	Forgery	11/30/06—1/16/07	#3653
IV	Theft 2	12/10/06—1/19/07	(#3650)
V	Forgery	12/10/06—1/19/07	#3650

VI	Theft 2	3/2/07—3/29/07	(#3651)
VII	Forgery	3/2/07—3/29/07	#3651
VIII	Theft 2	4/24/07—4/27/07	(#3649)
IX	Forgery	4/24/07—4/27/07	#3649
X	Theft 2	5/1/07—5/8/07	(#3652)
XI	Forgery	5/1/07—5/8/07	#3652
XII	Theft 2	5/18/07—5/21/07	(#3604)
XIII	Forgery	5/18/07—5/21/07	#3604
XIV	Theft 2	6/1/07—6/5/07	(#3526)
XV	Forgery	6/1/07—6/5/07	#3526

CP 19-25.

The prosecutor explained to the jury that the identity theft charge was for the “entire scheme,” while each check was linked to one forgery and one theft charge. RP 298-99. The defense argued that Mrs. Strom had authorized the checks as payment for Mrs. Aquino’s services and reimbursement for items purchased for the Stroms and that Mrs. Strom simply had forgotten that she authorized the checks. RP 327-29.

The jury convicted Mrs. Aquino on all charges. CP 142-156.

Mrs. Aquino had no prior offenses. CP 159-161. The court rejected the defense’s request for first time offender sentencing. RP 374. The court found that Mrs. Aquino’s offender score was 9+, making her

standard range for count I 63-84 months and 22-29 months for the rest.

CP 162. None of the offenses were found to be the same offense for

sentencing purposes. CP 161. Mrs. Aquino was sentenced to 74 months

on count I, 29 months on the rest, to be served concurrently. CP 165.

This appeal timely follows.

## V. ARGUMENT

**ISSUE 1: THE TRIAL COURT INCORRECTLY CALCULATED MRS. AQUINO'S OFFENDER SCORE BY FAILING TO FIND THAT THE THEFT CONVICTIONS WERE THE SAME CRIMINAL CONDUCT AS THE FORGERY CONVICTIONS AND THE FORGERY CONVICTIONS WERE THE SAME CRIMINAL CONDUCT AS THE IDENTITY THEFT CONVICTION.**

If concurrent offenses encompass the same criminal conduct, they are treated as one crime for the purposes of calculating the offender's sentence. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). All three prongs must be met, and the absence of any one prong prevents a finding of "same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The trial court's finding on same criminal conduct is reviewed for abuse of discretion. *State v. Freeman*, 118 Wn. App. 365, 377, 76 P.3d 732 (2003).

The relevant inquiry for finding the objective criminal intent is “the extent to which the criminal intent, objectively viewed, changed from one crime to the next. . . . This, in turn, can be measured in part by whether one crime furthered the other.” *State v. Vike*, 125 Wn.2d at 411 (citations omitted).

Whether crimes occurred at the same time depends on whether they were committed sequentially as part of a continuous, uninterrupted sequence of events over a short period of time—the statute does not require that the crimes be committed at the exact same moment in time. *See State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

In this case, the State charged one count of forgery for each check and one count of theft in the second degree for each check. CP 19-25. In addition, the State charged Mrs. Acquino with identity theft for “the entire scheme” with the forged checks being the only evidence of identity theft. RP 298-99. The objective intent behind each forgery and theft charge was the same—to receive the funds. The time of each forgery and each theft was the same, as was the victim. Each forgery furthered each theft. It is clear that the thefts must merge into the corresponding forgery charges as the same criminal conduct.

Further, the forgery convictions and identity theft also constitute the same offense. The only evidence of identity theft was the forged

checks. The prosecution simply used the same acts it used for seven individual forgery charges to constitute another charge of identity theft. The objective intent was the same—to receive the money. The time and place were the same, as was the victim. The forgeries furthered the identity theft. Consequently, it is also clear that the forgeries merge into the identity theft charge as the same criminal conduct.

All the convictions in this case merge into a single offense—identity theft. Therefore, under the same criminal conduct statute Mrs. Aquino’s offender score should have been a zero, with a standard range of 3-9 months for identity theft. The trial court erred by failing to find that the same criminal conduct doctrine applied.

**ISSUE 2: MS. AQUINO WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER TRIAL COUNSEL FAILED TO CHALLENGE HER OFFENDER SCORE AND FAILED TO ARGUE THAT THE CONVICTIONS SHOULD BE TREATED AS THE SAME OFFENSE UNDER THE SAME CRIMINAL CONDUCT DOCTRINE.**

Mrs. Aquino’s trial counsel failed to argue at the sentencing hearing that her convictions should be considered the same criminal conduct when calculating her offender score and did not challenge the court’s calculation of her offender score, although he also never affirmatively acknowledged the offender score. RP8. If Ms. Aquino’s convictions had been correctly identified as the same criminal conduct, her offender score would have been reduced to a zero and her sentencing

range would have been three to nine months instead of 63 to 84 months. There was no legitimate trial strategy for failing to argue same criminal conduct in this case. Therefore, Ms. Aquino was deprived of effective assistance of counsel when her trial attorney failed to challenge her offender score.

The Sixth Amendment right of a criminal defendant to have a reasonably competent counsel is fundamental and helps ensure the fairness of our adversary process. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This fundamental right to effective counsel ensures that a defendant's conviction will not stand if it was brought about as a result of legal representation that fell below an objective standard of reasonableness. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000).

To prevail, the defendant must show that her counsel's conduct fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the case would have been different. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)).

In this case, counsel's conduct fell below an objective standard of reasonableness because there was no legitimate reason to fail to challenge the offender score and argue same criminal conduct in this case. And, the outcome of the case would have been different but for the error because under the same criminal conduct doctrine, all of Ms. Aquino's convictions should have been treated as the same offense (see above). This would have reduced Ms. Aquino's offender score from above nine to zero and her sentencing range would have been reduced from 63 to 84 months to three to nine months. That is a very different outcome for Ms. Aquino and more proportionate to her actions and criminal history.

## **VII. CONCLUSION**

Criminal defendants rely on counsel to advocate for their interests at every stage of the proceeding. The average defendant would have no idea that a doctrine like same criminal conduct exists and therefore would have no idea that her attorney was waiving an argument by failing to challenge the offender score at her sentencing. It is inherently unfair therefore to deem this right waived because an attorney failed to live up to his professional obligation by making the argument to the trial court.

This court should remand this case to the trial court for a new sentencing hearing where the trial court will re-sentence Ms. Aquino with an offender score of zero. Alternatively, this court should remand the case

for a new sentencing hearing in which the trial court will hear argument on same criminal conduct.

DATED: March 11, 2009

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CERTIFICATE OF SERVICE

I certify that on March 11, 2009, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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