

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

NO. 45049-6-II

IN THE COURT OF APPEALS,
OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON,
Respondent,

v.

CHANDRA WITT,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

GERALD R. FULLER
Interim Prosecuting Attorney
for Grays Harbor County

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

Procedural Background

The defendant was charged by Information on February 14, 2013, with Trafficking in Stolen Property in the First Degree, RCW 9A.82.050. (CP 1). An Amended Information was filed on May 7, 2013, to properly include all the necessary elements of the crime. (CP 23). A jury trial was commenced on May 7, 2013. Prior to jury selection the court ruled regarding the admissibility, pursuant to ER 404(b), of the defendant's out-of-court statement. The court ruled that the statement could be used at trial after certain redactions were made. (Exhibit 22, RP 10-12).

Following deliberations, the jury returned a verdict of guilty of the crime of Trafficking in Stolen Property in the Second Degree, RCW 9A.82.055, a lesser degree of the charged offense. The defendant was sentenced to serve 10.5 months in the Grays Harbor County Jail, 15 days of which were converted to 120 hours of community service. The court ordered, without objection from the defendant, the following costs and assessments: crime victim assessment \$500.00; court costs (filing fee) \$200.00; \$500.00 attorney fees; \$100.00 DNA collection fee; and \$72.00 restitution to Butcher's Scrap and Metal.

Factual Background

On June 21, 2012, Anna Owens-Pierce and Michelle Hinkle went to Butcher's Scrap and Metal, a business located in the city of Hoquiam to sell copper. The business purchased the items, paying Ms. Owens-Pierce \$72.00. (Exhibit 1, RP 45-46). Butcher's Scrap and Metal is located in the city of Hoquiam, less than a mile from the former Hoquiam train station, which now houses the Washington State Department of Licensing offices. (RP 48, 50).

On June 20, 2012, Mr. Pat Herrington, an employee of the Department of Licensing, was working in the building. He heard what he thought was the sound of water running. Mr. Herrington found that the door leading to the outside of the building was open. He stepped outside the door and looked toward the air conditioning units located immediately outside the building. He heard a loud noise and the sound of escaping air and noticed that all the copper tubing from the building to the air conditioning units had been cut and removed. (RP 50-51). He shut down the air conditioning units and called Harbor 911. He noticed that the condenser units still had power to them, but the copper pipes were all gone. (RP 52).

Sergeant Strong of the Hoquiam Police Department responded to the call. He examined the damage and observed that there were crimped off and sawed off sections of copper piping leading from the building to the air conditioning units. He could see the copper stubs coming out of the building where they had been cut and crimped and small sections of copper tubing coming from the air conditioning units. (RP 70).

Later that afternoon Sergeant Strong went to Butcher's Scrap and Metal and determined that no one, as of yet, had sold any similar copper tubing. (RP 73). The following day he recovered approximately 14 feet of copper tubing of various diameters that had since been sold to Butcher's Scrap Metal. (RP 74-75). He obtained a copy of the receipt for the transaction. The seller was Anna Owens-Pierce. (Exhibit 1).

Sergeant Strong later took the items back to the Department of Licensing building. He was accompanied by Guy Barber, a heating, air conditioning, and refrigeration technician who worked for a local business. Mr. Barber identified the copper pipes as refrigeration tubing. He was able to take the recovered pieces and reconstruct where each of the pieces had come from at the site of the theft. (RP 58-60).

Sergeant Strong subsequently obtained a search warrant to search the defendant's apartment. (RP 91). The search warrant was served and the defendant was placed under arrest.

The evidence at trial was that the copper pipe had been sold by Anna Owens-Pierce and Michelle Hinkle (Exhibit 1, RP 83-84). Ms. Hinkle had earlier pled guilty to her involvement in this matter. She testified that she had worked, from time to time, as a housekeeper for Ms. Witt. (RP 83). She stated that the defendant had given her the copper pipe sold at Butcher's Scrap Metal in payment for her work. (RP 83).

The defendant was subsequently interviewed. In initial oral remarks to Sergeant Strong the defendant acknowledged that she had received the copper pipe at her apartment from a person named Rick Cottrell. (RP 93). She acknowledged to Sergeant Strong that she believed that the property was stolen because ". . . he [Cottrell] does that sort of thing." She subsequently gave a written statement to Sergeant Strong. (Exhibit 21). The redacted form of that statement was admitted and submitted to the jury. (Exhibit 22).

RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The court properly admitted the out-of-court statement of the defendant.**

The State has attached copies of exhibits 21 and 22. This court can see the contents of each statement and those portions of exhibit 21 that were redacted.

First of all, this court should acknowledge that there are multiple alternative means for committing the offense of Trafficking in Stolen Property. In this particular case, the information alleged that the defendant knowingly possessed stolen property, which she knew to be stolen, with intent to sell or dispose of the property to another person. (CP 33). A person traffics in stolen property when he or she possesses stolen property with intent to sell or otherwise dispose of the property to another person. RCW 9A.82.010(19). The crime, in this case, was committed when the defendant received the property from Rick Cottrell. At that moment she possessed the property with intent to sell or dispose of it. Her intent was later demonstrated when she gave the property to Michelle Hinkle to sell.

In that regard, it is critically important that the jury understand the circumstances under which the defendant received the property. All of those circumstances reflect directly upon the defendant's state of mind and her knowledge concerning whether the property was stolen. This was not a legitimate business transaction. No cash was exchanged and no records

of any kind were kept. These facts and the method of payment for the property (drugs) all reflect upon her guilty knowledge. See U.S. v. Carrasco, 257 F.3d 1045 (9th Cir. 2001) (possession of drug paraphernalia relevant to prove defendant's knowing possession of firearm.,)

Furthermore, the method of payment is an inseparable part of the charged crime. She received the payment in drugs at the very moment she was committing the crime. Her admission to the possession of the drugs is part of the *res gestae* of the crime. See Tegland, Washington Practice, Volume 5, Section 404.18:

In a number of Washington cases, evidence of misconduct has been admitted on the theory that is part of the *res gestae* of the crime for which the defendant is charged. The general notion is that other misconduct is admissible if it is so connected in time, place, circumstances or means employed that proof of other such misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged.

An example is found in State v. Brooks, 20 Wn.App. 52, 59, 579 P.2nd 961 (1978). In Brooks the defendant was charged with First Degree Murder. The allegation was that he solicited others to kill his wife. Witnesses were properly allowed to testify that the defendant offered to pay for the killing with drugs. The court in Brooks found this was an integral part of the crime, which explained both the involvement of the defendant and the person who he had solicited to commit the crime.

The court in the case at hand made a reasoned ruling. The court noted that the drugs were the compensation paid by the defendant at the time she received the property. This fact explains the nature of the transaction. It explains, in part, why the defendant would know why the property she was receiving was stolen. The court found that the evidence was relevant and that the relevance outweighed any prejudice. (RP 11-12). Furthermore, the court made a point of redacting the last two paragraphs of her typed statement in which she acknowledged selling methamphetamine and stated that some of the money found in her purse came from the sale of the methamphetamine. (RP 8, 10-12).

The court properly exercised its discretion. This court should not substitute its opinion for that of trial court. This assignment of error must be denied.

2. The trial court properly imposed legal financial obligations.

First of all, there are certain mandatory legal financial obligations. The legislature has divested the courts of any discretion to consider a defendant's ability to pay when imposing these legal financial obligations. As regards victim restitution, victim assessment, DNA filing fee, and the criminal filing fee, the legislature has directed expressly that a defendant's ability to pay should not be taken into account when ordering these

statutorily mandated costs. State v. Lundy, 176 Wn.App. 96, 101-102, 308 P.3d 755 (2013). In the case at hand, almost all of the legal financial obligations imposed are mandatory obligations. This includes crime victim assessment, RCW 7.68.035, court costs, RCW 36.18.020(2)(h), restitution, RCW 9.94A.753(4)(5), and the DNA collection fee, RCW 43.43.7541. The only financial assessment that is discretionary is the \$500.00 fee for court-appointed counsel.

A challenge to the imposition of the legal financial obligations, including the attorney fees is not ripe for review until the state attempts to curtail a defendant's liberty by attempting to enforce collection of them. State v. Bertrand, 165 Wn.App. 393, 267 P.3d 571 (2011). The meaningful time to examine a defendant's ability to pay is when the government seeks to collect the obligation. State v. Baldwin, 63 Wn.App. 303, 308-311, 818 P.2d 1116 (1991).

The requirement that the defendant pay attorney fees for court appointed counsel is not an impermissible infringement upon the defendant's right to counsel. The obligation can only be imposed upon a subsequent finding that the defendant has the ability to pay. State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976).

This assignment of error must be denied.

3. This court may remand the matter to the Superior Court to ensure that the defendant is orally advised of her ineligibility to possess a firearm.

The State acknowledges that the court is required at the time of sentencing to notify the defendant “orally and in writing” that he may not possess a firearm unless his right to do so is later restored by a court of record. RCW 9.41.047. In the case at hand, this was done in writing. That admonition is contained in the judgment and sentence. The defendant was not orally told by the court at the time of sentencing that her firearm rights were being forfeited.

That being said, the failure of the court to orally advise the defendant of the forfeiture of her firearm rights does not affect the validity of the current conviction. In all likelihood, the failure of the sentencing court to advise the defendant orally of the forfeiture of her firearm rights would not affect any subsequent prosecution for Unlawful Possession of a Firearm unless there was evidence that the defendant was either never advised that her firearm rights were being forfeited or the trial court affirmatively misled the defendant regarding her firearm rights. State v. Breitung, 173 Wn.2d 393, 401-403, 267 P.3d 1012 (2011) (sentencing court failed to advise the defendant either orally or in writing, that her

right to possess a firearm would be forfeited); State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008) (sentencing court affirmatively misled the defendant regarding his firearm rights).

The state would not object to remand to the superior court for the sole purpose of providing such oral notice to the defendant.


CONCLUSION

For the reasons set forth, this defendant's conviction must be affirmed.

DATED this 14 day of March, 2014.

Respectfully Submitted,

GERALD R. FULLER
Interim Prosecuting Attorney
for Grays Harbor County


WSBA #5143

GRF/lh

APPENDIX "A"



HOQUIAM POLICE DEPARTMENT

215 10th Street, Hoquiam, WA 98550
(360) 532-0892 Fax (360)532-0899

STATEMENT

Incident No: 12-H07490

Suspect

Date: 06-26-2012 Time: 1850 Place of statement: Hoquiam PD

Statement of: Chandra M. Witt D.O.B.: 12-11-1973

Address: 2821 Simpson Avenue #1 City: Hoquiam State: Wa Zip: 98550

Home Telephone: (360) 401-0054

Work Telephone:

I Chandra Witt do make the following statement freely and voluntarily, without threat or promise of any kind.

A few days ago, Rick Cottrell called me on my cell phone. He called me during the daytime, but I can't remember the specific time. He told me he had some metal. I have gotten metal from him before. I went over to his house, 520 Karr Avenue #1, to pick it up. It was copper piping. He had it in a bucket. He didn't say it was stolen, but I assumed it was because he wouldn't get it anywhere else. I gave him about a \$20.00 sack of meth for the bucket of piping. I took the metal home to my house as I was going to scrap it.

Later that day, Michelle Hinkle came over. I have known her for a few months. Michelle saw the bucket of scrap and there was conversation about it. I told her Rick had stolen it.

Michelle was going to do my dishes and cook some taco meat while I left for a while. I gave her a little bit of meth for helping me out. I was gone for 30 minutes to an hour. When I got back, Michelle was gone and so was the metal. I haven't seen Michelle since.

[REDACTED]

This statement was typed/written for me by Sgt Strong however these are my words.

Initials

I wrote this statement.
Initials

I have read each page of this statement consisting of 1 page(s). Each page bears my signature. Corrections, if any, bear my initials. I certify (or declare) under the penalty of perjury under the laws of the state of Washington; the foregoing is true and correct.

x Chandra M Witt

S J STRONG



HOOQUIAM POLICE DEPARTMENT

215 Tenth Street, Hooquiam Washington 98550 · Emergency Dial 911 · Office (360) 532-0892 · Fax (360) 532-0895

Constitutional Rights

Date: 6-26-2012	Time: 6:45 pm	Officer Completing Form: STREANZ	Low Incident: 12-H07490
Location Where Rights Advised: HOOQUIAM POLICE DEPT		Witnesses:	

Last Name: WITT	First Name: CHANDRA	Middle: MICHELLE	Date of Birth: 12-11-1973
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You are hereby advised:

1. You have the right to remain silent;
2. Anything you say can and will be used against you in a court of law;
3. You have the right at this time to talk to a lawyer and have him present with you while you are being questioned;
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish;
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

Additional Warning for Juveniles:

If you are under the age of 18, anything you say can be used against you in a juvenile court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if the juvenile court decides that you are to be tried as an adult.

After reading and/ or having the above rights read to you:

1. Do you understand each of these rights explained to you? YES NO Initials: CE
2. Having these rights in mind, do you wish to talk to us now? YES NO Initials: CE

Signature: Chandra Witt Date: 6-26-2012 Time: 6:48

Signature of Witness: S.J. Smith

Signature of Witness: _____



HOQUIAM POLICE DEPARTMENT

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Later that day, Michelle Hinkle came over. I have known her for a few months. Michelle saw the bucket of scrap and there was conversation about it. I told her Rick had stolen it.

Michelle was going to do my dishes and cook some taco meat while I left for a while. I gave her a little bit of meth for helping me out. I was gone for 30 minutes to an hour. When I got back, Michelle was gone and so was the metal. I haven't seen Michelle since.

I only sell small amounts of meth. I would say no more than 1/4 ounce per week. I don't sell pills or marijuana. The marijuana found in my bedroom is mine and I for my own personal use. I don't have a prescription for it.

Probably only 1/3 of the money in my purse is from selling meth. The other 2/3 of the money was from child support.

This statement was typed/written for me by Sgt Strong however these are my words.

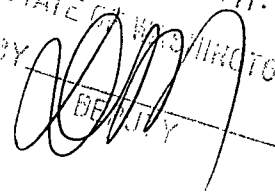
Initials

I wrote this statement. _____
Initials

I have read each page of this statement consisting of 1 page(s). Each page bears my signature. Corrections, if any, bear my initials. I certify (or declare) under the penalty of perjury under the laws of the state of Washington; the foregoing is true and correct.

X Chandra Witt

S.J. STRONG

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STATE OF WASHINGTON,

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CHANDRA WITT.

Appellant.

No.: 45049-6-II

DECLARATION OF MAILING

DECLARATION

I, Sarah L. Wisdom, hereby declare as follows:

On the 17th day of March, 2014, I mailed a copy of the Brief of Respondent and Supplemental Designation of Clerk's Papers and Exhibits to Whitney Rivera, Attorney for Appellant, Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 17th day of March, 2014, in Montesano, Washington.

