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COURT OF APPEALS
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STATE OF WASHINGTON

No. 33701-1-II BY JW DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

JERRY RONALD LAMPLEY,
Appellant.

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

THE HONORABLE DAVID E. FOSCUE, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Procedural History.

The defendant was charged by Information with Possession of Stolen Property in the Second Degree, RCW 9A.56.160. It was alleged that the defendant knowingly possessed a stolen check issued by the Department of Social and Health Services (DSHS) to Juliaetta Holt in the amount of \$621.10, which the defendant knew to be stolen. (CP 1). The matter was tried to a jury commencing on July 26, 2005. During deliberations, the jury sent out two questions: (1) "Is the face value considered the day it was stolen or the day he was found with it?" (2) "Does reissue equal satisfied?" The court instructed the jury that the value of a written instrument is not affected by the fact that a replacement may of have been issued and that the value of the property is determined as of the time of its possession. (RP 75). The defendant objected. He believed that the check was worthless because a replacement had been issued. (RP 76-77). Upon further deliberation, following answer to the questions, the jury returned a verdict of guilty.

Factual Background.

Juliaetta Holt worked as a home care provider for the Department of Social and Health Services. At the time of trial, she had been doing such work since about 1998. (RP 33-34). In August of 2004, she was working for a family named Bentley. She was receiving her mail at a rural mailbox in Graham, Washington. (RP 34). Ms Holt was expecting a check from the Department of Social and Health Services for work she had done for the Bentleys. (RP 34-35). The check was to be in the amount of \$621.10. She never received the check. (RP 35). When she did not receive the check, she waited approximately thirty days and then contacted the Department of Social and Health Services. She reported the original check stolen and a new check was issued. (RP 36-37).

On March 1, 2005, at about 10:30 p.m., Robert Wilson of the Montesano Police Department had contact with the defendant. Wilson confirmed a warrant for the defendant's arrest and placed the defendant under arrest pursuant to the warrant. (RP 40-42). The defendant was searched incident to arrest. Wilson located the original DSHS check in the amount of \$621.10 payable to Juliaetta Holt, as well as the stub for the check which set forth the services performed by Ms. Holt. (RP 43, Exhibit 3). At the time it was seized, there was an endorsement on the back of the check that had not been placed there by Ms. Holt. (RP 35).

The defendant was subsequently interviewed. The defendant claimed not to know if the check was stolen. He did acknowledge that he

received the check from another individual. He believed he may have received it at the Emerald Queen Casino. (RP 45-46). The defendant acknowledged that he did not know Juliaetta Holt.

RESPONSE TO ASSIGNMENTS OF ERROR

The State presented ample evidence to prove the value of the written instrument. (Response to Assignment of Error No.1).

The check, Exhibit 3, is a legitimate instrument which happens to contain a forged endorsement. The check is “an instrument constituting an evidence of debt.” The value is defined by statute, RCW

9A.56.010(18)(b)(i):

The value of an instrument constituting an evidence of debt, such as a check, draft or promissory note, shall be deemed the amount due to collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness was any portion thereof which has been satisfied.

The short answer is that the value of the check, \$621.10, the amount owed by the State of Washington to Mrs. Holt for the services performed. State v. Skorpen, 57 Wn.App. 144 787 P.2d 54 (1990), cited by the defendant, is not on point. The instrument in Skorpen was a stolen check that had been falsely completed by a third person and found by the defendant. The check was not a legitimate evidence of indebtedness. The drawer of the check never issued the check. The court in Skorpen held that, under these circumstances, even though the check was purportedly written in the amount of \$375, it was worthless.

Skorpen presented a much different from the situation at hand. In the case at hand, a check was issued to Mrs. Holt in payment for legitimate services that she had done. The check, itself, was not a forged document. The check had value.

Furthermore, the fact that the victim reported the check stolen and a stop payment was issued on the original check, did not render it valueless. State v. Easton, 69 Wn.2d 965, 970, 422 P.2d 7 (1966):

Did the fact that the payment was stopped upon check render it valueless? The answer is no. The "instrument"... here involved is perhaps the most negotiable of negotiable instruments - a United States Treasury check. The issuance of the stop payment notice by the treasury department neither affected the negotiability of the check nor discharged the treasury department's liability thereon. The holder in due course could enforce payment for full amount thereof.... Neither did the fact that the check had been stolen impaired its negotiability.

See also State v. Long, 2 Neb.App. 847, 515 NW2d 273 (1994).

The "value" of an item is to be determined "at the time and in the approximate area of the criminal act." RCW 9A.56.010(18)(a). Accordingly, the value of the instrument was the face value at the time of its possession by the defendant.

This assignment of error must be denied.

The trial court properly instructed the jury following its inquiry. (Response to Assignment of Error No. 2).

The trial court may, in its within the sound discretion. give further instructions to the jury after it has retired to deliberate. State v. Miller, 40 Wn.App. 483, 489, 698 P.2d 1123 (1985). No one can seriously dispute that the instructions given to the jury were a correct statement of the law. They were not a statement of the judge's opinion of the facts. The giving of such a supplemental instruction was appropriate under these circumstances. See State Frederick, 32 Wn.App. 624, 626, 648 P.2d 925 (1982). The giving of supplemental instructions is also contemplated by the Superior Court criminal rules. CrR 6.15(e)(1).

There was no error. This Assignment of Error must be denied.

**The court properly imposed sentence on the defendant.
(Response to Assignment of Error No. 3).**

At the time of his initial contact with Officer Wilson, the defendant had an outstanding warrant for his arrest in Pierce County Cause No. 02-1-271-6 for Possession of Methamphetamine for a crime that occurred on January 14, 2002. The defendant was returned to custody in Pierce County to have that matter resolved. On March 31, 2005, the defendant received a sentence in that cause of 18 months in prison. Thereafter, the defendant was returned to Grays Harbor County from prison for prosecution of this matter. (CP 40-43, 15).

Upon conviction in this cause, the trial court had the option, by statute, to make the sentence in this cause either concurrent or consecutive

to the Pierce County cause. RCW 9.94A.589(3) specifically provides as follows:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

There is no dispute that the facts of this case fit within the above statute. A consecutive sentence imposed pursuant to RCW 9.94A.589(3) does not require the finding of an exceptional sentence. The statute expressly provides for consecutive sentences. See State v. Linderman, 54 Wn.App. 137, 722 P.2d 1025 (1989).

The Washington courts have set forth the application of RCW 9.94A.589(3) (formally RCW 9.95A.400(3)) as follows:

Indeed, when sentencing under that subsection, the sentencing judge need not set forth any reason for imposing a consecutive sentence, he or she must only 'expressly order' that the sentences be served consecutively.

State v. Smith, 74 Wn.App. 844, 851, 875 P.2d 1249 (1994).

The defendant's citation to Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 3248 (2000) and Blakely v. Washington, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) is misguided.

The State does agree that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction must be submitted to a jury and proved beyond a reasonable doubt. Apprendi, 530 U.S. at 490. The defendant's sentence in this case was expressly controlled by the fact of a prior conviction, the conviction in Pierce County Cause No. 02-1-271-6. The sentence in the Pierce County cause was imposed subsequent to the commission of the crime in this case. The defendant was being sentenced in this cause for an event that was committed while the defendant was not under sentence of the Pierce County felony conviction. Accordingly, the terms of RCW 9.94A.589(3) cover this situation and provide for the possibility of consecutive sentences based upon the fact of the prior Pierce County conviction.

The trial court is not required to make any finding in order to impose consecutive sentences. There is no necessity of a factual determination that a concurrent sentence would be "clearly too lenient." The sentencing court need only determine that it wishes to impose a consecutive sentence. State v. Linderman, supra, 54 Wn.App. at 139.

Furthermore, the imposition of consecutive sentences, so long as the sentence for each offense is within the standard range, does not require a finding of aggravating circumstances. State v. Cubias, 155 Wn.2d 549, 552-53, 120 P.3d 929 (2005). The Washington Supreme Court in Cubias

and again in State v. Louis, 155 Wn.2d 563, 572, 120 P.3d 936 (2005)

specifically held as follows:

... the principle set forth in Apprendi and Blakely has no application to consecutive sentencing decisions so long as each individual sentence remains within the statutory maximum for that particular offense....

In Cubias, there was a specific statute authorizing consecutive sentences for multiple convictions of serious violent offenses. RCW 9.94A.589(1)(b). In the case at hand, the imposition of a consecutive sentence is also expressly authorized by statute as a sentencing alternative.

For the reasons set forth, this assignment of error must be rejected.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

Respectfully Submitted,

By: Gerald R. Fuller
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WSBA #5143

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STATE OF WASHINGTON,

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No.: 33701-1-II

v.

DECLARATION OF MAILING

JERRY R. LAMPLEY,

Appellant.

DECLARATION

I, *Randi M. Toya* hereby declare as follows:

On the *21st* day of April, 2006, I mailed a copy of the Brief of Respondent to Roger Hunko; Attorney at Law; 569 Division Street, Suite E; Port Orchard, WA 98366-4600, and Jerry R. Lampley #759257; Cedar Creek Corrections Center; P. O. Box 17; Littlerock, Washington 98556, 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.

Randi M. Toya