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THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT/CROSS-PETITIONER,

v.

EDDIE LEE DAVIS, PETITIONER/CROSS-RESPONDENT
LETRECIA NELSON, PETITIONER/CROSS-RESPONDENT

Court of Appeals Cause No. 41739-1 (Consolidated No.)
Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 09-1-05374-1
No. 09-1-05453-5

ANSWER TO PETITION FOR REVIEW/CROSS-PETITION

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A. IDENTITY OF PARTY/CROSS-PETITIONER.

The State of Washington, plaintiff in the trial court and respondent below, asks this court to deny the petitions for review filed by Eddie Davis and Letricia Nelson ("defendants") and to grant review of the portion of the Court of Appeals' decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION.

The State seeks review of that portion of the published majority opinion, filed on September 20, 2013, in ***State of Washington v. Eddie Davis and Letricia Nelson***, COA No. 41689-1-II. Where the court held there was insufficient evidence to support the jury's finding of the aggravating factor found in RCW 9.94A.535(3)(v) - that the offense was committed against a law enforcement officer who was performing his official duties at the time of offense - as it pertained to defendants' convictions of possession of a stolen firearm because the victim officer was dead at the time of defendants' possession, even though they knew that the gun had been taken from a law enforcement officer who was trying apprehend a murderer and that it had been used by the murderer to kill the officer.

C. ISSUE PRESENTED FOR REVIEW.

1. Since possession of a stolen firearm is but a continuation of the initial theft, should the "at the time of offense" language of RCW 9.94A.535(3)(v) be construed to refer to whether the law enforcement officer was performing his official duties at the point in time that he was initially victimized by the theft of his firearm as opposed to the point in time that a receiver of a stolen firearm comes into possession of the weapon or when the receiver is apprehended?

D. STATEMENT OF THE CASE.

A full recitation of the facts of this case may be found in the State's response brief filed below as well as in the opinion of the Court of Appeals. The following facts are relevant to the issue for which the State seeks review.

On the morning of November 29, 2009, around 8:00 a.m., Lakewood Officers Tina Griswold, Ron Owens, and Mark Renninger, and Greg Richards were at the Forza Coffee Shop located at 11401 Steele Street in Parkland, Washington. RP 230-231. Maurice Clemmons entered the coffee shop carrying two firearms: a Glock Model 17 9mm Luger semiautomatic, and a Smith & Wesson .38 double action revolver. RP

231. Clemmons walked over to the table where the three officers were sitting, and shot Officer Tina Griswold in the back of the head using the Glock 9mm. RP 232. He then immediately used to same gun to shoot Officer Mark Renninger in the side of the head. RP 232. When the Glock jammed, Clemmons then fired several shots from the Smith & Wesson - one of which struck and killed Officer Ronald Owens. RP 232. Then Clemmons and Officer Greg Richards began struggling with each other; Officer Richards fired his firearm, a .40 caliber Glock semiautomatic, which struck Clemmons in the right back. RP 233. The struggle continued until Officer Richards was shot in the head with his own weapon. RP 233. Clemmons then left the coffee shop taking Richards' firearm with him. RP 233.

Cicely Clemmons testified that in November of 2009, she lived at 101 Second Avenue in Pacific, Washington, with her mother, defendant Letrecia Nelson. RP 274-76. She testified that defendant Eddie Davis and Maurice Clemmons were her cousins. RP 276-78. Cecily[1] testified that Maurice Clemmons came to her house the morning of November 29, 2009, after he had killed four police officers at a Forza Coffee Shop in Parkland, Washington. RP 283. He arrived with Eddie and Doug Davis; her mother was also home when Maurice arrived. RP 283-84. Maurice

announced that he had just killed four police officers and asked defendant Nelson to get him a shirt; he also announced that he had been shot and wanted help with his wound. RP 307, 333, 380. Maurice stated that he had killed four police officers, including a female officer that he shot in the head, and that one of the officers shot him, and that he had a tussle over the officer's gun before Maurice got it away from him, then used it to shoot the officer in the head. RP 312. Maurice indicated that his own gun had jammed and that he took the officer's gun. RP 312, 316. When getting ready to leave Maurice asked "Where's the gun?" RP 316. The gun had been put in to a blue shopping bag, - a bag which Cicely had brought home and stored in a drawer in the laundry room; the bag with the gun was sitting on the counter. RP 314, 383. Eddie Davis told Clemmons that the gun was on the counter in the bag and then retrieved it for Maurice. RP 320. Maurice stated that he wasn't done-that he was going to kill more officers. RP 321. Maurice left with defendants Eddie and Doug; the three took the car that they arrived in, a white Bonneville that Cicely had seen Eddie driving previously, and Cecily's car. RP 286-87, 321-22.

[1] Where more than one person has the same last name, the State has used first names for the sake of clarity. No disrespect is intended.

As part of the investigation into these murders, Letricia Nelson was interview by Detective Quilio. He testified that she told him that Maurice Clemmons showed up knocking on her door on November 29 and when she answered it he was there holding his side saying he'd been shot. RP 1168-69. She got peroxide and bandages to help with the wound. RP 1174. Defendant Nelson indicated that Clemmons bled on her carpet and that she cleaned it up after he left. RP 1173-74. Defendant Nelson was vague as to who had picked up the gun that Clemmons brought to her house, but acknowledged that she "might have picked it up." RP 1175. She then admitted getting the bag for the gun out of the closet and putting the gun back in the bag. RP 1175-76, 1201.

As part of the investigation into these murders, Eddie Davis was questioned by Detectives Kobel and Anderson. There was testimony that Davis eventually admitted to them that he had seen Maurice Clemmons on the morning of the 29th and that he had used his cell phone that morning. RP 955. Davis told Det. Kobel that Maurice came back to the house and told him he wanted to be driven to Auburn. RP 964. He drove Maurice in his white Bonneville and on the way Maurice, who was in the back seat, told Eddie that he had been shot. RP 965, 968. Eddie stated that Maurice told him while on the freeway that he had been shot by one of the police officers and that he "had shot four of them bitches" -meaning that he had

shot the four police officers. RP 969, 995-96. When they reached their destination, Eddie could see that Maurice had been shot in the side of his chest, but it did not look serious. RP 966, 997-98. At their destination, he got the wound cleaned with peroxide and bandaged; he was given fresh clothes. RP 967, 970, 998. From the house, Eddie drove Maurice to the Supermall and dropped him off near Discount Tires between 9:00 and 10:00 a.m. where he got into another car. RP 971-73, 998, 1011. Eddie acknowledged that he heard Maurice talking about shooting cops prior to him doing so, and knew that he had guns that would enable him to carry out his threat. RP 1014.

E. ARGUMENT WHY THE STATE'S CROSS-REVIEW SHOULD BE ACCEPTED.

1. THE COURT OF APPEALS ERRED IN FAILING TO TAKE INTO CONSIDERATION THAT DEFENDANTS' CONVICTIONS FOR UNLAWFUL POSSESSION OF A STOLEN FIREARM CONTINUED THE INITIAL CRIME OF THEFT SO THAT THE STATUS OF THE VICTIM AT THE TIME OF THE INITIAL THEFT SHOULD CONTROL THE APPLICABILITY THE AGGRAVATING FACTOR FOR CRIMES COMMITTED AGAINST ON-DUTY LAW ENFORCEMENT OFFICERS.

a. This Case Presents An Issue Of First Impression.

At issue is this case is construction of the statutory aggravating circumstance found in RCW 9.94A.535(3)(v), which allows for increased punishment for crimes committed against on-duty law enforcement officers under certain circumstances. The aggravating factor is applicable when a jury finds that:

> The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

RCW 9.94A.535(3)(v). Until the Court of Appeals issued the decision in this case, all published opinions addressing this aggravating factor had been in situations when the factor was applied to the crime of assault. *See*

State v. Mann, 157 Wn. App. 428, 237 P.3d 966 (2010); ***State v. Kolesnik***, 146 Wn. App. 790, 192 P.3d 937, *review denied*, 165 Wn.2d 1050, 208 P.3d 555 (2008); ***State v. Hale***, 146 Wn. App. 299, 189 P.3d 829 (2008). In the case now before the court the jury found that that this aggravating factor was applicable to defendants' crime of possession of a stolen firearm, but the majority below found that there was insufficient evidence supporting this aggravating factor because:

> Although Officer Richards was performing his official duties when Clemmons shot and killed him with his own service weapon, the evidence shows that Officer Richards was deceased by the time Eddie [Davis] and [Letricia] Nelson possessed the gun, Thus Officer Richards cannot be considered to have been in performance of his "official duties" during that time.

Opinion at p. 30 (footnote omitted). This court should take review of this issue because the decision below is in conflict with several decisions which stand for the proposition that possession of stolen property is but a continuation of the original theft and it is undisputed that Officer Richards was "on duty" at the time of the initial theft so as to make this aggravator applicable to the defendants' crimes which continued the harm of the original theft. It also it presents an issue of first impression as no case has construed the temporal aspect of "at the time of the offense" in RCW 9.94A.535(3)(v) to establish whether the focus should be at the point in time the victim is injured, the crime is complete, or the offender is

captured. This presents an issue of substantial public interest. RAP 13.4(b).

b. As The Receipt Of A Stolen Firearm Continues The Initial Injury Of The Theft, The Status Of The Victim Should Be Determined At The Time Of The Initial Injury To The Victim.

Washington law has long recognized that the receipt of stolen property by a person other than the thief is correctly viewed as a continuation of the initial theft. Prior to 1975, theft and knowing receipt of stolen property were but alternative means of committing the crime of larceny. *See* former RCW 9.54.010, Laws of 1909, ch. 249, § 349, p. 997, amended by Laws of 1915, ch. 165, § 3, p. 493, repealed by Laws of 1975, 1st Ex. Sess. ch. 260, p. 863. Cases construing this larceny statute held that "one cannot be both the principal thief and the receiver of stolen goods" and would vacate a conviction if a person were convicted of both theft and receiving stolen goods for the same stolen property. ***State v. Hancock***, 44 Wn. App. 297, 301, 721 P.2d 1006, 1008 (1986), *citing* ***State v. Hite***, 3 Wn. App. 9, 12, 472 P.2d 600 (1970) and ***State v. Flint***, 4 Wn. App. 545, 547, 483 P.2d 170 (1971). When the Legislature separated theft and possession of stolen property into two different statutes in 1975, the rule prohibiting dual convictions survived. ***Hancock***, 44 Wn.2d at 301;

see also ***State v. Dallas***, 126 Wn.2d 324, 329 n.2, 892 P.2d 1082 (1995). This court recently reiterated this continuing offense concept when it stated "[i]n our opinion, the unlawful possession of property taken in a theft is a mere continuation of the thief's act of depriving the true owner of his or her right to possess their property." ***State v. Haddock***, 141 Wn.2d 103, 112, 3 P.3d 733 (2000).

In ***Haddock***, this court addressed who the "victim" was of the crime of possession of a stolen firearm and concluded that it was the owner of the stolen firearm and not the general public, because "to conclude otherwise, ... would be discounting the significance of the injury to the owner of the property that was unlawfully possessed[.]" *Id.* at 111.

In the case now before the court, Officer Richards had his firearm stolen from his while he was on duty as a law enforcement officer. Thus the harm or injury flowing from that theft was created at a point when Officer Richards' "on-duty" status brought the offense within the parameters of RCW 9.94A.535(3)(v). The defendants gaining possession of that stolen firearm constituted a new crime but their actions did not create a new injury, it merely perpetuated the original injury to Officer Richards. Thus, the impact of defendants' "offense" was broader than the injury caused by strictly looking at their current offense of unlawful possession of a stolen firearm, because it continued the harm of the

original theft; their actions had the effect of reaching back and accepting culpability for the original injury cause by the theft.[2] The majority's construction ignores the fact that the defendants' crimes are part of a continuing offense. The victim's status as an on-duty law enforcement officer at the time of the initial injury should continue to apply to defendants' crimes.

As the dissent below pointed out, the majority's construction can lead to some absurd results because under the majority's interpretation of RCW 9.94A.535(3)(v), a person could steal a firearm from an on-duty law enforcement officer and the aggravator would apply as long as the defendant was caught in possession of the stolen firearm while the officer remained on- duty, but if the officer went off duty the aggravator would cease to apply until he returned to duty. *See* Opinion at p.38-39 (Quinn-Brintnall, J., dissenting in part). There is nothing to suggest that the Legislature intended to have the applicability of this aggravator be dependant upon an officer's work schedule. Rather the Legislature was looking at the status of the officer at the time he was victimized by criminal behavior.

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[2] There is no danger that a receiver of stolen firearm will unwittingly make themselves eligible for this aggravating factor as the statutory requirements include that the jury to find that "the offender knew that the victim was a law enforcement officer" before it can be utilized.

A similar situation could arise if an officer was shot and seriously injured while on-duty but did not die until after spending several months on life support. Under the majority's interpretation, a defendant charged with homicide for shooting the officer could argue that there was no "homicide" until the point in time that the officer died, and as the officer was not "on-duty" at the time of death, the aggravator could not be applied to his homicide conviction. In this scenario, there is an injury from the assault that continues until it results in death. The majority's interpretation of RCW 9.94A.535(3)(v) would focus on the time of death to determine the nature of the victim rather than by looking at when the victim was first injured by the shooter's actions. The focus of the Legislature in enacting RCW 9.94A.535(3)(v) was to protect law enforcement officers by providing for increased punishment for those offenses that harm or injure officers while they are on duty. Thus, application of this factor should focus on the time the injury is first inflicted upon the victim to establish whether the officer is "performing his or her official duties at the time of the offense" and not focus when the crime is completed or when the offender is apprehended. The majority of the court erred in construing the temporal element of this aggravating factor.

F. CONCLUSION.

The majority of the court below misconstrued the "time of offense" component of RCW 9.94A.535(3)(v) and this court should grant the State's petition for review of this issue.

DATED: November 15, 2013

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/14/13 Johnson
Date Signature