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Court of Appeals
Division III
State of Washington

No. 33573-9-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SHANE R. HUGHES,

Defendant/Appellant

Respondent's Brief

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III. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

1. The amended information did not omit an essential element of the crime of Possession of a Stolen Vehicle.

2. The trial court did not err by ordering the defendant to submit a DNA sample, where the language of the order indicated that the sample did not need to be taken if it was established that the crime laboratory already has a sample from the defendant.

3. The page marked Appendix 4.6 to the Judgment and Sentence by its terms did not apply to this defendant and is therefore irrelevant.

4. The financial appendix to the Judgment and Sentence by its terms did not apply to this defendant and is therefore irrelevant.

5. The State did not ask for appellate costs.

IV. STATEMENT OF FACT

Deputy Hoctor of the Kittitas County Sheriff's Office received a call in January of 2014 from a Yakima County deputy that a person in custody had just notified them about the location of a stolen vehicle in the Kittitas county area. (RP 31). Deputy Hoctor spoke to the person, Miranda Rosenberg. (RP 31, 129) She was trying to get herself out of trouble. (RP 129) She told Deputy Hoctor that Shane Hughes, who is her cousin, and Cody Magruder had some stolen trucks that they had stolen from somewhere in the canyon. (RP 128-130) They had brought the trucks to her uncle, Don Rosenberg's house. (RP 131) Mr. Rosenberg lived with another cousin of Mr. Hughes, Jane Dickens, at a house in rural Kittitas County. (RP 78-79) Ms. Dickens described how Mr. Hughes showed up with the blue truck in January of 2014, and parked it out back. (RP 79-80)

Deputy Hoctor went out to the property to take a look at the truck. (RP 32) He saw from a vantage point a 1999 blue Dodge Ram truck

which had two men working on it. (RP 33-34) The men appeared to be tearing it apart. (RP 35) Deputy Hoctor went to Ms. Dickens and asked to look closer at the truck. (RP 36) She allowed him to go back and look at it, and he was able to verify a license plate. (RP 36)

The truck belonged to Otto Seiber. (RP 36) The deputy drove out to Mr. Seiber's residence in the Yakima Canyon. (RP 39) It is in Kittitas County. (RP 162) The place was completely in disarray, as though nobody had been there for a while. (RP 41) He spoke with the neighbor about Mr. Seiber. (RP 42) He was able to determine that Mr. Seiber had been in a bad wreck. (RP 45) Since that accident, five years earlier, Mr. Seiber has been in an intensive care nursing home. (RP 117) He had a severe brain injury and is unable to care for himself. (RP 139) His ex-wife testified that she has been visiting him regularly since the accident, with their son. (RP 139) The truck, along with another, had stayed parked on the property for quite a while since his accident. (RP 117-118, 123, 142) The trucks disappeared one day. (RP 118) Mr. Seiber is not capable of giving anyone permission to take his vehicles. (RP 140) He doesn't even recognize any of them anymore; he cannot carry on a conversation, or even communicate. (RP 140)

Mr. Hughes later confessed to the Kittitas County Sheriff's Office that he had gone to the property and taken that truck because he thought the owner was dead. (RP 65, 158) He was planning to sell it. (RP 67-68 161) Then he decided to dismantle a part from it and sell that, so he drove it to Ms. Dickens' house. (RP 161) The co-defendant also testified about Mr. Hughes and himself taking two trucks from the property. (RP 173) He said he got the black truck and Mr. Hughes ended up with the blue one. (RP 173) Mr. Hughes did not end up testifying or calling witnesses. (RP 193)

Mr. Hughes was charged with one count of Possession of a Stolen Vehicle. (CP 1) After the jury heard the evidence, Mr. Hughes was convicted of that one count. (CP 2)

This appeal followed.

V. ARGUMENT

1. The amended information did not omit an essential element of the crime of Possession of a Stolen Vehicle.

The information alleged,

> "He, the said SHANE R. HUGHES, in the State of Washington, on or about the month of January, 2014, did knowingly possess a stolen vehicle, to wit: Dodge Ram, license plate #B80949H, belonging to Otto Sieber; thereby committing the felony crime of Possession of a Stolen Vehicle; contrary to Revised Code of Washington 9A.56.068." (CP 1)

Defense counsel never objected to the information or raised any issue of its insufficiency to inform the defendant of the charge against him.

As appellant stated in the Brief of Appellant, State v. Satterthwaite, 186 Wn.App. 359 (2015), from Division II, held that language about withholding or appropriating the stolen vehicle to the use of someone other than the owner needed to be in the information for Possession of a Stolen Vehicle, so that the defendant was properly apprised of the crime.

However, more recently, in State v. Porter, No. 92060-5, 2016 WL

3910995, 2015 Wash. Lexis 825 (Wash. July 14, 2016), the Supreme Court of Washington overruled Satterthwaite, pointing out that

> "The fact that 'possession' is more precisely defined in a way that might vindicate someone who unwittingly possesses the stolen property and thus does not withhold it from the true owner does not *add* to the essential elements of RCW 9A.56.068. Instead, it limits and defines the scope of the essential element, which the State is not required to allege under *Johnson*. (Referring to *State v. Johnson*, 180 Wn. 2d 295 (2014))

In *Johnson*, the Court held that the State need not include definitions of elements in the information. The Court said that it was enough that all of the essential elements of the statute (in that case, the Unlawful Imprisonment statute) were present. It said,

> "We have never held that the information must also include definitions of essentials elements. In fact, we have rejected similar arguments before." *Johnson* at 302.

Johnson held that where a definition simply defines and limits the scope of an element of a crime, it need not be alleged in the information, because it is not itself an essential element of the crime. *Johnson* at 302-303. In *Porter,* the Supreme Court found that language about withholding the stolen vehicle from the owner, which is part of the definition of possess, merely defines and limits the scope of the essential elements of the crime of unlawful possession of a motor vehicle. *Porter* at p. 6.

Since, "words in a charging document are read as a whole,

construed according to common sense, and include facts which are necessarily implied," (from *State v. Kjorsvik*, 117 Wn. 2d 93 (1991)), the court in *Porter* determined that the charging document was legally sufficient. The charging document in this case is essentially the same as the one in *Porter* and should therefore be, likewise, legally sufficient to apprise Mr. Hughes of what he was charged with.

In this case, the jury instructions properly included the language about withholding and appropriating the motor vehicle to the use of someone other than the true owner or person entitled thereto, when the Court instructed the jury on the elements of the offense. (RP 202) The language was referenced in closing argument. (RP 210-211) The jury, thus, did consider that language as an element of the offense. The defendant was convicted of the offense, and the conviction should stand.

2. The trial court did not err by ordering the defendant to submit a DNA sample, where the language of the order indicated that the sample did not need to be taken if it was established that the crime laboratory already has a sample

from the defendant.

The Judgment and Sentence for Mr. Hughes has a boilerplate section under number 4.4, which reads:

> "The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754." (CP 10)

The defendant, as the appellant pointed out, had quite a sizable offender score of 38, which included 26 actual prior offenses. (RP 233 and CP 5—note there are five separate Burglary 2 charges in the middle) Presumably DNA testing occurred on at least one of these sentencing occasions. However, the point of the boilerplate language is to make certain that it gets done, whether the institutions from prior occasions did their proper job or not. As the Court of Appeals has stated,

> "The legislature has repeatedly found the DNA database is an important tool for the investigation and prosecution of criminal cases, the exclusion of individuals subject to investigation or prosecution, the detection of recidivist acts, and the identification and location of missing and unidentified persons." *State v. Lewis*, 194 Wn. App. 709 (2016), citing *State v. Shelton*, 194 Wn. App 660 (2016) at 667.

It is important to make certain that the collection gets done.

Appellant points out that the statute, RCW 43.43.754(2) provides that if the Washington State Patrol already has a sample, a subsequent submission is not required. The language of the Judgment and Sentence reflects this statute exactly and notifies the jail that the paragraph ordering the DNA collection does not even apply if they can determine the sample has been taken. A significant percentage of Mr. Hughes' prior cases were from Kittitas County, and the jail would have a record of that. There is no error. It is not manifestly unreasonable to order a sample and to indicate that it does not need to be taken if the jail can verify that the State Patrol's database already has a sample.

3. The page marked Appendix 4.6 to the Judgment and Sentence by its terms did not apply to this defendant and is therefore irrelevant.

The court properly ordered no community custody for his charge. (RP 236, CP 7) One of the appendices to the Judgment and Sentence, which is part of every sentencing packet for felonies in Kittitas County, is Appendix 4.6. This consists of two pages, which are stapled to the back of the Judgment and Sentence and which contains a list of specific

community custody conditions the judge typically orders. (CP 14 and 15) This is attached along with a legal financial appendix to be discussed in Issue Number Four. (See Clerk's Papers pages 14 through 16)

The Appendix begins,

"Defendant shall report to the Department of Corrections at 1109 So. Industrial Way, Ellensburg, Washington, within 72 hours of the commencement of community supervision." Although this Appendix is frequently detached from cases where there is no community custody, sometimes it is inadvertently left attached. However, by its own words, it simply tells the defendant to report "within 72 hours of the commencement of community supervision." Since supervision will not commence, because none was ordered, the defendant does not have to report. Those pages are not applicable to the defendant. Their existence is irrelevant to this defendant. It is akin to the sentence on CP 7 which says "All counts shall be served concurrently…" which does not apply because there was only one count. The pages can be stricken if they confuse the defendant, but since they are obviously not applicable to him, they should not be an issue.

4. The financial appendix to the Judgment and Sentence by its terms did not apply to this defendant and is therefore irrelevant.

Despite the fact that many of the fees, including the Victim's Assessment Penalty and the DNA collection fee are mandatory, this Superior Court judge elected not to assess any of them for this crime. (RP 236)[1] (See *State v. Lundy,* 176 Wn. App. 96 (2013) and *State v. Thornton,* 188 Wn. App. 371 (2015) for the mandatory nature of these assessments.) The standard Appendix regarding legal financial obligations was still stapled to the end of the Judgment and Sentence when the document was filed at the Clerk's Office. (CP 16) The number of the Appendix was left blank, and it was clearly not filled out.

The Appendix is titled, "Legal Financial Obligations" and begins, "Defendant's compliance with the legal financial obligations ordered herein shall be monitored by the Kittitas County Collections Deputy Clerk and/or Restitution Specialist." No legal financial obligations were ordered herein, so there is no monitoring.

Then at the end, in bold, the defendant was told, "The Defendant

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1 The court noted the State could appeal if they wanted to, but the Court knew Mr. Hughes was looking at 24 years in prison and didn't see how he was going to pay. The State obviously decided, with 26 prior crimes full of legal financial obligations, there would be no point to appealing this and adding more.

must notify the Clerk of the Court within 48 hours of any change in address of employment status as long as there are legal financial obligations owing." Since there are no legal financial obligations at all, this page –obviously and by its own terms -- does not apply to the defendant.

Mr. Hughes obviously need not make $100 monthly payments toward a zero balance. The page is clearly meant to apply to people who actually have legal financial obligations. If need be, it can be considered stricken.

5. The State did not ask for appellate costs.

VI. CONCLUSION

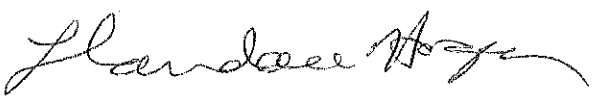
Since all of the elements of Possession of a Stolen Vehicle were present in the information, and since language about withholding and appropriating the vehicle to the use of a person other than the true owner or person entitled thereto is part of the definition of the elements, and was

properly given to the jury as a jury instruction, the jury's guilty verdict should be upheld.

Since language ordering Mr. Hughes to give a DNA sample properly told the jail they did not need to take a sample if they determined the State Patrol database already had one, the language in the order should not be stricken.

Since the Appendix for DOC supervision and the Appendix for legal financial obligations do not apply to Mr. Hughes, who had neither community custody, nor legal financial obligations imposed, those appendices are inapplicable to this defendant already, and are essentially stricken as to this defendant by the documents' own terms.

Respectfully submitted,



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PROOF OF SERVICE

I, Dustin Davison, do hereby certify under penalty of perjury that on August 22nd, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the cover page for the Respondent's Brief:

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