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COURT OF APPEALS
DIVISION II

10 APR 19 PM 2:16

STATE OF WASHINGTON

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DEPUTY

NO. 39426-0-II
Cowlitz Co. Cause NO. 09-1-00196-8

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

STATE OF WASHINGTON,

Respondent,

v.

LAQUITTA DIANE SPURGEON,

Appellant.

RESPONDENT'S BRIEF

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

The statute outlawing unlawful redemption of food stamps is not concurrent with the statute outlawing possession of a stolen access device, because it is possible to violate the unlawful redemption of food stamps statute without violating the possession of a stolen access device statute.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

- a. Is the statute outlawing the unlawful use of food stamps concurrent with the statute outlawing the possession of a stolen access device?**

III. STATEMENT OF THE CASE

Carol Armstrong is a recipient of social security income ("SSI"). RP at 57. On December 9, 2008, Armstrong was issued an electronic benefits transfer ("EBT") card. RP at 36, 40. EBT cards are issued by the Department of Social and Health Services ("DSHS") to allow cardholders to access benefits electronically. RP at 36. Benefits received electronically with an EBT card include both food stamps and cash. RP at 36. To use an EBT card, an EBT cardholder is required to use a personal identification number ("PIN"). RP at 52. As the holder of the EBT card, Armstrong was the only person authorized to use the card. RP at 55. Other than Armstrong, the only people she was aware of who knew her PIN were William Passfield and Lisa Love. RP at 59.

On February 5, 2009, Armstrong spent the night at Love's residence. RP at 60. On February 6, 2009, Armstrong received a deposit of \$156.00 on her EBT card, giving her card a balance of \$156.75.¹ RP at 43-44, 59. On the morning of February 6, 2009, while still at Love's residence, Armstrong checked the balance of her EBT card using a phone. RP at 60. After confirming she had received a deposit of \$156.00, Armstrong went grocery shopping at around 1:30 that afternoon. RP at 62. A friend by the name of Stephanie Malone picked up Armstrong, Love, and Love's children and took them to the Winco in Longview. RP at 62-63. After filling her grocery cart at Winco, Armstrong proceeded to the checkout line. RP at 63. Armstrong planned to pay for these groceries using her EBT card. RP at 64. Accompanied by Love, Armstrong took out her EBT card but then ran back into the shopping aisles to pick up an item she had forgotten. RP at 64-65. When Armstrong returned to the checkout line, she was unable to locate her EBT card. RP at 65. In addition to her EBT card being gone, Love was gone also. RP at 65-66.

On February 7, 2009, at 2:27 p.m., Laquitta Spurgeon purchased a soda at Winco for \$1.35 using Armstrong's EBT card. RP at 46-47, 92-94, 111, 146. By making this purchase, Spurgeon was able to determine what the balance was on the EBT card. RP at 146. Spurgeon and her

¹ Money received by the EBT cardholder remains on the EBT card for 365 days; if the money is not used within 365 days, it returns to the state. RP at 45.

husband, Brent Spurgeon, then filled a grocery cart with meats, appetizers, and bottled water. RP at 151. Spurgeon kept track of the amounts of these items with a calculator. RP at 136, 146. After filling up their grocery cart, Spurgeon and her husband proceeded to the checkout line and purchased the items they had selected for \$155.40. RP at 99-100, 108-121,

By looking at an electronic journal displaying purchases on various access devices, Winco security officer Chris Larranga was able to determine when and where Armstrong's EBT card had been used. RP at 92-93, 134. Then, by utilizing in-store video surveillance, he was able to obtain pictures of Spurgeon and her husband using the card, shopping, entering, and exiting Winco. RP at 93, 123-24, 134-36. Larranga provided this information to the police, and this ultimately led to the discovery of Spurgeon's identity and address. RP at 125-26, 134-36.

On February 19, 2009, Officer Steve Dennis of the Longview Police Department, went to Spurgeon's address and contacted her. RP at 141. During his contact with Spurgeon, she admitted to being the person in one of the pictures Officer Denis had received from Winco security. RP at 142. Spurgeon also admitted to using Armstrong's EBT card on February 7, 2009. RP at 142. Spurgeon told Officer Dennis that she had

used other people's EBT cards several times and that she had "never had any problems or issues." RP at 142.

Spurgeon told Officer Dennis that she buys other people's EBT cards from her brother, John Kell, and from a female named Sarah. RP at 142. Spurgeon stated that she makes these purchases at the apartments above Reid's Tavern on Commerce Avenue. RP at 143. She explained that after purchasing an EBT card, she goes to the store and buys a small item to find out how much is left on the card. RP at 143. Upon discovering the balance on the card, Spurgeon would spend the remaining balance. RP at 143. Afterward, she would pay whoever she purchased the card from, John Kell or Sarah, one-half of the amount she purchased in cash. RP at 143.

When asked if she had purchased Armstrong's EBT card, Spurgeon stated that she did not know. RP at 143. Officer Dennis asked Spurgeon to try to remember where she had gotten Armstrong's EBT card. RP at 145. Spurgeon thought for a quite a while, but then said she could not remember where she had gotten Armstrong's card. RP at 145. Spurgeon admitted to using a calculator to keep track of her purchases to stay as close to the balance on the card as possible. RP at 146. Officer Dennis then placed Spurgeon under arrest. RP at 146.

After being read her rights and agreeing to speak further with Officer Dennis, Spurgeon again explained that she buys EBT cards from different people, but mainly from John Kell and Sarah, then takes an EBT card and uses it to buy a small item to determine the balance, uses up the remaining balance, and then pays half of the amount she purchased to the person she obtained the EBT card from. RP at 146-47. Spurgeon told Officer Dennis she did not know Carol Armstrong. RP at 148. Spurgeon again admitted to using Armstrong's EBT card, but also stated that she could not remember how she had obtained Armstrong's card. RP at 148. The jury found Spurgeon guilty of both possession of stolen property in the second degree – access device, and theft in the third degree. RP at 197.

IV. ARGUMENT

When wrongful conduct creates the possibility of charging for violations under two different statutes, a prosecutor has the discretion to charge under either, unless those statutes are concurrent. If two statutes are concurrent, the perpetrator must be charged under the more specific statute. However, statutes are not concurrent unless the general statute is violated in each instance where the special statute is violated. Spurgeon argues that the statute outlawing possession of a stolen access device is a general statute that is concurrent to a special statute outlawing the

unlawful redemption of food stamps. Spurgeon's argument fails. Because it is possible to unlawfully redeem food stamps without possessing a stolen access device, the statutes are not concurrent. For this reason, it was proper for Spurgeon to be charged with possessing a stolen access device.

- a. RCW 9A.56.020(1)(c), which outlaws the possession of a stolen access device, is not concurrent to RCW 9.91.144, which outlaws the unlawful use of food stamps.**

Because a person can violate the provisions of RCW 9.91.144 by conduct that would not violate RCW 9A.56.020(1)(c), the statutes are not concurrent. When ascertaining whether two statutes are concurrent, "[t]he determining factor is that statutes are concurrent in the sense that the general statute will be violated in each instance where the special statute has been violated." *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). Here, because RCW 9A.56.020(1)(c) is not violated in each instance where RCW 9.91.144 is violated, the statutes are not concurrent.

Whether statutes are concurrent is an issue of statutory construction, therefore the standard of review is de novo. *State v. Chase*, 134 Wn.App. 792, 800, 142 P.3d 630 (2006). "[T]here is no equal protection violation when the crimes the prosecutor has discretion to charge require proof of different elements." *State v. Taylor*, 105 Wn.2d

67, 69, 711 P.2d 345 (1985). If a special statute punishes the same conduct that is punished by a general statute, the accused can only be charged under the special statute. *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). Criminal statutes are concurrent, if a general statute is violated whenever a special statute is violated. *State v. Karp*, 69 Wn.App. 369, 371, 848 P.2d 1304 (1993). It is irrelevant that the special statute may contain additional elements not contained in the general statute. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). “To decide whether two statutes are concurrent, a court must look at the elements of each statute to determine whether a person can violate the special statute without necessarily violating the general statute.” *Karp*, 101 Wn.2d at 372.

In *Taylor*, 105 Wn.2d at 67-68, the Supreme Court dealt with the question of whether the statute defining theft in the first degree was concurrent with the statute prohibiting one from knowingly giving false information or withholding material information as required by the Employment Securities Act. Taylor was convicted of first degree theft for receiving unemployment benefits after being employed. *Id.* at 67. Taylor maintained that the two statutes were concurrent, and that he had been charged under the general statute. *See id.* at 70. The Court explained that the general-specific rule only applies if “the general statute will be

violated in each instance where the special statute has been violated.” *Id.* (quoting *Shriner*, 101 Wn.2d at 580). Because the theft statute required proof of elements not contained in the statute enforcing the Employment Securities Act, the statutes were not concurrent. *Id.*

In *Shriner*, 101 Wn.2d at 583, the Court held that theft in the first degree was concurrent with criminal possession of rented or leased property. Whenever a person violated the criminal possession of a rented motor vehicle statute, he or she also violated the theft in the first degree statute, because all of the elements required to be proved for a conviction of theft in the first degree would be proved by a conviction for criminal possession of a rented motor vehicle. *Id.* at 579-80. At the time, both crimes required proof that the property value was over \$1,500. *Id.*

In *State v. Jendrey*, 46 Wn.App. 379, 381, 730 P.2d 1374 (1986), the Court of Appeals was asked to decide whether the theft in the second degree statute was concurrent with the statute outlawing criminal possession of leased or rented equipment. Unlike in *Shriner*, where both statutes required the property value to exceed \$1,500, theft in the second degree required the property value to exceed \$250 but not exceed \$1,500. *Id.* at 382. Thus, because the property value element for theft in the second degree was distinct from the property value element for criminal

possession of leased or rented equipment, the two statutes were not concurrent.² *Id.* at 383.

In *Chase*, 134 Wn.App. 792, 142 P.3d 630 (2006), the Court of Appeals again addressed the issue of whether theft in the first degree was concurrent with theft of rented or leased property. The court stated the rule: “Statutes are not concurrent unless the general statute is violated every time the special statute is violated.” *Id.* at 800. The court explained that when the *Shriner* Court had held that the predecessor to the theft of leased property statute was concurrent with theft in the first degree, that predecessor statute—criminal possession of rented or leased property—had not defined “value.” *Id.* at 801. However, in 1997 the Legislature replaced the old statute with the current statute, and the current statute defined “value” as “replacement value.” *Id.* While the value for theft of leased property was defined as “replacement cost,” the “value” for theft in the first degree was defined as “fair market value.” *Id.* at 802. Because it is possible for “replacement value” to differ from “market

² The court’s holding makes perfect sense considering that had it held contrary a prosecutor would have been denied the discretion to charge a perpetrator with either of the offenses if a person stole rental equipment valued at \$1,500 or less. More recently, the Supreme Court has explained that the “general-specific” rule does not apply to a situation where its application would infringe on the prosecutor’s discretion. *See State v. Conte*, 159 Wn.2d 797, 807, 154 P.3d 194 (2007).

value,” a person could be guilty of first degree theft of leased property without being guilty of theft in the first degree. *Id.*

The court was not persuaded by Chase’s argument that under the facts of his case he still could have been convicted under both statutes, stating: “[T]he question is whether *all* violations of the first degree theft of leased property statute are necessarily violations of the first degree theft statute. Because they are not, the statutes are not concurrent.” *Id.* at 802-03 (emphasis in original). The court’s ruling clarifies that unless all possible violations of the purported special statute would also violate the purported general statute, the statutes are not concurrent.

Here, Spurgeon was convicted of possession of stolen property in the second degree under RCW 9A.56.020(1)(c) for possessing a stolen access device. She argues that this statute is concurrent with RCW 9.91.144, which outlaws the unlawful redemption of food stamps. Her theory hinges on the proposition that RCW 9A.56.020(1)(c), which prohibits a person from knowingly possessing a stolen access device, is violated every time RCW 9.91.144, which prohibits the unlawful redemption of food stamps, is violated. As such, she maintains that the State was required to charge her with under RCW 9.91.144.

Spurgeon’s argument fails to address the distinctive elements of these two statutes. The two statutes are not concurrent because it is

possible to violate RCW 9.91.144 without violating RCW 9A.56.020(1)(c). There are at least two circumstances where this may occur. First, a person can violate RCW 9.91.144 without possessing food stamps that are stolen. Second, a person can violate RCW 9.91.144 without possessing an access device.

- 1. Because it is possible to violate RCW 9.91.144 without the possessing food stamps that are stolen, RCW 9.91.144 is not concurrent with RCW 9A.56.020(1)(c).**

It is possible to violate RCW 9.91.144 without the food stamps in question being stolen, therefore it is not the case that every time RCW 9.91.144 is violated RCW 9A.56.020(1)(c) is also violated. To determine whether the two statutes are concurrent it is necessary to examine the language of both.

RCW 9A.56.160, "Possession of stolen property in the second degree – Other than a firearm or a motor vehicle," states:

- (1) A person is guilty of possessing stolen property in the second degree if . . .
 - (c) He or she possesses a stolen access device.

RCW 9A.56.140, "Possessing stolen property – Definition," defines possessing stolen property as:

- (1) "Possessing Stolen Property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any

person other than the true owner or person entitled thereto.

Thus, a person commits the crime of possessing stolen property in the second degree by possessing a stolen access device, with the knowledge that the access device is stolen, and withholding or appropriating that access device to the use of someone other than the true owner or the person entitled to use it.

RCW 9.91.144, “Food stamps – Unlawful Redemption,” states:

A person who, in violation of 7 U.S.C. Sec 2024(c), obtains and presents food stamps as defined by the federal food stamp act, as amended, 7 U.S.C. Sec. 2011 et seq., or food stamp benefits transferred electronically, for redemption or causes such stamps or benefits to be presented for redemption through the program established under RCW 74.04.500 is guilty of a class C felony punishable according to chapter 9A.20 RCW.

Therefore, a person commits the crime of unlawful redemption of food stamps, by obtaining and presenting food stamps, or food stamp benefits transferred electronically, for redemption, or by causing the food stamps or benefits to be presented for redemption, while violating of 7 U.S.C. § 2024(c).

7 U.S.C. § 2024(c), “Presentation for payment or redemption of benefits that have been illegally received, transferred, or used,” states:

Whoever presents, or causes to be presented, benefits for payment or redemption of the value of \$100 or more, knowing the same to have been received, transferred, or

used in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony[.]

Accordingly, to violate § 2024(c), a person must present, or cause to be presented, benefits for payment or redemption worth at least \$100, while knowing that these benefits have been received, transferred, or used in violation of the provisions of the chapter or the regulations issued pursuant to the chapter that § 2024(c) falls under. The chapter referred to here, is Chapter 51, “Supplemental Nutrition Assistance Program.” 7 U.S.C. Chapter 51. Thus, when a person redeems food stamps or food stamp benefits in violation of Chapter 51 or the regulations issued pursuant to Chapter 51, he or she violates § 2024(c).

7 C.F.R. § 278, “Participation of Retail Food Stores, Wholesale Food Concerns, and Insured Financial Institutions,” is one of the regulations issued pursuant to Chapter 51. According to this regulation:

[Food stamp] [c]oupons may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food. Coupons may not be accepted in exchange for cash, except when cash is returned as change in a transaction in which coupons were accepted in payment for eligible food under paragraph (d) of this section.

7 C.F.R. § 278.2(a). The regulation explains that food stamp coupons may only be accepted by an “authorized” retail food store, from an “eligible”

household or representative, and only in exchange for food. An exchange for cash by a retail food store is forbidden, unless it is for making change on a purchase of eligible food. This regulation applies directly to § 2024(c); if a retail food store were to redeem food stamp coupons that the retailer knew had been received for cash or from an ineligible household, the retailer would be violating a regulation issued pursuant to Chapter 51.

The regulation also directly addresses redemption of food stamps:

[Food stamp] [c]oupons accepted by the retail food store or a wholesale food concern before the receipt by the firm of an authorization card from the FNS [“Food Nutrition Service”] may not be presented for redemption unless the FNS officer in charge has approved redemption under Sec. 278.7(b).

7 C.F.R. § 278.4(a). Thus, a retail food store fails to abide by this regulation if it does not first receive authorization from the FNS prior to presenting food stamps for redemption. Were a retail food store to present food stamps for redemption without first being authorized to accept food stamps, that store would also be in violation of a regulation issued pursuant to Chapter 51.

On numerous occasions, owners of retail food stores have been convicted under § 2024(c) for violating these regulations. A store owner licensed to receive food stamps was convicted under § 2024(c) for redeeming food stamps that were purchased at a cash discount from other

grocers who were not licensed to accept food stamps. *See United States v. Hassan*, 211 F.3d 380 (7th Cir. 2000). A store owner, previously barred for life from participating in the food stamp program, violated § 2024(c) when he redeemed food stamps collected after making a sham sale of his store to another and then fraudulently applied to receive food stamps under the sham owner's name. *See United States v. Hebeke*, 89 F.3d 279 (6th Cir. 1996). A store owner was convicted under § 2024(c), when he had knowledge that he was ineligible to participate in the food stamp program, received food stamps from other retailers, and presented them to the Department of Agriculture ("DOA") for payment. *See United States v. Puello*, 21 F.3d 7 (2d. Cir. 1994). An authorized food stamp retailer violated § 2024(c) by purchasing food stamps for cash with the knowledge that such a purchase was a violation of § 2024(c). *See United States v. Marshall*, 683 F.2d 1212 (8th Cir. 1982). Evidence was sufficient to convict a food store owner, authorized to receive food stamps under § 2024(c), when it was shown that he and his employees had purchased food stamps for \$0.67 on the dollar, that he had signed all redemption receipts, and that there was a vast discrepancy between his store's food stamp redemptions and gross sales. *See United States v. Barnes*, 117 F.3d 328 (7th Cir. 1997). It is noteworthy that none of these convictions under § 2024(c) involved the possession food stamps that were stolen.

Here, for Spurgeon’s claim to succeed, it must be shown that RCW 9A.56.020(1)(c) is violated every time RCW 9.91.144 is violated. “Statutes are not concurrent unless the general statute is violated every time the special statute is violated.” *Chase*, 134 Wn.App. at 800. A violation of RCW 9A.56.020(1)(c) requires the possession of an access device that is stolen. On the other hand, violations of RCW 9.91.144 occur when food stamps are redeemed in violation of 7 U.S.C. § 2024(c). 7 U.S.C. § 2024(c) is violated when food stamps are redeemed in violation of the provisions or regulations issued pursuant to Chapter 51 of Title 7 to the United States Code. Because there are numerous means of violating Chapter 51 without possessing food stamps that are stolen,³ the statutes are not concurrent.

2. Because it is possible to violate RCW 9.91.144 without possessing an access device, RCW 9.91.144 is not concurrent with RCW 9A.56.020(1)(c).

While it is possible to violate RCW 9.91.144 without possessing an access device, one must possess an access device to violate RCW 9A.56.020(1)(c); for this reason the statutes are not concurrent. RCW 9A.56.010(1) defines “access device”:

³ See *supra* preceding paragraph. It appears that § 2024(c) is most often violated by store owners who redeem food stamps they have purchased for cash at less than face value. See, e.g. *Barnes*, 117 F.3d at 333.

“Access device” means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument[.]

Under the above definition any card, plate, code, account number, or other means of account access that can be used to obtain money, goods, services, or anything else of value qualifies as an access device.⁴ As previously discussed, a person violates the unlawful redemption of food stamps statute by obtaining and presenting either “food stamps *or* food stamp benefits transferred electronically” in violation of § 2024(c). RCW 9.91.144 (emphasis added). Accordingly, a person can commit the crime of unlawful redemption of food stamps by presenting either actual food stamp coupons or by presenting food stamp benefits that have been transferred electronically.

Here, there is no dispute that by possessing an EBT card, Spurgeon possessed an access device. Were the unlawful redemption of food stamps statute limited solely to “food stamp benefits transferred electronically,” then an access device might be necessary to violating that statute. However, to determine whether or not the statutes are concurrent, it must be shown that every time that RCW 9.91.144 is violated, RCW

⁴ 7 U.S.C. § 2012 provides a similar definition of access device.

9A.56.020(1)(c) is also violated. *See Chase*, 134 Wn.App. at 800. In addition to benefits transferred electronically, RCW 9.91.144 also prohibits the unlawful redemption of “food stamps” themselves. Actual food stamp coupons are not cards, plates, or codes, and do not contain account numbers or provide a means of access to an account. Rather food stamp coupons are a form of tender. They are spent just like currency but limited to the purchase of food. Because food stamp coupons do not involve benefits transferred electronically, they do not meet the definition of an “access device.” Therefore it is possible to violate RCW 9.91.144 without possessing an access device. Because it is possible to violate RCW 9.91.144 without possessing an access device, and it is necessary to possess an access device to violate RCW 9A.56.020(1)(c), the statutes are not concurrent.

V. CONCLUSION

For the above stated reasons, Spurgeon's conviction should be affirmed.

Respectfully submitted this 12th day of April, 2010.

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DIVISION II

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

BY Ca DEPUTY

STATE OF WASHINGTON,)	NO. 39426-0-II
)	Cowlitz County No.
Respondent ,)	09-1-00196-8
)	
vs.)	CERTIFICATE OF
)	MAILING
LAQUITTA DIANE SPURGEON,)	
)	
Appellant.)	
_____)	

I, Michelle Sasser, certify and declare:

That on the 16th day of April, 2010, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Brief addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
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Lisa Tabbut
Attorney at Law
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Longview, WA 98632

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of April, 2010.

Michelle Sasser
Michelle M. Sasser