

FILED
COURT OF APPEALS
DIVISION II

09 JUN 11 PM 12:30

No. 38428-1-II

STATE OF WASHINGTON
BY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

HEATHER DENNIS,

Appellant.

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

The Honorable Chris Wickham, Judge
Cause No. 08-1-00564-3

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT..... 1

1. Dennis was not entitled to the jury instruction regarding good faith claim of title 1

2. The no-contact requirement of the judgment and sentence is not impermissibly vague..... 7

D. CONCLUSION..... 9

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Ager,
128 Wn.2d 85, 904 P.2d 715 (1995)..... 1, 2, 4

State v. Bahl,
164 Wn.2d 739, 193 P.3d 678 (2008).....8

State v. Hicks,
102 Wn.2d 182, 683 P.2d 186 (1984).....2, 3, 4

Decisions Of The Court Of Appeals

State v. Chase,
134 Wn. App. 792, 12 P.3d 630 (2006)..... 1, 2, 3, 4, 6

State v. Sanchez Valencia,
148 Wn. App. 302, 198 P.3d 1065 (2009).....8

State v. Self,
42 Wn. App. 654, 713 P.2d 142 (1986).....3

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the defendant, who was charged with first degree theft, was entitled to the jury instruction regarding the defense of good faith claim of title.

2. Whether the no-contact provision of the judgment and sentence is vague.

B. STATEMENT OF THE CASE.

The State accepts Dennis's statement of the case.

C. ARGUMENT.

1. Dennis was not entitled to the jury instruction regarding good faith claim of title.

A trial court's decision to give or refuse a particular jury instruction is reviewed for abuse of discretion. Where the evidence supports the giving of a good faith claim of title instruction, the court's refusal to give it is an abuse of discretion and thus reversible error. State v. Chase, 134 Wn. App. 792, 803, 12 P.3d 630 (2006). Similarly, it is error to give the instruction if it is not supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). Dennis was entitled to the instruction only if she presented evidence "(1) that the property was taken openly and avowedly and (2) that there was some legal or factual basis upon which the defendant, in good faith, based a claim of title to the property taken." Chase, *supra*, at 803-04. A good faith claim of title

is a defense even if the claim proves to be untenable. Ager, *supra*, at 95. The defense “negates the element of intent to steal.” Id., at 92, (citing to State v. Hicks, 102 Wn.2d 182, 184, 683 P.2d 186 (1984)).

State v. Ager was an embezzlement case, which is similar to Dennis’s case. There the defendants owned a life insurance company and, until they bankrupted the company, took sums of money beyond their salaries, bonuses, and fees, such that they were unable to pay operating expenses, let alone claims. They argued that they had lawful control over the money (as did Dennis have lawful control over the State credit card) and were merely taking advances against their legitimate income. The court held that “a defendant in an embezzlement case must do more than assert a vague right to property,” Ager, *supra*, at 95, but rather “circumstances which arguably support an inference that the defendant has some legal or factual basis for a good faith belief that he or she has title to the property taken.” That could have included past practices of the company or statements from the directors. Id., at 97.

In State v. Chase, the defendant had purchased some equipment from Snap-On Tools on contract, then stopped making

payments and refused to return the equipment. He also claimed that he possessed the property openly and avowedly after ceasing to make payments, but he had removed identification plates and serial numbers, told investigating officers that a particular machine was not the one at issue, although it was, and that other creditors had repossessed the Snap-On machine. Chase's claim to the defense failed because "there was no objective evidence to corroborate his account. Even if Chase's testimony created an issue of fact about whether he openly and avowedly took control of Snap-On's equipment, there is insufficient evidence to support an inference that he had some legal or factual basis upon which he, in good faith, based a claim of title to the equipment." Chase, *supra*, at 804-05.

These cases illustrate why Dennis was not entitled to the jury instruction. The State agrees that cases such as State v. Self, 42 Wn. App. 654, 713 P.2d 142 (1986) (the defendant collected earned wages at knife- and gunpoint) and State v. Hicks, *supra*, (the defendant forcibly took cash from the pockets of the person he believed had stolen that same cash from him), are distinguishable. They involve robberies rather than embezzlement, and were both self-help attempts to recover money the defendants believed they

were entitled to. Had Dennis claimed that she had permission to purchase the court reporter course, but then bought training materials to be a private investigator, for example, the Self and Hicks cases would be more on point. Chase and Ager, on the other hand, are directly applicable.

Dennis produced no evidence other than her bare assertion that Swigert had authorized her to use \$4034 of the taxpayer's money to purchase a training course in court reporting. She did not provide any notes or e-mails, claiming that she no longer had access to her work computer. She could not give the name of the person from whom she purchased a stenograph machine. [Trial RP 252] Although she said she had a receipt for the machine at home, she did not produce it in court. [Trial RP 253] She forwarded information to Smith, who had denied her request, in her attempt to gain authorization to purchase the court reporting training course, five days after she had already purchased it. [Trial RP 254-55] While she maintained that Swigert had approved the purchase, she had no documents to that effect, [Trial RP 260, 263] and she charged the materials to Smith's cost code. [Trial RP 262] She had to log the purchase in order to reconcile the transaction log with the credit card bill, [Trial RP 264] or it would have been an instant red

flag that there was a problem, so her claim that this shows that she openly purchased the materials is suspect. She claimed to need the training so she could record law enforcement meetings, although she no longer attended those meetings, and they were never recorded by a stenographer. [Trial RP 265] She said she was looking for another job within the State system because she did not want to work for Smith, [Trial RP 267] but she began investigating the court reporter training three or four months before Smith became her supervisor. [Trial RP 275]

On the other hand, State witnesses testified that the Parks Commission had no need for a stenographer, [Trial RP 43, 49] the purchase was made from Dennis's home computer and the material was delivered to her home address, [Trial RP 44] and had it been an approved expense the agency would have purchased both the machine and the training material and had them delivered to the agency, [Trial RP 74]. Melanie Watness from the Human Resources department documented all of Dennis's requests known to the agency, and asked Dennis to notify her if there were any inaccuracies or omissions; the court reporter training was not listed and Dennis did not bring that to her attention. [Trial RP 76, 150] Dennis provided only minimal information on the credit card

transaction log—that it was for training—and the invoice contained no more information than the web address of the company and an amount of money. Smith had to do his own research to discover that the company provided court reporter training. [Trial RP 140] Dennis never told Smith, her immediate supervisor, or anyone else, for that matter, that she had purchased the program. [Trial RP 147-48] She never worked on the course material at the office. [Trial RP 160] Although Swigert asked for additional information about the course, Dennis did not provide it, and, in fact, this conversation occurred several months after she had actually purchased it. [Trial RP 170-71, 177]

While Dennis's assertion that she believed she had permission to purchase the court reporter training with State funds may have raised an issue of open and avowed taking, she was not entitled to the jury instruction because she produced no evidence of a legal or factual basis for that belief. Like the defendant in Chase, her testimony did not establish all the necessary elements of the defense. Chase, *supra*, at 805; even taking her explanation at face value, it would be difficult to find a justifiable belief that she was entitled to purchase the training materials. The evidence she did present, summarized above, shows that she did not even produce

documentation that she claimed existed. Therefore, she fails to satisfy the second prong of the defense, and thus was not entitled to the jury instruction. The court did not abuse its discretion in refusing to give her requested jury instruction.

2. The no-contact requirement of the judgment and sentence is not impermissibly vague.

Section 4.3 of the judgment and sentence prohibits Dennis from having contact with the “WA State Parks Commission.” [CP 20] She argues that this language is so vague she does not know what is required of her. She further argues that this prohibition raises a First Amendment issue because it affects her freedom of speech and right to peaceably assemble. It seems unlikely that Dennis’s choice of dinner companions or with whom she has telephone conversations are the sort of rights contemplated by the First Amendment. As she acknowledges, if the challenged condition does not implicate a constitutional right, it is not ripe for review until it has been enforced. In any event, the State maintains that even if her challenge is ripe for review, the prohibition against contacting the Parks Commission is not so vague as to require remand for clarification.

Appellate courts do not require trial courts to anticipate all possibilities when ordering conditions of a sentence. Doing so would cause a significant hardship to the courts. State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009). Terms used in the judgment and sentence are to be considered in the context in which they are used. State v. Bahl, 164 Wn.2d 739, 759, 193 P.3d 678 (2008).

Dennis was an employee of the Parks Commission. She was convicted of taking money belonging to the Parks Commission to buy property that was for her personal benefit. She was fired from that job. The sentencing court ordered her to have no contact with the Washington Parks Commission. It is apparent that she is to have no dealings with the Park Commission as an entity. It does not follow that she is precluded from having dinner with old friends or associates who are doing so in their private capacities, rather than as representatives of the Commission. It does follow that she cannot go to the Commission office or call her friends there while they are at work. While the State has no particular objection to a remand for clarification of this condition, it is not necessary.

D. CONCLUSION.

Dennis did not produce evidence of any legal or factual basis for a defense of good faith claim of title, and thus the court did not err in refusing to instruct the jury as to that defense. She was free to, and did, argue that she lacked intent to steal.

The no-contact provision of the judgment and sentence is not vague; common sense would tell Dennis what she can and can't do.

The State respectfully asks this court to affirm the conviction and deny the request to remand for clarification.

Respectfully submitted this 10th day of June, 2009.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

COURT OF APPEALS
DIVISION II
09 JUN 11 PM 12:30
STATE OF WASHINGTON
BY _____
DEPUTY

TO: ANNE CRUSER
ATTORNEY AT LAW
PO BOX 1670
TACOMA, WA 98625

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

Dated this 10th day of June, 2009, at Olympia, Washington.


CHONG H. McAFEE