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Court of Appeals
Division III
State of Washington
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

DUANE EDWARD GRAY, RESPONDENT

APPEAL FROM THE SUPERIOR COURT
OF FERRY COUNTY

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. “Redemption” may apply to individual recipients as well as retailers/merchants.

Defendant/Respondent claims that RCW 9.91.144 applies only to merchant conduct because it charges a state-level violation of federal statute 7 USC § 2024(c). Br. of Respondent, pg. 11-12. Respondent claims that because it is unclear whether the federal statute prohibits a consumer from exchanging benefits or a merchant exchanging the benefits for cash, we must look at the surrounding statutes to determine whether “redemption” refers to consumers or merchants. Id. 12-14. Respondent goes on to say that because other federal statutes, such as 7 USC § 2019, refer to redemption in the context of merchant activity, that it is clear that administrative agencies consider “redemption” to apply to merchant activity and not consumer activity. Id. at 14.

However, this interpretation ignores the fact that federal statutes and regulations also use “redemption” in the context of consumer activity. For instance, 7 CFR 274.7, which sets forth the guidelines for consumer-level usage, is entitled “Benefit Redemption by Eligible Households”. “Eligible households” is defined by 7 USC § 2014 and refers to consumer-level users that qualify to receive assistance under the Supplemental Nutritious Assistance Program. Thus it is clear that consumer-level users,

as well as merchants, are also considered “redeemers” under the federal statutes.

Defendant next contends that if the statutes can be read to apply to both consumers and merchants, then it is ambiguous and the rule of lenity applies. This argument presupposes that the statute may only apply to one class of individuals, which is incorrect. By its very language, the federal statute applies broadly: “Whoever presents, or causes to be presented, benefits for payment or redemption...”. 7 USC § 2024(c). “Whoever” encompasses both the individual and the merchant. Moreover, the Washington iteration of the statute also clearly applies to individuals as well: “A person who, in violation of 7 USC § 2024(c) obtains and presents food stamps...”. RCW 9.91.144. Because both statutes apply to persons or entities that present benefits for payment or redemption, and because redemption includes consumer-level usage, both the federal and state statutes prohibit illegal redemption by consumers such as Mr. Gray. Because it is clear that the statutes are meant to apply broadly – based on their wording – the rule of lenity does not apply.

B. The State Charged Mr. Gray Under the Appropriate Statute

Respondent also contends that that State incorrectly charged Mr. Gray, and should have charged him under RCW 9.91.142, Washington’s food stamp trafficking statute. Respondent’s reading of the federal and

Washington statutes would have the statutes apply based solely on the identity of the perpetrator – however, it is clear that the statutes do not apply based on the identity of the actor, but based on the acts committed by the actor. As explained above, a redemption statute may apply equally to an individual consumer or to a merchant. Likewise, the trafficking statute may apply to both categories.

The State did not charge the Defendant under the trafficking statute, because the Defendant was not engaged in trafficking activity. RCW 9.91.142, Washington’s food stamp trafficking statute, states that it is a crime when “a person who purchases, or who otherwise acquires and sells, or who traffics in, food stamps as defined by the federal food stamp act”. Likewise, the federal interpretation of “trafficking” refers to giving cash in exchange for SNAP benefits. SNAP Training Guide for Retailers, pg. 10¹. Here, the Defendant neither purchased nor sold the food stamps. He redeemed them for benefits that he knew he wasn’t entitled to, which appropriately qualifies him for prosecution under the redemption statutes.

Contrary to Respondent’s assertion, it is not the State’s contention that only the trafficking statute applies to merchants and only the redemption statute applies to individuals. Again, the statutes apply based on the prohibited conduct, not based on the identity of the actor. An

¹ https://fns-prod.azureedge.net/sites/default/files/Retailer_Training_Guide.pdf.

individual consumer may traffic if s/he buys/sells food stamp benefits, and an individual may unlawfully redeem benefits by presenting/using benefits s/he is not authorized to use, transfer, acquire, or possess. Similarly, a merchant or retailer may also commit both these offenses. Respondent uses the example of a merchant obtaining food stamps in exchange for prohibited items in an attempt to muddy the distinction between the trafficking and redemption statutes. However, such an act on behalf of a merchant instead would be a violation of RCW 74.08.580, which defines prohibited uses of public assistance benefits. The remedy for a violation such as that would be merchant disqualification from participating in the SNAP program under 7 CFR 278.6. Therefore, the fact that this specific scenario proposed by Respondent does not fall neatly into either category does not render the trafficking and redemption statutes ambiguous.

C. Case Law

While there is not a wealth of case law on the issue of food stamp fraud, there are some cases which discuss the issue in the context of 7 USC 2024(c). For instance, in United States v. Nguyen, the Ninth Circuit considered an appeal of three counts of wire fraud and nine counts of food stamp fraud under 7 USC 2024(c). 497 Fed. Appx. 722, 2012 U.S. App.

LEXIS 22501.² In that case, defendant Nguyen met SNAP beneficiaries outside supermarkets, took their cards into the markets, and gave them cash upon her return. Id. at 723. Despite not being a merchant redeeming benefits from the government – as Respondent claims you must be in order to be convicted under 7 USC 2024(c) – Nguyen was still convicted of violating the statute nine times, further indicating that the statute does apply to unlawful individual consumer activity, not just merchant or retailer activity. Furthermore, the Court of Appeals also held in that case that the SNAP fraud regulations are not unconstitutionally vague as applied to Nguyen, thereby addressing another of Respondent’s claims. Id. at 274. In addition to Nguyen, other unpublished case law from Washington and other jurisdictions demonstrates that § 2024(c) applies to individual consumers, not just merchants and retailers.

Respondent cites Liparota v. United States in support of his contention that § 2024(c) applies to stores, not individuals. 471 U.S.419, 428, 105 S. Ct. 2084, 85 L.Ed. 2d 434 (1985). However, the main issue in Liparota was whether in a prosecution under 7 USC § 2024(b) the government must prove that the defendant knew his possession of food stamps was unauthorized by statute. Id. at 420-21. The Court found that

² Although this case is unpublished, GR 14.1 allows citation to unpublished opinions from other jurisdictions if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. Under FRAP 36.3 for the 9th Circuit, unpublished dispositions and order of the 9th Circuit that were published after Jan. 1, 2007 may be cited in accordance with FRAP 32.1.

there were no compelling policy reasons to include a mens rea element in § 2024(c) (which it in passing indicated is directed primarily at stores) and not include a mens rea element in § 2024(b). Id. at 430. Notably, the Court did not hold that § 2024(b) cannot apply to individual redeemers.

In addition, Liparota also makes clear that including the requirement of a showing that the defendant knew his conduct was unauthorized by law does not create a general “mistake of law” defense under which a defendant could claim that he did not know it was illegal to use food stamps in an unauthorized manner. Id. at 425. Similar to case of receiving stolen goods, it is a defense if you did not know the goods were stolen, but it is not a defense that you did not know that receipt of stolen goods is a crime. Id.

Here, the trial court held – and Respondent continues to argue – that because Respondent might not have known that unauthorized use of another’s card was illegal or known which specific statute or regulation he violated, he cannot be convicted of a violation of § 2024(c) or RCW 9.91.144. However, Liparota specifically rejects that argument. While it might be a defense that the Respondent didn’t know his use was unauthorized, it is not a defense that he didn’t know that unauthorized use was against the law. And, in this case, the state presented ample evidence

by way of reference to facts and circumstances surrounding the case that the Respondent did know that his conduct was unauthorized or illegal.

II. CONCLUSION

The State respectfully requests that the court reverse the trial court's decision to arrest the judgment and vacate the jury's verdicts. The trial court erred in finding that the information did not charge a crime and that the state failed to provide sufficient proof of a material element of the crime charged.

The court's conclusion of law that only vendors can "redeem" an EBT card disregards the common-sense and actual definitions of the word "redeem", as well as the reality of how EBT cards are used. Furthermore, such a definition is contradicted by Washington's statutory scheme as well as federal statutes/regulations which also reference "redemption" in the context of individual users.

Likewise, no evidence was provided from which the trial court could find beyond a reasonable doubt that RCW 9.91.144 is unconstitutionally vague where a person of common sense and ordinary intelligence could understand the statute. Congress cannot be expected to proscribe with absolute clarity all forms of unlawful conduct. It is enough for Congress to set forth a statute with sufficient clarity that a person of ordinary intelligence could measure their own particular conduct up to the

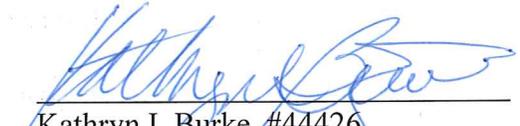
general language and determine whether there is a substantial risk that their conduct crosses the line of legality.

Finally, the State presented sufficient evidence of the material elements at trial upon which the jury could – and did – convict the defendant of the charged offenses.

For the foregoing reasons, the State respectfully requests reversal of the lower court's order arresting judgment and vacating the verdicts, and asks this court to reinstate the verdicts of the jury.

Dated this 4 Day of May, 2018.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on May 4, 2018, I e-mailed a copy of the Motion to Extend Time in this matter, pursuant to the parties' agreement, to:

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(Signature)

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