

NO. 38995-9-II

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

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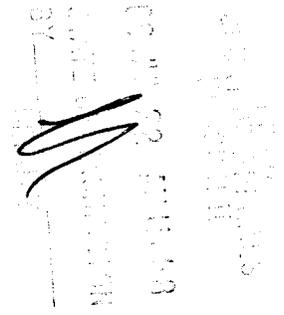
STATE OF WASHINGTON,

Respondent,

v.

AARON FALLON,

Appellant.



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

The Honorable Diane Woolard, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove the charged crime beyond a reasonable doubt.

2. The trial court imposed an indeterminate sentence in violation of the Sentencing Reform Act.

Issues pertaining to assignments of error

1. Appellant was charged with forgery after attempting to cash a check made payable to him. There was no evidence from the account holder that the check was not authentic, however. Where only suspicion and speculation could support a determination that the check was forged, did the State fail to prove beyond a reasonable doubt that appellant was guilty?

2. The statutory maximum sentence for Appellant's offense is 60 months. The court below imposed a sentence of 57 months confinement plus nine to 18 months community custody, noting on the Judgment and Sentence form that the combined term of confinement and community custody actually served shall not exceed the statutory maximum. Where the court failed to make an initial determination of the sentence length and required the DOC to ensure that the statutory maximum was not violated, must the indeterminate sentence be vacated?

B. STATEMENT OF THE CASE

1. Procedural History

The Clark County Prosecuting Attorney charged appellant Aaron Fallon with possession of a stolen motor vehicle, 13 counts of second degree identity theft, forgery, and second degree theft. CP 28-32; RCW 9A.56.066; RCW 9.94A.535(2)(c); RCW 9A.60.020; RCW 9A.56.020(1)(a). Fallon was charged with a second count of forgery in a separate cause number. CP 195.<sup>1</sup> The two causes were joined for jury trial before the Honorable Diane M. Woolard. The jury convicted on all counts. CP 149-63, 311. The court found that because of Fallon's multiple current offenses and high offender score, some of his current offenses would go unpunished with a standard range sentence. CP 181. It imposed an exceptional sentence, ordering one of the standard range forgery sentences to be served consecutively to the remaining standard range sentences. CP 167.

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<sup>1</sup> The previous charging documents included several other charges which were omitted for failure of proof following the State's presentation of evidence. CP 1-4, 11-27, 189-94.

2. Substantive Facts

a. **Trial Testimony**

Around 3:00 a.m. on June 17, 2008, Clark County Sheriff's Deputies responded to a report of a suspected vehicle prowl. 1RP<sup>2</sup> 116. They contacted Aaron Fallon, who was sitting in the driver's seat of a Ford Explorer, and Michael Whittington, who was in the front passenger's seat. 1RP 97, 117-18. After noticing some tools in the front of the vehicle, one of the deputies ran the vehicle identification number and learned that the car had been reported stolen. 1RP 100, 118. Both Fallon and Whittington were arrested, and the deputies began searching the car, despite Fallon's protests that they could not search without a warrant. 1RP 100, 120, 130. In the center console and behind Whittington's seat, the deputies found checks from accounts belonging to numerous people, opened mail, and an unsigned social security card in Fallon's name. 1RP 103-05, 121. Some of the checks appeared to have been altered. 1RP 122.

Fallon was charged with possession of a stolen motor vehicle and 13 counts of second degree identity theft relating to checks found in the vehicle. CP 28-32. The State presented testimony from the owners of the Explorer and the checks, each of whom testified that Fallon did not have

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<sup>2</sup> The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—1/5/09; 2RP—1/6/09 (a.m.); 3RP 1/6/09 (p.m.); 4RP—1/7/09; 5RP—3/9/09.

permission to have their property. 2RP 203, 208, 211, 215, 219, 223, 231; 3RP 324, 330, 334, 363, 368, 383.

In his defense Fallon testified that he was buying the Explorer from Whittington, and he did not know it was stolen. 3RP 388. He had just gotten off work, the Explorer had broken down, and he and Whittington were trying to fix it. 3RP 389-90. He did not know anything about the checks in the vehicle. 3RP 395-97.

Fallon was also charged with forgery and second degree theft, relating to a check he had cashed on June 10, 2008. CP 31. Fallon explained that for the past few months he had been planning to move to California, and he was trying to sell everything he could not take with him. 3RP 399. Whittington, the boyfriend of his former roommate, was helping him. Whittington had given Fallon a check for \$460 drawn on the account of Edward Kingrey and Masako Smith for his television. 2RP 239; 3RP 399. Fallon cashed the check, providing his name, driver's license number, and fingerprint. 2RP 234, 236-37; 3RP 398. Kingrey and Smith testified at trial that they did not write the check to Fallon and that Fallon did not have permission to have the check. 3RP 362-63, 367-68.

A second charge of forgery related to a \$4,500 check drawn on the account of Goodway Technologies Corporation. CP 195. Fallon testified that Whittington had arranged for the sale of Fallon's cement cutter, a

paint machine, and other equipment. 3RP 401. One of Whittington's friends brought Fallon the check, saying his father owned the company. 3RP 403.

On March 1, 2008, Fallon tried to cash the Goodway check, again providing his name, driver's license, and fingerprint. 2RP 294-95. The teller had not seen a check from Goodway before, and she believed the format of the check was unusual, so she verified the signature using Image View, a program which stores images of all checks processed by Bank of America. 2RP 289-91, 297. She noticed that the font on this check was different from other checks on that account, and she gave the check to her manager. 2RP 292. The teller testified that her manager called the Sheriff's office because she suspected the check might not have been made out to Fallon. 2RP 295. While they were attempting to verify the check, Fallon left. 2RP 295. He explained that after waiting 15 minutes, he went to his car to call Whittington about the check. When he saw the police arrive, he panicked and left. 3RP 404-05. No one from the bank contacted Goodway about the check, and the State presented no testimony from any representative of Goodway regarding the check. 2RP 309.

**b. Sentencing**

Fallon's standard sentencing range on the 13 counts of second degree identity theft was 43 to 57 months, with a statutory maximum

sentence of five years. CP 166. The court imposed a high end sentence of 57 months on each count and also ordered Fallon to serve nine to 18 months community custody. CP 169-71. A notation in the judgment and sentence stated, “The combined total amount of confinement and Community Placement or Community Custody shall not exceed the statutory maximum. RCW 9.94A.505(5).” CP 170.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT FALLON COMMITTED FORGERY AS TO THE GOODWAY CHECK.

In every criminal prosecution, due process requires the State to prove each fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). On appeal, a reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all elements of the crime were proven beyond a reasonable doubt. State v. C.G., 150 Wn.2d 604, 610-11, 80 P.3d 594 (2003); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303,

309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

As charged in this case,

(1) A person is guilty of forgery if, with intent to injure or defraud:

(a) He falsely makes, completes, or alters a written instrument or;

(b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged.

RCW 9A.60.020.

A forged instrument is a written instrument which has been falsely made, completed, or altered. RCW 9A.60.010(7). Thus, an instrument is not “forged” when it is what it purports to be. To be forged, the instrument itself must be counterfeit. Dexter Horton Nat. Bank of Seattle v. U.S. Fidelity & Guar. Co., 149 Wash. 343, 346-49, 270 Pac. 799 (1928); see also State v. Hiser, 51 Wn.2d 282, 284, 317 P.2d 1072 (1957) (the spurious character of the instrument is an essential element of forgery).

In Dexter Horton, an employee endorsed checks made out to his employer using his true name and job title. Although he was not authorized to receive the funds, the bank cashed the checks. Dexter Horton, 149 Wash. at 343. The Supreme Court held that the cashier’s endorsement did not render the checks forged instruments, because there

was no evidence the checks were falsely made, in that they purported to be anything other than what they were. Dexter Horton, 149 Wash. at 347; see also State v. Mark, 94 Wn.2d 520, 524, 618 P.2d 73 (1980) (applying Dexter Horton analysis to criminal charge of forgery).

Here, as in Dexter Horton, there was no evidence that the Goodway check was forged. Significantly, no representative from Goodway testified that the check was not authentic or had been altered in any way. The jury was told that the bank teller believed the check Fallon presented looked different from other Goodway checks, but the jury was not shown any other Goodway checks to consider. Without proof that the check was anything other than what it purported to be, the jury was left to speculate as to the check's authenticity or rely on the suspicions of the bank employees as to this essential element of the State's case. Such speculation and suspicion do not satisfy the requirement of proof beyond a reasonable doubt. See Hiser, 51 Wn.2d at 283 (lack of proof that instrument is forged "cannot be filled by suspicion, speculation, or surmise."). Fallon's conviction must be reversed and the charge dismissed.

2. FALLON'S SENTENCE IS INDETERMINATE BECAUSE IT PLACES THE BURDEN ON DOC TO ENSURE THAT THE STATUTORY MAXIMUM IS NOT VIOLATED.

The Sentencing Reform Act (SRA) requires a sentencing court to impose a determinate sentence in which the combined terms of confinement and community supervision do not exceed the statutory maximum sentence. RCW 9.94A.505(5). That statute provides:

Except as provided under RCW 9.94A.750(4) and 9.94A.753(4), a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

In addition, the SRA requires a trial judge to impose a determinate sentence, defined as follows:

"Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

RCW 9.94A.030(21).

Fallon's sentence is not determinate and violates RCW 9.94A.505.

The court below imposed a sentence of 57 months confinement plus nine to 18 months community custody on the second degree identity theft convictions. CP 169-71. Although this sentence would exceed the

statutory maximum sentence of five years, the Judgment and Sentence also included the following notation: “The combined total amount of confinement and Community Placement or Community Custody shall not exceed the statutory maximum. RCW 9.94A.505(5).” CP 170.

The trial court’s approach has been approved by the Court of Appeals in the past. State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004); see also State v. Vant, 145 Wn. App. 592, 605, 86 P.3d 1149 (2008) (adopting Sloan approach). However, Division One of this Court recently rejected the Sloan approach in State v. Linderud, 147 Wn. App. 944, 197 P.3d 1224 (2008).

In Linderud, as here, the sentencing court imposed terms of confinement and community custody which combined to exceed the statutory maximum sentence, but included a notation stating “combined maximum of prison time + community custody may not exceed the stat max of 60 months.” Linderud, 147 Wn. App. at 947. While recognizing that previous cases had approved this approach, the Court of Appeals noted that none of the prior cases had addressed whether this approach resulted in an indeterminate sentence in violation of the SRA. Linderud, 147 Wn. App. at 948-49. The Court held that “a sentence is indeterminate when it puts the burden on the DOC rather than the sentencing court to

ensure that the inmate does not serve more than the statutory maximum.”  
Linerud, 147 Wn. App. at 948.

The SRA does not authorize the DOC to determine how long a sentence will be. Rather, the SRA mandates that the court impose a determinate sentence. “Because a court may not impose a sentence that exceeds the statutory maximum and must impose a determinate sentence, it may not sentence a defendant to a term that, on its face, exceeds the statutory maximum and leave to the DOC responsibility for assuring that the sentence is lawful.” Linerud, 147 Wn. App. at 950.

Courts have a duty under RCW 9.94A.505(5) and RCW 9.94A.030(21) to impose a determinate sentence within the standard range. Linerud, 147 Wn. App. at 950. Regardless of the court’s notation, the court below imposed a sentence which exceeds the statutory maximum. Nowhere in RCW 9.94A.505 did the legislature permit the imposition of an unlawful sentence so long as the trial court believes it will not actually be served. Courts must limit the total sentence imposed to the statutory maximum, exercising discretion as to how much of the sentence is served in confinement and how much in community custody. Linerud, 147 Wn. App. at 951.

“[W]hen a court does not make an initial determination of the sentence length, and requires the DOC to calculate the inmate’s time

served and ensure it does not exceed the statutory maximum, the sentence is indeterminate in violation of the Sentencing Reform Act.” Linerud, 147 Wn. App. at 946. Such is the case here, and Fallon’s indeterminate sentence must be vacated.

D. CONCLUSION

The State failed to prove the crime of forgery beyond a reasonable doubt, and Fallon’s conviction on that offense must be reversed and the charge dismissed. In addition, the trial court imposed an indeterminate sentence in violation of the SRA, and the sentence must be vacated.

DATED this 21<sup>st</sup> day of July, 2009.

Respectfully submitted,



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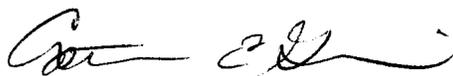
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Aaron Fallon*, Cause No. 38995-9-II directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
July 21, 2009

09 JUL 22 AM 11:43  
STATE OF WASHINGTON  
BY  DEPUTY  
COURT OF APPEALS  
DIVISION II