

FILED

FEB 22 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28441-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO CONTRERAS,

Appellant.

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

BRIEF OF APPELLANT

JASON C. KINN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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A. SUMMARY OF APPEAL

Francisco Contreras completed the crime of possession of a stolen motor vehicle in 2004. Contreras was arraigned in January 2009. The applicable statute of limitations is three years. Under controlling Supreme Court precedent, the crime of possession of stolen property is not a continuing offense. Mr. Contreras's conviction must be dismissed because the statute of limitations had expired at the time the State commenced the prosecution.

If this Court holds that Mr. Contreras's conviction should stand, it should not result in the revocation of his driver's license. Mr. Contreras did not use or operate the car in the commission of a felony. See RCW 46.20.285(4). The lower court's interpretation of RCW 46.20.285(4) was erroneous.

B. ASSIGNMENTS OF ERROR

1. The superior court had no authority to enter the judgment of conviction of Mr. Contreras because the applicable statute of limitations had run.

2. Alternatively, if Mr. Contreras's conviction should stand, the superior court erred in finding that Mr. Contreras's possession of a stolen vehicle entailed the use of a car in the commission of a

felony such that his driver's license would be revoked under RCW 46.20.285

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Possession of a stolen vehicle is not a continuing offense. The statute of limitations for possession of stolen property is three years. Where Mr. Contreras obtained a stolen vehicle in 2004, but where he was only charged with criminal possession of that vehicle in 2009, does the statute of limitations bar his prosecution and require his conviction to be vacated?

2. Is possession of a stolen vehicle properly classified as "a felony in the commission of which a motor vehicle is used" under RCW 46.20.285(4)?

D. STATEMENT OF THE CASE

Francisco Contreras obtained possession of a 1990 Acura Integra in 2004. CP 90-91; RP 90-92. Between 2004 and the time he took the car to be relicensed in October 2007, Mr. Contreras possessed and drove the 1990 Acura. CP 90.

Mr. Contreras previously owned a black 1991 Acura Integra. RP 107. The 1991 Acura was wrecked in 2004 and the State considered the car to be an "insurance total or a salvage." RP 108-09.

The Vehicle Identification Number (“VIN”) tags in the passenger compartment of the stolen 1990 Acura belonged to the 1991 Acura registered to Contreras. RP 90-92. However, the number found on the engine of the car belonged to the 1990 Acura. Id. The 1990 Acura had been reported stolen in 2004. RP 92.

The 1990 Acura appeared stolen to the untrained eye. It had “[a] real poor paint job on it.” RP 88. “[Y]ou could just tell by looking at it” that “it wasn’t a professional [paint] job.” RP 100. The stolen 1990 Acura had originally been red but had been painted black. RP 109. The car’s engine compartment had not been painted but remained red, in sharp contrast to the outside of the car. RP 91. There were little specks of paint around where tape had been applied during the painting of the car. RP 109-10.

There was other evidence that the car had been stolen. “[I]t was very obvious” that the VIN tag on the driver’s side door “had been glued on.” RP 89. There was also a hole in the fire wall of the engine compartment where the VIN tag should have been. RP 91.

The record is silent regarding when these changes were made to the stolen vehicle.

Despite Mr. Contreras's possession of the stolen vehicle since 2004, the State only charged Mr. Contreras with the crime of possession of a stolen vehicle on January 22, 2009. CP 97.

Before trial, the defendant moved to dismiss on the ground that the statute of limitations had run before Mr. Contreras was charged.

CP 81-86. The court denied that motion in a one-page letter opinion, holding that

[c]ontrary to [defense counsel]'s assertion, the court believes that possession of stolen property is a continuing offense. Consequently, prosecution for that prong of the crime can be initiated at anytime [sic] within three years of the last occasion on which the property was possessed.

CP 70.

A jury subsequently convicted Mr. Contreras of the charge of possessing a stolen motor vehicle. CP 27-34. The court made a special finding that the crime was "a felony in the commission of which a motor vehicle was used." CP 27. Pursuant to that special finding, the court directed the court clerk to report the conviction to the Department of Licensing for the purpose of revoking Mr. Contreras's driver's license. Id.

Mr. Contreras seeks reversal of the superior court, the vacation of his conviction, and the dismissal of all charges against

him. Alternatively, he challenges the court's special finding as erroneous as a matter of law.

E. ARGUMENT

1. MR. CONTRERAS'S CONVICTION MUST BE REVERSED AND ALL CHARGES AGAINST MR. CONTRERAS REGARDING THE 1990 ACURA MUST BE DISMISSED WITH PREJUDICE

a. The applicable statute of limitations is three years from the completion of the crime. With limited exceptions, no felony may be prosecuted more than three years after its commission. RCW 9A.04.080. The felony of possession of a motor vehicle does not fall within any of the exceptions in the limitations statute. RCW 9A.04.080; see also RCW 9A.56.068, RCW 9A.56.140 (statutes State charged Mr. Contreras with violating). Therefore, the State was prohibited from initiating this prosecution more than three years after the crime was committed. RCW 9A.04.080(h); see also State v. Ladely, 82 Wn.2d 172, 509 P.2d 658 (1973) (affirming judgment where evidence showed that defendant had come into possession of stolen property within three years).

b. Controlling precedent holds that, where defendant is charged with possessing stolen property, the statute of limitations begins to run when the property is received. The statute of limitations on a given crime begins to run when the crime has been committed. RCW 9A.04.080(h). With limited exceptions, the time of the commission of the crime is the time that all elements of the crime are first present. Ladely, 82 Wn.2d at 177 (“the statute of limitations starts to run with the receiving of the stolen property”); State v. Green, 150 Wn.2d 740, 82 P.3d 239 (2004). (holding that misdemeanor of failure to transfer title was complete after 45 days of receipt of vehicle)

Ladely unambiguously holds that the statute of limitations for possession of stolen property begins to run on the date the stolen property is first possessed by the defendant. 82 Wn.2d at 177. In that case, the defendant was charged with violating former RCW 9.54.010, Washington’s then-existing larceny statute, by possessing a stolen antique revolver. Id. 173-74. The revolver had been stolen on June 7, 1968. Id. at 173. The defendant testified at trial that he had bought the revolver in April 1971. Id. at 177. He was charged on June 8, 1971, three years and one day after the

revolver had been stolen but only two months after the time he said he had acquired it. Id. at 173.

The court noted that the defendant had been charged under the possession of stolen goods portion of the larceny statute, former RCW 9.54.010(5), which provided that

[e]very person who, knowing the same to have been so appropriated, shall bring into this state, or buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated, whether within or outside of this state, in such manner as to constitute larceny under the provisions of this chapter . . . [s]teals such property and shall be guilty of larceny.

Ladely, 82 Wn.2d at 174.

The defendant in Ladely argued that the statute of limitations for the crime of possession of stolen property began to run when the revolver was originally stolen. Id. at 176. The court rejected this argument, holding instead that the limitations period began to run when the defendant first received the stolen property. Id. at 177. Finding there to be adequate evidence that Mr. Ladely first received the revolver less than two months before he was charged, his judgment of conviction was upheld. Id.

Ladely deliberately and unambiguously held that, where possession of stolen property is charged, the limitations period begins to run from the date the property is first received by the

defendant. Id. at 177 (“the statute of limitations begins to run with the receiving of the stolen property”). The court explicitly joined “many states” holding that “the statute of limitations starts to run with the receiving of the stolen property.” Id. (citing State v Friend, 210 Iowa 980, 230 N.W. 425 (1930)).

The State will likely argue that this Court should not follow the controlling Ladely case but should instead hold that Mr. Contreras had a “continuing criminal impulse” on October 1, 2007, when Mr. Contreras attempted to relicense the car. See State v. Mermis, 105 Wn. App. 738, 747, 20 P.3d 1044 (2001) (“Mermis had a continuing criminal impulse such that the crime of theft by deception was not complete until . . . within three years of the charge.”).

Mermis does not cite to, much less purport to abrogate, Ladely. Id. The defendant Mermis was charged with theft by deception, not possession of stolen property. Id. at 742.-43; see also RCW 9A.56.020 (defining theft).

On September 6, 1995, the defendant Mermis overheard the victim Johnson arranging for sale of Johnson’s Dodge Viper through a car dealer for \$55,000. Id. at 741. Mermis suggested that Johnson save the commission by selling the car to him for the

same amount. Id. at 741-42. Mermis took the car with him that day and drove it thereafter. Id. at 742. Twenty days later, on September 26, 1995, Mermis returned to Johnson's house to tell Johnson that he needed the title to the Viper and would return to give Johnson a check for \$55,000. Id. at 742. Johnson signed over the title and a bill of sale to Mermis on September 26, 1995. Id. Mermis never paid Johnson and the State filed an information against Mermis on September 18, 1998 alleging that Mermis committed first degree theft of the car by deception. Id.

The superior court granted Mermis's motion to arrest judgment on statute-of-imitations grounds, holding that the theft was complete on September 6, 1995, when the car was delivered to Mermis. Id. at 743. The appellate court reversed, holding that the successive takings of the car, the title certificate, and the bill of sale constituted a "continuing criminal impulse or intent" and that, where the impulse continues, "the crime is not complete until the continuing impulse has been terminated." Id. at 745-46. Because the defendant had secured the title certificate and bill of sale less than three years before the State initiated the prosecution, Mermis held that the statute of limitations did not bar the prosecution. Id. at 746-47.

Mermis does not control the outcome of this case. Mermis applied the “continuing criminal impulse” test to the crime of theft by deception, not to the crimes of possession of stolen property or possession of a stolen motor vehicle. Id. Ladely, on the other hand, laid down the rule for when the limitations period begins to run for the crime of possession of stolen property, the crime with which Mr. Contreras is charged. 82 Wn.2d at 177; CP 97; CP 52. This Court is powerless to reverse Ladely and hold that the “continuing criminal impulse” test applies to the possession of stolen property.

Second, the “continuing criminal impulse” of Mermis lasted for a period of twenty days, while in this case the State will likely argue that Mr. Contreras had a continuing criminal impulse that lasted for three years, but with no outward manifestations of that impulse (other than driving the car, not an element of the crime charged) from 2004 until October 1, 2007. See Mermis, 105 Wn. App. at 741-42 (Mermis obtained car September 6 and obtained title and bill of sale September 26). Mr. Contreras was charged over four years after he began to possess the vehicle. CP 90; CP 97. As a matter of policy, courts should be hesitant to apply the “continuing criminal impulse” test over such long periods.

[Statutes of limitations are] designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before the principle that criminal limitations statutes are to be liberally interpreted in favor of repose.

Toussie v. United States, 397 U.S. 112, 90 S. Ct. 858, 25 L.Ed.2d 156 (1970) (quotation marks and citations omitted); see also United States v. Irvine, 98 U.S. 450, 25 L.Ed. 193 (1878) (holding that statute of limitations was defense to prosecution for wrongful withholding of a pension where pension had first been demanded four years before trial, even though defendant continued to withhold pension until trial); United States v. Mendoza, 122 F. Supp. 367, 367 (N.D. Cal. 1954) (dismissing indictment where there was “no evidence in the record showing that the retention of any of the [stolen] property began in the period between May 5, 1951 and May 5, 1954, the latter date being the date that the indictment was filed”); State v. Nuss, 235 Neb. 107, 454 N.W.2d 482 (1990) (reversing conviction for possession of stolen property where defendant had obtained property at least four years before charge brought); People v. Kimbro, 182 Ill.App.3d 572, 538 N.E.2d 826

(1989) (holding that statute of limitations began to run upon original possession of tractor in 1975 and that defendant did not commit separate offense by transferring tractor to friend's farm in 1986); State v. Hersch, 445 N.W.2d 626, 633 (N.D. 1989) (citing Ladely for proposition that "receiving, concealing or withholding stolen property not a continuing offense"); Duncan v. State, 282 Md. 385, 391, 384 A.2d 456 (1978) ("it was established a century ago that the criminal withholding of money or property was not a continuing offense"); State v. Webb, 311 So.2d 190 (Fla. App. Ct. 1975) (retaining property known to be stolen not continuing offense); Friend, 230 N.W. at 428 ("In so far as the statute of limitations is concerned, the time which is material is the time when the appellant bought or received the goods") (cited by Ladely, 82 Wn.2d at 176).

Because the crime of possession of stolen property is not a continuing offense under controlling Washington case law, the statute of limitations in this case began to run when Mr. Contreras first acquired the stolen property with knowledge that it was stolen. See Ladely, 82 Wn.2d at 177 (possession of stolen property not continuing offense); RCW 9A.56.140(1) (defining "possessing stolen property").

c. The Washington legislature did not abrogate *Ladely* by its passage of RCW 9A.56.140. The State may argue that the slight difference between former RCW 9.54.010(5), interpreted by Ladely, and the current possession of stolen property statute, RCW 9A.56.140(1), evidences the legislature's intent to abrogate Ladely.

No court has recognized the abrogation of Ladely. Further, a closer look at the language of the statute evidences no such legislative intent to abrogate Ladely. The former statute read:

. . .

(5) Every person who, knowing the same to have been so appropriated, shall bring into this state, or buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated, whether within or outside of this state, in such manner as to constitute larceny under the provisions of this chapter . . . [s]teals such property and shall be guilty of larceny.

Ladely, 82 Wn.2d at 174 (quoting former RCW 9.54.010(5)). The current version reads:

“Possessing stolen property” means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140(1).

The State may argue that the use of the words “possess” and “retain” in the new statute radically changes the former statute and makes clear that the legislature intended that possession of stolen property now be classified as a continuing crime. The Court should reject any such argument. Although the former statute did not use the words “possess” or “retain,” it did use the term “withhold.” Ladely, 82 Wn.2d at 174. “Withhold” is defined as “to keep in check; restrain” and “to refrain from giving, granting, or permitting.” The American Heritage Dictionary of the English Language (3d ed. 1992) at 2050. “Possess” is defined to mean “have as property; own” and “to gain or exert influence or control over; dominate.” Id. at 1413. “Retain” is defined as “to maintain possession of.” Id. at 1539. Certainly if one is exerting control over an object, one is also refraining from giving or granting that object to another person. The difference between former RCW 9.54.010(5) and current RCW 9A.56.140 is merely semantic and does not reflect any intention to create a new crime of possession of stolen property. At the time Ladely was decided, the State could have charged a defendant with the crime of possession of stolen property under former RCW 9.54.010(5) by alleging that the accused person wrongfully aided in withholding the property from

its rightful owner. The distinction between “withholding” and “possessing” is simply not important enough to have effectively abrogated Ladely.

“[T]he doctrine of continuing offenses should be employed sparingly, and only when the legislature expressly states the offense is a continuing offense, or when the nature of the offense leads to a reasonable conclusion that the legislature so intended.” Green, 150 Wn.2d at 742-43. Here, the legislature has not expressly stated that the possession of stolen property is a continuing offense. RCW 9A.56.140(1). Nor is it reasonable to conclude that the legislature so intended to create a continuing offense, when to do so would abrogate existing law, and when the intent to abrogate was anything but clear. This Court should defer to the Supreme Court to recognize an abrogation of Ladely if it is to be held to be abrogated at all.

d. Mr. Contreras’s conviction for possession of a stolen motor vehicle must be vacated and the charge must be dismissed because prosecution of that charge began after the statute of limitations had expired. Where the statute of limitations expires before a criminal charge is prosecuted, but where the court convicts the defendant of that charge anyway, the conviction must be

vacated and the charge dismissed. In re Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000). Here, the applicable statute of limitations prohibited prosecution more than three years after the crime's commission. RCW 9A.04.080(h). As discussed above, Mr. Contreras completed the crime of possession of a stolen vehicle in 2004 and the State began its prosecution of that crime in January 2009, more than a year after the statute of limitations had run. CP 90-91 (Contreras Decl.) (stating that Contreras possessed 1990 Acura in 2004); CP 97 (Jan. 22, 2009 Information). Mr. Contreras's conviction must be vacated and the charge against him must be dismissed.

2. THE COURT'S SPECIAL FINDING THAT POSSESSION OF A STOLEN MOTOR VEHICLE WAS A FELONY IN THE COMMISSION OF WHICH A MOTOR VEHICLE WAS USED IS ERRONEOUS AS A MATTER OF LAW AND MUST BE REVERSED.

If Mr. Contreras's conviction is upheld, Mr. Contreras argues in the alternative that the court below erred in holding that Mr. Contreras's possession of a motor vehicle was a felony in the commission of which a motor vehicle was used. See CP 27 (Judgment and Sentence).

RCW 46.20.285(4) mandates that the Department of Licensing revoke a driver's license for one year where the driver

has a final conviction for “[a]ny felony in the commission of which a motor vehicle is used.” The application of this statute to a given set of facts is a matter of law and is reviewed de novo by an appellate court. State v. B.E.K., 141 Wn. App. 742, 745, 172 P.3d 365 (2007)

RCW 46.20.285(4) does not define “use,” but Washington courts have held that “the relevant test for ‘use’ [i]s whether the felony has some reasonable relation to the operation of a motor vehicle, or whether the use of the motor vehicle contributes in some reasonable degree to the commission of the felony.” State v. B.E.K., 141 Wn. App. 742, 172 P.3d 365 (2007) (citing State v. Batten, 140 Wn.2d 362, 365, 997 P.2d 350 (2000)). Based on this test, courts have found that the statute clearly applies where the commission of a felony directly involves motor vehicle operation. See, e.g., State v. Dykstra, 127 Wn. App. 1, 11-12, 110 P.3d 758 (2005) (finding Batten test met where defendant drove around stolen cars for purpose of finding other cars to steal). Courts have also found the Batten test to be met where the vehicle is used as a repository to store contraband. See, e.g., Batten, 140 Wn.2d at 366 (holding that RCW 46.20.285(4) had been met where defendant used car to store and conceal a prohibited weapon).

Courts do not apply RCW 46.20.285(4) where the vehicle was not “an instrumentality of the crime, such that the offender use[d] it in some fashion to carry out the crime.” B.E.K., 141 Wn. App. at 748. In B.E.K., the juvenile defendant was convicted of second degree malicious mischief for spray-painting a police vehicle. Id. at 744. The appellate court held that since the defendant 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,” RCW 46.20.285(4) did not apply. Id. at 748.

Similarly, here Mr. Contreras did not employ the stolen 1990 Acura in any manner to commit his act of possessing a stolen vehicle but simply made the 1990 Acura the object of the crime. Therefore, RCW 46.20.285(4) does not apply. See B.E.K., 141 Wn. App. at 748. If Mr. Contreras’s conviction is upheld, the court must reverse the superior court’s special finding regarding the application of RCW 46.20.285(4) and remand with instructions to vacate the order notifying the Department of Licensing of Mr. Contreras’s felony adjudication. See B.E.K., 141 Wn. App. at 748.

F. CONCLUSION

For the foregoing reasons, Mr. Contreras respectfully requests this Court vacate his conviction and remand the matter to

the superior court for dismissal of the charge with prejudice. In the alternative, should the Court uphold the conviction, Mr. Contreras respectfully requests this Court reverse the superior court's special finding regarding the applicability of RCW 46.20.285(4) and remand with instructions to vacate the order notifying the Department of Licensing of Mr. Contreras's conviction.

Respectfully submitted this 18th day of February 2010.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 28441-7-III
)	
FRANCISCO CONTRERAS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] FRANCISCO CONTRERAS 209 N CHINOOK ST MOXEE, WA 98930	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF FEBRUARY, 2010.

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