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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR.

Did the trial court properly determine that the crime of malicious mischief in the second degree was a felony in which a motor vehicle was used under RCW 46.20.285 when the defendant spray painted a police vehicle?

B. STATEMENT OF THE CASE.

On February 13, 2006, BLAKE EDWARD KEYES, hereinafter “appellant,” was charged by information with malicious mischief in the second degree. CP 1-2. It was alleged that the appellant and his friends sprayed the words “\$20 pig” and “4:20 fucking piggy” on the driver’s side of the patrol car. *Id.* The appellant was charged under RCW 9A.48.080(1)(b), which states:

A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously . . . 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.

On July 24, 2006, the appellant entered a plea of guilty to malicious mischief in the second degree. CP 6-11. On his plea form the appellant indicated that on October 19, 2005, in Pierce County, he spray

painted a police vehicle. *Id.* He was sentenced to a total of 24 days of detention and other conditions. CP 12-19. At the time of sentencing, appellant argued that the court should not report the conviction to the Department of Licensing because the police car was not “used” in the commission of a felony. 1RP<sup>1</sup> 32. The State indicated that it would like an opportunity to respond to the appellant’s argument, and the motion was set over to August 4, 2006. 1RP 34; 2RP 1-10.

On August 4, 2006, both parties appeared for argument. 2RP 2.

The court made the following ruling:

Well, I am going to make a relatively speedy ruling, and that’s not to suggest that I consider this to be a frivolous motion. I have had a chance to read through everything. And again, I am not making this ruling saying that this is a slam dunk obvious, but I think what tips it over the scales for me is the statutory requirement to make it this degree of crime, referring to an emergency vehicle. And I guess we have the statute. We have sort of a common understanding and definition of what “use” means. And the area that I agree with the respondent is, what are the purposes to be served by the statute? But that gets into me questioning whether this is some sort of enhanced penalty versus a public safety issue.

But it does seem like the legislature would have to clarify it and tighten it up a little bit if the Courts have interpreted “use” as broadly as they apparently have. That’s why I was asking about an administrative procedure, if there was any ability for the department to look at this differently,

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<sup>1</sup> For convenience of reference, the verbatim report of proceedings will be identified as follows:

- 1RP Verbatim Report of Proceedings from July 24, 2006
- 2RP Verbatim Report of Proceedings from August 4, 2006
- 3RP Verbatim Report of Proceedings from August 30, 2006

because my decision, is it reported or isn't it? Do I think it's use of a vehicle?

And I think, in addition to the cases cited under the statute, that they do see pretty broad in their definition. I am also aware of the civil arena in terms of use of a motor vehicle when it comes to coverage under insurance policies and such. And the last time I traipsed through that area it was incredibly broad what was determined to be use of a motor vehicle to invoke insurance coverage. So I am going to deny the motion.

2RP 8-9.

The appellant filed an untimely notice of appeal, which was accepted by this court. CP 36-37.

C. ARGUMENT.

THE TRIAL COURT PROPERLY FOUND THAT RCW 46.20.285 REQUIRED THAT THE DEPARTMENT OF LICENSING BE NOTIFIED OF THE DEFENDANT'S CONVICTION WHEN THE DEFENDANT'S CRIME WAS A FELONY IN WHICH A MOTOR VEHICLE WAS USED.

RCW 46.20.285 provides, in 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 has become final: . . . (4) Any felony in the commission of which a motor vehicle is used.

The appellant asserts that he did not "use" a motor vehicle in the commission of his crime because he did not operate or "actively employ" a vehicle. Brief of Appellant at p. 6. However, RCW 46.20.285(4) does not require that the appellant drive a motor vehicle in the commission of a

felony. RCW 46.20.285(4) requires only that a vehicle is used. The statute does not specify how the vehicle is used. The trial court's application of RCW 46.20.285 is reviewed de novo. State v. Hearn, 131 Wn. App. 601, 609, 128 P.3d 139 (2006).

In State v. Batten, 140 Wn.2d 362, 997 P.2d 350 (2000), the police arrested Batten on a warrant and searched his vehicle incident to arrest. Id. at 363. The officer found a gun under the driver's seat and a cotton ball and spoon coated with methamphetamine residue in the console between the two front seats. Id. Batten pleaded guilty to two felony charges of unlawful possession of a controlled substance and unlawful possession of a firearm. Id. at 364.

Batten asserted that there must be more of a connection between the offense and the vehicle, not merely incidental use of a vehicle. Id. at 365. The court disagreed, and applied the Webster's Dictionary definition of "used," in that it meant "employed in accomplishing something." Id. at 365. The court held that the vehicle was "used" as a repository for an illegal substance. Id. at 366. The court also noted that its decision comported with the ruling in In re Gaspar D., 22 Cal. App. 4<sup>th</sup> 166, 27 Cal. Rptr, 2d 152, review denied (1994), where a nearly identical statute was applied to a person who hid a stolen tape deck in the truck of an accomplice's car. Batten 140 Wn.2d 362 at 366. The court in Gaspar upheld the license suspension.

Similarly, in State v. Dykstra, 127 Wn. App. 1, 110 P.3d 758 (2005), review denied, 156 Wn.2d 1004 (2006), the court held that RCW 46.20.285(4) was applicable when the defendant was convicted of five counts of first degree theft for his participation in a car theft ring. The defendant and his associates used cars to drive around looking for other cars to steal. Id. at 12. The defendant and his associates took possession of the stolen cars by driving them away from the scene. Id. During the thefts, a lookout used a motor vehicle. Id. The court determined that the facts “easily” supported the conclusion that a vehicle was used in the crime. Id.

In State v. Griffin, 126 Wn. App. 700, 109 P.3d 870 (2005), the court addressed whether the license suspension in RCW 46.20.285(4) was deemed to be punishment in excess of the statutory maximum, requiring it to be proven to a jury under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct 2531, 159 L.Ed.2d 403 (2004). The court found that the revocation need not be proven to a jury because, “revocation effectuates the rational, nonpunitive goal of protecting the motoring public.” Griffin, 126 Wn. App 700 at 707. Griffin also challenged his license revocation because the cocaine recovered was found in his hat and sock. Id. at 708. The court found that Griffin’s own statement to police was that he obtained the cocaine in exchange for giving someone a ride in a car. Id. at

703, 708. This “use” of a motor vehicle was sufficient for license revocation under RCW 46.20.285(4). Id. at 708.

Conversely, in State v. Hearn, 131 Wn. App. 601, 128 P.3d 129 (2006), the court reversed a finding that the defendant used a motor vehicle in the commission of her felony drug possessions. Id. at 610-611. In Hearn, the drugs were found in her purse in the car and in some damp jeans in a basket in the car. Id. The court determined that the drugs were not found in or around the fixtures of the vehicle itself, they did not have a reasonable relationship to the vehicle, and the use of the vehicle did not contribute in any way to the commission of the crime; therefore, her license should not have been revoked under RCW 46.20.285(4). Id. In State v. Wayne, 134 Wn. App. 873, 142 P.3d 1125 (2006), the court found that there was no “reasonable relation” between cocaine found in the defendant’s pocket and the vehicle he was driving at the time. Id. at 875-876.

Hearn and Wayne are distinguishable from the case at bar. In Hearn and Wayne, there was no relationship between the use of the vehicle and the charge of possession of a controlled substance. Hearn and Wayne had not used the vehicle to store or conceal the drugs.

In the present case, however, the defendant’s crime is directly related to police vehicle. Under RCW 9A.48.080(1)(b), the defendant committed the crime of malicious mischief by physically damaging a police vehicle. CP 1-2, 6-11. The defendant specifically acknowledged in

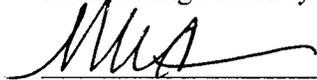
his plea of guilty that he spray painted a police car. CP 6-12. The crime of malicious mischief in the second degree is inextricably related to the police vehicle. The appellant asserts that the police car was “incidental here because the malicious mischief is with Keyes’ act of spray painting rather than the presence of the police vehicle.” Brief of Appellant at p. 6. The appellant ignores that doing damage to an emergency vehicle, in this case a police car, is an element of the crime itself. The police car was not “incidental” to the malicious mischief, but was the canvas on which the malicious mischief was committed, thereby elevating it to malicious mischief in the second degree. But for the police vehicle being utilized, the defendant would not have committed malicious mischief in the second degree under RCW 9A.48.080(1)(b). It is clear that RCW 46.20.285(4) is applicable to the case at bar and the trial court correctly determined that it applies.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that the trial court's decision be affirmed.

DATED: May 2, 2007.

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Prosecuting Attorney

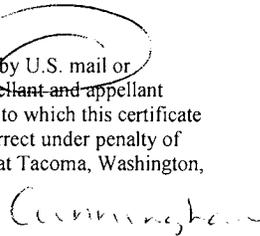


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Certificate of Service:

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.



5-2-07 Rosalie V. Martinelli  
Date Signature

STATE OF WASHINGTON  
COUNTY OF PIERCE  
BY: [Signature]  
JUL 11 2007