NO. 93660-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SANDRA LEE ALLEN,

Petitioner.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Sandra Lee Allen has filed a petition for review of the unpublished Court of Appeals opinion in State v. Allen, No. 73046-1-I, 2016 WL 3982909, affirming her conviction for first degree theft. Allen seeks review of two issues: (1) whether the Court of Appeals properly rejected Allen's statutory interpretation of the terms "partner" and "partnership agreement" in finding sufficient evidence of theft by exerting unauthorized control of property as a partner; and (2) whether Allen's conviction violates the First Amendment. The State respectfully asks this Court to deny review because (1) the First Amendment claim is a new legal issue that may not be raised here; and (2) the statutory interpretation of the definitional terms is not an issue of substantial public interest meriting review by this Court.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the

petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

C. STATEMENT OF THE CASE

The procedural and substantive facts of this case are well-stated in the Court of Appeals opinion, and are even more thoroughly recited in the State's briefing to the Court of Appeals. Most relevant to Allen's petition for review:

The victim in this case, Elizabeth Hughes, met Sandra Allen in the spring of 2012 and quickly grew to trust Allen as a Christian pastor, a friend and a confidante. 9RP 41; 11RP 20-22, 31.[1] Allen claimed to be a "prophetess" and highly-paid recording artist with an established ministry and important friends in the Christian community, and she spoke of plans to "start an outreach center for homeless people" in Federal Way. 11RP 54, 81-83. Hughes ended up transferring to Allen about $77,000, nearly all of her family's life savings. 11RP 45-48; CP 62, 68. Allen wrote out a "receipt" for $55,000 of that money that said it was intended for

[1] The verbatim report of proceedings is divided into 15 individually numbered volumes, which the State referred to as: 1RP (August 8, 2014); 2RP (October 16, 2014); 3RP (October 20, 2014); 4RP (December 4, 2014); 5RP (December 8, 2014); 6RP (December 9, 2014); 7RP (December 10, 2014); 8RP (December 15, 2014); 9RP (December 16, 2014); 10RP (December 17, 2014); 11RP (January 5, 2015); 12RP (January 7, 2015); 13RP (January 8, 2015); 14RP (January 9, 2015); and 15RP (February 13, 2015).

"outreach work, ministry building, and church ministries, and music publications, and helps." Ex. 27.

Hughes later testified that, based on Allen's pretenses, she intended and understood that the money was for a ministry that they would build together cooperatively, and that Allen would pay back the money from Allen's lucrative record contracts, and it was not for Allen's personal enrichment. 11RP 79-80, 133. Hughes testified she never would have given Allen tens of thousands of dollars otherwise. 11RP 79. Allen spent nearly all the money on a car and personal shopping. 8RP 45-59.

Allen testified in her own defense and denied having any ministry, ever claiming to be a prophetess, or demanding any religious "tithing" from Hughes. 12RP 24. 12RP 11-144. In fact, she denied any religious motivations at all, and claimed it was Hughes who claimed to be a prophetess and the ministry was all Hughes' idea. 12RP 33. Allen claimed that Hughes gave her the money without being asked, as a surprise gift, because Allen needed help. 12RP 20.

The State charged Hughes with first-degree theft under two alternative means: Theft by color or aid of deception and exerting

unauthorized control over property as a partner. CP 20-21, 32-38. The jury convicted her of that charge. CP 45.

On direct appeal, Allen made two assignments of error: (1) her conviction violated the due process clauses of the Fourteenth Amendment of the federal constitution and Article I, Section 3 of the state constitution because there was insufficient evidence to convict her of first degree theft under either prong; and (2) her right to a unanimous verdict under Article I, Section 21 of the state constitution was violated. Appellant's Opening Brief (AOB) at 1. In her opening brief, Allen's only mention of the First Amendment was in arguing that the State's evidence was insufficient to prove unauthorized control of partnership funds because "Hughes' money was a donation to God and Ms. Allen's ministry, not a business investment," and both Hughes and Allen were free to do with it as they pleased. AOB at 17.

In response, the State noted that Allen's entire argument relied on viewing the evidence in Allen's light — that all the money was given as no-strings-attached donations — and the argument ignored all the other evidence of Allen's other falsehoods and promises. Brief of Respondent (BOR) at 29-32. The State noted that in analyzing the evidence in the light most favorable to the

State, any rational jury could have concluded that Allen's entire persona, including being a well-connected "prophet," was false and deceptive. BOR at 31.

In her Appellant's Reply Brief (ARB), Allen made a more detailed argument about the free exercise of religion under the First Amendment, including a verbatim excerpt from the United States Supreme Court that exceeded an entire page, single-spaced. ARB at 8-12. But Allen's free-exercise argument was still in the context of evaluating the sufficiency of the evidence, concluding that "in reviewing the record for evidence of deception that induced Ms. Hughes to transfer money to Ms. Allen, this Court cannot rely on the State's 'false prophet' theory" because that would be unconstitutional. ARB at 12.

In its unpublished opinion, the court of appeals did not address the First Amendment or any of Allen's religious-freedom arguments. It simply stated that as to the sufficiency-of-the-evidence claim before the court, the "State presented ample evidence of deception here," including Allen's portrayal as a "well-known pastor and prophet," her promise to pay Hughes back from record deals, and her threats of divine vengeance if Hughes did not pay up. Allen, 73046-1-I, 2016 WL 3982909, at *10. The court also

reiterated that its review required viewing the facts in the light most favorable to the State. Id.

As to Allen's partnership argument, the court of appeals determined that "nothing in the statute's plain language or legislative history suggests that the legislature intended to strictly limit the term 'partnership agreement' to the technical definition Allen proposes." Id. at *7. It held: "Viewed in a light most favorable to the State, there is sufficient evidence allowing a jury to conclude beyond a reasonable doubt that Allen's purchases violated their agreement." Id. at *10.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

1. ALLEN MAY NOT RAISE A NEW ISSUE IN A PETITION FOR REVIEW.

The basic premise of Allen's challenges to her conviction has not changed: that it was not illegal for her to take Hughes' money. But now she is raising a new legal claim, that her first-degree theft conviction under a supposed "false prophet theory" directly violated the First Amendment. Allen did not assign a First Amendment error at the Court of Appeals. Consequently, the Court of Appeals has issued no decision on the matter. This Court will not ordinarily consider an issue not raised or briefed in the Court of

Appeals. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); RAP 13.3(a) (allowing a party to seek review by the Supreme Court of a "decision" of the Court of Appeals). See also Pappas v. Hershberger, 85 Wn.2d 152, 153, 530 P.2d 642 (1975) (assignments of error not made in appellant's opening brief to the court of appeals are abandoned). Accordingly, this Court should not accept review of this alleged error.

Certainly, Allen made lengthy religious-freedom arguments in her reply brief to the court of appeals. But those arguments were not assignments of trial error. See RAP 10.3(a)(4). They were not framed as Allen is attempting to frame them now — that her theft conviction directly violated her First Amendment rights. Her actual assignments of error were confined to due process claims, and her religious claims were made strictly in the context of arguing which evidence the court of appeals could consider in determining the sufficiency of the evidence. And, in fact, Allen's claim that the State relied on a "false prophet theory" to convict Allen comes not from anything in the trial record but from the single use of the phrase

"false prophet" in the State's Brief of Respondent in the court of appeals.[2]

Consequently, the court of appeals did not address Allen's religious arguments because it did not need to: To succeed, Allen's religious arguments require viewing the evidence in the light most favorable to Allen and disbelieving the State's evidence, particularly the testimony of the victim herself, Hughes. Allen's religious-freedom protestations require concluding that all of Hughes' money was handed over as pure donations or gifts based solely on religious fervor. As the court of appeals correctly decided, there was ample evidence for the jury to find the opposite. After all, Allen herself disavowed religious motivations in her own trial testimony.

Essentially, Allen's new argument is a roundabout and wholly unsupported as-applied constitutional challenge to the state's theft statutes. The court of appeals did not have the opportunity to address this complex and strained First Amendment issue because Allen did not present it to them. Further, even if Allen were allowed to make this assignment of error now, she has not even begun to meet her basic threshold burden of

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[2] See Petition for Discretionary Review at 13 ("On appeal, the State broadened its argument to include *religious* representations by Ms. Allen as the deceptive conduct.") (emphasis in original).

demonstrating that our theft statutes constitute an undue burden on her free exercise of religion, i.e., having a coercive effect operating against her ability to practice her religion. See Munns v. Martin, 131 Wn.2d 192, 200, 930 P.2d 318 (1997) (threshold burden for free-exercise challenges).

This Court should decline to review Allen's new assignment of error under the First Amendment.

2. THE "PARTNERSHIP" ISSUE DOES NOT MEET THE CRITERIA FOR REVIEW UNDER RAP 13.4(b).

Allen proposes that the lower court's unpublished rejection of her interpretation of the terms "partner" and "partnership agreement" in the theft statute[3] was a "judicial expansion of the criminal law of theft" that merits review as an issue of substantial public interest. Petition for Discretionary Review (PDR) at 1, 11; RAP 13.4(b)(4). It was not. Her petition should be denied.

First, the court of appeals correctly noted that Allen provided no real authority for her extremely narrow interpretation of the statutory terms. Allen, 73046-1-I, 2016 WL 3982909, at *7. As the appellate court keenly observed, Allen's reasoning flowed from a

[3] RCW 9A.56.010(22)(c).

single sentence of *dicta* in State v. Coria,[4] that "the legislature made it a crime for a partner to steal partnership property" in response to State v. Birch.[5] But, as the court of appeals also pointed out, even if that is true, it does not follow that the legislature necessarily restricted its lawmaking to the factual circumstances of Birch, and the legislature had the opportunity to define the terms and did not. Allen, 73046-1-I, 2016 WL 3982909, at *8. See also State v. Glas, 147 Wn.2d 410, 417, 54 P.3d 147 (2002) (court may not add language to a clear statute, even if it believes legislature intended something else but failed to express it adequately).

That is hardly an argument worthy of review as an issue of substantial public interest. Moreover, the dearth of cases on this particular issue demonstrates that this is an uncommon issue unlikely to arise except in unusual circumstances. It is not of substantial public interest.

Additionally, it should be noted that Allen's petition for review on this issue includes an argument that was not raised at the court of appeals: that a separate subsection of the definitional statute, RCW 9A.56.010(22)(b) (pertaining to agents, trustees, officers and

[4] 146 Wn.2d 631, 638, 48 P.3d 980, 983 (2002).

[5] 36 Wn. App. 405, 410, 675 P.2d 246 (1984).

other such people entrusted with other people's property) covers partners in non-profit ventures. PDR at 10-11. This is a baseless argument, because that subsection specifically addresses custodians of property of others, which partnership funds are not (and the very reason why partnership funds are addressed in a separate subsection). Regardless, Allen may not make this new argument for the first time in a petition for review. See Halstien, 122 Wn.2d at 130.

Allen fails to show that the public has a substantial interest meriting this Court's review. Her petition for review should be denied.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

DATED this 12th day of October, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Richard W Lechich, the attorney for the petitioner, at richard@washapp.org, containing a copy of the ANSWER TO PETITION FOR REVIEW in State v. Sandra Lee Allen, Cause No. 93660-9, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of October, 2016.

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Name:
Done in Seattle, Washington