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Division II
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NO. 51572-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES O'HAGAN,

Appellant.

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

The Honorable Michael Evans, Visiting Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. A CLAIM OF *FULL* OWNERSHIP IS NOT REQUIRED FOR A ‘GOOD FAITH CLAIM OF TITLE’ DEFENSE.

In response to O’Hagan’s claim the trial court erred when it refused to instruct his jury on his ‘Good Faith Claim of Title’ (GFCT) defense, the prosecution first claims O’Hagan’s failure to assert ownership of the airboat and Suburban at trial defeats this claim. Brief of Respondent (BOR) at 13-15, 22. To support this assertion, the prosecution attempts to analogize the facts of O’Hagan’s case with those from State v. Brown, 36 Wn. App. 549, 676 P.2d 525 (1984). Because an asserted lien interest is a sufficient claim of ownership to support a GFCT defense and because Brown is readily distinguishable, the prosecution is wrong.

In Brown, the three defendants, Myles, Washington and Brown, claimed Washington’s ex-husband, Morrow, stole a purse and gun from Washington’s apartment. 36 Wn. App. at 551. Brown armed himself with a gun and then he, Myles and Washington drove to Morrow’s home and eventually forced their way in. Id. at 551-52. Morrow fled out a window, so at Washington’s suggestion they take Morrow’s stereo to secure the return of her purse and gun. Id. at 552. All three defendants were arrested while loading the stereo into their car. Id.

At trial, the court refused to grant the defense request to instruct the jury on a GFCT defense. This Court agreed with the decision, noting none of the defendants claimed title to the stereo, and admitted it was taken not because of any ownership interest, but instead because Morrow stole Washington's purse. This Court correctly noted "[t]he good faith claim of title defense to theft applies only when a claim of title can be made to the specific property acquired." Id. at 530-31 (citing State v. Larsen, 23 Wn. App. 218, 219, 596 P.2d 1089 (1979)).

Here, the airboat and Suburban O'Hagan acquired from Couch were acquired with Couch's permission. RP 119-20, 122. Couch agreed to have O'Hagan work on the airboat's seized motor, and he took possession of it for that purpose. RP 274. As to the Suburban, Couch asked O'Hagan to drive it back to Grayland, and O'Hagan claimed this constituted a "service" for which he should be compensated. RP 338, 352.

O'Hagan claimed his work on the airboat and Suburban gave rise to a "common law lien" on each. RP 279. At least initially, the trial court correctly concluded the work performed by O'Hagan on the airboat gave rise to something like a "mechanic's lien" and therefore he could pursue the GFCT defense for the charge related to the vehicle. CP 47 (Conclusion of Law 2.1); RP 16. And because a "mechanic's lien" on property can give rise to a "superior possessory interest" over that of the

true owner, this Court should conclude the trial court's initial ruling as to the airboat was correct. State v. Pike, 118 Wn.2d 585, 590-93, 826 P.2d 152, 156 (1992). And in light of O'Hagan's asserted lien interest in the Suburban, this Court should also conclude he was also entitled to assert and have the jury instructed on the GFCT defense for it as well.

The prosecution errs in trying to analogize Brown to O'Hagan's case because the property at issue here were items O'Hagan asserted title interest in as a result of work performed on them, whereas the defendants in Brown asserted no such interest in the stereo. Brown does not address this factual scenario and therefore does not assist this Court in addressing O'Hagan's claims on appeal.

2. THAT THE STATUTES DEFINING "THEFT" AND "POSSESSION OF STOLEN PROPERTY" BOTH LIST A DEFENSE SPECIFIC TO "A PALLET RECYCLER OR REPAIRER" DOES NOT DEFEAT O'HAGAN'S CLAIM ON APPEAL.

The prosecution claims that because the statutes defining "theft" and "possession of stolen property" both list a specific defense for "a pallet recycler or repairer," it is clear the legislature intended the GFCT defense to be limited to "theft" charges. BOR at 15-19. This claim should be rejected because this defense was added to the statutes in order to protect a specific business in Washington, pallet recyclers and repairers, and therefore is irrelevant to defendants not engaged in that business.

The relevant statutes provide:

(1) “Theft” means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

RCW 9A.56.020 (emphasis added).

(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.

(2) The fact that the person who stole the property has not been convicted, apprehended, or identified is not a defense to a charge of possessing stolen property.

(3) When a person has in his or her possession, or under his or her control, stolen access devices issued in the names of two or more persons, or ten or more stolen merchandise pallets, or ten or more stolen beverage crates, or a combination of ten or more stolen merchandise pallets and beverage crates, as defined under RCW 9A.56.010, he or she is presumed to know that they are stolen.

(4) The presumption in subsection (3) of this section is rebuttable by evidence raising a reasonable inference that

the possession of such stolen access devices, merchandise pallets, or beverage crates was without knowledge that they were stolen.

(5) In any prosecution for possessing stolen property, it is a sufficient defense that the property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

RCW 9A.56.140 (emphasis added).

As the prosecution acknowledges, the defense provisions specific to “a pallet recycler or repairer” were added in 2004. BOR at 19 n.2 (citing Laws of 2004, ch. 122, § 1). What the prosecution failed to acknowledge, however, is the legislative intent in enacting the defense.

The legislature’s intent in amending the “theft” and “possession of stolen property” definitions is revealed in both the House and Senate bill reports. The Senate report notes there was no testimony against the amendments, and the testimony in favor is summarized as follows;

This bill gives protection to people who recycle and repair pallets. Pallet recyclers receive pallets in the ordinary course of business. If there is a name on some of the pallets, they are presumed to have been knowingly stolen. This bill provides a defense to that claim.

Senate Bill Report, SB 6338 at 1.

Similarly, the House bill report notes there was no testimony against, and the testimony in favor is summarized as follows;

This bill is merely a housecleaning bill. Pallet recycling is a big business in this state. Pallet recyclers buy and sell used pallets. Pallet recyclers receive thousands of pallets,

some of which have a name of origin printed on them. Under the current law, pallet recyclers could be subject to liability under the theft statutes for possession of these pallets. This bill gives protection to pallet recyclers from such liability.

House Bill Report, SB 6338 at 2.

It is worth noting the language used by the House in summarizing the favorable testimony; it notes pallet recyclers/repairers would be liable under the “theft statutes for possession” of stolen pallets. This at least implies the 2004 legislature considered the mere *possession* of stolen pallets by pallet recyclers and repairers could be prosecuted as a “theft” even though the business merely received and possessed stolen pallets instead of actually stealing them outright.

The Final Bill Report provides;

Background: There are businesses in Washington that repair or recycle pallets. Sometimes, in the ordinary course of business, a pallet recycler will receive pallets that have been mislaid or misplaced and the recycling business arranges to have them returned to their rightful owners. A fee is charged for this service.

Summary: In a prosecution for theft or possession of stolen property, it is a sufficient defense that the property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

Final Bill Report, SB 6338 at 1.

What the defense effectively does is prevent prosecution of pallet recyclers and repairers for theft or possession of stolen pallets provided

they acquire them in the ordinary course of business. It has no application beyond that context.

And although the defense was added to both statutes, that does not mean “possession of stolen property” does not also constitute a “theft.” Instead it means only that the legislature wanted to make clear pallet recyclers and repairers should not be prosecuted for engaging in an otherwise lawful and important business to Washington State. Including the defense in both statutes should be viewed, based on the bill reports, as a legislative intent to protect the pallet recycling and repair business, and not as a way to distinguish between “theft” and “possession of stolen property.”

3. AN “INTENT TO DEPRIVE” MUST BE PROVED TO CONVICT FOR POSSESSION OF STOLEN PROPERTY.

The prosecution claims it is “not required to prove the defendant intended to deprive the victim of the property in a prosecution for possession of stolen property.” BOR at 17. As discussed in detail in the opening brief, however, to convict for possession of stolen property, the prosecution must prove beyond a reasonable doubt that the person possessing the property knew it was stolen and thereafter acted “to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1); see BOA at

18-20 (explaining why “possession of stolen property” constitutes theft because the act of withholding the property from the true owner meets the definition of “theft”). Thus, to convict the prosecution must prove the intentional act of withholding the property from the true owner. Therefore, an ‘intent to deprive’ must be proved for both “theft” and “possession of stolen” property and therefore the prosecution’s contrary claim is wrong.

4. O’HAGAN IS “INDIGENT” FOR PURPOSES OF RAMIREZ.

The prosecution claims O’Hagan is not “indigent” for purposes of State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), claiming he failed to submit documentation to support his claim of indigency. BOR at 24-25. The prosecution is wrong. O’Hagan he did submit supporting documentation, CP 103-113, and the trial court found he was eligible for appeal at public expense. CP 126-27: RP 470. The \$200 criminal filing fee imposed against him should be stricken in the event this Court affirms his conviction.

B. CONCLUSION

Based on the reasoning set forth here and in O'Hagan's opening brief, this Court should reverse and remand for a new trial. In the alternative, this Court should order the trial court to strike the improperly imposed \$200 criminal filing fee from his judgment and sentence.

DATED this 19th day of February 2019.

Respectfully submitted,

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