

No. 41539-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ALLEN K. DUPUIS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred in finding Allen Dupuis used a motor vehicle in the commission of the offense.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

RCW 46.20.285(4) authorizes the Department of Licensing (DOL) to revoke a person's driver's license for one year if the person "uses" a motor vehicle in the commission of a felony. The statute applies only if the offender uses a vehicle to facilitate commission of the crime; it does not apply if the vehicle is the *object* of the crime. Did the trial court err in finding Mr. Dupuis "used" a motor vehicle to commit the crime of taking a motor vehicle without permission, where the car was merely the object of the crime?

C. STATEMENT OF THE CASE

Mr. Dupuis was in a relationship with Kelli Armfield and lived with her and her mother, Marilea Armfield. CP 17. Marilea Armfield was the protected person in a guardianship proceeding. CP 4. At a hearing held on March 19, 2009, the guardianship court ordered Mr. Dupuis to immediately transfer possession of a 2003 Mercury Marauder motor vehicle to Ms. Armfield's guardian. CP 4.

Mr. Dupuis had purchased the car from Ms. Armfield and repaired it after it was wrecked in an accident. CP 4, 17.

Mr. Dupuis did not agree with the court's order to turn over the car to Ms. Armfield's guardian. CP 17; 11/08/10RP 2. Instead of transferring possession of the vehicle, he left the courtroom, entered the car, which was parked just outside, and drove away in it. CP 4. He was subsequently charged with one count of taking a motor vehicle without permission in the second degree, a class C felony. CP 1; RCW 9A.56.075.<sup>1</sup> Mr. Dupuis pled guilty as charged. CP 7-15.

At sentencing, defense counsel argued Mr. Dupuis did not "use" a motor vehicle to commit the offense because the car was merely the object of the crime. 11/08/10RP 3. Therefore, counsel argued, DOL was not authorized to revoke Mr. Dupuis' driver's

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<sup>1</sup> Taking a motor vehicle without permission in the second degree is defined as follows:

A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.

RCW 9A.56.075(1).

license.<sup>2</sup> Id. The trial court disagreed. 11/08/10RP 4. The court found Mr. Dupuis "used a motor vehicle in the commission of the offense." CP 25. Therefore, the court ordered the clerk of the court "to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke [Mr. Dupuis'] driver's license." Id.

#### D. ARGUMENT

THE TRIAL COURT ERRED IN FINDING MR. DUPUIS "USED" A MOTOR VEHICLE TO COMMIT THE OFFENSE, WHERE THE CAR WAS MERELY THE OBJECT OF THE CRIME

1. When a person is convicted of a felony, RCW

46.20.285(4) requires DOL revoke the person's driver's license if a motor vehicle was used to facilitate commission of the crime but not if the car was merely the object of the crime. RCW 46.20.285(4) provides: "The department shall revoke the license of any driver for the period of one calendar year . . . upon receiving a record of the driver's conviction of . . . [a]ny felony in the commission of which a motor vehicle is used."<sup>3</sup>

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<sup>2</sup> RCW 46.20.285(4) authorizes DOL to revoke for one year the driver's license of any person who is convicted of "[a]ny felony in the commission of which a motor vehicle is used."

<sup>3</sup> The statute provides in full:

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

In State v. Batten, the Washington Supreme Court held there must be a sufficient nexus between the crime and the offender's use of a motor vehicle to justify revocation of his license under the statute. State v. Batten, 140 Wn.2d 362, 365-66, 997 P.2d 350 (2000). The term "used" in the statute means "employed in accomplishing something." Id. at 365 (quoting State v. Batten, 95 Wn. App. 127, 131, 974 P.2d 879 (1999), aff'd, 140 Wn.2d 362, 997 P.2d 350 (2000) (quoting Webster's Third New International Dictionary 2524 (3d ed. 1966)). Thus, "the use of the motor vehicle must contribute in some reasonable degree to the commission of

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of the following offenses, when the conviction has become final:

(1) For vehicular homicide the period of revocation shall be two years. The revocation period shall be tolled during any period of total confinement for the offense;

(2) Vehicular assault. The revocation period shall be tolled during any period of total confinement for the offense;

(3) Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle, for the period prescribed in RCW 46.61.5055;

(4) Any felony in the commission of which a motor vehicle is used;

(5) Failure to stop and give information or render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or personal injury of another or resulting in damage to a vehicle that is driven or attended by another;

(6) Perjury or the making of a false affidavit or statement under oath to the department under Title 46 RCW or under any other law relating to the ownership or operation of motor vehicles;

(7) Reckless driving upon a showing by the department's records that the conviction is the third such conviction for the driver within a period of two years.

RCW 46.20.285.

the felony.'" Id. at 365 (quoting Batten, 95 Wn. App. at 131). In Batten, a sufficient nexus existed between Batten's use of a car and the crimes of unlawful possession of a controlled substance and unlawful possession of a firearm, where Batten used the car as a place to store, conceal, and transport the contraband over a period of time. Id. at 365-66. Because Batten's use of the car contributed to the accomplishment of the crime, and was not merely incidental to the crime, DOL was authorized to revoke Batten's driver's license. Id.

A car is merely incidental to a crime, and not "used" to commit the crime, if it is used simply as a means of transportation. See, e.g., State v. Wayne, 134 Wn. App. 873, 875-76, 142 P.3d 1125 (2006) (insufficient nexus existed between use of car and crime of possession of cocaine, where Wayne merely drove car while possessing cocaine on his person); State v. Hearn, 131 Wn. App. 601, 610-11, 128 P.3d 139 (2006) (insufficient nexus existed between use of car and crime of possession of methamphetamine, where drugs were merely found inside car); State v. Griffin, 126 Wn. App. 700, 708, 109 P.3d 870 (2005), rev. denied, 156 Wn.2d 1004, 128 P.3d 1239 (2006) (sufficient nexus existed between use

of car and crime of possession of cocaine, where Griffin obtained the cocaine in exchange for giving someone a ride in his car).

In accordance with the reasoning of Batten and the other cases cited above, courts also hold that, if a car is merely the *object* of the crime and not used independently as an instrument to facilitate commission of the crime, the statute does not apply. State v. B.E.K., 141 Wn. App. 742, 172 P.3d 365 (2007); State v. Dykstra, 127 Wn. App. 1, 110 P.3d 758 (2005), rev. denied, 156 Wn.2d 1004, 128 P.3d 1239 (2006). In B.E.K., the juvenile offender was adjudicated guilty of second degree malicious mischief for spray painting a police patrol car. Id. at 744. In determining whether the car was "used" to commit the felony, the Court acknowledged the car was a necessary ingredient of the crime. Id. at 747. Second degree malicious mischief, as charged, required proof that the offender perpetrated the mischief on an emergency vehicle.<sup>4</sup> Thus, there was a "clear relationship" between the vehicle and the crime. Id. "But a relationship in any form between the vehicle and the crime is not sufficient." Id. Instead, "the vehicle must be an instrumentality of the crime, such that the offender uses

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<sup>4</sup> Under RCW 9A.48.080(1)(b), a person is guilty of the felony of second degree malicious mischief if he knowingly and maliciously "[c]reates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle."

it in some fashion to carry out the crime." Id. at 747-48. Because "B.E.K. did not employ the patrol car in any manner to commit his act of mischief but simply made the patrol car the *object* of the crime," there was not a sufficient nexus between the crime and B.E.K.'s use of the car to justify suspending his driver's license under RCW 46.20.285(4). Id. at 748 (emphasis added).

In State v. Dykstra, by contrast, a car was "used" to commit the crime of car theft, but only because the car was *both* the object *and* an instrumentality of the crime. Dykstra, 127 Wn. App. at 12. Dykstra was charged and convicted of five counts of first degree theft for his role in an auto theft ring. Id. at 6. Thus, cars were the object of the crimes. Id. at 12. But they were also "used" to facilitate commission of the crimes, where: Dykstra and his cohorts used cars to drive around looking for other cars to steal; they took possession of the stolen cars by driving them away from the scene; they sat in cars while acting as lookouts; and, after dismantling the engines, they used cars to carry the unwanted parts away for disposal. Id.

California courts similarly hold that, in order for a car to be "used" to commit a crime, it must be more than merely the object of

the crime or a means of transportation.<sup>5</sup> See People v. Gimenez, 36 Cal. App. 4th 1233, 42 Cal. Rptr. 2d 681 (1995) (sufficient nexus existed between use of car and crime of vehicle burglary, where defendant used car to carry burglary tools and intended to use car to carry away stolen car radio); In re Gaspar D., 22 Cal. App. 4th 166, 27 Cal. Rptr. 2d 152 (1994) (sufficient nexus existed between use of car and crime of vehicle burglary, where juvenile offender used car to carry and conceal stolen car stereo and burglary tools); People v. Paulsen, 217 Cal. App. 3d 1420, 267 Cal. Rptr. 122 (1989) (sufficient nexus existed between use of car and crime of fraud, where defendant used truck to carry and conceal stolen merchandise); People v. Poindexter, 210 Cal. App. 3d 803, 258 Cal. Rptr. 680 (1989) (insufficient nexus existed between use of car and crime of theft, where defendant used car merely as a means of transporting himself to the scene, and as a means of transporting himself and stolen property away from the scene).

Thus, where the crime at issue is theft, in order for a car to be "used" to commit the crime, the car must be more than the

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<sup>5</sup> California's statute, California Vehicle Code section 13350(2), requires the Department of Motor Vehicles to revoke the driver's license of an offender who is convicted of "[a]ny felony in the commission of which a motor vehicle is used." Thus, the statute is almost identical to RCW 46.20.285(4). Batten, 140 Wn.2d at 366. As such, California cases interpreting the California statute are persuasive authority for Washington courts interpreting RCW 46.20.285(4). Id.; Batten, 95 Wn. App. at 130.

object of the theft. The offender must use the car as an instrument to help carry out the theft, such as by storing, carrying and concealing burglary tools or stolen merchandise. The offender must also use the car as more than merely a means of transportation to and from the scene.

2. The trial court erred in finding Mr. Dupuis "used" a car to commit the crime. In this case, the car was merely the object of the crime. Mr. Dupuis used the car only to transport himself away from the scene. Therefore, under the authorities cited already, a car was not "used" to commit the crime for purposes of RCW 46.20.285(4).

This Court reviews the trial court's application of the statute to this set of facts de novo. B.E.K., 141 Wn. App. at 745 (citing State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003)).

Mr. Dupuis was convicted of the crime of second degree taking a motor vehicle without permission after he refused to transfer possession of the car to Ms. Armfield's guardian despite being ordered to do so by the guardianship court and instead drove the car away from the scene. CP 1, 4. Thus, the car was a necessary ingredient of the crime and there was a "clear relationship" between the vehicle and the crime. B.E.K., 141 Wn. App. at 747. "But a relationship in any form between the vehicle

and the crime is not sufficient." Id. If the vehicle is merely the *object* of the crime, it is not "used" to commit the crime for purposes of RCW 46.20.285(4). Id. at 748. Here, the car was merely the object of the theft. Therefore, Mr. Dupuis did not "use" the car to commit the crime. The taking of the car was the crime.

In addition, although Mr. Dupuis used the car to transport himself away from the scene, that alone is also insufficient to establish he "used" the car for purposes of RCW 46.20.285(4). See Wayne, 134 Wn. App. at 875-76; Hearn, 131 Wn. App. at 610-11; Griffin, 126 Wn. App. at 708. The use of the car as a means of transportation was merely incidental to the crime.

In sum, the trial court erred in finding Mr. Dupuis "used a motor vehicle in the commission of the offense." CP 25. At the least, the statute is ambiguous when applied to these facts and, under the rule of lenity, this Court must construe the statute in favor of Mr. Dupuis.<sup>6</sup> B.E.K., 141 Wn. App. at 745.

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<sup>6</sup> If the statute's meaning is plain on its face, the Court follows that plain meaning without resorting to statutory construction. B.E.K., 141 Wn. App. at 745 (citing State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)). A statute is ambiguous if it can reasonably be interpreted in more than one way. B.E.K., 141 Wn. App. at 745 (citing Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd., 127 Wn.2d 759, 771, 903 P.2d 953 (1995)). Under the rule of lenity, if two possible statutory constructions are permissible, the Court construes the statute strictly against the State in favor of a criminal defendant. B.E.K., 141 Wn. App. at 745 (citing State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984)).

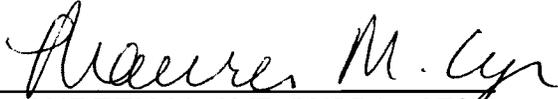
3. The trial court's order must be reversed and vacated.

When a trial court erroneously finds an offender "used" a motor vehicle in the commission of a felony, the court's order that DOL be notified of the offender's conviction must be reversed and vacated. B.E.K., 141 Wn. App. at 748. Here, the trial court found Mr. Dupuis "used" a motor vehicle to commit the crime and ordered the clerk of the court to forward an abstract of the court record to DOL "which must revoke [Mr. Dupuis'] license." CP 25. Because the court's finding that Mr. Dupuis "used" a motor vehicle to commit the offense was erroneous, the court's order that DOL be notified must be reversed and vacated. B.E.K., 141 Wn. App. at 748.

E. CONCLUSION

Mr. Dupuis did not "use" a motor vehicle to commit the offense, because the car was not used as an instrument to facilitate commission of the crime, but was merely the object of the crime. Therefore, the trial court's order that DOL be notified of the conviction must be reversed and vacated.

Respectfully submitted this 20th day of June 2011.

  
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