IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEXTER LAMAR PETRIE, JR., Appellant.	No. 38644-5-II Unpublished OPINION

Bridgewater, P.J. — Dexter Lamar Petrie, Jr., appeals his convictions of identity theft and theft. Under *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892, 46 P.3d 840 (2002), we hold that the convictions of identify theft and theft do not violate double jeopardy. We affirm.

Petrie, with help from his girlfriend, Erica David, collected credit card information from several patrons of the Indochine restaurant in Tacoma. He obtained credit card information from Pamela Mesick, Jean Swanson, Kristen Costello, and Kathleen Montante. Using their information, Petrie bought merchandise or gift cards from Zebra Club, Niketown, Nordstrom, Fred Meyer, and Gene Juarez.

The State charged and a jury convicted Petrie of two counts of first degree identity theft, two counts of second degree identity theft, one count of first degree theft, and four counts of second degree theft.

ANALYSIS

I. Double Jeopardy

Petrie first argues that this court must vacate his theft convictions because they are lesser included offenses of his identity theft convictions, and, therefore, his conviction for both offenses violates double jeopardy. We disagree.

Article I, section 9 of the Washington State Constitution, and the Fifth Amendment to the federal constitution prohibit multiple punishments for the same offense. *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). But a trial court does not necessarily impose multiple punishments for the same criminal conduct if the conduct it punishes more than once violates more than one criminal statute. *See State v. Calle*, 125 Wn.2d 769, 776-77, 888 P.2d 155 (1995). The fundamental issue is whether the legislature intended to authorize multiple punishments for a criminal conduct that violates more than one statute. *See Calle*, 125 Wn.2d at 776.

Washington courts use a three-step analysis to determine whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one statute. *In re Burchfield*, 111 Wn. App. at 895 (citing *Calle*, 125 Wn.2d at 776). First, we look to the statutory language to determine whether the legislature specifically authorized separate punishments. *In re Burchfield*, 111 Wn. App. at 895-96. Second, if the statute is silent, we apply the "same evidence" test to determine whether each offense has an element not contained in the other. *In re Burchfield*, 111 Wn. App. at 896. Third, if each offense contains a separate element, we look for evidence of legislative intent to treat the crimes as one offense for double jeopardy purposes. *In re Burchfield*, 111 Wn. App. at 896.

The amended identity theft statute specifically authorizes separate punishments for each offense arising out of identity theft. RCW 9.35.020.[1] If we found the amended statute applicable to the case at bar, our resolution would be simple, but we would have to undertake a retroactive analysis. *See State v. Kane*, 101 Wn. App. 607, 613, 5 P.3d 741 (2000). We decline to undergo retroactivity analysis, however, because the law is clear that at the time of the commission of the crimes, Petrie's theft and identity theft convictions did not violate double jeopardy.

The pertinent statutes here do not address the issue of multiple punishments; therefore, we apply the "same evidence" test. Under the "same evidence" test, we consider whether each offense, as charged, includes an element not included in the other. *In re Burchfield*, 111 Wn. App. at 896. If proof of one offense would not necessarily prove the other, the offenses are not unconstitutionally multiple and double jeopardy does not preclude convictions for both offenses. *In re Burchfield*, 111 Wn. App. at 896; *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) ("[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not").

Applying the "same evidence" test to identity theft and theft, we hold that they are not the same in law or fact. The identity theft statute, former RCW 9.35.020 (2004)[2], does not require

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[1] "Every person who, in the commission of identity theft, shall commit any other crime may be punished therefor as well as for the identity theft, and may be prosecuted for each crime separately." RCW 9.35.020(6).

[2] "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any

proof that defendant intended to deprive another of property or services, and the theft statute, RCW 9A.56.020[3], does not require proof that the defendant "obtain, possess, use, or transfer" another person's identification or financial information. To be clear, proof of theft does not prove identity theft—and vice versa—because those crimes contain different elements. Instead, Petrie's identity theft was his means of committing theft, and the offenses involved different victims; accordingly, the offenses were not the same in fact. *See State v. Baldwin*, 150 Wn.2d 448, 457, 78 P.3d 1005 (2003) (offenses are not factually the same if they harm different victims). Petrie's victims in the identity theft charge, who suffered from loss of financial information, were Mesick, Swanson, Costello, and Montante. His victims in the theft charges were the retail merchants where Petrie used the stolen financial information: Zebra Club, Niketown, Nordstrom, Fred Meyer, and Gene Juarez. They suffered from loss of merchandise. Therefore, identity theft and theft are not the same in law or fact and we hold that convictions for both do not violate double jeopardy.

II. Ineffective Assistance

Petrie next argues that he received ineffective assistance of counsel in two instances: (1) when his counsel failed to argue at sentencing that theft and identity theft are the same criminal conduct, and (2) when his counsel failed to challenge venue. He is not persuasive.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. We use the familiar tests set forth in *Strickland v. Washington*, 466 U.S. 668, 686-87,

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crime." Former RCW 9.35.020(1).

[3] "'Theft' means: (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020.

104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), to show (1) deficient performance and (2) prejudice. Ineffective assistance of counsel fails without proof of deficient performance and prejudice. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Here, Petrie's counsel was not deficient where, at sentencing, he declined to make arguments that were contrary to law regarding double jeopardy and same criminal conduct. Further, Petrie's counsel was not deficient where he declined to request venue change when the venue was correct under former RCW 9.35.020(5) (the crime will be considered in any locality where any part of the offense took place) because while Petrie used the financial information in King County, he acquired the information in Pierce County. Venue was appropriate in Pierce County.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.