

55312-7

55312-7
78782-4

55312-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

Respondent.

v.

TOMMY B. GEORGE and JOHN GEORGE

Appellants,

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE PARIS KALLAS

BRIEF OF APPELLANT

JEFFREY H. SMITH
Attorney for Appellant
WSBA #16437

LAW OFFICES OF JEFFREY H. SMITH
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101-1651
(206) 340-0053

2005 JUL 21 AM 9:50

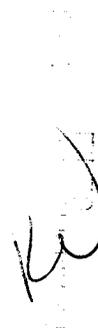


TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR	1
Issues Pertaining to Assignments of Error. . .	1
B. STATEMENT OF THE CASE	2
C. ARGUMENT	4
D. CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Table of Cases	
<u>Washington Cases:</u>	
<u>City of Seattle v. Eze</u> , 111 Wn.2d 22, 26, 759 P.2d 366(1988).....	9
<u>Haley v. Med. Disciplinary Bd.</u> , 117 Wn.2d 720, 739, 818 P.2d 1062 (1991).....	10
<u>Spokane v. Douglass</u> , 115 Wn.2d 171, 178, 795 P.2d 693(1990).....	9
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	4
<u>State v. Halstien</u> , 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).....	9
<u>State v. Kleist</u> , 126 Wn.2d 432, 895 P.2d 398 (1995).....	5
<u>State v. Lee</u> , 128 Wn.2d 151, 904 P.2d 1143 (1995).....	7, 8, 10, 12
<u>State v. Schulze</u> , 116 Wn.2d 30, 804 P.2d 566 (1990).....	11
<u>State v. Shaw</u> , 120 Wash.App. 847, 86 P.3d 823 (2004).....	5, 6
<u>Washington Statutes:</u>	
RCW 9A.56.010(18).....	4, 6, 10, 11, 13
RCW9A.56.020.....	7, 12, 13
RCW 9A.56.020(b)	8
<u>Other Jurisdictions:</u>	
<u>Connally v. Gen. Constr. Co.</u> , 269 U.S. 385, 391, 46 S.Ct 126, 70 L.Ed.322 (1926)).....	10

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to dismiss this case after the State failed to admit any evidence of the "market value" of the truck.

2. The trial court erred in failing to dismiss this case for insufficient evidence.

3. RCW 9A.56.010(18) is void for vagueness as applied to the facts of this case because it fails to require proof of "actual loss" to the victim in a Theft charge.

4. RCW 9A.56.020 is void for vagueness as applied to the facts of this case because fails to provide the public of fair notice of what conduct is prohibited.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Sufficient evidence of the value of the truck must be established by "market value", which is the price that a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction; market value is based not on the value to any particular person, but rather on an objective standard. Here, the trial court permitted the jury to reach conclusions about the value of a 31 year-old truck, when the value was not ascertainable by any standard known to the detective or witnesses, and no evidence of "market value" was ever offered to the jury.

2. Under the due process clause, a prohibition is void for vagueness if either (1) it does not define an offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to

protect against arbitrary enforcement. RCW 9A.56.020 fails to provide fair notice of what conduct is prohibited; RCW 9A.56.010(18) fails to provide ascertainable standards of guilt to protect against arbitrary enforcement.

B. STATEMENT OF THE CASE

John and Tommy B. George repair and sell used cars for a living.

In June 2003, they purchased a 1974 Chevrolet Cheyenne Half-ton truck from Jerome Potter for \$1,800.00. RP at 45. Mr. Potter had initially asked for \$2,500, but had been talked down in his price. RP 2 at 43.

Mr. Potter initially described the truck as having 185,000 miles on the odometer, RP 2 at 37, however, later acknowledged that the odometer only had five digits on it, and that it was showing 70,000 miles on it at the time he sold the truck. RP 2 at 47. Prior to selling the truck, Mr. Potter acknowledged that it had been sitting in his back yard for a couple years, and that it was not operable because of a problem with the rear differential. RP 2 at 40. During his negotiations with one or both of the

Georges, Mr. Potter advised them that he had replaced the original engine with a larger one many thousands of miles before. Mr. Potter said that the new engine was actually larger than the original engine, and had more power. RP 2 at 56-57. Mr. Potter acknowledged that he did not complete an odometer statement with the State, because DOL does not require such a form on a car that old. RP 2 at 67.

Det. Dan Stokke from the Seattle Police Department testified next. He said that he routinely reviews the classified ads in the newspapers for possible fraudulent car ads. He observed one such ad related to this truck. RP 2 at 80-82. Det. Stokke enlisted the assistance of two other detectives to attempt to purchase the truck from the seller. They went to Renton to examine the truck and met with John George. They did not purchase the truck that day. RP 2 at 88-89. These same detectives arranged to purchase the truck the next day in downtown Seattle. At that time, Tommy George drove the truck, which was now driveable, to Pioneer Square where he met with the undercover officers again. This time, Tommy George sold the truck to the officer, RP 2 at 91, with the officer providing Tommy with a \$5,500 cashier's check. RP 2 at 99. The undercover officer gave the observing officers a signal, and the officers proceeded to arrest Tommy George and John George, who was parked nearby. RP 2 at 91.

Det. Stokke was asked about the value of this truck, and was unable to provide any evidence of the value of this truck. He said that this was a normal part of his job, but that there was insufficient available information to provide the jury with a value for this truck because of its age. RP 2 at 100-101. He acknowledged that there are certain specific characteristics of a vehicle that will alter its value, such as leather interior, chrome wheels, radios, and numerous other items. RP 2 at 105-6. Whether a car has been owned by one or more persons, or has been garaged, are not value-altering characteristics, Det. Stokke agreed. RP 2 at 106. Det. Stokke agreed that no odometer statement is required for 1970's era vehicles, due to their age. RP 2 at 106. Det. Stokke also acknowledged that he did not have the truck inspected to determine what type of engine it had, or whether the odometer had been altered in any way. He indicated that he could not tell from his cursory examination that the odometer had been tampered with in any way. RP 2 at 110.

Dets. Richard O'Donnell and Dana Duffy testified that they were undercover officers asked to pose as buyers for the truck. They met with John George to look at the truck, after Det. O'Donnell previously had a couple telephone conversations with both Tommy and John George about their newspaper ad. RP 3 at 6-13. O'Donnell said that John George

described the truck as having, "70,000 original miles, it's pretty much been in the garage all the time, it's in great shape. The only thing that's new on it is the wheels." RP 3 at 12. After viewing the truck, Det. O'Donnell and Mr. George made plans to transfer the truck the next day. RP 3 at 14. The next day, Det. O'Donnell and Tommy George met in Seattle and finalized the sale of the truck. RP 3 at 20-22. Immediately after completing the sale of the truck for \$5,500, Tommy George was arrested. John George, who was parked nearby, was also arrested at that time.

The State rested.

The defense moved to dismiss on the grounds that the State has failed to introduce any evidence of the value of the truck. In the alternative, the defense moved to dismiss the felony charge of Attempted Theft in The First Degree, and find that the State established only the elements of Attempted Theft in the Third Degree, based on the definition of "value" found in RCW 9A.56.010, which states that items "having a value that cannot be ascertained...shall be deemed to have a value not exceeding \$250." This motion was denied.

The defense did not present any evidence at trial. Both defendants were convicted. This appeal timely followed.

C. ARGUMENT

1. There is Insufficient Evidence of Attempted Theft to Support a Finding of Guilt in this Case.

The appropriate test for determining the sufficiency of the evidence to establish an element of the crime charged is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential element proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

The value of property, as an element of the Theft statutes, is defined under RCW 9A.56.010(18) as:

(a) "Value" means the market value of the property or services at the time and in the approximate area of the criminal act;...

(e) Property or services having value that cannot be ascertained pursuant to the standards set forth above shall be deemed to be of a value not exceeding two hundred and fifty dollars;

a. There is Insufficient Evidence of Market Value to Support the Claimed Value of The Truck as Being in Excess of \$250 Under RCW 9A.56.010(18)(a).

For purposes of distinction between first, second and third-degree Theft, in which the distinction is based on market value of property at time

and in approximate area of offense, "market value" is the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction; market value is based not on the value to any particular person, but rather on an objective standard. State v. Shaw, 120 Wash.App. 847, 86 P.3d 823; State v. Kleist, 126 Wn.2d 432, 895 P.2d 398 (1995). According to the above statute, if the evidence fails to establish a market value, or such value is not ascertainable, the value is deemed to be less than \$250.

In Kleist, supra, the court permitted the State to introduce price tags through store employees to establish the value of stolen items and, ultimately, permitted the defense to introduce the price tags for identical items sold at other stores in the same general area. The court found that this approach established the market value of those items, even though the figures were different. State v. Kleist, supra.

Another means of proving "market value" was used in Shaw, supra, where the court permitted the case detective to testify that he regularly refers to the Kelley Blue Book to establish the market value of vehicles, and that he did so in that instance. The detective also explained

what information the site requires to value a car. In Shaw, the detective determined that the car in question was valued by the Kelley Blue Book at \$2,520, even though the car had actually sold for \$1,400. The Court, on appeal, rejected appellant's argument that the sales price of \$1,400 established the market value under 9A.56.010(18), and concluded that the appropriate market value of \$2,520 was established by the Kelley Blue Book, as testified to by the detective, and affirmed the defendant's conviction for First Degree Possession of Stolen Property.

In the instant case, the State offered no evidence of the National Automobile Dealers Association (NADA) or Kelley Blue Book values for the truck in question. The detective testified that he routinely used NADA or Kelley Blue Book values, was familiar with the information needed to establish value through the Kelley Blue Book process, but that he could find no value in the NADA or Kelley Blue Book for this truck. RP at 100-101. Det. Stokke acknowledged that the NADA and Kelley Blue Book only have values for cars dating back to 1984. He further agreed that some vehicles of that age in the NADA or Kelley Blue Book may have a value of zero. RP at 103-104.

The only evidence the State offered as to the "value" of this truck

was the sales price the undercover detectives agreed to pay. As in the Shaw case, the actual sales price fails to establish the market value of the item. Since no market value for this 1974 truck could be found, and none was offered in evidence, the State has failed to establish the essential element of value in excess of \$250, as required to support a conviction for Attempted Theft in the First (or Second) Degree as charged in this case. Pursuant to RCW 9A.56.010(18), the evidence, at best, supports a finding of Attempted Theft in the Third Degree.

b. There is Insufficient Evidence of the Deprivation of Property to Any Alleged Victim, as Required Pursuant to RCW 9A.56.020(b).

RCW 9A.56.020 defines Theft, among several different definitions, as:

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services;

In State v. Lee, 128 Wn.2d 151, 904 P.2d 1143 (1995), the Supreme Court reversed a conviction for Theft where the appellant had improved otherwise uninhabitable property to the point where he was able

to collect rent, even though he did not yet own the property. The Court concluded that the renters received exactly what they bargained for in the rental property. The property could not have been rented but for the repairs made to it by the appellant. As the court stated:

...in fact, (appellant's) actions secured them the housing that ... they...desired. Thus, (appellant's) acquisition of the \$700 resulted in no loss (to the victim), as each received what they bargained for.

State v. Lee, *supra* at 163.

Similarly, in the instant case, the evidence establishes that John and Tommy George purchased an inoperable truck, performed repair work on this truck to the point where it became operable, and sold it for more than they paid. The evidence at trial established that the false information provided by the Georges was not information that would alter the value of a truck. As Det. Stokke acknowledged, the value-altering aspects of a vehicle in the Kelley Blue Book are the physical parts of the vehicle, such as leather interior or CD player. He indicated that a vehicle having one owner, or being garaged, are not even mentioned as factors in the Kelley Blue Book. RP at 105-106.

Concerning the discrepancy on the mileage, it was significant that Jerome Potter inaccurately remembered the vehicle mileage, remembering

it initially at 185,000 miles, then having to agree later, that it must actually have been 170,000 miles. Mr. Potter made an incorrect statement while selling his vehicle, which John and Tommy George then repeated, but Mr. Potter was not charged with a crime, unlike John and Tommy George. While the State might argue that Mr. Potter's error resulted in an increased value for the vehicle, John and Tommy George also made errors that in fact increased the value of the truck for the buyer. Specifically, John and Tommy George did not tell the buyers that the truck actually had a 400cc engine, rather than a 350cc engine. Mr. Potter testified that he replaced the original engine with a larger one several years before selling the truck. This was not included in the classified ad for the truck, even though the size of the engine would be a physical characteristic of the truck that Det. Stokke testified would increase the value of the truck.

While John and Tommy George did make misrepresentations about the truck, just as Mr. Lee misrepresented himself as the property owner in State v. Lee, the evidence does not establish that these misrepresentations resulted in the alleged victims receiving anything less than what they bargained for. In Lee, the people received the use of rental property in exchange for money; in this instance, the buyers received the

transfer of the truck in exchange for money. In such circumstances, there can be no intent to deprive, as required under RCW 9A.56.020(b).

Further, by failing to establish the market value of this truck, the State cannot establish that there was any difference whatsoever between the value of the truck and the \$5,500 offered for the truck. In failing to prove any difference in the value paid and the value of the truck, the State has failed to prove that any theft occurred at all.

2. RCW 9A.56.010(18), RCW 9A.56.020 Are Both Unconstitutionally Vague as Applied to a "Theft" in which a Transfer of Property is Made.

The due process vagueness doctrine "serves two important purposes: first, to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement." State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). Under the due process clause, a prohibition is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what

conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

It should be noted that, when a challenged prohibition does *not* involve First Amendment rights, it is not properly evaluated for *facial* vagueness; instead, it must be evaluated *as applied*. Spokane v. Douglass, 115 Wn.2d at 182. Accordingly, appellants' convictions for Attempted Theft are tested for unconstitutional vagueness by inspecting the actual conduct of the defendants to whom it is applied, and the particular facts of the case. Spokane v. Douglass, *supra*. Duly adopted ordinances are presumed constitutional. City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). The party urging unconstitutional vagueness has the heavy burden of proving vagueness beyond a reasonable doubt. City of Seattle v. Eze, *supra*. An ordinance is void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S.Ct 126, 70 L.Ed.322 (1926)).

a. RCW 9A.56.010(18) is Unconstitutionally Vague in Cases Where the Claimed Theft Involves the Transfer of Property of Allegedly Disproportionate Value, Because the Statute Does Not Provide Ascertainable Standards of Guilt to Protect Against Arbitrary Enforcement.

RCW 9A.56.010(18) does not differentiate between theft by taking, where someone steals something of value, and a "theft" in which it is alleged that a misrepresentation leads to the exchange of property of disproportionate value. In State v. Lee, the court noted that a "loss to the victim is key in assessing whether an unlawful taking has occurred". State v. Lee, *supra* at 162.

In the latter situation, where each party gives up something of value to the other, the "loss", if any, to the alleged victim is not solely the value of the property given. The alleged victim has also received something of value in exchange for their property. The "actual loss" to the victim is the difference between the value of the property given and the value of the property received, yet RCW 9A.56.010(18) does not require such an approach. The statute permits the State to use a disproportionately

larger figure, because it does not account for the property received by the "victim", and punishes the defendant disproportionately by holding him legally accountable for the larger amount. This leads to the unconstitutionally arbitrary result that a defendant is punished for significantly more than he actually took; or, that he is punished for taking something of value, when he actually received no additional value, and the victim incurred no "actual loss".

If the statutory definition of value set forth in RCW 9A.56.010(18) remained in effect, the outcome would lead to absurd results in situations where there is a transfer of claimed unequal value. A Statute will not be construed in a manner that leads to absurd results. State v. Schulze, 116 Wn.2d 30, 804 P.2d 566 (1990).

For example, in this very case, John and Tommy George sold a truck containing a much larger engine than advertised. This increases the value of the truck. Even with the purported misrepresentations by the Georges, which had no value according to Det. Stokke, they could actually have sold this truck for less than it's market value, and still be convicted of Attempted Theft in the First Degree because RCW 9A.56.010(18) does not require a determination of the "actual loss" to the victim. Using this

analysis, John and Tommy George could repair a truck, increase its value to \$6,000, sell it for \$5,500 while making value-less misrepresentations, and still be convicted of Attempted Theft at a Felony level. Or, they could sell the truck for a \$50 net loss to the "victim" and still face a felony-level charge, because the total market value of the truck is \$5,500.

Such a result is absurd, since there is little or no loss to the "victim". Such a result is also completely arbitrary, because it does not account for the "actual loss" to the victim, but arbitrarily inflates that loss to the full value of the property given by the "victim", and leads to a conviction for a more serious charge, such as this felony charge, even though there is no evidence of any "actual loss" by the victim.

b. RCW 9A.56.020(b) is Unconstitutionally Vague in Cases Where the Claimed Theft Involves the Transfer of Property of Allegedly Disproportionate Value, Because It Fails to Provide Fair Notice of What Conduct is Prohibited.

RCW 9A.56.020 does not adequately inform citizens that they risk

a criminal charge if they engage in unfair or inequitable sales techniques. Again, in this case, John and Tommy George made misrepresentations which Det. Stokke acknowledged would not actually alter the value of the truck. These misrepresentations were used by the State as the basis for their felony charges of Attempted Theft in the First Degree. Such unfair sales practices may constitute a violation of the Consumer Protection Act, or some other statute, but, absent evidence that there is an "actual loss" to the victim cannot form the basis for a criminal charge or conviction. As in State v. Lee, supra, where the defendant put time and money into increasing the value of the property, then rented the property and kept the rent money, even though he did not own the property, there is no crime in this case where the State cannot prove that the misrepresentation caused an "actual loss" to the "victim".

To avoid being constitutionally vague, a statute must provide citizens with fair notice of what conduct is prohibited. The Theft statute, RCW 9A.56.020 warns people that they may not take things of value from other people, by use of stealth or deception, or they will be charged with a crime. The court's interpretation of this Theft statute, as applied in this

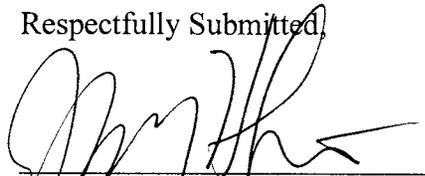
case, prohibits any use of deception, regardless of whether there is any "actual loss" of any value whatsoever to the "victim".

D. CONCLUSION

There is insufficient evidence of the "market value" of the truck to support a conviction for Attempted Theft in the First Degree. The "value" definition, under RCW 9A.56.010(18), and the Theft definition, under RCW 9A.56.020, are both unconstitutionally void for vagueness as applied to the facts of this case.

DATED this 20th day of July, 2005.

Respectfully Submitted,



JEFFREY H. SMITH
LAW OFFICES OF JEFFREY H. SMITH
Attorney for Appellants
WSBA #16437

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE KING COUNTY DISTRICT COURT
EAST DIVISION

STATE OF WASHINGTON)	
)	
Respondents)	COA#: 55312-7-I
v.)	
)	AFFIDAVIT OF MAILING
)	
TOMMY B. GEORGE and)	
JOHN GEORGE,)	
Appellant)	

I, Sherrie L. White, hereby certify that on the day listed below I placed a copy of the Brief of Appellant to the Court of Appeals in the above-captioned case in the U.S. Mail addressed to the following:

Keith Scully
King County Prosecutors Office
516 Third Ave. #W554
Seattle, WA 98104

Dated this 20th day of July, 2005

Respectfully Submitted

Sherrie L. White
Sherrie L. White, Paralegal

2005 JUL 21 AM 9:50
[Handwritten Signature]