

NO. 39426-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LAQUITTA DIANE SPURGEON,

Appellant.

FILED
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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION TWO

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

The Honorable James Stonier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Ms. Spurgeon's conviction for possessing stolen property in the second degree must be dismissed for violation of her right to equal protection as she should have been charged under the concurrent specific statute of unlawful use of food stamps.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A criminal defendant's constitutional right to equal protection and principles of statutory construction require that where a general statute and a concurrent specific statute prohibit the same conduct, the defendant can be charged under the specific statute only. Here, Ms. Spurgeon was charged under the general statute of possessing stolen property in the second degree rather than the specific statute of unlawful use of food stamps. Must this Court reverse her conviction for possession of stolen property in the second degree?

C. STATEMENT OF THE CASE

1. Procedural History.

Laquitta Spurgeon was tried to a Cowlitz County jury on an amended information. CP 4-5; RP I and II.¹ The amended information charged Ms. Spurgeon with three crimes: count I - possessing stolen

¹ There are two volumes of verbatim. The transcriptionist labeled them Volume 1 and Volume 2. For purposes of this brief, and citation to the record, the appropriate volume number will appear before the "RP" designation.

property in the second degree, an access device²; count II – criminal impersonation in the first degree³; and count III - theft in the third degree.⁴ CP 4-5. At the end of the State’s case, the court, on Ms. Spurgeon’s motion, dismissed count II, criminal impersonation, for insufficient evidence. 2RP at 156-159. The jury found Ms. Spurgeon guilty on the remaining two counts. CP 23, 24; 2RP at 197.

The court sentenced Ms. Spurgeon within her standard range on both charges. CP 25-37; 2RP at 202-208. Ms. Spurgeon filed a timely appeal. CP 38.

2. Trial Testimony.

Laquitta Spurgeon buys electronic benefit transfer (EBT) cards from her brother and other persons. 1RP at 36, 142. She uses the cards to buy groceries. 1RP at 143. She pays the card’s seller half of the value of the groceries she receives. 1RP at 143. She thought this was legal.⁵ 1RP 142.

Carol Armstrong has food stamp benefits through an EBT card. 1RP at 56. As of February 2009, she received \$156 a month. 1RP at 58.

² In violation of RCW 9A.56.160(1)(c) and RCW 9A.56.140(1)

³ In violation of RCW 9A.60.040(1)(a)

⁴ In violation of RCW 9A.56.020(1)(b) and RCW 9A.56.050(1)

⁵ Ms. Spurgeon did not testify at trial. Ms. Spurgeon’s statements came into evidence through Longview Police Officer Steve Dennis. 1RP at 140-2RP at 155. Officer Dennis interviewed Ms. Spurgeon as part of his investigation. 1RP at 140-2RP at 155. The trial court held a CrR 3.5 hearing and found the statements admissible. 1RP at 6-27.

Each month, the State of Washington, transfers a \$156 credit to Ms. Armstrong's EBT card on the 6th of the month. 1RP at 40, 43, 45, 58. Ms. Armstrong was made eligible to receive the food stamp EBT card by applying for benefits through the Department of Social and Health Services (DSHS). 1RP at 35-38. The food stamp benefits are supposed to be for the benefit of the recipient only. 1RP at 54-55. EBT cards can only be used by a person who has the PIN number for the EBT card. 1RP at 52-55. To use the card, it must be swiped through an electronic reader. 1RP at 52.

On February 6, 2009, Ms. Armstrong received her monthly direct EBT deposit. 1RP at 59-60. She spent the previous night at Lisa Love's home. 1RP at 60. Lisa Love is like a daughter to Ms. Armstrong. 1RP at 58-59, 78. In the morning, Ms. Armstrong went grocery shopping at the Longview Winco with Ms. Love. 1RP at 62-63. Ms. Armstrong loaded up her cart and was waiting in the checkout line when she realized she needed one more item. 1RP at 64. When she returned to the checkout stand, Ms. Love was gone and so was Ms. Armstrong's EBT card. 1RP at 64-66. Ms. Armstrong reported the lost EBT card to DSHS, Winco, and the Longview Police. 1RP at 66, 68-69, 92. Ms. Armstrong did not give any other person permission to use her EBT card. 1RP at 57.

Winco Loss Prevention Officer Chris Larranaga checked Winco's "electronic journal report" to see if Ms. Armstrong's EBT card was used at the Longview Winco. 1RP at 89-97. The electronic journal report is a part of a computer program that tracks all purchase information at the store. 1RP at 92-93. Mr. Larranaga found that the card had been used twice on February 7. 1RP at 92-100. Mr. Larranaga was able to pinpoint the check stand number and the time of the two purchases made with Ms. Armstrong's EBT card. 1RP at 92-100. The first purchase was for \$1.35 soda. 1RP at 94, 111. The second purchase, for \$155.59, was about 20 minutes later and included meat, frozen foods, and deli items. 1RP at 99-103. From there, Mr. Larranaga pulled up the store's video surveillance history. 1RP at 92-93. He was able to print a photo of the EBT card's female user and her male companion. 1RP at 95, 105. These photos were given to the Longview Police Department. 1RP at 123-126. Longview Office Jeremy Johnson recognized Ms. Spurgeon in the photo. 1RP at 32-34, 137-141. He gave that identifying information to investigating officer Steve Dennis. 1RP at 139-140.

Officer Dennis spoke with Ms. Spurgeon. 1RP at 140. The man in the Winco surveillance photos is her husband. 1RP at 141. After purchasing an EBT card, she uses it to buy an inexpensive item, like a soda, to find out the balance on the card. 1RP at 143. Once she has the

balance, she makes a second purchase of food and uses up the value of the card. 1RP at 143. Ms. Spurgeon has bought and used numerous EBT cards in this manner and it had never led to any legal difficulties for her. 1RP at 142-144.

D. ARGUMENT

MS. SPURGEON'S CONVICTION FOR POSSESSING STOLEN PROPERTY IN THE SECOND DEGREE, RATHER THAN THE CONCURRENT SPECIFIC OFFENSE OF UNLAWFUL USE OF FOOD STAMPS, VIOLATED HER CONSTITUTIONAL RIGHT TO EQUAL PROTECTION.

1. Where a general statute and a specific statute prohibit the same conduct, only the specific statute can be charged.

The “concurrent statute” rule of statutory construction provides that when two statutes are concurrent, a criminal defendant’s constitutional right to equal protection⁶ dictates only the specific statute may be charged, Busic v. United States, 466 U.S. 398, 406, 100 S. Ct. 1747, 64 L. Ed. 2d 381 (1980); State v. Shriner, 101 Wn.2d 576, 581, 681 P.2d 237 (1984). “Statutes are concurrent if ‘the general statute will be violated in each instance where the special statute has been violated.’” State v. Conte, 159 Wn.2d 797, 811, 154 P.3d 194 (2007), quoting Shriner, 101 Wn.2d at 580. “It is not relevant that the special statute may

contain additional elements not contained in the general statute.” Shriner, 101 Wn.2d at 580. On appeal, the reviewing court must look at the elements of both statutes as charged and prosecuted to determine whether a person can violate the special statute without also necessarily violating the general statute. Shriner, 101 Wn.2d at 579 n.2; State v. Karp, 69 Wn. App. 369, 372, 374, 848 P.2d 1304 (1993).

The purpose of the concurrent statute rule is to protect a defendant’s right to equal protection by restraining prosecutorial discretion and to give effect to legislation.

[The concurrent statute rule] protects the defendant’s constitutional right to equal protection under the law by preventing the prosecution from obtaining varying degrees of punishment while proving identical elements. Furthermore, it ensures that courts do not interpret statutes in such a way as to impliedly repeal existing legislation.

State v. Shelby, 61 Wn. App. 214, 219, 811 P.2d 682 (1991) (internal citations omitted). Otherwise, when making a charging decision, the State could control the degree of punishment by selecting between two concurrent statutes.

[W]here a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute. Thus the prosecutor has a basis distinguishing between persons who can be charged under one or the other statute, and is not at liberty to

⁶ U.S. Const. Amend XIV; Wash. Const. art. 1, § 12. The state and federal constitutional equal protection clauses are identically construed. State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996.)

charge under the general statute a person whose conduct brings his offense within the special statute. Under such circumstances, there is no denial of equal protection.

State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). See also, in re Personal Restraint of Taylor, 105 Wn.2d 67, 70, 711 P.2d 345 (1985) (“If there was unfettered prosecutorial discretion, there would be an equal protection issue.”); State v. Hupe, 50 Wn. App. 277, 280, 748 P.2d 263 (1988), overruled on other grounds in State v. Smith, 159 Wn.2d 778 (2007) (rule protects defendant’s constitutional right to equal protection by preventing the prosecution from obtaining varying degrees of punishment while proving identical elements).

In addition, this rule is necessary to give effect to the special statute. Specific statutes include all the elements of the general statute as well as additional elements. If the general statute could be charged rather than the specific statute, the prosecutor would presumably elect to prosecute under the general statute only because it would be easier to prove. State v. Danforth, 97 Wn.2d 255, 259, 643 P.2d 882 (1982). Consequently, the prosecutor could impermissibly usurp the legislative function. Id.

2. **Possession of stolen property in the second degree and unlawful use of food stamps are concurrent statutes.**

A comparison of the elements establishes that possession of stolen property in the second degree, access device, and unlawful use of food stamps, as charged and prosecuted here, were concurrent offenses. As charged, possession of stolen property, access device, is defined as follows:

A person is guilty of possessing stolen property in the second degree if . . . (c) He or she possesses a stolen access device.

RCW 9A.56.160. The jury was instructed as to the specific elements as applied to Ms. Spurgeon's case:

INSTRUCTION 7

To convict the defendant of the crime of possessing stolen property in the second degree as charged in Count I of the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 7, 2009, the defendant knowingly received, retained or possessed stolen property;
- (2) That the defendant acted with knowledge that the property had been stolen;
- (3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
- (4) That the stolen property was an access device; and
- (5) That the acts occurred in the State of Washington. CP 15.

The crime of unlawful use of food stamps is defined as follows:

A person who, in violation of 7 U.S.C. Sec. 2024(c), obtains and presents food stamps as defined by the federal food stamp act, as amended, 7 U.S.C. Sec. 2011 et seq., or food stamp benefits transferred electronically, for redemption or causes such stamps or benefits to be presented for redemption through the program established under RCW 74.04.500 is guilty of a class C felony punishable according to chapter 9A.20 RCW.

RCW 9.91.144.

Furthermore, 7 U.S.C. Sec. 2024(c),⁷ provides:

(c) Presentation for payment or redemption of benefits that have been illegally received, transferred, or used

Whoever presents, or causes to be presented, benefits for payment or redemption of the value of \$100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony[.]

All of the elements required to prove possession of stolen property in the second degree, access device, are also elements that prove unlawful use of food stamps. Because unlawful use of food stamps required proof of all the elements of possession of stolen property in the second degree, access device, unlawful use of food stamps was the more specific offense.

The Washington Supreme Court's decision in Danforth, *supra*, is instructive. In Danforth, the defendants were convicted of escape in the

⁷ See entirety of 7 U.S.C.A. § 2024 attached as Appendix at section F.

first degree when they failed to return to a work release center. 97 Wn.2d at 256. The Court reversed their convictions on the grounds that they should have been charged under the more specific statute prohibiting a willful failure to return to a work release program. Id. at 257. The Court's reasoning was three-fold. First, the general statute prohibited escape from a "detention facility," the definition of which included escape from a work release facility, whereas the special statute specifically prohibited escape from a work release facility. Id. at 258. Second, the special statute required willful conduct, a mental intent not required by the general, in recognition of the possibility that unforeseen circumstances such as illness could prevent a person from returning to a work release facility. Id. Third, given that the special statute required proof of a mental intent not required by the general statute, a prosecutor cannot be allowed to impermissibly usurp the "legislative function" by proceeding under the less demanding general statute. Id. at 258-59.

Here, as in Danforth, the prosecutor should not be able to impermissibly usurp the legislative function by proceeding under the general crime of possessing a stolen access device when the legislature has specifically made it a crime to use food stamps unlawfully.

3. **Ms. Spurgeon's conviction for possession of stolen property in the second degree must be dismissed.**

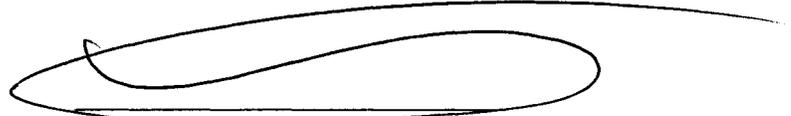
Where statutes are concurrent and the defendant is convicted under a general statute rather than the specific statute, the proper remedy is dismissal of the conviction. Danforth, 97 Wn.2d at 257-58. Here, Ms. Spurgeon was convicted of the general statute of possession of stolen property in the second degree, an access device, rather than the specific statute of unlawful use of food stamps, in violation of her constitutional right to equal protection. Therefore, this Court must reverse Ms. Spurgeon's conviction for possession of stolen property in the second degree with instructions to dismiss. Shriner, 101 Wn.2d at 580; Danforth, 97 Wn.2d at 257-58.

E. **CONCLUSION**

The State improperly charged Ms. Spurgeon under the general statute, possession of stolen property in the second degree, access device, rather than the concurrent specific, unlawful use of food stamps. For the foregoing reasons, Ms. Spurgeon respectfully requests this Court to reverse and dismiss her conviction for possession of stolen property in the second degree.

DATED this 14th day of December 2009.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, sweeping loop that starts on the left, goes up and over, then down and under, ending on the right. The signature is positioned above the printed name.

LISA E. TABBUT, WSBA No. 21344
Attorney for Appellant

F. APPENDIX WITH STATUTE

7 U.S.C.A. § 2024

United States Code
Title 7. Agriculture
Chapter 51. Food Stamp Program
§ 2024. Violations and enforcement

(a) In general

Notwithstanding any other provision of this chapter, the Secretary may provide for the issuance or presentment for redemption of benefits to such person or persons, and at such times and in such manner, as the Secretary deems necessary or appropriate to protect the interests of the United States or to ensure enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter.

(b) Unauthorized use, transfer, acquisition, alteration, or possession of benefits

(1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses benefits in any manner contrary to this chapter or the regulations issued pursuant to this chapter shall, if such benefits are of a value of \$5,000 or more, be guilty of a felony and shall be fined not more than \$250,000 or imprisoned for not more than twenty years, or both, and shall, if such benefits are of a value of \$100 or more, but less than \$5,000, or if the item used, transferred, acquired, altered, or possessed is an benefit that has a value of \$100 or more, but less than \$5,000, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than \$10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than \$10,000 or, if such benefits are of a value of less than \$100, or if the item used, transferred, acquired, altered, or processed is an [FN1] benefit that has a value of less than \$100, shall be guilty of a misdemeanor, and, upon the first conviction thereof, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one

year and may also be fined not more than \$1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the supplemental nutrition assistance program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

(2) In the case of any individual convicted of an offense under paragraph (1) of this subsection, the court may permit such individual to perform work approved by the court for the purpose of providing restitution for losses incurred by the United States and the State agency as a result of the offense for which such individual was convicted. If the court permits such individual to perform such work and such individual agrees thereto, the court shall withhold the imposition of the sentence on the condition that such individual perform the assigned work. Upon the successful completion of the assigned work the court may suspend such sentence.

(c) Presentation for payment or redemption of benefits that have been illegally received, transferred, or used

Whoever presents, or causes to be presented, benefits for payment or redemption of the value of \$100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony and, upon the first conviction thereof, shall be fined not more than \$20,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than one year nor more than five years and may also be fined not more than \$20,000, or, if such benefits are of a value of less than \$100, shall be guilty of a misdemeanor and, upon the first conviction thereof, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than \$1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the supplemental nutrition assistance program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

(d) Benefits as obligations of the United States

Benefits issued pursuant to this chapter shall be deemed to be obligations of the United States within the meaning of section 8 of Title 18.

(e) Forfeiture of property involved in illegal benefit transactions

The Secretary may subject to forfeiture and denial of property rights any nonfood items, moneys, negotiable instruments, securities, or other things of value that are furnished by any person in exchange for benefits, or anything of value obtained by use of an access device, in any manner contrary to this chapter or the regulations issued under this chapter. Any forfeiture and disposal of property forfeited under this subsection shall be conducted in accordance with procedures contained in regulations issued by the Secretary.

(f) Criminal forfeiture

(1) In general

In imposing a sentence on a person convicted of an offense in violation of subsection (b) or (c) of this section, a court shall order, in addition to any other sentence imposed under this section, that the person forfeit to the United States all property described in paragraph (2).

(2) Property subject to forfeiture

All property, real and personal, used in a transaction or attempted transaction, to commit, or to facilitate the commission of, a violation (other than a misdemeanor) of subsection (b) or (c) of this section, or proceeds traceable to a violation of subsection (b) or (c) of this section, shall be subject to forfeiture to the United States under paragraph (1).

(3) Interest of owner

No interest in property shall be forfeited under this subsection as the result of any act or omission established by the owner of the interest to have been committed or omitted without the knowledge or consent of the owner.

(4) Proceeds

The proceeds from any sale of forfeited property and any monies forfeited under this subsection shall be used--

(A) first, to reimburse the Department of Justice for the costs incurred by the Department to initiate and complete the forfeiture proceeding;

(B) second, to reimburse the Department of Agriculture Office of Inspector General for any costs the Office incurred in the law enforcement effort resulting in the forfeiture;

(C) third, to reimburse any Federal or State law enforcement agency for any costs incurred in the law enforcement effort resulting in the forfeiture; and

(D) fourth, by the Secretary to carry out the approval, reauthorization, and compliance investigations of retail stores and wholesale food concerns under section 2018 of this title.

(g) Redesignated (e)

(h) Redesignated (f)

COURT OF APPEALS
DIVISION II

CO-09-017 FWD:01

STATE OF WASHINGTON
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CERTIFICATE OF MAILING

State of Washington, Respondent, v. Laquitta Diane Spurgeon, Appellant
Court of Appeals No. 39426-0-II

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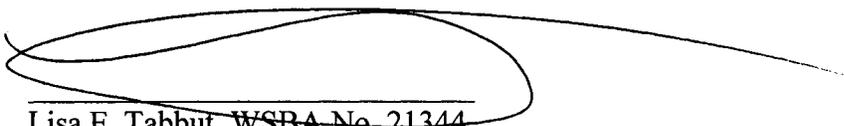
Laquitta Spurgeon
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 14, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on December 14, 2009.



Lisa E. Tabbut, WSBA No. 21344
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