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Court of Appeals  
Division II  
State of Washington  
6/11/2019 1:20 PM

**NO. 52569-1-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**AUSTEN CARTER,**

Appellant.

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

The Honorable Erik D. Price, Judge

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. The evidence presented through stipulated facts does not support a conviction for possession of heroin on count 2 of cause number 17-1-01497-34.

2. The evidence presented through stipulated facts does not support a conviction for attempting to elude a pursuing police vehicle on count 2 of cause number 17-1-02212-34.

3. The evidence presented through stipulated facts does not support two convictions for identity theft in the second degree in cause number 17-1-02257-34.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether Mr. Carter's conviction for possession of heroin on count 2 of case number 17-1-01497-34 should be dismissed for insufficient evidence when the stipulated trial facts fail to prove Carter possessed heroin?

2. Whether Mr. Carter's conviction for attempting to elude a pursuing police vehicle on count 2 of case number 17-1-02212-34 should be dismissed for insufficient evidence when the stipulated trial facts fail to prove the pursuing officer wore a uniform, a required element of an attempting to elude a pursuing police vehicle conviction?

3. Whether one of Mr. Carter's two convictions for identity theft in the second degree in case number 17-1-01497-34 should be dismissed for insufficient evidence when, at the stipulated facts trial, the facts proved only a single count of identity theft?

**C. STATEMENT OF THE CASE**

Austen Carter actively participated in the Thurston County Drug Court under six separate superior court cause numbers which charged, in total, 13 felony separate offenses. CP 1-6.

In entering Drug Court, Mr. Carter agreed that if terminated from the program, the Court would determine if he were guilty of the charged offenses at a stipulated facts bench trial. Each of the Drug Court contracts/agreements signed by Mr. Carter included the following language:

18. If he/she is terminated from the program, he/she agrees and stipulates that the Court will determine the issue of guilt on the pending charge(s) solely upon the law enforcement/investigative agency reports or declarations, witness statements, field tests results, lab test results, or other expert testing or examinations such as fingerprint or handwriting comparisons, which constitute the basis for the prosecution of the pending charge(s). He/She further agrees and stipulates that the facts presented by such reports, declaration, statements and/or expert examination are sufficient for the Court to find him/her guilty of the pending charge(s).

CP 9, 13, 18, 21, 25, 29.

Judge Price terminated Mr. Carter from Drug Court after Carter admitted using heroin while on work release in violation of the Drug Court contract. RP 9/7/18 at 3-4, 11.

The heroin use while in work release was not Mr. Carter's first misstep in Drug Court. CP 10/16/18 at 14. In terminating Mr. Carter's participation, Judge Price noted, "You had nine lives in this program." RP 9/7/18 at 11. Judge Price reached the point where he believed accountability outside of Drug Court was Mr. Carter's best path to recovery. RP 9/7/18 at 11.

The State, as per the Drug Court contract, provided the Court with the police reports to review at the stipulated facts trial. RP 10/16/18 at 3, 6; CP 31-180. The Court noted it read all the State's materials before the trial. RP 10/16/18 at 7. The Court explained to Mr. Carter that although what was happening did not look like a trial, it was a trial. RP 10/16/18 at 6-7.

The Court found Mr. Carter guilty as charged on each count of each cause number as follows:

No. 17-1-01497-34

Count 1: Residential Burglary (RCW 9A.52.025)

Count 2 – Unlawful Possession of a Controlled Substance, Heroin

(RCW 69.50.4013)

No. 17-1-01923-34

Count 1 – Taking a Motor Vehicle Without Permission in the First Degree (RCW 9A.56.070(1)(a))

Count 2 – Unlawful Possession of a Controlled Substance- Methamphetamine (RCW 69.50.4013)

Count 3: Unlawful Possession of a Controlled Substance – Heroin (RCW 69.50.4013)

No. 17-02212-34

Count 1 - Possession of a Stolen Motor Vehicle (RCW 9A.56.068(1))

Count 2 - Attempting to Elude a Pursuing Police Vehicle (RCW 46.61.024)

No. 17-1-02257-34

Count 1 – Identity Theft in the Second Degree (RCW 9.35.020(1)(3))

Count 2 – Identity Theft in the Second Degree (RCW 9.35.020(1)(3))

No. 17-1-02256-34

Count 1 – Identity Theft in the Second Degree (RCW 9.35.020(1)(3))

Count 2 - Forgery (RCW 9A.60.020(1)(a)(b))

No. 17-1-02255-34

Count 1 – Burglary in the Second Degree (RCW 9A.52.030;

RCW 9A.08.020)

Count 2 – Theft of a Motor Vehicle (RCW 9A.56.068, RCW 56.020(1)(a))

CP 1-6.

The Court imposed standard range sentences on each offense and also imposed community custody where required. RP 10/16/18 at 8 – 17; CP 55-235.

Mr. Carter appeals all portions of each judgment and sentence. CP 214-324. The causes are appropriately consolidated on this appeal.

The facts for each incident challenged for sufficiency of the evidence are articulated in the Argument section rather than more generally in the Statement of the Case.

#### **D. ARGUMENT**

**Mr. Carter is entitled to dismissal of three convictions because the evidence of each is insufficient.**

The State's evidence on stipulated facts fails to prove three of the charges against Mr. Carter: possession of heroin, attempting to elude a pursuing police vehicle, and identity theft in the second degree. The cases should be remanded for dismissal and Mr. Carter resentenced.

A stipulated facts trial requires the Court to find sufficient proof of each element of each offense before entering judgments of guilty for any

charged offense. *State v. Johnson*, 104 Wn.2d 338, 342, 705 P.2d 773 (1985). The prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder ‘beyond a reasonable doubt’ of the facts necessary to establish each of those elements.” *State v. Chacon*, 192 Wn.2d 545, 549, 431 P.3d 477 (2018). The remedy for insufficient evidence is dismissal with prejudice. *State v. Franks*, 105 Wn. App. 950, 959-60, 22 P.3d 269 (2001).

Mr. Carter is entitled to dismissal of three counts with prejudice and remand for resentencing.

A. *The unlawful possession of heroin under 17-1-01497-34 must be dismissed with prejudice for lack of evidence.*

The stipulated facts tell the story of a rural home in Thurston County left uninhabited after the death of its only occupant. CP 36-53. People unrelated to the home in any legal manner entered the home without permission and took items from the home. CP 36-53. Mr. Carter was one such person. CP 48-51. He admitted his conduct to the police creating a factual basis for his residential burglary conviction. CP 48-49.

The stipulated facts reference other people engaging in the same activity. CP 36-39, 44-47. In one of the cars associated with the activity, a white Honda, the police located a plastic bag of white crystalline and a

plastic bag with brown tar residue. CP 35. However, the stipulated facts did not tie Mr. Carter to the white Honda, the two people in the Honda, or to the drugs in the Honda. CP 33-53. Instead, a fair reading of the stipulated facts is many people knew about the vacant house and tried to take advantage of it. CP 33-53. Although Mr. Carter was one of those people, no evidence suggested any ties to drugs as it related to the house, the surrounding property, or the other people coming and going from the house. CP 33-53.

Ultimately, because the investigating officer could not determine who possessed the drugs in the white Honda, he recommended the drugs be destroyed rather than any charges brought against anyone. CP 53.

The stipulated facts fail to connect Mr. Carter to heroin in any manner. CP 31-53. Without the connection, the trial court erred in finding Mr. Carter guilty of heroin possession. His conviction for possession of heroin should be dismissed with prejudice for insufficient evidence.

*B. The attempting to elude a pursuing police vehicle under 17-1-02212-34 must be dismissed with prejudice for lack of evidence.*

The stipulated facts do not satisfy the proof beyond a reasonable doubt requirement for the attempting to elude a pursuing police vehicle conviction.

Per the stipulated facts in the police report, the police noticed a car parked outside of the Red Wind Casino. CP 71. Its rear license plate was entirely covered with red duct tape. CP 71. While the police were attempting to obtain the car's VIN, Mr. Carter walked out of the casino, removed the duct tape, and drove away in the Honda. CP 71.

Nisqually Police Officer Anthony Brunscheen followed the Honda. CP 71. The Honda accelerated and reached a "high rate of speed." CP 71. The officer activated his lights in an attempt to stop the Honda. CP 71. The Honda did not stop but instead used the oncoming lane of travel to pass other cars. Cars, passed by the speeding Honda, slowed rapidly. The Honda reached speeds of 70+ miles per hour. CP 71. Officer Brunscheen ended the pursuit after the rear of his car lost traction, likely as a consequence of mud on the roadway. CP 71.

The Olympian newspaper made a post about the incident which included a picture of the Honda driver. CP 72. Several persons who knew Austen Carter, including his father Jeffrey Carter, identified Austen Carter as the Honda's driver from the post. CP 72.

The above evidence is not, however, sufficient to satisfy the elements of Attempting to Eluding a Pursuing Police Vehicle.

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024

As noted, a conviction for attempting to elude a police vehicle requires the State to prove, beyond a reasonable doubt, that the defendant was signaled to stop by a uniformed police officer. *State v. Hudson*, 85 Wn. App. 401, 403, 932 P.2d 714 (1997); *State v. Fussell*, 84 Wn. App. 126, 127, 925 P.2d 642 (1996).

Nowhere in the stipulated record relied on by the Court is there any reference to Officer Brunscheen, or any officer, wearing a uniform while pursuing Mr. Carter. CP 66-76. Without proof of a uniformed officer pursuing the Honda, the evidence is insufficient, and the trial court erred in finding Mr. Carter guilty of attempting to elude a pursuing police vehicle. Mr. Carter's eluding conviction must be dismissed with prejudice.

*C. One count of identity theft in the second degree under 17-1-02257-34 must be dismissed with prejudice for lack of evidence.*

The stipulated facts presented to the court identified only a single incident of identity theft. Yet, the court found Mr. Carter guilty of two counts of identity theft under this case number. Because the stipulated facts identify and support only a single count of identity theft, Mr. Carter's case must be remanded to dismiss with prejudice one count of identity theft in the second degree.

RCW 9.35.020(3) provides the elements of identity theft in the second degree:

(1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

(2) Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value, or when the accused knowingly targets a senior or vulnerable individual in carrying out a violation of subsection (1) of this section, shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

Here the stipulated facts reflect that someone stole Dan Widder's truck in Centralia on September 26, 2017. CP 124. His Capital One credit card was in the truck when it was stolen. The card was subsequently used at several locations without his authorization. CP 124.

While the police report claims three instances of the card's unauthorized use – at Walmart, at Jack in the Box, and at a Shell station – the police report documents only a single use of the card and that was at Walmart. CP 124-25.

The investigating officer, Officer Raphael, contacted the Asset Protection Manager at the Littlerock Road Walmart. CP 124. The manager found the unauthorized transaction on the in-store surveillance video. CP 124. She provided the officer with a still photo of the person using the stolen credit card to purchase two prepaid phone cards. CP 124. Officer Raphael thought the person looked like Austen Carter. CP 124. The officer knew Mr. Carter from a previous arrest. CP 124. He contacted Mr. Carter's mother, showed her the photo, and she identified Austen as the person at Walmart. CP 124.

Officer Raphael requested video footage from Jack in the Box where the card was also reportedly used. CP 124. However, no one from

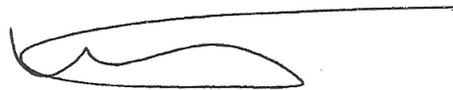
Jack in the Box responded. CP 124. The police reports provided to the court document no additional instances where Mr. Carter used the credit card. CP 118-33. Consequently, the Court only had proof of a single instance of Mr. Carter using the credit card. The trial court erred in finding Mr. Carter guilty of the second instance of identity theft where there was no proof of a second instance. CP 116-17.

Additionally, the counts in the information (17-1-02257-34) do not clarify which of the two counts occurred at Walmart. CP 4. Mr. Carter's case should be remanded for dismissal of one or the other count with prejudice.

**E. CONCLUSION**

Mr. Carter's case should be remanded for dismissal of the possession of heroin, attempting to elude a pursuing police vehicle, and one count of identity theft in the second degree, and for resentencing.

Respectfully submitted June 11, 2019.



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LISA E. TABBUT/WSBA 21344  
Attorney for Austen Carter

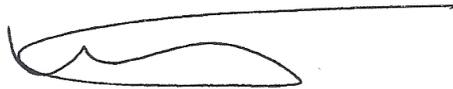
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Austen Carter, DOC#411644, Larch Corrections Center, 15314 NE Dole Valley Road, Yacolt, WA 98675.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed June 11, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Austen Carter, Appellant

**LAW OFFICE OF LISA E TABBUT**

**June 11, 2019 - 1:20 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52569-1  
**Appellate Court Case Title:** State of Washington, Respondent vs Austen M. Carter, Appellant  
**Superior Court Case Number:** 17-1-01497-8

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