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State of Washington  
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NO. 53004-0-II

THE COURTS OF APPEALS OF THE STATE  
OF WASHINGTON, DIVISION TWO

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DARIUS MICHAEL BURGENS,

Appellant

v.

STATE OF WASHINGTON,

Respondent.

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

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BRIEF OF APPELLANT

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## **A. INTRODUCTION**

Darius Burgens was convicted in a bench trial of one count of attempted Theft of a Motor Vehicle and one count of Possession of Burglary Tools stemming from his April, 2018 arrest in the city of Lakewood.

Mr. Burgens admitted that he was attempting to take a vehicle that didn't belong to him, but maintained his intention was to use it only temporarily before abandoning it. The trial court entered findings accepting this stated intention as fact.

The State argued at trial that it was not required to present evidence that Mr. Burgens intended to take the vehicle for any particular amount of time to prove every element of the crime of attempted Theft of a Motor Vehicle. The trial court accepted the state's argument, contrary to well-established Washington law that the *mens rea* element of the theft statute requires a taking for more than a temporary period.

Without this temporary period, the offenses of attempted Theft of a Motor Vehicle and attempted Taking of a Motor Vehicle Without Permission in the second degree proscribe the same conduct. By charging Mr. Burgens with the offense carrying a greater punishment, the State

violated his right to Equal Protection under the law if the trial court's interpretation was not erroneous.

For these reasons, the court must reverse his conviction for attempted theft of a motor vehicle.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering a conviction of attempted Theft of a Motor Vehicle in the absence of sufficient evidence.

2. Mr. Burgens's conviction for attempted Theft of a Motor Vehicle rather than the concurrent offense of Taking a Motor Vehicle Without Permission violated his right to Equal Protection under the law.

3. Interest was improperly imposed on Mr. Burgens legal financial Obligations

## **C. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. The State must prove every fact necessary to constitute the crime charged beyond a reasonable doubt. U.S. Const. Amend. XIV, U.S. Const. Art. I, § 3. Where the court applied an erroneous legal standard to the *mens rea* element of attempted theft of a motor vehicle, did the court find Mr. Burgens guilty of the offense in the absence of sufficient evidence of his intent to deprive?

2. Defendants in criminal proceedings are guaranteed the right to equal protection under the law. See Const. Art. I § 12; See also U.S.

Const. Amend. XIV. Where two statutes share all of the same elements such that they proscribe identical conduct, but where one statute applies a disparately greater punishment, whether similarly situated defendants will be treated the same under the law is left to the sole discretion of the State's charging authorities. This situation is constitutionally untenable because it allows the severity of punishment each defendant may face to be decided arbitrarily by the charging authority on bases other than the criminal conduct itself. Where the court applied a legal interpretation which caused two statutes carrying disparate punishments to proscribe the same conduct, and where the State convicted Mr. Burgens of the statute carrying the greater punishment, was his constitutional right to equal protection under the law violated?

3. As of June 2018, interest may not accrue on the non-restitution legal financial obligations of indigent defendants. Where an order required interest to be applied to the financial obligations included in the judgement and sentence of Mr. Burgens, who was found to be indigent, was interest improperly applied?

#### **D. STATEMENT OF THE CASE**

At approximately 3 in the morning on April 14<sup>th</sup>, 2018, while driving through an empty commercial district on patrol in Lakewood, Officer David Maulen saw Darius Burgens in the driver's seat of a white Chevy

panel van. CP 59. According to the officer's testimony, he could see Mr. Burgens was "slumped under the steering wheel" and seemingly manipulating the steering column of the van as he drove by. CP 60. As the officer approached to investigate further, Mr. Burgens got out of the car and ran away. CP 61. After a brief foot chase, Mr. Burgens was caught and arrested at gunpoint. CP 61.

Mr. Burgens explained to the officer after his arrest that he had been stranded in Lakewood by some friends who had left him without transportation. CP 63. He was unable to get anyone to give him a ride back to his home in Renton. CP 63. He said his feet were in pain from walking around all night and he was tired of walking. CP 63.

Mr. Burgens explained he came across the van and was forthright with the officer that he had intended to take the van so he could use it to drive back to Renton; however, he made clear he intended to leave the vehicle in Renton after using it to make the trip and had no intention of keeping it for himself. CP 63.

Mr. Burgens then used shaved keys, screwdrivers, and hammers he had in his possession to break into the van and attempt to bypass its ignition system. CP 64. He was still in the process of bypassing the ignition system of the van at the time he saw the officer approach and did not successfully start or move the vehicle. CP 64.

The State charged Mr. Burgens with Possession of Burglary Tools for the shaved keys recovered in his belongings and attempted Motor Vehicle Theft based on these facts. CP 25, 64.

At a bench trial, Mr. Burgens asked the court to consider Taking a Motor Vehicle Without Permission in the second degree as a lesser included offense of Theft of a Motor Vehicle. CP 45. This motion was denied by the court, primarily on the basis of *State v. Ritchey*'s holding that Taking a Motor Vehicle Without Permission is not a lesser included offense of Theft of a Motor Vehicle due to the distinguishing *mens rea* elements of each offense, where Theft of a Motor Vehicle requires an intent to deprive for a "continuous or lasting" period of time as opposed to a "temporary" taking of a vehicle. CP 66; *State v. Ritchey*, 1 Wn. App. 2d 387, 391-92, 405 P.3d 1018 (2017).

The court found Mr. Burgens's intent was only to take the van temporarily and the State did not contest this finding. CP 63, CP 66. When issuing its final ruling, however, the court determined that its finding that Mr. Burgens's intent to take the van was only temporary was irrelevant because the State was not required to prove the accused intended to deprive the rightful owner of their vehicle for any particular period of time. RP 138 at 2 (10-22-2018). The trial court held it was sufficient that the State had shown Mr. Burgens had simply intended to

exert wrongful, unauthorized control over the van and remove it from its owner's immediate control and possession by driving it to Renton to satisfy the "intent to deprive" element of the offense. CP 66. Thus, the court convicted Mr. Burgens of attempted theft of a motor vehicle and sentenced him to 40 months of in prison. CP 75.

## **E. ARGUMENT**

### **1. The State failed to prove, and the trial court did not find, the essential element of intent to deprive the owner of a vehicle for more than a temporary period**

The Due Process Clause of the Fourteenth Amendment protects an accused person against conviction except where the State has submitted sufficient evidence to prove, beyond a reasonable doubt, every fact necessary to constitute the crime it has charged. See U.S. Const. Amend. XIV; *In Re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970). The "essential elements" of guilt for an offense are those facts which must be established beyond reasonable doubt to constitute a violation of a criminal statute. *Id.* at 361. The accused's right to Due Process is therefore violated when they are convicted of a crime where the State failed to prove even a single essential element of an alleged crime. *Id.*

Upon review for insufficient evidence in a criminal proceeding, the court looks at the totality of evidence in the light most favorable to the State to determine if any rational trier of fact could have found that every

essential element of the offense was proved beyond a reasonable doubt. See *State v. Green*, 94 Wash.2d 216, 221-22, 616 P.2d 628 (1980). A conviction can be validly reached only where sufficient evidence has been presented for the offenses charged, even where underlying conduct may violate other uncharged offenses. See *State v. Thompson*, 68 Wn.2d 536, 541, 413 P.2d 951 (1966).

a. Attempted Theft of a Motor Vehicle Requires the State Prove the Accused Possessed the “Intent to Deprive” the Rightful Owner of Their Vehicle

Washington’s theft of a motor vehicle statute requires the State to prove a person acted with the “intent to deprive” the owner of their motor vehicle. RCW 9A.56.020 provides, in relevant part:

“Theft” means:

- a) To wrongfully obtain or exert unauthorized control over the property or services of another . . . with **intent to deprive** him or her of such property or services.

The legislature has specified the term “deprive” retains its common meaning except in intellectual property theft cases. See RCW 9A.56.010(6). The common meaning of “Deprive” is “to take something away from” and/or “to withhold from.” See *State v. Komok*, 113 Wash.2d 810, 815, 783 P.2d 1061 (1989). With the common definitions of the term “deprive” substituted, the elements of Theft of a Motor Vehicle can be

restated as “to wrongfully obtain or exert unauthorized control over the motor vehicle of another with intent to take the vehicle away and/or withhold it from the owner.” *Id.*

Conversely, an accused commits the offense of Taking a Motor Vehicle Without Permission in the second degree when they intentionally take another’s vehicle without permission with knowledge that such a taking is unlawful. RCW 9A.56.075.

These two offenses share a common *actus reus* element differing only in their phrasing; RCW 9A.56.065 requires the accused to “wrongfully obtain or exert unauthorized control” over another’s vehicle, while RCW 9A.56.075 requires the accused to unlawfully “take or drive away” a vehicle to constitute a violation of the statute. RCW 9A.56.020(1)(a); RCW 9A.56.075(1).

The acts underlying this language are indistinguishable in any meaningful sense. To “Wrongfully obtain” for purposes of a theft by taking in RCW 9A.56.065(1)(a) and to “unlawfully take” a vehicle both proscribe the identical act of removing a vehicle from its owners possession against the owners wishes in an unlawful or wrongful manner. Therefore, it is only in their *mens rea* elements where RCW 9A.56.065 and RCW 9A.56.075 can be rationally distinguished as offenses. See *State v. Clark*, 96 Wn.2d 686, 691-92, 638 P.2d 572 (1982).

The *mens rea* elements of each statute can be rationally distinguished only by the amount of time a person intends to take a vehicle as per this Court's holding in *Ritchey*. 1 Wn. App. 2d at 392. The *mens rea* element of Theft of a Motor Vehicle requires the person act with the "intent to deprive" the rightful owner of their property at the time of taking their vehicle. RCW 9A.56.020(1)(a). Taking a Motor Vehicle requires only the accused to "intentionally take" or "intentionally drive away" a vehicle with "knowledge" that are were doing so unlawfully. RCW 9A.56.075. Because of their shared *actus reus* elements, the "intent to deprive" *mens rea* element of theft could not have been intended to simply mean "intentionally take" ("take" being one of the common definitions of the term "deprive" above); otherwise both the *actus reus* and *mens rea* elements of RCW 9A.56.065 and RCW 9A.56.075 would be identical. The "intent to deprive" necessary to sustain a Theft of a Motor Vehicle conviction must mean the intent both to take and to withhold a vehicle from its rightful owner for some substantial period of time.

In *Ritchey*, this Court held that Taking a Motor Vehicle Without Permission cannot be a lesser-included offense of Theft of a Motor Vehicle because each offense is distinguished from the other by the differing *mens rea* elements of each crime. *Ritchey*, 1 Wn. App. 2d at 391-92. *Ritchey* found "the concept of a 'taking' denotes a less severe

deprivation than that of a ‘theft;’ [representing] an unauthorized *use* of a vehicle without the goal of exercising a more lasting control over it.” *Id.* (emphasis added).

In *Walker*, this Court found Taking a Motor Vehicle Without Permission in the second degree is not a concurrent offense with first degree theft because they are distinguished by the intent to deprive for “a substantial period of time” in first degree theft, as opposed to a more temporary taking in the taking statute. See *State v. Walker*, 75 Wn. App. 101, 106, 879 P.2d 957 (1994) (emphasis added).

Since the legislature’s 1975 revision to the theft statute, Washington no longer follows the common law *mens rea* requirement of theft, where the State once needed to prove the accused’s intent to “permanently” deprive the owner of the use and value of their property in all instances of theft by taking. See *Komok*, 113 Wn.2d at 816-817. However, the legislature and Supreme Court’s interpretation in *Komok* did not and could not have eliminated all need for the State to prove that the intended duration of a taking was for more than a temporary period because the time period of an intended deprivation is still the sole distinguishing element between theft and taking without permission of a vehicle. To remove this temporal distinction completely would have created an absurdity in the legislative scheme whereby each statute proscribes the

same conduct. *Clark*, 96 Wn.2d at 691-92. Following this logic, since *Komok*, this Court has consistently found the necessary intent to deprive must be “continuous, lasting, or permanent” or of sufficient length to be more than just “temporary”. *Ritchey*, 1 Wn. App. 2d at 392; *Walker*, 75 Wn. App. at 107; *State v. Williams*, 22 Wn. App. 197, 199, 588 P.2d 1201 (1978).

Here, the trial court first denied Mr. Burgens’s motion to consider attempted Taking of a Motor Vehicle Without Permission in the second degree as a lesser included offense of attempted Theft of a Motor Vehicle. 10/22/18 RP 135. The court cited to *Ritchey*’s holding that the “intent to deprive” element of theft must be continuous or lasting whereas an “intent to take” is of shorter duration. *Id.* Yet the court found simultaneously that the “intent to deprive” element of attempted Theft of a Motor Vehicle was proved beyond reasonable doubt because the State did not need to present evidence of Mr. Burgens’s intent to deprive the owner of his van was for any particular length of time. *Id.*

These legal conclusions are irreconcilable, resulting in Mr. Burgens conviction for a crime the State did not prove. Instead, the court relieved the State of its burden to show Mr. Burgens’s intent in taking the van was to deprive the owner of it for more than a temporary period of time. See *Ritchey*, 1 Wn. App. 2d at 391-92.

b. The State presented insufficient evidence to prove that Mr. Burgens's intent to take the vehicle was for more than a temporary period as necessary to satisfy the "intent to deprive" element

The State presented no evidence to refute Mr. Burgens's statement to officers that he intended only to drive the van temporarily to Renton where he planned to abandon it. In fact, the prosecution insisted it did not need to provide such evidence to sustain a conviction. 10/22/18 RP 129 at 15-16. Following this insistence, the trial court found Mr. Burgens intended only to take the van to Renton and abandon it, but did not find that this conclusion affected the outcome of its disposition due to the court's own error in law. CP 66 at 8.

The State did not prove beyond a reasonable doubt Mr. Burgens intended anything more than to temporarily take the vehicle from its rightful owner. The short trip from Lakewood to Renton does not indicate an intent to deprive. An intent to merely remove a vehicle from its owner's immediate possession and control for a 45 minute trip is not sufficient to establish an intent to deprive an owner of their vehicle for a lasting period of time to any rational fact finder.

The trial court's error in finding that the intent to remove a vehicle from the immediate possession and control of the owner required no consideration of this short time period was plain. Due to the failure of the State to present sufficient evidence on the essential *mens rea* element of

RCW 9A.56.065 in light of this error, Mr. Burgens conviction for attempted Theft of a Motor Vehicle must be reversed.

**2. In the alternative, attempted Theft of a Motor Vehicle and attempted Taking of a Motor Vehicle Without Permission in the second degree are concurrent offenses because they proscribe identical conduct**

The Equal Protection clause of the Fourteenth Amendment, and Article I Section 12 of the Washington Constitution is violated when two criminal statutes share the same elements (and therefore proscribe the same conduct) but apply significantly more severe penalties under one statute than the other. See Const. Art. I, § 12; see also U.S. Const. Amend. XIV; *City of Kennewick v. Fountain*, 116 Wn.2d 189, 193, 802 P.2d 1371 (1991). In such instances, the severity of punishment that two similarly situated defendants may face for identical conduct is left to the sole discretion of the charging authorities, where only an arbitrary basis for charging the offense with greater punishment instead of the lesser may exist due to the identical elements of the statutes. *Kennewick*, 116 Wn.2d at 193-194.

As the Supreme Court observed in *State v. Clark*, to remove all temporal consideration from the “intent to deprive” element would create a logical absurdity where Washington’s Theft in the first degree and Taking a Motor Vehicle Without Permission statutes would proscribe the same conduct but apply disparate punishments. See *Clark*, 96 Wn.2d at

691-92. *Clark* found this could not have been the intention of the legislature because without the temporal distinction in their *mens rea* elements, RCW 9A.56.075 and RCW 9A.56.020 are indistinguishable offenses where every “joyride” in a vehicle would also constitute a theft in the first degree. *Id.* This would necessarily create an equal protection quagmire between the two statutes where first degree theft, a Class B felony, carries a far greater penalty than the Class C felony joyriding statute. RCW 9A.56.030; RCW 9A.56.075; *Id.* Following this observation, the court found it logical that the legislature intended to proscribe the “initial unauthorized taking” in RCW 9A.56.075, while first degree theft would then require both an intent to commit an initial unauthorized taking and a subsequent withholding of the vehicle from the owner for a lasting duration. *Id.*

The temporal distinction between Theft in the first degree and Taking a Motor Vehicle Without Permission as illustrated in *Clark* must also hold true between Washington’s Theft of a Motor Vehicle and Taking a Motor Vehicle Without Permission in the Second Degree statutes or each is also proscribing the same conduct. 96 Wn.2d at 691-92. Each offense is distinguished only by the same *mens rea* element as the offenses discussed in *Clark*. *Id.* If the mere intent to take a vehicle is sufficient by itself to satisfy the “intent to deprive” element of Theft of a Motor Vehicle,

regardless of how long a person intends to take it away from the owner, every attempted joyride would also constitute an attempted theft of a vehicle, allowing charging authorities to arbitrarily choose between applying either charge carrying lesser or greater punishments respectively for the same conduct.

Such a situation cannot be constitutional because the maximum sentence for attempted Theft of a Motor vehicle is potentially five times greater than that of attempted Taking a Motor Vehicle Without Permission in the second degree, and where a defendant is charged under the attempted theft statute for conduct wholly applicable to both statutes, their right to Equal Protection under the law would presumptively be violated. See *State v. Leech*, 114 Wn.2d 700, 711-712, 790 P.2d 160 (1990).

Attempted Taking of a Motor Vehicle Without Permission in the second degree is a gross misdemeanor offense, punishable by a maximum of 364 days incarceration. RCW 9A.56.075; see also RCW 9A.28.020(3)(d). Attempted Theft of a Motor Vehicle is a Class C felony, carrying a maximum potential sentence of 5 years. See RCW 9A.56.065; RCW 9A.28.020(3)(c).

Mr. Burgens was charged with attempted Theft of a Motor Vehicle instead of Taking of a Motor Vehicle Without Permission in the second degree. If the trial court was correct in its finding of law that whether Mr.

Burgens's intended to take the vehicle for a temporary or lasting period is irrelevant to the consideration of the *mens rea* element of the theft statute, it necessarily applied an arbitrary punishment to Mr. Burgens by convicting him of a concurrent charge carrying a much more severe penalty than the lesser charge also proscribing his exact conduct. RP 138 at 2 (10-22-2018).

Mr. Burgens was sentenced to a term of 40 months of imprisonment for his conviction stemming from his attempted Theft of a Motor Vehicle charge. RP 14 at 22 (11-09-18). If he had been charged with attempted Taking of a Motor Vehicle Without Permission instead, he would have been subject to a maximum sentence of only 364 days. RCW 9A.56.075; RCW 9A.28.020. Other similarly situated individuals have been charged with the lesser crime under nearly identical circumstances; In *State v Howerton* the defendant was charged with the attempted taking of a motor vehicle in the second degree after a neighbor observed him breaking into a van at 2:00 AM and attempting to bypass the ignition system to take the van away. 187 Wn. App. 357, 362, 348 P.3d 781 (2015). Howerton was unsuccessful in getting the van started and was arrested by authorities within an hour of his attempt to flee the scene. *Id.* Mr. Howerton was convicted of attempted Taking of a Motor Vehicle in the second degree and Possession of Burglary Tools for this conduct – conduct essentially

identical to the facts here. CP 66.

Yet Howerton was charged and convicted of a gross misdemeanor, while Mr. Burgens was charged and convicted of a Class C felony. This arbitrary application of a far greater punishment for the same crime cannot be held constitutional under Article I Section 12. Const. Art. I § 12.

**3. The trial court improperly applied interest to the legal financial obligations**

The judgment and sentence, entered on November 9, 2018, includes a provision that “the financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.” CP 77. However, as of June 7, 2018, financial obligations excluding restitution may no longer accrue interest for indigent clients. See RCW 3.50.100(4) (b); *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 713 (2018). Mr. Burgens was found to be indigent at trial, and accordingly if the Court does not reverse Mr. Burgens’s conviction, it should order the trial court to strike the interest accrual provision. *Id.* at 749-50; see also CP 95.

## F. CONCLUSION

For the foregoing reasons, the Court should reverse Darius Burgens's conviction for attempted Theft of a Motor Vehicle or alternatively strike the interest provision in the judgment and sentence.

Dated this 19<sup>th</sup> day of July, 2019.



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 53004-0-II
v.	)	
	)	
DARIUS BURGENS,	)	
	)	
Appellant.	)	

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SIGNED IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF JULY, 2019.



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# WASHINGTON APPELLATE PROJECT

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