

original

No. 35338-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BLAKE EDWARD KEYES,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
BY: [Signature]
STEPHANIE C. CUNNINGHAM

On Appeal from the Pierce County Superior Court
Cause No. 06-8-00265-0

The Honorable James Marshall, the Honorable Julia Lindstrom &
the Honorable James Orlando, Judges

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignment of Error

The juvenile court erred when it ruled that the Department of Licensing should be notified of Appellant's felony crime of malicious mischief, resulting in the one-year revocation of Appellant's driver's license.

B. Issue Pertaining to the Assignment of Error

Did Appellant "use" a motor vehicle in the commission of the crime of malicious mischief, warranting the one-year revocation of his driver's license, where the Appellant merely spray painted a police vehicle?

II. STATEMENT OF THE CASE

The State charged Blake Edward Keyes by Information in Pierce County Juvenile Court with one count of second degree malicious mischief, RCW 9A.48.080(1)(b).¹ (CP 1) Keyes entered a guilty plea to the charge, admitting that he "spray painted a police

¹ RCW 9A.48.080 states, in relevant part:

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

...

(b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

car[.]” (CP10; 07/24/06 RP 9)²

The court imposed a standard range disposition. (07/24/06 RP 29; CP 13) Over defense objection, the court also ordered that the Department of Licensing (DOL) be notified of Keyes’ felony conviction, which would result in a one-year suspension of Keyes’ driver’s license. (07/24/06 RP 32, 08/04/06 RP 4, 8-9; CP 25) The court stayed the notification pending this appeal. (08/30/06 RP 6; CP 32)

III. ARGUMENT & AUTHORITIES

RCW 46.20.285(4) provides for a one-year revocation of an offender’s driver’s license for “[a]ny felony in the commission of which a motor vehicle is used.”³ RCW 46.20.285 does not define the term “used.” Washington courts have adopted the common, dictionary definition of the term “used,” and held that the vehicle must be “employed in accomplishing” the crime. *State v. Batten*, 95 Wn. App. 127, 129, 974 P.2d 879 (1999) (quoting WEBSTER’S

² Citations to the transcripts in this case will be to the date of the proceeding followed by the page number.

³ RCW 46.20.285 states, in relevant part:

The department shall revoke the license of any driver for the period of one calendar year unless otherwise provided in this section, upon receiving a record of the driver’s conviction of any of the following offenses, when the conviction has become final:

...
(4) Any felony in the commission of which a motor vehicle is used[.]

THIRD NEW INTERNATIONAL DICTIONARY 2524 (3d ed.1966)), *aff'd*, 140 Wn.2d 362, 997 P.2d 350 (2000).

In this case, the juvenile court incorrectly found that Keyes “used” a motor vehicle when he committed malicious mischief. (08/04/06 RP 8-9; CP 25, 32) The juvenile court’s decision is reviewed de novo. *State v. Wayne*, 134 Wn. App. 873, 875, 142 P.3d 1125 (2006) (citing *State v. Hearn*, 131 Wn. App. 601, 609, 128 P.3d 139 (2006)).

In *State Batten, supra.*, police stopped the defendant in his vehicle for license plate and registration infractions. Police found a handgun Batten had hidden under the seat and methamphetamine-laced paraphernalia on the console of the vehicle. The gun had been in the car for several days. *Batten*, 95 Wn. App. at 128.

The *Batten* Court reviewed the revocation statute and held that “where the conviction is a possessory felony . . . the possession must have some reasonable relation to the operation of a motor vehicle or . . . the use of the motor vehicle must contribute in some reasonable degree to the commission of the felony.” 95 Wn. App. at 131. Applying this rule to the facts of the case before it, the *Batten* Court held that because the defendant employed the vehicle to store and conceal the weapon, there was a sufficient

relationship between the use of the vehicle and the unlawful weapon possession. 95 Wn. App. at 131. Similarly, although the methamphetamine was not hidden, there was a sufficient relationship between the drugs and the vehicle because the console was a "repository" for the illegal substance. 95 Wn. App. at 131.

In *State v. Hearn, supra.*, police found methamphetamine in Hearn's purse and inside clothing within a basket, both located inside her vehicle. 131 Wn. App. at 605, 610. Division 3 held that "the *Batten* criteria is not met here" because the items were located within Hearn's personal effects and therefore the "vehicle did not play a role in the drug possession." 131 Wn. App. at 610-11. There was no reasonable relation to the operation of the vehicle and the use of the vehicle did not contribute to the commission of the crime. 131 Wn. App. at 611.

In *State v. Wayne, supra.*, police found a bottle of cocaine in Wayne's pocket after arresting Wayne for driving while under the influence and for striking two other cars. 134 Wn. App. at 874. On appeal, the court again found no "'reasonable relation' between Mr. Wayne's possession of a controlled substance and the operation of his car. The drugs did not contribute to Mr. Wayne's vehicle

accident; the alcohol did. And Mr. Wayne did not transport the drugs with an intent to deliver them.” 134 Wn. App. at 875-76 (citation omitted).

A connection between the vehicle and the crime has also been found when the defendant was given cocaine in exchange for a ride in his car because the use of the car directly contributed to the commission of the crime of possession of cocaine. *State v. Griffin*, 126 Wn. App. 700, 708, 109 P.3d 870 (2005). A finding of the use of a vehicle was also found in *State v. Dykstra*, 127 Wn. App. 1, 11-12, 110 P.3d 758 (2005), *review denied*, 156 Wn.2d 1004 (2006), where the defendant and his accomplices to an auto theft ring drove around looking for cars to steal, drove stolen cars, posted someone in a lookout car during a theft, and drove away unwanted engine parts after disassembly.

Clearly, as interpreted by Washington courts, the term “used” implies some sort of active, rather than passive involvement of the vehicle. In each of the above cases where revocation was upheld, the defendants actually operated a motor vehicle, and the vehicles were actively employed by the defendants to aid in the commission of their crimes. The vehicles provided transportation or a hiding place for contraband. In the cases where revocation was

reversed, the vehicles were passive participants. The defendants themselves were concealing the contraband, and just happened to be in a vehicle when the contraband was discovered. The fact that they were operating a vehicle at the same time that they were committing a crime was not a sufficient connection to warrant revocation.

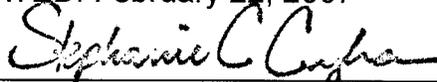
In this case, Keyes did not operate a motor vehicle, and he did not actively employ a motor vehicle to accomplish his crime. The police vehicle was the target of the crime, and sustained damage as a result of the crime. But the crime was in the vandalizing of government property, and the vehicle was merely the passive item on which Keyes committed the crime.

“The use of the car is merely incidental if possession is with the person rather than the car.” *Wayne*, 134 Wn. App. at 875 (citing *Hearn*, 131 Wn. App. at 610-11). Similarly, the police car was incidental here because the malicious mischief is with Keyes’ act of spray painting rather than with the presence of the police vehicle. Keyes’ crime does not fit within the terms of RCW 46.20.285, and revocation of Keyes’ driver’s license is not authorized.

IV. CONCLUSION

The act of spray painting the police vehicle has no “reasonable relation to the operation of a motor vehicle” and the police vehicle did not “contribute in some reasonable degree to the commission” of Keyes’ crime of malicious mischief. *Batten* 95 Wn. App. at 131. The juvenile court erred when it ordered that DOL be notified, and Keyes’ license should not be revoked. The court’s order should be reversed.

DATED: February 22, 2007



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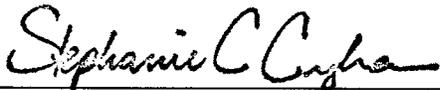
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CERTIFICATE OF MAILING

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