

NO. 63810-6-I

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

In re the Personal Restraint of

WAYNE NEWLUN,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT
SNOHOMISH COUNTY

MARK K. ROE
Prosecuting Attorney

KATHLEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

FILED
COURT OF APPEALS, DIV. #1
STATE OF WASHINGTON
2010 APR 13 AM 10:25

TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 3

IV. CONCLUSION..... 10

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Shale</u> , 160 Wn.2d 489, 158 P.3d 588 (2007)	7, 8, 9
<u>State v. Knight</u> , 134 Wn. App. 103, 138 P.3d 1114 (2006).....	6
<u>State v. Knight</u> , 162 Wn.2d 806, 174 P.3d 1167 (2008)	5, 7, 9
<u>State v. Leyda</u> , 157 Wn.2d 335, 138 P.3d 610 (2006)	4, 9
<u>State v. Martin</u> , 149 Wn. App. 689, 205 P.3d 931 (2009).....	7

FEDERAL CASES

<u>Blackledge v. Perry</u> , 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).....	7
<u>Menna v. New York</u> , 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975).....	7
<u>United States v. Broce</u> , 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989).....	5, 6, 8, 9

WASHINGTON STATUTES

RCW 9.35.020.....	4
-------------------	---

I. ISSUES

1. The defendant was charged with Identity Theft in two different cause numbers. Did the facts before the court establish the charges constituted the same unit of prosecution implicating double jeopardy considerations when each case alleged the same victim, but did not allege the same kind of identity stolen?

II. STATEMENT OF THE CASE

On January 26, 2006 the petitioner, Wayne Newlun, was charged in a six count Information with various property crimes in Snohomish County cause number 06-1-00241-0. Count I charged First Degree Identity Theft. The charge alleged that the defendant,

on or about November 16, 2005, did knowingly obtain, possess, use and transfer a means of identification and financial information of a person, to wit: identification belonging to Guy Randall, with intent the intent to commit, aid and abet a crime, to wit: First Degree Theft, and the defendant or an accomplice used such person's means of identification and financial information to obtain credit, money, goods, services, and other things having an aggregate value totaling more than \$1,500...

EX. 5 to State Response to Personal Restraint Petition.¹

Pursuant to the affidavit of probable cause the defendant

¹ Unless otherwise noted all references to exhibits are to the exhibits attached to the State's initial response to Personal Restraint Petition filed on September 28, 2009.

was alleged to have presented "Guy Randal's ID with his (the defendant's) picture and signed rental agreement" when he rented a 2004 Chevrolet Silverado truck from Lowe's. Ex. 6. The defendant agreed to plead guilty to the charges in exchange for the State forgoing filing additional charges of identity theft, forgery, and second degree theft. In his statement of defendant on plea of guilty the defendant said as to count I:

On 11/16/05 I knowingly possessed a means of identification and financial information belonging to Guy Randall with the intent to commit or abet the crime of First Degree theft and that I or an accomplice used such persons means of identification and financial information to obtain, (sic) credit, money, goods, services, and other things having an aggregate value totaling more than \$1,500.00 and the crime was aggravated by the following circumstances; the crime was a major economic offense due to the following factors; the crime involved multiple victims and multiple incidents per victim.

Ex. 7.

On March 21, 2006 the defendant was charged with Second Degree Identity Theft and Forgery in Snohomish County cause number 06-1-00648-2. Count I, Second Degree Identity Theft alleged:

The defendant, on or about the 14th day of December, 2005, did knowingly obtain, possess, use and transfer a means of identification and financial information of a

person, to wit; Guy Randal, with the intent to commit, aid and abet a crime, to wit: forgery, ...

Ex. 9.

According to the affidavit of probable cause the defendant tried to buy a gift card and some groceries from Safeway using a check. The check had the name Guy Randal printed above the names Pavlina Selezneva and Valeriy Akulov. The defendant produced a driver's license in the name of Guy Randal as identification. Ex. 10.

In his statement of defendant on plea of guilty the defendant said:

Count I: On 12-14-05, I Knowingly Possessed A means of Identification And Financial Information Of Guy Randal With Intent To Commit Or Abet The Crime of Forgery.

Ex. 11.

Additional facts are set out in the State's original response to personal restraint petition. They are incorporated herein by reference.

III. ARGUMENT

The petitioner argues that his convictions for Identity Theft in Snohomish County involving Guy Randall as the named victim, violate the proscription against double jeopardy, relying on State v.

Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006).² Leyda held the unit of prosecution for each identity theft charge under former RCW 9.35.020 was the possession, use, transfer, or obtainment of each piece of a person's identity or financial information, regardless of the number of times it had been used. Id. at 345. However, the Court noted that "a separate unit of prosecution may be charged where the accused has either possessed, obtained, use, or transferred multiple means of a single individual's financial information or identification with the requisite intent." Id. at 347, n. 9.

The defendant now raises a collateral challenge to his convictions arguing that he was convicted of multiple counts of a single unit of prosecution when he pled guilty to two counts of identity theft involving Guy Randall's identification in Snohomish County. Thus he argues his right to be protected against double jeopardy has been violated.³

² The defendant makes the same assertion to a third count of Identity Theft in which Guy Randall was the named victim and to which the defendant pled guilty in King County. King County has filed a response to this petition as it relates to that count.

³ He similarly asserts that his double jeopardy rights were violated when he pled guilty to a third count of identity theft alleging Guy Randall as the victim in King County.

A defendant who has pled guilty to multiple offenses may raise a collateral attack to those convictions if the attack is based on double jeopardy grounds. State v. Knight, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008). This is an exception to the general rule that a guilty plea insulates a defendant's conviction from collateral attack because it is a claim which goes to the power of the State to bring the defendant into court and answer the charges brought against him. Id. at 811. The exception is limited by the requirement that the claim must be supported by the record before the judge who took the plea. United States v. Broce, 488 U.S. 563, 575-76, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), Knight, 162 Wn.2d at 811.

In Knight the defendant pled guilty to conspiracy to commit first degree burglary, conspiracy to commit second degree robbery, and second degree murder. The charges arose from the defendant's agreement with others to lure the victim from his hotel room, where the original robbery was to have occurred. When the conspirators were unable to accomplish the robbery there they later conspired so that Knight lured the victim to an alley where the two others shot and robbed the victim. The Court of Appeals found the two conspiracy charges supported only one conspiracy conviction.

State v. Knight, 134 Wn. App. 103, 110, 138 P.3d 1114 (2006). Because the record before the court only supported the one conviction, the defendant was entitled to have her conviction for conspiracy to commit first degree burglary vacated on double jeopardy grounds even though she had pled guilty to the charge. Knight, 162 Wn.2d at 811-812.

In contrast the Court could not determine there was any double jeopardy violation from the record before the trial court in Broce. There the defendant pled guilty to two separate indictments charging the defendants with concerted acts to rig bids on work for two different highway projects at two different times in violation of the Sherman Act. Broce, 488 U.S. at 565. The defendant's acknowledged in the plea agreements that they were subject to separate sentences on each charge. Id. The defendants then sought to take advantage of a subsequent decision by the Court where defendant's Beachner were charged with similar violations. The Beachner defendants had established that each act of bid rigging was a continuous course of conduct, thereby entitling them to dismissal of subsequent charges on double jeopardy grounds.

The Court rejected the Broce defendants' argument reasoning that a defendant who pleads guilty to two counts that on

their face alleged two distinct offenses concedes that he has committed two separate crimes. Id. at 570. Because the defendants did not afford themselves of the opportunity to challenge the theory that there were two distinct crimes before pleading guilty they waived that issue. Id. at 571. The Court distinguished its earlier decisions in Blackledge⁴ and Menna⁵ on the basis that in neither of those cases the defendant sought to expand the record with new evidence when arguing double jeopardy violations resulting from their guilty pleas.

A later case applied the rule in Broce. In re Shale, 160 Wn.2d 489, 158 P.3d 588 (2007)⁶. In Shale the defendant pled guilty to multiple counts of possession of stolen property alleged to have been committed on the same date. On appeal he argued that those counts constituted the same unit of prosecution, and therefore convictions for multiple counts constituted a violation of

⁴ Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

⁵ Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975).

⁶ Only 8 members of the Court participated in the decision in Shale. Four members of the Court signed the lead opinion and the remaining four members signed the concurring opinion. The lead opinion held the defendant could not challenge the guilty plea on double jeopardy grounds on the basis that the defendant had entered into an indivisible plea agreement and could not challenge only a portion of that agreement. Shale, 160 Wn.2d at 493-94. The Court apparently has overruled that decision in Knight. See State v. Martin, 149 Wn. App. 689, 695, 205 P.3d 931 (2009) wherein this Court stated the lead opinion in Shale has been overruled sub silentio.

his double jeopardy rights. In a concurring opinion signed by four of the justices stated that the judgment and sentences only established part of the necessary facts to constitute a single unit of prosecution. Because the judgment and sentences only might have established each count constituted the same unit of prosecution, the concurrence was not willing to find a double jeopardy violation had been established from the record. Id. at 498-99.

Like Broce and the concurrence in Shale, the record before the court in cause numbers 06-1-00241-0 and 06-1-00648-2 do not on their face establish a single unit of prosecution. The record in 06-1-00648-2 does identify the piece of identification or financial information possessed by the defendant as Guy Randall's driver's license and a check with Guy Randall's name on it. The record before the Court in cause number 06-1-00241-0 is not specific as to what kind of identification the defendant possessed. It merely refers to "identification belonging to Guy Randall," "Guy Randall's ID with his (the defendant's) picture and signed rental agreement," and "a means of identification and financial information belonging to Guy Randall." While identification could be a driver's license, it could also be a driver's license from another State, an official state

identification card from Washington or any other State, a library card, a credit card with the defendant's picture and Guy Randall's name on it, or any other kind of official identification that commonly has both the name and image of an individual on it. Much like Shale the defendant's challenge fails because on its face the convictions for identity theft in the two cause numbers only may constitute a single unit of prosecution. Because under Leyda possession of more than one kind of identification even if it is in the name of the same victim constitutes a separate offense, identification in an individual's name alone, without more information, is insufficient to sustain the defendant's burden of proof.

The defendant attempts to enlarge the record by producing additional information that was not before the court at the time of the plea and sentence. See Reply to Respondent's Reply Brief, appendix A and B. By separate motion the State asks the Court to strike those documents because they were not part of the record in the trial court. Because the Court in Broce, Knight, and Shale all acknowledged that a double jeopardy claim after a guilty plea may only be collaterally attacked based on the record before the court at the time of the plea and sentence, the additional documents relied

upon by the defendant do not support his claim. The record which the Court may rely upon does not establish the defendant pled guilty to multiple counts which constitute a single unit of prosecution. The defendant has therefore waived the double jeopardy argument by pleading guilty to the two counts on that record.

IV. CONCLUSION

Because the record does not establish the defendant pled guilty to two counts of identity theft that constitute a single unit of prosecution he has waived his double jeopardy argument. The petition should be dismissed.

Respectfully submitted on April 12, 2010.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney
Attorney for Respondent