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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

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court deprived appellant of his constitutional right to present a defense.

2. The trial court erred by refusing to instruct the jury on Appellant's "good faith claim of title" defense.

3. The trial court erred in entering finding of fact 1.6. CP 47.

4. The criminal filing fee should be stricken under the Washington Supreme Court's recent decision in State v. Ramirez.[1]

Issues Pertaining to Assignments of Error

The complaining witness to first degree possession of stolen property and possession of a stolen vehicle charges had a longstanding business relationship with Appellant. Appellant would occasionally work on the complaining witness's construction projects. During the course of this relationship Appellant stored the complaining witness's Chevrolet Suburban and an airboat on his property. At some point Appellant concluded the complaining witness owed him money for work performed so he filed a civil law suit to recover that money. Either just before or just after the law suit was filed, the complaining witness demanded return of the Suburban and airboat. Appellant refused, claiming he would only

[1] State v. Ramirez, ___ Wn.2d, ___ P.3d ___, 2018 WL 4499761 (Sept. 20, 2018).

release them to the complaining witness by court order in light of the pending law suit. No court order was forthcoming, but the property was later seized by law enforcement and returned to the complaining witness and the charges were filed.

1. Was Appellant deprived of his right to present a defense when the trial court refused to instruct the jury on Appellant's 'good faith claim of title' defense despite initially ruling it could be used as a defense to the charge involving the airboat only, but later concluded the defense was unavailable for either charge?

2. Did the trial court err in finding the 'good faith claim of title' defense was unavailable for the possession of a stolen vehicle charge based on a factual finding that unlike the airboat, Appellant performed no work on the Suburban when evidence supported finding Appellant, at the request of the complaining witness, had performed work on the Suburban by transporting and storing it on his property?

3. In 1975 the Washington legislature engaged in an extensive revision of the criminal code. As part of that revision the term "larceny," which collectively referred to possession of stolen property and theft crimes, was omitted and replaced with specific statutes for each type of crime. The revision also rewrote the 'good faith claim of title' defense statute, replacing "larceny" with "theft." Does the 'good faith claim of

title' defense still apply to stolen property crimes despite the rewording of the statute when there is no indication the legislature intended to eliminate that defense for possession of stolen property charges and when intentionally possessing stolen property constitutes a 'theft,' and therefore the statutory defense as written still applies to possession of stolen property crimes?

4. Under the Supreme Court's recent Ramirez decision, should the $200 criminal filing fee be stricken?

B. STATEMENT OF THE CASE

(1) Procedural Facts

On November 2, 2016, the Pacific County Prosecutor charged appellant James O'Hagan with possession of a stolen vehicle and first degree possession of stolen property. CP 3-5. The prosecution alleged O'Hagan possessed and refused to return a Chevrolet Suburban and an airboat to their rightful owner, Brian Couch. The prosecution alleged that despite repeated demands by Couch to return the property and threats by law enforcement to charge O'Hagan criminally if he did not comply, he refused, absent a court order, to return the property until his civil law suit against Couch was resolved. CP 6-7. In April 2017, the prosecutor added

a bail jumping charge after O'Hagan failed to appear for a court hearing on January 17, 2017. CP 15-17.[2]

A trial was held February 26-28, 2018, before the Honorable Judge Michael Evans, at which O'Hagan represented himself, albeit with stand-by counsel. RP[3] 47-450. A jury convicted O'Hagan as charged. CP 98-100; RP 444-45.

O'Hagan was sentenced on March 23, 2018. RP 452-70. The prosecution conceded the two property crimes constituted the same criminal conduct and the court accepted the concession. CP 115; RP 452. Finding O'Hagan qualified for the "First-Time Offender Waiver," the court imposed 21 days incarceration on each count, converted to 168 hours of "community restitution (service)." CP 114-23; RP 462-63. The court also imposed $800 in Legal Financial Obligations (LFOs), which includes a $200 "criminal filing fee." CP 117.

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[2] The prosecution filed an amended information on November 18, 2016, that changed the charging language, but not the charges. CP 8-9.

[3] This brief cites uses "RP" followed by the page number to refer to the five consecutively paginated verbatim reports of proceedings for the dates of January 29, 2018, February 26-28, 2018 and March 23, 2018. Two additional volumes of verbatim report of proceedings were submitted to this Court on November 13, 2018. Counsel has reviewed them but does not cite to them in this brief.

After reviewing O'Hagan's declaration regarding his financial situation (CP 103-13), the court declared him indigent and therefore authorized him to pursue appeal at public expense. CP 126-27: RP 470. O'Hagan appeals. CP 124-25.

(2) Trial Testimony

According to complaining witness Brian Couch, he hired O'Hagan in 2015 to be a job site supervisor for Crouch's part of the "Olympic pipeline project" (OPP), which was to clear a right-of-way. RP 119. O'Hagan did not, however, stay on until the job was completed, and instead quit in September 2015, and according to Couch, asked to drive one of Couch's company vehicles, a Suburban, home and then store it until Couch could retrieve it. RP 119-20, 134, 136. Couch claimed when O'Hagan quit, it left him with an extra vehicle at the job site, so he allowed O'Hagan to borrow the Suburban. RP 135.

Couch recalled that in April 2015, O'Hagan took Couch's airboat from property Couch was moving off of to O'Hagan's property to store and try to free up the airboat's seized motor. Couch denied ever asking O'Hagan to work on the airboat, claiming instead O'Hagan simply volunteered to do so, but never completed the repair. RP 122-23, 124-25, 151, 187.

Couch claimed that when he first attempted to recover the airboat and Suburban from O'Hagan in February 2016, O'Hagan kicked him off the property. RP 123-24, 136. Couch recalled thereafter contacting law enforcement about how to get his property back from O'Hagan. RP 144. Shortly thereafter O'Hagan filed a law suit claiming Couch owed him money for a variety of reasons. RP 124.

Couch said he went to O'Hagan's place again in April 2016 to retrieve the airboat and Suburban, but O'Hagan again kicked him off the property. RP 173. When Couch threatened to call law enforcement, O'Hagan allegedly replied, "Fine, go ahead," so Couch did. Id.

Couch agreed that he and O'Hagan exchanged e-mails in March 2016 in which O'Hagan was demanding payment from Couch for work he and his family had performed for Couch. RP 174-83.

Pacific County Sheriff's Deputy Randall Wiegardt was contacted by Couch on May 13, 2016, who complained that O'Hagan would not release the vehicles he had stored on O'Hagan's property. RP 190-91. Wiegardt called O'Hagan the following day. RP 191. O'Hagan admitted he had Couch's property, and that he had a pending civil law suit against Couch. RP 192-93.

After consulting with his supervisor about whether O'Hagan could face criminal charges if he refused to release the property, Wiegardt went with another law enforcement officer and met with O'Hagan at his property. RP 193-94. Wiegardt was able to confirm the airboat and Suburban were on O'Hagan's property. RP 194. Wiegardt informed O'Hagan that he was facing "possible criminal charges" if he did not release the property to Couch. RP 194, 204. O'Hagan noted Couch had come by in the past and tried to retake possession of the property. RP 196. O'Hagan also told Wiegardt that he would not release the property to Couch absent a court order to do so. RP 194.

David Dunham and Robert Powers, both friends of O'Hagan, testified at trial. RP 226-56. Both claimed they were present and overheard a speaker phone call between O'Hagan and Couch regarding O'Hagan's civil suit against Couch. RP 228, 246. Dunham recalled Couch offering O'Hagan $4,000 in return for the Suburban and airboat. RP 230. Couch allegedly told O'Hagan that if he refused the settlement offer, he would "break" O'Hagan with sanctions, court fees and attorney fees. Id.

Powers, who was living in a trailer on O'Hagan's property in 2015 and 2016, testified Couch never attempted to recover the Suburban and airboat before O'Hagan filed the civil suit. RP 246. Powers recalled

Couch specifically asking O'Hagan to try to repair the engine on his airboat. RP 247. Powers also recalled during the speaking phone call between O'Hagan and Couch, Couch offering to settle for $4,000, but O'Hagan declined, stating he would accept that as a down payment provided there were monthly payment to follow. Id. Couch responded by stating he would "break" O'Hagan by using the courts. Id.

O'Hagan testified at trial. RP 259-320, 338-52. He denied ever stealing anything from anyone. RP 268. With regard to the airboat, O'Hagan recalled Couch had left it outside in the rain so long that the motor "seized up." RP 274. When Couch expressed his concern to O'Hagan that he may have "ruined" it, O'Hagan said he could probably save it, and thereafter had it moved into his warehouse to work on. O'Hagan said that over the next several months he worked on freeing up the airboat motor. Id.

With regard to the Suburban, O'Hagan recalled it had bad brakes, but Couch asked him to drive it back to Grayland because he trusted O'Hagan to be careful. RP 275, 338. O'Hagan explained at trial that by acquiescing to Couch's request to drive the Suburban to Grayland, it meant O'Hagan had to leave his motorhome in Mt. Vernon to recover at a later time. RP 338. O'Hagan considered his driving of the Suburban to

Grayland a service benefitting Couch for which he should be paid. RP 352.

In the fall of 2015, O'Hagan started trying to contact Couch about getting the rest he was owed for his work on the OPP. RP 278. Couch failed to answer or return O'Hagan's calls or respond to his e-mails. Id. When Couch failed to respond or show up at O'Hagan's property, O'Hagan filed a civil law suit against Couch for the money he was owed from the OPP and other projects he had worked on for Couch. RP 278-79, 345. O'Hagan recalled that shortly thereafter, Couch showed up at his property and demanded custody of a tow truck he had parked at O'Hagan's place. O'Hagan released the tow truck to him but emphasized that they needed to discuss what Couch owed O'Hagan. RP 279.

A few days later, Couch showed up in the tow truck and told O'Hagan he was there to take possession of the Suburban and airboat. RP 279. O'Hagan refused to release them to Couch on the basis that because he had a pending civil lawsuit against Couch, he had a "common law lien" on the Suburban and airboat and therefore he should not allow possession to transfer. Id.

O'Hagan agreed that Deputy Wiegardt repeatedly threatened him with criminal charges if he failed to return Couch's property. RP 347. He explained, however, that he never intended to keep Couch's property, only to hold it "in good faith" until the civil law suit was resolved. RP 351.

(3) Facts Pertaining to Jury Instructions

On August 11, 2017, the trial court concluded O'Hagan was entitled to pursue a good faith claim of title defense to possession of stolen property and vehicle charges. ***CP 130-33*** (Sub no. 176, Motion to Reconsider Defense of Good Faith Claim of Title under RCW 9A.56.010(2)(A), filed 08/18/17). The prosecution filed a motion to reconsider that ruling. Id.

On November 17, 2017, the court issued a ruling stating it was granting the prosecution's motion. ***CP 134-35***[4] (Sub no. 214, Order on State's Motion to Reconsider Defense of Good Faith Claim of Title Under RCW 9A.56.010(2)(a), filed November 22, 2017). Although the order

[4] A supplemental designation of Clerk's papers was filed on October 19, 2018 designating the following three additional documents; Sub no. 176, Motion to Reconsider Defense of Good Faith Claim of Title under RCW 9A.56.010(2)(A), filed 08/18/17, Sub no. 214, Order on State's Motion to Reconsider Defense of Good Faith Claim of Title Under RCW 9A.56.010(2)(a), filed November 22, 2017, and Sub no. 279, State's Proposed Instructions, filed February 27, 2018. The Supplemental Clerk's Papers Index has not yet been issued by the Pacific County Clerk. The bolded and italicized "***CP***" reference the expected index number the Clerk will assign to these documents.

does not specifically state O'Hagan will not be allowed to pursue the defense, it does state "evidence of a civil suit between Defendant and Brian Couch is not relevant to the charge of possession of a stolen motor vehicle, possession of stolen property in the first degree and bail jumping, and is hereby excluded from the criminal trial." Id.

At a pretrial hearing on January 29, 2018, the court once again addressed the issue of whether O'Hagan could pursue a good faith claim of title defense to the possession of stolen property and possession of a stolen vehicle charges. The court refused to hear argument, instead basing its ruling on the briefing provided. RP 2-3. The court did, however, ask some clarifying question of O'Hagan about his arrangement with Couch regarding the Suburban, and whether Couch directed O'Hagan to drive the Suburban from the OPP job site to Grayland and the timeline of when that occurred. RP 3-4. O'Hagan responded by noting that having to drive the Suburban to Grayland meant he had to leave one of his vehicles in Mt. Vernon, to be retrieved later at some hardship to O'Hagan. RP 3. According to O'Hagan, it was in the fall of 2015 or 2016 that this occurred. RP 4.

The court then engaged O'Hagan's stand by counsel in a colloquy about whether O'Hagan ever had a colorable claim of title to the Suburban even if he drove the Suburban to Grayland at Couch's request and never

got paid. RP 5-15. Stand by counsel argued that just as the storage and attempted repair work O'Hagan did on Couch's airboat gave rise to a colorable claim of title, so too did transporting and storing the Suburban on his property. Id.

The trial court, despite its November 17, 2016 ruling precluding a good faith claim of title for any of the charged offenses, held O'Hagan was entitled to pursue that defense as to the airboat, but not the Suburban. CP 45-47; RP 16-19. The court reasoned that because O'Hagan claimed he made repairs to the airboat, he arguably had a "mechanic's lien" that allowed for that defense as to the airboat. CP 47 (Conclusion of Law 2.1); RP 16. As to the Suburban, however, the court reasoned that because all O'Hagan did was drive it home versus making "physical repairs" like he had with the airboat, he was not entitled to the defense for that charge. CP 47 (Finding of Fact 1.6 & Conclusion of Law 2.3); RP 16-17.

The issue regarding the 'good faith claim of title' defense came up again after both parties had rested. RP 222, 382, 387-408. Both parties submitted proposed jury instructions. CP 48-75 (Defense proposed); ***CP 136-63*** (Sub no. 279, State's Proposed Instructions, filed February 27, 2018).

The defense proposed instructions included an instruction setting forth the 'good faith claim of title' defense. CP 55. The prosecution noted the trial court's prior rulings initially precluding the defense altogether, only to revise that ruling later allowing it for the airboat. RP 387. The prosecution then noted the decision in State v. Hawkins, 157 Wn. App. 739, 238 P.3d 1226 (2010), review denied, 171 Wn.2d 1013 (2011), and its holding "that the good faith claim of title does not apply to the charge of possession of stolen property." RP 387-88.

In response, O'Hagan argued that whether the defense applied was at least "vague or confusing," and that in such an instance it should be left to the jury to decide. RP 389-90. In response, the court noted that "theft is defined as unlawfully obtaining or exerting unauthorized control over property." RP 390. The court also noted that the rule announced in Hawkins is "pretty black and white to me." RP 392.

O'Hagan's stand by counsel was allowed to make argument on O'Hagan's behalf. RP 393-95. Counsel argued that in light of the evidence the court allowed O'Hagan to present -- that he lawfully obtained possession of the airboat and Suburban but refused to return them based on a claim he was keeping them under the good faith belief he lawfully could because of his civil suit against Couch -- it would confuse the jury if

no instruction was provided on how the jury should consider that evidence. Id.

The trial court rejected the argument. The court noted Hawkins held there is "no theft component to the crime" of possession of stolen property, and asked, "How do I get around that?" RP 395-96. Stand by counsel replied that theft is inherent in possession of stolen property cases because they necessarily involve a theft by virtue of involving "stolen" property. RP 396. Counsel also argued that under the unique circumstances of this case, which included a prior ruling allowing the defense as to the airboat and O'Hagan's reliance on that ruling in presenting his defense, it would be unfair to change course. RP 396-97, 399-400.

The trial court concluded it needed to comply with Hawkins, so it refused to give O'Hagan proposed instruction setting forth the defense. RP 407-08; see CP 76-97 (Court's Instructions). O'Hagan took exception. RP 410, 412. The court speculated, however, that even without a specific instruction on the 'good faith claim of title" defense, O'Hagan could still utilize the evidence of that defense he presented to argue the State failed to prove he had "unauthorized control" of the airboat and the Suburban. RP 407-08. The court did, however, instruct the jury on the definition of

"theft." CP 87 (Instruction 9); RP 421 (trial court reads Instruction 9 to jury).

(4) Closing Arguments

In closing argument, the prosecution framed the issue for the jury regarding the property crime charges as "Did [O'Hagan] retain or possess stolen property or a stolen vehicle?" RP 427. The prosecutor argued he had because he refused to give Couch his property back and was therefore "withholding it from the true owner." Id.

O'Hagan argued he had no intent to steal anything, and he refused to return Couch's property based on a good faith belief he was entitled to do so because Couch owe him for wages and services. RP 430-31.

In rebuttal, the prosecution argued that if a neighbor borrows your lawnmower and does not return it, a theft has occurred. RP 437. The prosecutor also highlighted that despite O'Hagan's comments in closing about having retained Couch's property under a good faith claim of title, the instruction provided by the court make no mention of this as a valid defense. RP 438.

C. ARGUMENTS

1. THE TRIAL COURT DEPRIVED O'HAGAN OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Despite what the Hawkins Court held, the statutory defense of 'good faith claim of title' applies to prosecutions for possession of stolen property crimes. This is true for the simple reason that the act of possession stolen property satisfies the statutory definition of "theft," and the statute setting forth the 'good faith' defense expressly states it applies to "any prosecution for theft." RCW 9A.56.020(2). The Hawkins Court's contrary conclusion is in error. That Court failed to recognize that possession of stolen property constitutes "theft," and its statutory construction analysis was flawed because it failed to take into account the legislative history of the 1975 amendments, which provide no indication of an intent to change what crimes the 'good faith' defense should apply. Because O'Hagan's jury should have been allowed to consider the defense with regard to the two charged property crimes and were not, this Court should reverse those convictions.

a. The right to present a defense is fundamental to the integrity of the criminal justice system.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane

v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 3, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

b. Defendants are entitled to have the jury properly instructed on their defense theory.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). "'Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory."' Id. (quoting State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997)). "'Failure to give such instructions is prejudicial error.'" Id. (quoting State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999)).

c. First Degree Possession of Stolen Property and Possession of a Stolen Vehicle constitute forms of "theft."

First degree possession of stolen property and possession of a stolen vehicle fall within the definition of "theft."

> (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;

RCW 9A.56.020 (emphasis added); see CP 87 (Instruction 9).

> "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.

RCW 9A.56.140(1) (emphasis added) see CP 89 (Instruction 11).

O'Hagan's jury was instructed;

> A person commits the crime of possessing a stolen motor vehicle when he or she possesses a stolen motor vehicle.
>
> Possessing a stolen motor vehicle means knowingly to receive, retain, possess, conceal, or dispose of a stolen motor vehicle 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.

CP 84 (Instruction 6) (emphasis added); see RCW 9A.56.068.

"Stolen" means obtained by theft, robbery, or extortion;

RCW 9A.56.010(17) (emphasis added); O'Hagan's jury was instructed that "'Stolen' means obtained by theft." CP 86 (Instruction 8).

Given these definitions, it is axiomatic that by "possess[ing] . . . stolen property[/stolen motor vehicle] knowing that it has been stolen and . . . withhold[ing] [its] use [by] . . the true owner" constitutes "exert[ing] unauthorized control over the property . . . of another." CP 84, 87, 89. "[E]xert[ing] unauthorized control over the property . . . of another" constitutes theft. RCW 9A.56.020(1)(a).

Given these definitions, to convict O'Hagan of the charged property crimes the jury had to find he possessed a stolen Suburban and a stolen airboat. To find them "stolen" the jury had to find both vehicles were "obtained by theft." CP 86 (Instruction 8).

Couch gave O'Hagan permission to possess both the Suburban and the airboat on his property. RP 119-20, 122. Therefore, in order to find them "stolen" for purposes of the charges, the jury had to conclude O'Hagan committed a "theft." Under the circumstances, the only way O'Hagan committed a "theft" was by making a finding that he "exerted unauthorized control over" the vehicles with intent to deprive Couch of such property. CP 87 (Instruction 9). In other words, to be found guilty as charged, the jury had to find he committed a theft.

If the jury had to find O'Hagan committed a theft to convict him of the charge offenses, then those offenses are subject to the 'good faith' defense, which provides:

> (2) In <u>any</u> 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;

RCW 9A.56.020 (emphasis added).

As discussed, to convict O'Hagan of either charged property crime, the jury had to find O'Hagan committed a theft. Thus, a prosecution for first degree possession of stolen property or possession of a stolen motor vehicle constitutes a "prosecution for theft." The 'good faith' defense applies to "any prosecution for theft." <u>Id.</u>

d. <u>The decision in *State v. Hawkins* is wrong.</u>

The Division Three Court of Appeals decision in <u>Hawkins</u> is wrong. That Court based its decision on 1975 amendments to Washington's criminal code. 157 Wn. App. at 748-49. The Court noted these amendments removed the word "larceny" as used in the former 'good faith' defense statute and replaced it with the word "theft." 157 Wn. App. at 748 (citing RCW 9.54.120(1909)). The Court also noted that because the former possession of stolen property provision was a subsection of the overall larceny statute, the defense was available under

the former criminal code. 157 Wn. App. at 748-49 (citing RCW 9.54.010(1915) and State v. Smythe, 7 Wn. App. 50499 P.2d 63 (1972)).

The Hawkins Court then notes that under the current criminal code, possession of stolen property crimes have their own statutory provisions (RCW 9A.56.140 through .170) and concluded that the "essence of the modern crime is possession of stolen property knowing it is stolen." 157 Wn. App. at 749. The Court then concluded:

> In light of the separation of the statutes and the limitation of the defense to the theft offenses, the statutory defense has no applicability to modern possession of stolen property cases.

Id.

Notably lacking from the Court's analysis is any consideration of legislative intent in rewording the 'good faith' defense statute in 1975. A copy of the relevant portions of the Washington State Legislature's "Final" legislative report issued in July 1975 is attached as an appendix. This report specifically notes that for "Crimes Against Property";

> A new crime of reckless burning is established to cover conduct not within the arson statute provisions. Requirement of a "break" for burglary has been dropped. A general definition of theft has been set out to replace the modified common law categories in present law, the dividing lines between the three degrees of theft are set at $1500 and $250. Protection against the theft of computer time is added. The bill also contains substantial revisions of the extorsion provisions.

Appendix at 3. Although "theft" is mentioned, missing is any indication the legislature intended to eliminate the "good faith' defense for possession of stolen property crimes.

The Hawkins Court failed to properly analyze how the 1975 amendments to the 'good faith' defense statute should be interpreted. Instead the Court made the unwarranted assumption that possession of stolen property does not constitute theft because the 1975 Legislature enacted separate statutes for each subsection of the former larceny statute. It then reasons that because the 'good faith' defense provision only applies to "theft," it cannot apply to possession of stolen property.

As previously discussed, however, the criminal act of possessing stolen property necessarily results in the criminal act of theft. The Hawkins Court's contrary conclusion is wrong. 157 Wn. App at 749. Moreover, because possession of stolen property constitutes a theft, the Court's conclusion that the 'good faith' defense provision's reference to "theft" necessarily excludes it application to possession of stolen property cases is similarly wrong.

e. Reversal is required because this constitutional error is not harmless beyond a reasonable doubt.

Violation of the right to present a defense is constitutional error. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). The prosecution bears the burden of overcoming the presumption of prejudice and proving harmlessness beyond a reasonable doubt. State v. Maupin, 128 Wn.2d 918, 928–29, 913 P.2d 808 (1996); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The prosecution cannot meet its burden here. O'Hagan admitted he possessed and withheld the Suburban and airboat from Couch. He claimed, however, that he was entitled to do so in light of his pending civil suit against Couch and because he had performed work on both and never been compensated. Without the 'good faith' defense instruction, however, the jury had no legal way to acquit O'Hagan on that basis, even if they believed him.

Moreover, O'Hagan began trial with the understanding the 'good faith' defense would apply at least to the airboat and presented his defense evidence accordingly. O'Hagan reasonably relied on the court's pretrial ruling at least as to the airboat charge. He did not dispute possessing the airboat. He did not dispute he refused to return it absent a court order. He claimed only that he did so because he believed in good faith that he had

the legal right to retain custody of the airboat under the circumstances. This is precisely the situation the 'good faith' defense was intended. Unfortunately, although the trial court seemed to recognize how the defense logically applied, it reversed course at the end of trial based solely on the decision in Hawkins. This was error because Hawkins is wrongly decided. Reversal of the conviction is required.

2. THE $200 CRIMINAL FILING FEE SHOULD BE STRICKEN UNDER *STATE V. RAMIREZ.*

O'Hagan is indigent under the applicable statutory criteria. The criminal filing fee should be stricken under the recent Ramirez decision.

In Ramirez, an appellant challenged discretionary legal financial obligations (LFOs) on the grounds that the trial court had not engaged in an appropriate inquiry regarding his ability to pay under State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). Ramirez, 2018 WL 4499761 at *2.

The Supreme Court agreed, setting forth detailed instructions regarding the appropriate inquiry. Id. at *4-6.

But, based on watershed statutory amendments that took effect while Ramirez's appeal was pending, the Supreme Court ultimately granted relief on statutory grounds.

The Court explained that Laws of 2018, ch. 269, § 6(3) ("House Bill 1783") made substantial modifications to several facets of Washington's LFO system. In doing so, the legislature "address[ed] some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction." Ramirez, 2018 WL 4499761 at *6.

For example, House Bill 1783 eliminates interest accrual on the non-restitution portions of LFOs, establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction, and provides that a court may not sanction an offender for failure to pay LFOs *unless* the failure to pay is willful. Ramirez, 2018 WL 4499761 at *6 (citing Laws of 2018, ch. 269, §§ 1, 18, 7.)

It amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Ramirez, 2018 WL 4499761 at *6 (citing Laws of 2018, ch. 269, § 6(3)). It also prohibits imposing the $200 filing fee on indigent defendants. Ramirez, 2018 WL 4499761 at *6 (citing Laws of 2018, ch. 269, § 17).

As Ramirez further noted, a trial court "'shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).'" Ramirez, 2018 WL 4499761 at *7 (quoting Laws of 2018, ch. 269, § 6(3)). Thus, indigency

may be established by three objective criteria. "Under RCW 10.101.010(3)(a) through (c), a person is 'indigent' if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level." Ramirez, 2018 WL 4499761 at *7.[5]

Crucially to this case, the Court also held that the House Bill 1783 amendments applied prospectively to cases not yet final on appeal. Ramirez, 2018 WL 4499761 at *7-8 (citing State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)).

The Supreme Court concluded that the trial court impermissibly imposed discretionary LFOs, as well as the $200 criminal filing fee, on Ramirez. The Court remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. Ramirez, 2018 WL 4499761 at *8.

Here, the record shows O'Hagan is indigent under RCW 10.101.010(3). CP 126-27. And House Bill 1783 applies prospectively

[5] If none of these criteria apply, only then must the trial court engage in an individualized inquiry into current and future ability to pay. Ramirez, 2018 WL 4499761 at *7.

to his case. This Court should remand or the $200 filing fee to be stricken.

D. CONCLUSION

O'Hagan was deprived of his right to present a defense to the possession of stolen property and possession of a stolen vehicle charges because the trial court erred in refusing to instruct the jury on O'Hagan's only defense to those crimes, that he reasonably and in good faith believed he could claim title to the Suburban and airboat. This Court should therefore reverse the property crime convictions and remand for the $200 criminal filing fee to be stricken from O'Hagan's judgment and sentence.

DATED this 14th day of October, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorney for Appellant

APPENDIX

LEGISLATIVE REPORT

of the
44th Regular and 1st Extraordinary Sessions

WASHINGTON STATE LEGISLATURE

FINAL
July 1975

9 510WW2 XL 3123
10/99 28880-67 NULE

By Senators Francis, Woody and Jones RESSB 2092

Enacting a new criminal code

ANALYSIS AS ENACTED

ISSUE:

Not since 1909 has there been a comprehensive review and reform of the state's criminal code (Title 9 RCW). Since that time, court decisions, inflation, urbanization, and increasing sophistication of both criminals and the criminal justice system has rendered much of the present code archaic and unenforceable.

SUMMARY:

This bill constitutes a major revision of the provisions of Title 9 RCW. The revision was undertaken to clean up some antiquated or simply awkward language in the 1909 code as well as to introduce into state law some criminal law concepts developed since that time. The bill was taken from a draft developed by the Criminal Code Task Force of the State Bar Association. Their draft was based upon an earlier code revision proposal developed by the Washington Legislative Council's Judiciary Committee.

General Provisions - Preliminary article, principles of liability, insanity, defenses, classification of crimes, anticipatory offenses.

Standardizes sentences - three degrees of felonies and two degrees of misdemeanors, each with a prescribed sentencing range. The bill contains definitions of intent, knowledge, recklessness, and criminal negligence, the four mental states which can lead to criminal culpability. Significantly revised existing provisions relating to principals/accessories (now treated under a "complicity" section) and the conspiracy section (a "substantial step" now required). New provisions are an insanity defense (the M'Naughten test), an entrapment defense (taken from state case law) and a provision allowing the court to order restitution in lieu of the statutory fine.

Crimes Against Persons - Homicide, assault, kidnapping.

A statutory defense to the felony murder rule has been added with larceny (now known as "theft") being dropped from first degree murder portion of the rule. Two degrees of manslaughter replace a number of specific manslaughter provisions. The coverage of the kidnapping sections is broadened by dropping the "holding for ransom" requirements of first degree.

Crimes Against Property - Arson, malicious mischief, burglary, trespass, theft, robbery, fraud.

A new crime of reckless burning is established to cover conduct not within the arson provisions. Requirement of a "break" for burglary has been dropped. A general definition of theft has been set out to replace the modified common law categories in present law, the dividing lines between the three degrees of theft are set at $1500 and $250. Protection against the theft of computer time is added. The bill also contains substantial revisions of the extortion provisions.

Victimless Crimes - Prostitution, sodomy, adultery.

Committing prostitution remains a criminal offense. The pimping provisions of present law are rewritten for more effective utilization and a new crime of "permitting prostitution" without a requirement of direct profiteering is added to the regulatory scheme. The bill repeals the broad sodomy section of present law and the adultery provisions.

Miscellaneous Crimes - Bribery and corrupt influence, perjury, obstructing governmental operations, abuse of office, public disturbance.

This section deals primarily with crimes relating to government operation. It contains a more direct comprehensive regulation of the conduct of public officials of those who would attempt to influence public officials. A new section reverses the common law rule on inconsistent statements (making them perjurious). Another new provision makes failure to appear after release on bail or "personal recognizance" a crime with the grading of the offense depending on the grading of the original charge.

NOTE:

The effective date of this act is July 1, 1976.

The revised criminal code passed the Senate in a package of bills, but was consolidated into one bill (RESSB 2092) by the House of Representatives.

SENATE:	46	3		Effective: July 1, 1976
HOUSE:	64	26	(a)	C 260 L 75 1st ex. sess.
SENATE CONCURRED:	28	20		

NIELSEN, BROMAN & KOCH P.L.L.C.

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