NO. 78254-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

COLE W. SHALE,

Petitioner.

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

The Honorable Tari S. Eitzen, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED

1. To commit the crime of unlawful possession of payment instruments, a person must possesses two or more checks "in the name of a person or entity." Where petitioner pleaded guilty to three counts of unlawful possession of payment instruments occurring on the same day involving only two different victims, do double jeopardy principles require vacation of one of the convictions?

2. When a defendant possesses stolen property from multiple owners at the same time, the unit of prosecution is a single count. Where petitioner pleaded guilty to three counts of first degree possession of stolen property occurring on the same date, do double jeopardy principles require vacation of two of the convictions?

3. Two first degree possession of stolen property charges that were originally charged as "possession of a stolen firearm" occurred on the same date and involved the same victim. Were the two charges "same criminal conduct"?

4. Must petitioner's case be remanded for resentencing based on a recalculated offender score?

B. STATEMENT OF THE CASE

1. Underlying Facts and Plea Hearing

On July 2, 2004, police stopped Petitioner Cole Shale in his pickup truck. After arresting Shale on a warrant, police found in the truck items connected with a series of burglaries. Police also located other items in a storage unit Shale rented. Supplemental Response to Personal Restraint Petition (Supp. Resp.) Att. A and D. Shale denied participating in any burglary but acknowledged he obtained the items from another man, Donald Myhren, in exchange for drugs. RP 26-27; Supp. Resp. Att. D.

At his November 16, 2004 plea hearing, Shale plead guilty to twelve charges under seven case numbers:

Case no.	Charge	Date
04-1-02712-9	Second degree poss. of stolen prop. (PSP)	7/2/2004
04-1-02713-7	**First degree PSP**	**7/2/2004**
	First degree PSP	**7/2/2004**
04-1-02714-5	Forgery	6/29/2004
	Forgery	7/1/2004
	Second degree identity theft	6/29/04-7/1/04
04-1-02816-8	**Unlawful poss. of payment instruments**	**7/2/2004**
	Unlawful poss. of payment instruments	**7/2/2004**
	Unlawful poss. of payment instruments	**7/2/2004**
04-1-02817-6	Second degree PSP	6/14/2004
04-1-02873-7	**First degree PSP**	**7/2/2004**
04-1-02897-4	Second degree burglary	6/9/2004

Those pertinent to Shale's claims here are shown in bold print.

Before the plea hearing, the court permitted the State to amend certain charges. RP 6-7. Under 04-1-02713-7, Shale was originally charged with two counts of possession of stolen firearms. The State amended the charges to two counts of first degree possession of stolen property other than a firearm and informed the court Shale would stipulate to property values of over $1,500 as to each count. RP 6-7, 11; Supp. Resp. Att. B (Information and Amended Information).

Under 04-1-02816-8, the State charged Shale with three counts of unlawful possession of payment instruments. At the hearing, the State informed the court it was charging one count based on victim Dean Hackett and the other two counts based on victim Katy Bassen. RP 5-6, 10; Supp. Resp. Att. A. The State specifically stated the charges were not based on another alleged victim, Malmsten, who was originally named in the charging documents.[1] RP 6; Supp. Resp. Att. A.

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[1] The exchange occurred as follows:

> [The State]: Your Honor, Count I relates to a victim named Forrest [sic] Hackett. . . . Count II and III related to a victim named Katy Bassen.
>
> . . . .
>
> [The Court]: There was a victim Malmsten in that case.
>
> [The State]: Your Honor, there was. In this particular case, there was so much stuff taken and Malmsten lives in Idaho. . . . I am just not putting his name in this particular matter. Idaho can handle that if they want.

(continued...)

The court reviewed with Shale each listed case number individually and inquired whether he understood the standard range sentences, the State's recommended sentences, and the amount of restitution requested. The court also inquired if Shale was promised anything in exchange for his pleas under each case number. RP 20-23.

Shale pleaded guilty to 12 charges. RP 28-30. Based the resulting offender score of 11, the court sentenced Shale to 29 months, the high end of the standard range, on the unlawful possession of payment instruments, forgery, and second degree possession of stolen property charges. It sentenced him to 57 months, the high end of the standard range, on second degree identity theft and first degree possession of stolen property charges. Finally, it sentenced him to 57 months, within standard range, on the second degree burglary charge. The court ordered each of the sentences to run concurrently. RP 58-60.

2. Post-Plea Proceedings

In February of 2005, Shale moved under CrR 7.8 to vacate his judgment and sentence as to each charge. On April 19, 2005, Spokane

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[1](...continued)

[The Court]: So Count I is victim Hackett. Count I and Count III victim Bassen.

[The State]: That's correct.

RP 5-6.

County Superior Court transferred the matters to Division Three of the Court of Appeals for consideration as a single personal restraint petition (PRP). On January 5, 2006, the Court filed an order dismissing Shale's PRP.

Shale moved this Court for discretionary review, and on April 5, 2006 a commissioner of this Court directed the State to respond. On September 7, 2006, this Court granted discretionary review and appointed counsel for Shale.

C. ARGUMENT

1. BECAUSE SHALE'S THREE CONVICTIONS FOR UNLAWFUL POSSESSION OF PAYMENT INSTRUMENTS ARE BASED ON ONLY TWO VICTIMS, ONE CHARGE MUST BE VACATED AND DISMISSED.

Based on a "unit of prosecution" analysis, the court's judgment under 01-1-02816-8 in violates double jeopardy. By entering a guilty plea, Shale did not waive his claim, and he is entitled to relief here.

a. Shale's Guilty Plea Does Not Bar This Double Jeopardy Challenge.

Shale's guilty plea does not preclude this Court's review of his double jeopardy claim. A guilty plea to a charge does not waive a claim that, judged on its face, the charge is one which the State may not constitutionally prosecute. In re Butler, 24 Wn. App. 175, 178, 599 P.2d

1311 (1979) (citing Menna v. New York, 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975); Launius v. United States, 575 F.2d 770 (9th Cir. 1978)); State v. Cox, 109 Wn. App. 779, 782, 37 P.3d 1240, review denied, 147 Wn.2d 1003 (2002); see also United States v. Broce, 488 U.S. 563, 575-76, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989) (defendant's double jeopardy claim not barred by guilty plea where violation obvious on face of the indictment); United States v. Stanwood, 872 F.Supp. 791, 796-97 (D.Or., 1994) (so holding and vacating charge). Moreover, in his plea agreement, Shale did not explicitly waive his double jeopardy or other constitutional claims. State v. Kells, 134 Wn.2d 309, 314, 949 P.2d 818 (1998).

Thus, although Shale pleaded guilty to each of the charges currently at issue, Shale may now raise these double jeopardy challenges.

b. Based on a "Unit of Prosecution" Analysis, One Unlawful Possession of Stolen Payment Instruments Must Be Vacated.

Under the double jeopardy provisions of the United States and Washington State Constitution, a defendant may not be convicted more than once under the same criminal statute if only one "unit" of the crime has been committed. U.S. Cosnt. amend. V; Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); State v. Tvedt, 153 Wn.2d

705, 710, 107 P.3d 728 (2005). The "unit of prosecution," or the punishable act under the statute, is determined by examining the statute's plain language. Leyda, 157 Wn.2d at 342; State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). If the legislature has failed to specify the unit of prosecution in the statute or if its intent is not clear, this Court resolves any ambiguity in favor of the defendant. Tvedt, 153 Wn.2d at 711.

Here, Shale pleaded guilty to three counts of unlawful possession of payment instruments. RCW 9A.56.320(2)(a), the statute at issue, states in pertinent part:

> A person is guilty of unlawful possession of payment instruments if he or she possesses two or more checks or other payment instruments, alone or in combination:
>
> (i) In the name of a person or entity, or with the routing number or account number of a person or entity, without the permission of the person or entity to possess such payment instrument, and with intent either to deprive the person of possession of such payment instrument or to commit theft, forgery, or identity theft.

(Emphasis added.) No published case has addressed the unit of prosecution under this statute. However, another recently decided case is instructive.

In State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005), this Court was asked to determine the unit of prosecution for second degree possession

of stolen property where the State alleged the defendant "possess[ed] a stolen access device" under RCW 9A.56.160(1)(c). This Court stated:

> because the word "a" is [in general] used only to precede singular nouns . . . , the legislature's use of the word "a" before "stolen access device" unambiguously gives RCW 9A.56.160(1)(c) the plain meaning that possession of each stolen access device is a separate violation of the statute.

Ose, 156 Wn.2d at 146. This Court specifically rejected Ose's argument "a" in the statute could be read as "any stolen access device" and that "any number of stolen access devices would constitute only one unit of prosecution." Id. at 146-47.

It follows from Ose that the statutory language here, "[i]n the name of a person or entity," indicates there is one unit of prosecution for each person or entity whose payment instruments the defendant possesses. RCW 9A.56.320(2)(a)(i). Moreover, for a violation of this statute to occur, a defendant must possess more than one check or payment instrument per person or entity. Thus, any number of payment instruments belonging to a single victim can only support one charge.

Shale pleaded guilty to three counts of unlawful possession of payment instruments occurring on July 2, 2004 based on possession of checks belonging to only two different people: Hackett and Bassen. RP 5-6. Regardless of how many payment instruments belonging to each

victim Shale possessed, he only committed two offenses, one pertaining to each victim.

Because there were only two victims of unlawful possession of payment instruments, Hackett and Bassen, but there two charges related to Bassen, one of the Bassen charges must be vacated and dismissed. See Butler, 24 Wn. App. 175 (following guilty plea, vacating conviction on charge violating double jeopardy).[2] Moreover, even if the invalid conviction is to be served concurrently, it has potential adverse collateral consequences that may not be ignored; the conviction "carries the societal stigma accompanying any criminal conviction." State v. Calle, 125 Wn.2d 769, 772, 776, 888 P.2d 155 (1995). Regardless of the effect on Shale's offender score or sentence, this constitutional defect has prejudiced Shale. RAP 16.4; In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

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[2] Shale does not seek withdrawal of his guilty plea under 01-1-02816-8 nor seek to undo any other plea agreement. Shale entered guilty pleas under all seven case numbers at the November 16, 2004 plea hearing. But in its colloquy with Shale, the court reviewed each case number individually, describing the original charges, the corresponding amended charges if applicable, and the standard range sentence for each count. Thus, it is clear on this record that the court treated each case number separately. RP 21-23; cf. State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003) (even where there are multiple charges, some plea agreements may involve one bargain or a "package deal" if charges made at the same time, described in one document, and accepted in a single proceeding).

2. BECAUSE SHALE WAS CONVICTED OF THREE COUNTS OF FIRST DEGREE POSSESSION OF STOLEN PROPERTY OCCURRING ON THE SAME DATE BUT COMMITTED ONLY ONE OFFENSE, HE IS ENTITLED TO THE VACATION AND DISMISSAL OF TWO OF THE CHARGES.

Under the "unit of prosecution" test, Shale's three convictions for first degree possession of stolen property under 04-1-02713-7 and 04-1-02873-7 violate double jeopardy.

RCW 9A.56.150(1) states, "A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property other than a firearm as defined in RCW 9.41.010 which exceeds one thousand five hundred dollars in value." When a defendant possesses stolen property from multiple owners at the same time, the unit of prosecution is a single count of possession of stolen property. State v. McReynolds, 117 Wn. App. 309, 335-40, 71 P.3d 663 (2003); cf. Ose, 156 Wn.2d 140 (where second degree possession of stolen property charge based on possession of "a stolen access device," language of that subsection unambiguously defines unit of prosecution as each access device possessed). As in McReynolds, Shale's three counts of first degree possession of stolen property occurring on July 2, 2004 should be considered a single unit of prosecution.

The State may argue that Shale's claim should be rejected because under 04-1-02713-7, the State originally charged Shale with two counts of

possession of stolen firearms and then amended these charges to lesser charges.[3] In In Restraint of Barr, 102 Wn.2d 265, 684 P.2d 712 (1984), for example, Barr challenged his guilty plea to indecent liberties, arguing the trial court failed to establish a factual basis for the plea and the plea was not "knowing and voluntary" because Barr was not informed of a critical element of the charge. This Court held Barr had waived any challenge to the conviction because even though the facts did not support an element indecent liberties, the record established a factual basis for the more severe crimes originally charged and revealed "defendant's understanding of his complicity in those crimes." Id. at 270-71.

But here, the record establishes neither a factual basis for the original charges nor Shale's admission to those crimes. In 04-1-02713-7, Shale was originally charged with two counts of possessing a stolen firearm under RCW 9A.56.310. The amended information charged him with two counts of possession of stolen property other than a firearm and each count and for each count listed a gun and other items Shale was alleged to have possessed. Supp. Resp. Att. B.

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[3] First degree possession of stolen property is a "level II" charge with a standard range sentence of 43-57 months with offender score of nine or more. Possession of a stolen firearm is a "level V" charge with a standard range sentence of 72-96 months with that same offender score. RCW 9.94A.510; former RCW 9.94A.515. Sentences for possession of a stolen firearm must be served consecutively. RCW 9.94A.589(1)(c).

The term "firearm" is defined by statute. Both RCW 9A.56.310, possession of a stolen firearm, and RCW 9A.56.150, first degree possession of stolen property, cross-reference RCW 9.41.010, which defines a firearm as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." See also State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (gun rendered permanently inoperable is not "firearm" under this statute because it is not ever capable of being fired), review denied, 139 Wn.2d 1003 (1999).

Shale stipulated to possession of stolen property of over $1,500 as to each count in the amended information. And in the "Statement of Defendant on Plea of Guilty" filed under each case number, he agreed the court could review the police reports and the State's statement of probable cause to establish the factual basis for his pleas. But Shale did not admit the guns listed in the information, amended information, or police reports were "firearms" under RCW 9.41.010. Nor is this made clear elsewhere in the record before the plea court. E.g. RP 6-7, 11; Supp. Resp. Att. D. Thus, unlike in Barr, the record does not reveal, and Shale did not admit to, facts supporting more severe charges.

Under the McReynolds "unit of prosecution" test, the applicable rule is that possession of property belonging to multiple owners at the same time

results in a single count of possession of stolen property. 117 Wn. App. at 335-40. Because Shale was convicted of three counts of possession of stolen property occurring on July 2, 2004 but committed only one offense, two of his convictions should be vacated and dismissed.

3. ALTERNATIVELY, THE TWO FIRST DEGREE POSSESSION OF STOLEN PROPERTY CONVICTIONS UNDER 04-1-02713-7 ARE "SAME CRIMINAL CONDUCT."

The charges in 04-1-02713-7 appear to be the same criminal conduct because they involve the same criminal intent, the same victim, and were committed on the same date. However, under In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002), Shale may have waived this challenge by failing to object below.

a. A "Same Criminal Conduct" Finding is Reviewed for Abuse of Discretion.

Where a defendant is convicted of two or more crimes, current offenses are treated as prior convictions for determining the offender score, except where "the current offenses encompass the same criminal conduct . . . those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a). Multiple offenses encompass the same criminal conduct if (1) they require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a); State v. Williams, 135 Wn.2d 365, 367, 957 P.2d 216 (1998). A trial

court's determination of what constitutes the same criminal conduct is reversed for an abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Dolen, 83 Wn. App. 361, 364, 921 P.2d 590 (1996), review denied, 131 Wn.2d 1006 (1997). Even if the presence of multiple firearms constitutes separate offenses for charging purposes, the "same criminal conduct" provision applies for purposes of calculating the offender score. Haddock, 141 Wn.2d at 114-15; State v. Murphy, 98 Wn. App. 42, 51, 988 P.2d 1018 (1999), review denied, 140 Wn.2d 1018 (2000).

Shale's two first degree possession of stolen property convictions under case number 04-1-02713-7 are based on possession of two guns occurring on the same date, July 2, 2004, and against the same victim, the public. See Williams, 135 Wn.2d at 367; State v. Simonson, 91 Wn. App. 874, 885-86, 960 P.2d 955 (1998) (describing victim of possession offenses as public at large), review denied, 137 Wn.2d 1016 (1999). The police's "summary of facts" indicates both guns were taken from Warren Hobbs. Supp. Resp. Att. D. Although the reports in the record indicate one firearm was discovered in a bag in the bed of Shale's pickup truck and another was found in his storage unit, Shale was clearly storing both firearms -- neither gun was found on Shale's person at the time of his

arrest. Id. Possession of the two firearms constituted "same criminal conduct."

b. Shale Did Not Acknowledge or Stipulate to the State's Calculation of His Offender Score.

Here, the "Statement of Defendant on Plea of Guilty" for each charge states at page 2:

> In considering the consequences of my guilty plea, I understand that: (a) Each crime with which I am sentenced carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows.

The statements then list for each charge the seriousness level, standard range, and maximum terms based on an offender score of "9."

At Shale's plea hearing, the following exchange occurred:

> [The Court]: . . . . I am going to explain to you what my understanding is and you tell me if this is your understanding. You had no prior felony history?
> [Shale]: None.
> [The Court]: And that the reason we are looking at an offender score of 9 here is because all of the concurrent offenses; is your understanding?
> [Shale]: Yes.
> [The Court]: All right. You understand that an offender score of 9 puts you at the top end of the standard sentencing ranges for all of theses offenses?
> [Shale]: Yes.

RP 14-15. This exchange reveals Shale never acknowledged his offender score -- only that his offender score was based on his current offenses because he had no prior criminal history and that he understood of the effect

of his offender score on his standard sentencing range. RP 14-15. This is a far cry from stipulating to or acknowledging his offender score. See, e.g., State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (defendant's presentence memorandum acknowledges offender score was properly calculated), review denied, 141 Wn.2d 1030 (2000).

c. This Court's Decision in Goodwin Notwithstanding, Shale Should be Permitted to Raise this Issue.

In Goodwin, this Court set out the general rule regarding collateral attack of miscalculated offender scores:

> [1] a sentence in excess of statutory authority is subject to collateral attack, [2] . . . a sentence is excessive if based upon a miscalculated offender score (miscalculated upward), and [3] . . . a defendant cannot agree to punishment in excess of that which the Legislature has established.

Goodwin, 146 Wn.2d at 873-74. However, this Court noted two limitations to this rule:

> While waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.

Id. at 874.

For the latter point, this Court cited to Nitsch, 100 Wn. App. 512. In that case, Nitsch argued for the first time on appeal the two crimes he was convicted of constituted the same criminal conduct and therefore neither

could be counted as part of his offender score. But he agreed in his own presentence memorandum his offender score was properly calculated. The Court of Appeals noted that application of the same criminal conduct statute involves both factual determinations and the exercise of discretion. Id. at 523. The Court therefore held that the defendant's "failure to identify a factual dispute for the court's resolution and . . . failure to request an exercise of the court's discretion" waived the challenge to his offender score. Id. at 520; see also State v. MacDougal, 132 Wn. App. 609, 132 P.3d 786 (2006) (sentencing judge does not commit legal error or otherwise abuse his discretion by imposing a sentence based upon an agreed offender score unless the offender score is wrong as a matter of law); but see State v. Anderson, 92 Wn. App. 54, 960 P.2d 975 (1998) (treating the trial court's calculation of defendant's offender score as an implicit determination that his offenses did not constitute the same criminal conduct and reviewing for abuse of discretion), review denied, 137 Wn.2d 1016 (1999).

Unlike the defendant in Nitsch, Shale did not agree his offender score was properly calculated. Accordingly, Shale requests this Court find he did not waive this argument and, because "same criminal conduct" is clear from this record, find the trial court abused its discretion in counting

both first degree stolen property charges under 04-1-02713-7 toward Shale's offender score. Anderson, 92 Wn. App. at 62.

4. SHALE'S CASE SHOULD BE REMANDED FOR RE-SENTENCING TO REFLECT A CORRECTED OFFENDER SCORE.

Because one unlawful possession of payment instruments charge and two first degree possession of stolen property charges should be vacated and dismissed, Shale's offender score is reduced by three points, and his case should be remanded for resentencing based on an offender score of eight.

The Judgment and Sentence for each case number indicates Shale was sentenced based on an offender score of "9+" as to each charge. He received a high-end standard range sentences in all but one conviction, second degree burglary, the crime with the longest standard range. On that charge, Shale was sentenced to 57 months on the 51-68 month standard range. Judgment and Sentence, Case No. 04-1-02897-4 at 7. With an offender score of eight, however, the range for second degree burglary is only 43-57 months. RCW 9.94A.510; former RCW 9.94A.515.

Alternatively, if this Court agrees Shale's unlawful possession of payment instruments should be vacated and the two charges under 04-1-02713-7 are same criminal conduct, then Shale's offender score should be

recalculated at "9," not "9+," and he should be re-sentenced based on that score. See State v. Parker, 132 Wn.2d 182, 192-93, 937 P.2d 575 (1997) (because unclear whether sentencing court would have imposed the same exceptional sentence with the correct offender score, remand required).

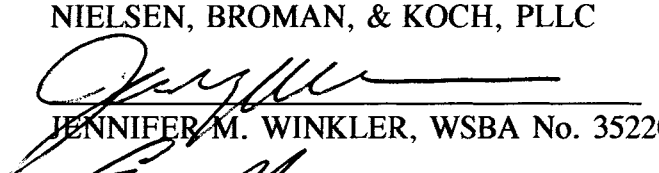
D. CONCLUSION

For all of the reasons stated in Shale's petition and subsequent briefs, this Court should grant the personal restraint petition and vacate one of Shale's convictions for unlawful possession of possession of payment instruments. Moreover, this Court should vacate two of the July 2, 2004 first degree possession of stolen property convictions. In the alternative, the Court should find two of the charges are same criminal conduct. Finally, this Court should remand for resentencing based on a recalculated offender score.

DATED this 20 day of October, 2006.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



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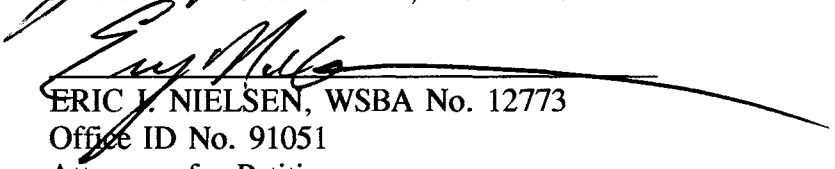

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