

No. 67313-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEONTE B.,

Juvenile Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

In his opening brief, juvenile appellant Keonte B. argued the State presented insufficient evidence to convict him of knowingly making a false or misleading material statement to a public servant. Indeed, Keonte identified several independent bases for reversal in this case: (1) The State did not prove Willet was a public servant under the statutory definition; (2) The State did not prove Keonte knew Willet was a public servant; (3) The State did not prove Keonte knew the statement was material; and (4) the statute is void for vagueness because the definition of “public servant” is, according to our Supreme Court, “entirely too broad.”

In response, the State interprets the statute contrary to ordinary English usage, allows a flawed interpretation of a WPIC to override legislative mandate, abdicates its burden of proof by asking the Court to presume proof of one element from proof of another, misconstrues the definition of “public servant,” and misapplies caselaw governing constitutional vagueness prohibitions. The State's arguments should be rejected.

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT KEONTE OF KNOWINGLY MAKING A FALSE OR MISLEADING MATERIAL STATEMENT TO A PUBLIC SERVANT.

a. The State failed to prove beyond a reasonable doubt that Keonte knew Willet was a public servant. Keonte was convicted of knowingly making a false or misleading material statement to a public servant. CP 43-44; RCW 9A.76.175. As explained in the opening brief, one of the elements the State failed to prove was that Keonte knew Willet was a public servant. Brief of Appellant at 7-8. Even the trial deputy prosecutor stated that Willet's uniforms "don't look like any of the law enforcement uniforms" and "the badge is a – doesn't have any government office on it, it has Securitas, which is a private company." RP 116.

The State acknowledges it must prove both knowledge of falsity and knowledge of materiality, but argues it is not clear the State is required to prove knowledge that the listener is a public servant. Brief of Respondent at 8-9. To the extent the application of the mens rea is unclear, this only supports Keonte's vagueness argument. See Brief of Appellant at 10-14. However, the State is wrong on the statutory construction issue.

The statute provides:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

RCW 9A.76.175. Under the plain language of the statute, the word "knowingly" applies to the entire verb phrase immediately following it; i.e., "knowingly" applies to each element of the phrase "makes a false or misleading material statement to a public servant."

The U.S. Supreme Court recently faced a similar statutory construction issue in Flores-Figueroa v. United States, 556 U.S. 646, 129 S.Ct. 1886, 173 L.Ed. 2d 853 (2009). The statute at issue there punishes a person who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." Id. at 647 (citing 18 U.S.C. 1028A(a)(1)). The Court followed standard rules of English grammar to hold that the word "knowingly" applied to the object of the verb phrase. Id. at 650-51. In other words, the Government was required to show that the defendant knew that the "means of identification" he or she unlawfully transferred, possessed, or used, in fact, belonged to "another person." Id. at 647.

The Court explained, “[a]s a matter of ordinary English grammar, it seems natural to read the statute’s word “knowingly” as applying to all the subsequently listed elements of the crime.” Id. at 650.

In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence. Thus, if a bank official says, “Smith knowingly transferred the funds to his brother’s account,” we would normally understand the bank official’s statement as telling us that Smith knew the account was his brother’s. Nor would it matter if the bank official said “Smith knowingly transferred the funds to the account of his brother.” In either instance, if the bank official later told us that Smith did not know the account belonged to Smith’s brother, we should be surprised.

Id. at 650-51. Similarly here, as a matter of ordinary English grammar, the legislature applied the mens rea of “knowingly” to each element of RCW 9A.76.175, including the object of the verb phrase, “public servant”. See id.

Despite the plain language of the statute, the State argues it need not prove a defendant knows that the listener is a public servant because the WPIC does not say so. Brief of Respondent at 9. This argument is flawed on two grounds.

First, the argument is internally inconsistent. The State acknowledges that even under the WPIC it must prove a defendant knew the statement was material. Brief of Respondent at 9. The State also acknowledges that under the statute a statement is material only if it is “reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.” Brief of Respondent at 7 (quoting RCW 9A.76.175). “Public servant” is therefore subsumed in the definition of materiality, for which the State admits the mens rea applies.

Second, the WPIC does not settle the issue because WPICs are not the law. The legislature made it a crime to knowingly make a false statement to a public servant. RCW 9A.76.175. Where a WPIC is in conflict with the plainly stated intent of the legislature, the intent of the legislature must prevail. State v. Goble, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005); State v. Freeburg, 105 Wn. App. 492, 507, 20 P.3d 984 (2001).

And again, to the extent there is merit to the State’s strained interpretation of this statute, it merely bolsters Keonte’s constitutional claim. If the statute were not vague, the State would not need to rely solely on a WPIC for legal support. Accordingly, should this Court sympathize with the State’s confusion, the statute

does not survive constitutional scrutiny. See, e.g., City of Columbus v. New, 1 Ohio St.3d 221, 224, 438 N.E.2d 1155 (1982) (similar statute held unconstitutionally vague due to confusion inherent in analogous use of “knowingly”); see also Brief of Appellant at 11.

b. The State failed to prove beyond a reasonable doubt that Keonte knew his statement was material. As explained in the opening brief, another independent basis for reversal is the State’s failure to present sufficient evidence that Keonte knew his statement was material, i.e., that it was “reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.” Brief of Appellant at 8-9. The State reads this element out of the statute and creates an improper mandatory presumption by responding, “had [Keonte] not believed that his name was material to Willet’s work, there would be no reason to give a false name.” Brief of Respondent at 8.

The statute requires both proof that the defendant made a false statement and proof that the defendant knew the false statement was material. RCW 9A.76.175; State v. Godsey, 131 Wn. App. 278, 290-91, 127 P.3d 11 (2006). To say the latter automatically flows from the former violates due process. See

Sandstrom v. Montana, 442 U.S. 510, 521-22, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (citing Morrisette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)); State v. Deal, 128 Wn.2d 693, 700-03, 911 P.2d 996 (1996). Under well-established due process doctrine, burden-shifting and mandatory presumptions are not allowed. See id. The State cannot escape its evidentiary burden in this manner.

The facts, even as put forth by the State, illustrate that a reasonable person would not know Willet would rely on Keonte's statement. Significantly, at the time he gave a false name, Keonte had not been told he would be cited. It would be reasonable for him to assume he would be directed to purchase proper fare. His real name would have been irrelevant to that process.

c. The State failed to prove beyond a reasonable doubt that Willet was a public servant. As explained in the opening brief, the State also failed to prove the "public servant" element because the ticket collector, Willet, worked for a private security company. Brief of Appellant at 6-7. According to the State, "sufficient evidence supports that Willet was performing a government function." Brief of Respondent at 5. But that is not enough.

Contrary to the State's argument, a public servant is not anyone "designated to perform a government function." Brief of Respondent at 6-7. Rather, it is "any person participating as an advisor, consultant, or otherwise in performing a governmental function." RCW 9A.04.110(23) (emphasis added). Thus, the legislature envisioned a public servant that would not only perform a governmental function, but would assume a governmental role – a participant in the government. See id. Furthermore, "under the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." In re Guardianship of Knutson, 160 Wn. App. 854, 868, 250 P.3d 1072 (2011) (internal citations omitted). Thus, the word "otherwise" must be limited to mean something similar to "advisor" or "consultant". See id.; RCW 9A.04.110(23). Because Willet was neither an employee of government nor an advisor, consultant, or similar professional, the State failed to prove he was a "public servant" under the statute. For this reason, too, the conviction should be reversed.

2. THE STATUTE PROHIBITING FALSE STATEMENTS TO PUBLIC SERVANTS IS UNCONSTITUTIONALLY VAGUE.

As explained in Keonte's opening brief, if the definition of "public servant" can be applied to this case, the statute is unconstitutionally vague. Brief of Appellant at 10-14. The State asserts that Keonte "offers no authority or argument to explain how application of the statute in his case renders the statute vague." Brief of Respondent at 12. This is incorrect. Keonte presented several pages of argument on the issue and cited numerous cases. Brief of Appellant at 10-14 (presenting argument that the statute is unconstitutionally vague and citing U.S. Const. amend. XIV; State v. Moultrie, 143 Wn. App. 387, 396, 177 P.3d 776 (2008); State v. Valencia, 169 Wn.2d 782, 791, 785, 239 P.3d 1059 (2010); Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); Bellevue v. Lorang, 140 Wn.2d 19, 31, 992 P.2d 496 (2000); City of Columbus v. New, 1 Ohio St.3d at 223; State v. White, 97 Wn.2d 92, 99, 640 P.2d 1061 (1982); and State v. LaLonde, 35 Wn. App. 54, 58, 665 P.2d 421 (1983)).

The State then acknowledges the citation to White, but asserts that because the vague meaning of "public servant" was not the only concern in that case this Court should disregard the

Supreme Court's pronouncement that "the RCW Title 9A definition of 'public servant' is entirely too broad." White, 97 Wn.2d at 100; Brief of Respondent at 12-14. The State is wrong. The fact that the overbroad definition of "public servant" was "not the sole concern in White," Brief of Respondent at 14, does not render the Supreme Court's analysis on the topic irrelevant. See In re Personal Restraint of Heidari, ___ Wn.2d ___, ___ P.3d ___, slip. op. at 5-6 (Filed 4/19/12) (explaining that alternate basis for holding should not be disregarded as "dictum"). Indeed, as discussed in the opening brief, this Court in LaLonde acknowledged that White "held that the term 'public servant,' as used in those sections of the statute, was too broadly defined." LaLonde, 35 Wn. App. at 58. The LaLonde court affirmed in that case only because the definition was not vague as applied to uniformed police officers.¹ Id. But here, the listener was not a uniformed police officer and indeed wore the uniform of a private security firm. RP 27-28, 116. Accordingly, as applied to a Securitas employee, the definition of

¹ Similarly, the State's citation to City of Bellevue v. Acrey is inapposite because that case involved uniformed police officers so there was no issue regarding the vagueness of the "public servant" definition as applied. Brief of Respondent at 15 (citing 37 Wn. App. 57, 62-63, 678 P.2d 1289, reversed on other grounds, 103 Wn.2d 203, 691 P.2d 957 (1984)).

“public servant” is unconstitutionally vague. See White, 97 Wn.2d at 100; LaLonde, 35 Wn. App. at 58.

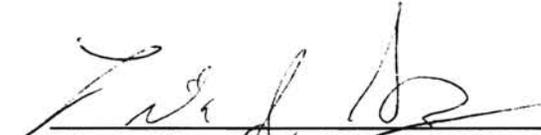
Additionally, as explained in Section 1 above and in the opening brief, this statute is vague not only as to the definition of “public servant,” but also as to whether the word “knowingly” applies to “public servant.” Brief of Appellant at 11. Thus, it suffers the same infirmity as the ordinance invalidated in City of Columbus v. New, 1 Ohio St.3d at 224. Because the State essentially concedes it is unclear whether “knowingly” applies to “public servant,” Brief of Respondent at 8-9, this Court should hold the statute is unconstitutionally vague.

B. CONCLUSION

Because the State failed to prove that Keonte knowingly made a false material statement to a public servant, Keonte respectfully requests that this Court reverse his conviction and dismiss the charge with prejudice. In the alternative, this Court should hold the statute at issue is unconstitutionally vague.

DATED this 20th day of April, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lila J. Silverstein', is written over a horizontal line.

Lila J. Silverstein – WSBA 38394
Washington Appellate Project
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DIVISION I

STATE OF WASHINGTON,)	
)	NO. 67313-1
Respondent,)	
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v.)	
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KEONTE B.)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 20TH DAY OF APRIL, 2012, A COPY OF **APPELLANT'S REPLY BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

King County Prosecuting Attorney
Appellate Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Keonte B
162 S.W. 200th Street
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SIGNED IN SEATTLE, WASHINGTON THIS 20th DAY OF APRIL, 2012

x Ann Joyce

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