

No. 63454-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

SAL OU,

Appellant.

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

The Honorable Ira J. Uhrig

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

Sal Ou's gross misdemeanor conviction for false statement to a public servant must be dismissed, as he should have been charged under the specific statute of refusal to give information to an officer, a misdemeanor.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Principles of statutory construction require that where concurrent statutes prohibit the defendant's conduct, the defendant must be charged under the more specific statute or not at all. A conviction for the more general statute results in an equal protection violation. Here Mr. Ou was charged and convicted under the general statute for false statement to a public servant as opposed to the specific statute of refusal to give information to a police officer. Are the two statutes concurrent, requiring this Court to reverse the conviction with instructions to dismiss as a matter of law?

C. STATEMENT OF THE CASE

On September 5, 2008, Whatcom County Sheriff's Deputy Ryan Bosen pulled over a vehicle driven by Sal Ou. RP 44. Deputy Bosen testified he initiated the traffic stop because he ran the vehicle's license plate and saw that it was registered to Mr. Ou

and that Mr. Ou's driver's license was revoked in the first degree, he was required to use an ignition interlock device, and he was labeled a habitual traffic offender. RP 46. Deputy Bensen asked Mr. Ou for his license; Mr. Ou replied that he did not have his identification or registration and gave the name Samley An. RP 46-47. Mr. Ou then handed over the title to his vehicle, which bore the name Sal Ou. RP 47. Mr. Ou admitted that was his name. RP 47.

Deputy Bensen arrested Mr. Ou and advised him of his *Miranda* rights. Mr. Ou stated he knew his license was revoked. RP 48, 54. Mr. Ou stated he knew he had a warrant and that he had provided a false name because he didn't want to be arrested. He also stated he no longer used an ignition interlock device because he no longer drove while intoxicated. RP 48. In a search incident to arrest, Deputy Bensen found identification, bearing the name Sal Ou, in the vehicle. RP 50.

At trial, Mr. Ou stipulated that the ignition interlock requirement was in effect on the date of the arrest. RP 50. The court admitted, over Mr. Ou's objection, a state certified copy of driving record (CCDR) stating on September 5, 2008, Mr. Ou's license was revoked in the first degree, and a revocation order (sent on July 18, 2008, to Mr. Ou's address of record but returned

as non-deliverable), advising him that on August 17, 2008 he would be required to stop driving and surrender his license to the Department of Licensing. RP 48-49.

After Deputy Bonsen's testimony, the defense moved to dismiss the charge of criminal impersonation in the first degree, a felony. RP 57. Defense counsel conceded Mr. Ou used a false name for the purpose of avoiding arrest, but not for the purpose of committing another crime, as the statute requires; the court agreed the State had not proven this element and granted the motion. RP 57, 72. Over defense objection, State amended the information to charge Mr. Ou with making a false statement to a public servant, a gross misdemeanor. RP 73-74.

Mr. Ou testified when he was stopped he believed his license was suspended, not revoked, and told this to Deputy Bonsen. RP 86-87.

Following a jury trial before the Honorable Ira Uhrig, Mr. Ou was convicted as charged of false statement to a public servant (count I), driving while license revoked in the first degree (count II), and operating a vehicle without ignition interlock device (count III). CP 11.

D. ARGUMENT

MR. OU'S CONVICTION FOR FALSE STATEMENT TO A PUBLIC SERVANT MUST BE REVERSED AND DISMISSED SINCE HE COULD ONLY BE CHARGED UNDER THE REFUSAL TO GIVE INFORMATION TO A POLICE OFFICER.

1. Where there is a specific and a general statute that prohibit the same conduct, only the specific statute may be charged. Under Washington law, the special statute prevails over the general where the two statutes are concurrent. *In re Personal Restraint of Taylor*, 105 Wn.2d 67, 70, 711 P.2d 345 (1985); *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). To determine whether two statutes are concurrent, the reviewing court must look at the elements of both statutes and ask whether a person can violate the special statute without necessarily violating the general. *State v. Karp*, 69 Wn.App. 369, 372, 848 P.2d 1304 (1993). If the court concludes the general statute can be violated any time the specific statute is violated, the statutes are concurrent and the special statute supersedes the general. *Karp*, 69 Wn.App. at 371-72, *citing Shriner*, 101 Wn.2d at 580 (criminal statutes are concurrent when a general statute is violated in each instance the special statute is violated).

If a general and a special statute are concurrent, the special statute applies and a defendant can be charged only under the special statute. *Shriner*, 101 Wn.2d at 580; *State v. Jendrey*, 46 Wn.App. 379, 387, 730 P.2d 1374 (1986), *review denied*, 108 Wn.2d 1007 (1987).

This rule of statutory construction is designed to promote equal protection of the laws by subjecting persons committing the same misconduct to the same potential punishment. *State v. Cann*, 92 Wn.2d 193, 196, 595 P.2d 912 (1979). *See also* 2A C. Sands, *Sutherland's Statutory Construction* § 51.05. (4th ed. 1973). This rule protects the defendant's constitutional right to equal protection under the law by preventing the prosecution from obtaining varying degrees of punishment while proving identical criminal elements. *See also State v. Hupe*, 50 Wn.App. 277, 280, 748 P.2d 263, *review denied*, 110 Wn.2d 1019 (1988) (overruled on other grounds by *State v. Smith*, 159 Wn.2d 778, 786, 154 P.3d 873 (2007)).

When making a charging decision, if the State could select between two concurrent statutes that proscribe the same conduct, it could control the degree of punishment for identical criminal elements. *Cann*, 92 Wn.2d at 196.

In addition, this rule is necessary to give effect to the specific statute. Specific statutes, which include all the elements of the general statute, are more specific crimes with additional elements or with higher mental intent elements. If a general statute could be charged instead of a special statute, the prosecutor would presumably elect to prosecute under the general statute because it would be easier to prove. Consequently, if special statutes did not supercede general statutes, the result of allowing prosecution under a general statute would be an effective repeal of the special statute. *State v. Danforth*, 97 Wn.2d 255, 259, 643 P.2d 882 (1982). This result would be an impermissible potential usurpation of the legislative function by prosecutors. *Id.* “(S)ound principles of statutory interpretation and respect for legislative enactments require that the special statute prevails to the exclusion of the general.” *Shriner*, 101 Wn.2d at 583; *see also Danforth*, 97 Wn.2d at 259.

Finally, this rule also ensures that courts do not interpret statutes in such a way as to impliedly repeal existing legislation. *Shriner*, 101 Wn.2d at 582-83; *State v. Shelby*, 61 Wn.App. 214, 219, 811 P.2d 682 (1991).

2. False statement to a public servant and refusal to give information to a police officer are concurrent statutes. The gross misdemeanor offense of “Making a false or misleading statement to a public servant” is defined as follows:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. “Material statement” means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

RCW 9A.76.175.

The simple misdemeanor offense of “refusal to give information to or cooperate with officer” is defined as follows:

It is unlawful for any person while operating or in charge of any vehicle to refuse when requested by a police officer to give his or her name and address and the name and address of the owner of such vehicle, or for such person to give a false name and address, and it is likewise unlawful for any such person to refuse or neglect to stop when signaled to stop by any police officer or to refuse upon demand of such police officer to produce his or her certificate of license registration of such vehicle, his or her insurance identification card, or his or her vehicle driver's license or to refuse to permit such officer to take any such license, card, or certificate for the purpose of examination thereof or to refuse to permit the examination of any equipment of such vehicle or the weighing of such vehicle or to refuse or neglect to produce the certificate of license registration of such vehicle, insurance card, or his or her vehicle driver's license when requested by any court. Any police

officer shall on request produce evidence of his or her authorization as such.

RCW 46.61.020 (emphasis added).

In *Jessup*, the defendant was charged with both promoting prostitution in the second degree under RCW 9A.88.080 and conspiracy to promote prostitution in the second degree under RCW 9A.28.040. *State v. Jessup*, 31 Wn.App. 304, 307, 641 P.2d 1185 (1982). This Court noted RCW 9A.28.040 proscribes conspiracy to commit any crime, while RCW 9A.88.080 specifically prohibits “advancing prostitution.” *Id.* at 308. Therefore, this Court held RCW 9A.28.040 is the more general statute and the defendant should have been charged under RCW 9A.88.080, the specific statute. *Id.*, citing *State v. Cann*, 92 Wn.2d 193, 196-97, 595 P.2d 912 (1979) (analyzing the same two statutes, Supreme Court held defendant could not be charged under the more general statute but must be charged under the more specific).

In contrast to *Jessup* and the instant case, in *Presba*, the defendant gave a police officer another person’s identification and was charged with identity theft. *State v. Presba*, 131 Wn.App. 47, 53, 126 P.3d 1280, *review denied*, 158 Wn.2d 1008 (2005). She argued on appeal that RCW 46.61.020 (refusal to give information

to an officer) was concurrent and more specific. However, this Court found that one could violate RCW 46.61.020 “by giving a name that is false because there is no person with that name,” therefore not violating the identity theft statute. *Id.* at 53.

These cases compel the finding in the instant case that the two statutes are concurrent. “It is not relevant that the special statute may contain additional elements not contained in the general statute.” *Shriner*, 101 Wn.2d at 580. Although here the more specific statute contains the additional element of operating a vehicle, there is no scenario where a driver, violating RCW 46.61.020 by giving a false name to a police officer, would not also be violating RCW 9A.76.175.

The fact that there are other means of violating RCW 46.61.020 is also immaterial, as *Jessup* demonstrates. There, RCW 9A.88.080, the more specific statute, proscribed “advancing prostitution,” a phrase defined in RCW 9A.88.060 as follows:

A person “advances prostitution” if, acting other than as a prostitute or as a customer thereof, he causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

There, as here, there are multiple possible means of violating the more specific statute. Not all of those means also violate the more general statute. For example, one could provide premises for prostitution purposes without conspiring with anyone else. The definition encompasses “any other conduct” and thus, in terms of the actual conduct proscribed, is much broader than the conspiracy statute – except that the statute focuses on prostitution specifically, not criminal conduct in general.

Similarly, there are means of violating RCW 46.61.020 which do not also violate RCW 9A.76.175. A simple refusal to produce identification, for example, is not a false statement. However, as in *Jessup* and *Cann*, the inquiry turns to the means used in this case before the Court. Cann attempted to recruit two undercover agents into prostitution. Jessup recruited prostitutes, took their earnings, hired bouncers for the prostitution establishment, and collaborated with others to develop a membership system. Both were engaged in conduct described by the conspiracy statute; in addition, their conduct was designed to institute, aid, and facilitate prostitution. Therefore, the statutes were concurrent. Here, Mr. Ou made a false statement – that his name was Samlaey An – to a public servant. In addition, that public servant was a police officer who

had asked Mr. Ou for his name, and Mr. Ou was in charge of a vehicle at the time. Mr. Ou's conduct was proscribed by both statutes. Therefore, the statutes are concurrent.

Accordingly, in order to prevent arbitrary election in violation of equal protection principles, this Court should rule that where an individual is alleged to have given a false name or address to a police officer while operating or in charge of a vehicle, the two statutes are concurrent and the more specific must apply.

3. Mr. Ou's conviction false statement to a public servant must be dismissed. Where concurrent statutes exist the defendant can only be charged under the specific statute. *Danforth*, 97 Wn.2d at 257-58. The remedy where the defendant has been convicted under the general statute instead of the specific statute is dismissal of the conviction. *Id.*

Any other ruling would be violate Mr. Ou's right to equal protection. *Karp*, 69 Wn.App. at 372.. A violation of equal protection occurs when the State, by selecting the crime to be charged, can obtain varying degrees of punishment while proving identical elements. *Id.* Here, the State had full ability to select which crime to charge and obtain the higher degree of punishment proving the same facts. This Court must reverse the possession of

stolen property conviction, with instructions to dismiss. *Shriner*,
101 Wn.2d at 580; *Danforth*, 97 Wn.2d at 257-58.

F. CONCLUSION

For the reasons stated, this Court must reverse and dismiss
Mr. Ou's conviction for false statement to a public servant.

DATED this 16th day of October, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Vanessa M. Lee', written over a horizontal line.

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Washington Appellate Project – 91052
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v.)	NO. 63454-2-I
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SAL OU,)	
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APPELLANT.)	

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