

No. 37548-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LUDVIGSEN,

Appellant.

09 JAN 26 AM 9:01
STATE OF WASHINGTON
BY _____ DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

APPELLANT'S REPLY BRIEF

ELAINE L. WINTERS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

 1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. LUDVIGSEN KNOWINGLY POSSESSED STOLEN PROPERTY..... 1

 a. The circumstantial evidence cited by the State does not prove possession 1

 b. The circumstantial evidence relied upon by the State does not prove knowledge the property was stolen 4

 c. Mr. Ludvigsen’s conviction must be reversed and dismissed..... 7

 2. THE TRIAL COURT INCORRECTLY INCLUDED A WASHED OUT CONVICTION IN MR. LUDVIGSEN’S OFFENDER SCORE 7

B. CONCLUSION..... 9

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007)..... 8

State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969)..... 3, 7

State v. Jones, 159 Wn.2d 231, 149 P.3d 636 (2006)..... 8

State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004)..... 8

Washington Court of Appeals Decisions

State v. Green, 2 Wn.App. 57, 466 P.2d 193 (1970)..... 6

State v. Henry, 80 Wn.App. 544, 910 P.2d 1290 (1995), rev. denied, 137 Wn.2d 1038 (1996) 5

State v. Rockett, 6 Wn.App. 399, 493 P.2d 213 (1972)..... 5-6

State v. McCaughey, 14 Wn.App. 326, 541 P.2d 998 (1975)..... 3, 7

State v. Summers, 45 Wn.App. 761, 728 P.2d 613 (1986)..... 1

Washington Statutes

Former RCW 9A.45.150..... 1

RCW 9.94A.030(14)..... 8

RCW 9A.08.010 4

RCW 9A.56.140 1

Washington Court Rule

RAP 10.3..... 1

A. ARGUMENT IN REPLY

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. LUDVIGSEN KNOWINGLY POSSESSED STOLEN PROPERTY

Thomas Ludvigsen was convicted of possessing stolen property in the first degree, which required proof that he (1) actually or constructively possessed stolen property (2) valued at over \$1,500 (3) with knowledge the property was stolen. RCW 9A.56.140(1); Former RCW 9A.45.150(1); State v. Summers, 45 Wn.App. 761, 763, 728 P.2d 613 (1986); CP 8-9 (Jury Instructions 3, 5, 7). On appeal Mr. Ludvigsen argues the State did not prove beyond a reasonable doubt that he possessed the stolen automobile parts or that he knew the auto parts were stolen. Brief of Appellant at 5-13. The State responds that it met its burden of proving these elements. Respondent's Brief at 6-10. The evidence relied upon by the State, however, does not prove possession or knowledge beyond a reasonable doubt.

a. The circumstantial evidence cited by the State does not prove possession. The State first argues it proved Mr. Ludvigsen possessed the stolen automobile parts. Respondent's Brief at 7-9. This portion of the argument includes no citation to authority or the record. Id.; see RAP 10.3(a)(6), (b). The State recites the facts

proven at trial, but these facts do not establish actual or constructive possession.

At trial, the State established that police officers located parts of a stolen Honda at a residence in Hoquiam. RP 25-26, 29-31. The State did not establish who owned the residence, but Klee Ann Lowdermilk responded when the police knocked on the front door, and an officer testified that she was living there at the time. RP 30. Ms. Lowdermilk gave the police permission to look at the engine they had noticed in the driveway, walked with Officer Mitchell to the engine, and talked with him about it. RP 30, 32-33. Ms. Lowdermilk went in and out of the house twice while the police were searching the yard. RP 33-34.

The second time Ms. Lowdermilk came outside, Mr. Ludvigsen accompanied her. RP 33-34. Officer Mitchell questioned Mr. Ludvigsen about the engine, and he denied knowledge that it was there or that it was stolen. RP 34. Mr. Ludvigsen returned to the house, but emerged later and again talked to the officer. RP 35. Stating he did not want to get Ms. Lowdermilk in trouble, Mr. Ludvigsen told Officer Mitchell that Jeremy Butts had dropped the engine off a few days earlier. RP

39-40. Mr. Ludvigsen again explained he did not know the engine was stolen. RP 39.

Actual possession “means that the goods are in the personal custody of the person charged with possession.” State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). There is no evidence the stolen property was in Mr. Ludvigsen’s actual physical possession.

Constructive possession is established if “the goods are not in actual physical possession, but that the person charged with possession has dominion and control over the goods.” Callahan, 77 Wn.2d at 29. According to the State, possession was established in this case by Mr. Ludvigsen’s “proximity to the stolen property” and his “assertion [sic] of himself in the conversation with officers regarding the engine.” Respondent’s Brief at 8-9. This evidence, however, established that Mr. Ludvigsen was present at the house where stolen property was located and he talked to the investigating police officer about the property. Proximity to stolen property and the provision of information to an investigating officer, even inconsistent information, does not establish possession of stolen property. State v. McCaughey, 14 Wn.App. 326, 329, 541 P.2d 998 (1975).

The State did not prove Mr. Ludvigsen had any form of control or proprietary interest in the stolen automobile parts. His presence at the home where they were located and his willingness to tell the police who brought the parts to the house do not establish that Mr. Ludvigsen possessed the automobile parts.

b. The circumstantial evidence relied upon by the State does not prove knowledge the property was stolen. The State correctly points out knowledge property is stolen may be established by either (1) proof of actual knowledge the property was stolen or (2) proof the defendant had information that would lead a reasonable person in the same situation to believe the property was stolen. RCW 9A.08.010(1)(b). Thus, for example, proof that a sex offender had knowledge of his registration requirements may be found from evidence that he had registered several times before. State v. Castillo, 144 Wn.App. 584, 589-90, 183 P.3d 355 (2008). The circumstantial evidence relied upon by the State, however, does not establish that a reasonable person in Mr. Ludvigsen's position would know the property was stolen.

The State relies heavily upon the appearance of the automobile parts and their location outside and inside the residence. Respondent's Brief at 9-10. However, the State did not

prove Mr. Ludvigsen ever examined the automobile parts; the evidence shows only that he was at the house when Jeremy Butts brought the automobile engine to the house. RP 39-40.

The State also argues knowledge is established by Mr. Ludvigsen's demeanor. Respondent's Brief at 9. Officer Mitchell described Mr. Ludvigsen as nervous or upset, but later testified Mr. Ludvigsen was calm. RP 35, 40. Many people, however, react nervously when dealing with law enforcement officers. See State v. Henry, 80 Wn.App. 544, 552, 910 P.2d 1290 (1995) (not unusual for drivers stopped by the police to be nervous), rev. denied, 137 Wn.2d 1038 (1996).

The State also relies upon Mr. Ludvigsen's conflicting statements to Officer Mitchell. Respondent's Brief at 9 (citing State v. Rockett, 6 Wn.App. 399, 402-03, 493 P.2d 213 (1972)). The Rockett Court held that knowledge may be established by the defendant's possession of recently stolen property along with other corroborating facts. Rockett, 6 Wn.App. at 402. In that case four sets of bucket seats were stolen on April 16, 17, 19 and 22 from separate cars. The defendant sold three sets of automobile bucket seats on April 20 and moved 22 sets of bucket seats from his house on April 24; the stolen bucket seats were included in both

transactions. Id. at 402-03. The defendant gave inconsistent explanations to the police on two separate dates and neither explanation accounted for the presence of stolen bucket seats in his possession. Id. at 403. Additionally, the defendant had told the business that purchased the bucket seats from him that he needed them for his dune buggy business, but the police established no such business existed. Id. This Court thus concluded that there was sufficient evidence to meet the requirement of possession of recently stolen property combined with “slight corroborative evidence” of guilt. Id. (quoting State v. Green, 2 Wn.App. 57, 68, 466 P.2d 193 (1970)).

Here, Mr. Ludvigsen was not found in possession of the property and it was not recently stolen.¹ Thus the State needed more than “slight” evidence that Mr. Ludvigsen knew the automobile parts were stolen. There is no evidence he had examined the automobile parts, nor was their appearance necessarily indicative that they were stolen. While Mr. Ludvigsen was inconsistent about whether he was aware of the automobile parts, he eventually cooperated with the investigating officer by telling him who had brought the parts to the house. Even looking at

¹ The Honda in this case was reported stolen on November 15 and the automobile parts were seized on December 7, 2006. RP 18, 21, 25, 29.

the evidence in the light most favorable to the State, the State did not prove beyond a reasonable doubt that Mr. Ludvigsen knew the property was stolen or that a reasonable person in his position would have known they were stolen.

c. Mr. Ludvigsen's conviction must be reversed and dismissed. The State did not prove beyond a reasonable doubt that Mr. Ludvigsen had actual or constructive possession of the stolen automobile parts. The State also did not prove beyond a reasonable doubt Mr. Ludvigsen knew the automobile parts were stolen. His conviction for possession of stolen property must therefore be reversed and dismissed. Callahan, 77 Wn.2d at 32; McCaughey, 14 Wn.App. at 330.

2. THE TRIAL COURT INCORRECTLY INCLUDED A
WASHED OUT CONVICTION IN MR. LUDVIGSEN'S
OFFENDER SCORE

Mr. Ludvigsen challenged the inclusion of 1982 convictions for Violation of the Uniform Controlled Substances Act (VUCSA) in his offender score. Brief of Appellant at 13-21. In response, the State agrees that the 1982 convictions "washed out." The State explains they were properly included in Mr. Ludvigsen's criminal

history but were not counted in computing his offender score.²

Respondent's Brief at 10-12 (citing RCW 9.94A.030(14)).

The State further asserts that Mr. Ludvigsen's offender score was correctly computed as 10 because a point was added for being on community custody at the time of the December 7, 2006, offense. Respondent's Brief at 12-13. The Judgment and Sentence, however, does not include a judicial finding that Mr. Ludvigsen was on community custody, and the court did not make such a finding at the sentencing hearing. CP 19-27; 3/24/08RP.

This Court reviews an offender score computation de novo. State v. Bergstrom, 162 Wn.2d 87, 91, 169 P.3d 816 (2007). Absent affirmative agreement, the defendant does not waive a challenge to his offender score by failing to object. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). Whether an offender is on community custody at the time of a new offense is a factual determination made by the court at sentencing. State v. Jones, 159 Wn.2d 231, 233-34, 149 P.3d 636 (2006). Because the sentencing court did not find Mr. Ludvigsen was on community custody at the

² In light of this position, the State did not respond to Mr. Ludvigsen's motion to take judicial notice of this Court's opinion in State v. Thomas Ludvigsen, No. 28087-6-II. See Commissioner's Ruling dated October 16, treating motion to take judicial notice as motion to file supplemental brief, granting motion, and providing States' brief due within 60 days.

time of this offense, his case should be remanded to correct his offender score.

B. CONCLUSION

Thomas Ludvigsen's conviction for possessing stolen property in the first degree must be reversed and dismissed because the State did not prove beyond a reasonable doubt that Mr. Ludvigsen possessed the stolen property.

In the alternative, this Court should remand Mr. Ludvigsen's to correct his Judgment and Sentence to reflect an offender score of 9.

DATED this 23rd day of January 2009.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 37548-6-II
)	
THOMAS LUDVIGSEN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF JANUARY, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------|-------------------------------------|
| [X] MEGAN VALENTINE, DPA
GRAYS HARBOR CO. PROSECUTOR'S OFFICE
102 W. BROADWAY AVENUE, ROOM 102
MONTESANO, WA 98563-3621 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] THOMAS LUDVIGSEN
631543
COYOTE RIDGE CORRECTIONS CENTER
PO BOX 769
CONNELL, WA 99326 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF JANUARY, 2009.

X _____ 

FILED
COURT OF APPEALS
DIVISION II
09 JAN 26 AM 9:00
STATE OF WASHINGTON
BY _____
DEPUTY

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711