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Court of Appeals
Division III
State of Washington

30081-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

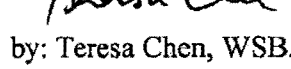
DEBRA LYN HONG,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentence of the Appellant.

III. ISSUES

1. Does the discussion on the record pertaining to the dismissal of the charge in Walla Walla Superior Court No. 11-1-00061-1 have any relevance to the factual basis for the conviction in Walla Walla Superior Court No. 11-1-00015-7?
2. Does the discussion on the record pertaining to the dismissal of the charge in Walla Walla Superior Court No. 11-1-00061-1 have any relevance to counsel's effective assistance in Walla Walla Superior Court No. 11-1-00015-7?
3. May the court interpret an element into a statute where the language is plain on its face? Where the defendant is charged with first degree theft by welfare fraud (RCW 74.08.331), is value (of the benefits

misappropriated) in excess of $5000 an element of the crime which must be alleged in the charging information?

4. Is the challenge to restitution permitted when made for the first time on appeal?

IV. STATEMENT OF THE CASE

In 2009, Oregon Child Protective Services had removed Debra Lyn Hong's children from her care, she had separated from her husband, and she had moved to Washington State. CP 1-2.

On April 20, 2009, Mrs. Hong applied with Washington DSHS for cash, food, and medical benefits. CP 1. As part of her application, she was advised of her reporting rights and responsibilities. CP 2. Mrs. Hong reported that she had no income of any kind, except for food assistance in Oregon. CP 1-2. DSHS verified that the Oregon food assistance grant would be terminating effective April 30, 2009. CP 1-2.

When Mrs. Hong was reunited with her husband two months later, she applied for benefits on his behalf as well, reporting that he also had no income. CP 2. DSHS confirmed that Mr. Baldwin Hong's unemployment claim had been denied in the State of Washington such that he was not

receiving unemployment income. CP 2.

In the next year, the DSHS interviews were frequent and thorough assessments of the Hongs' debits and credits, drawing out the denial of Mr. Hong's unemployment benefits, the Hongs' medical and child support bills, and their rent. CP 2-3. Mrs. Hong was repeatedly (4/20/09, 10/13/09, 4/12/10) advised of her responsibility to provide complete and truthful information upon penalty of prosecution. CP 1-3. She stated she understood and had no questions. CP 2-3. Mrs. Hong reported over and over again that she had no income of any kind. CP 1-3. She did so in-person (4/20/09), by written report (9/24/09), by online reports (9/25/09, 3/22/10), and in telephone interviews (6/18/09, 6/26/09, 10/13/09, 4/12/10).

As a result of Mrs. Hong's representations, she received benefits of food assistance and general assistance to which she was not entitled, benefits which were recertified repeatedly upon renewed representations. CP 1-3.

When Mrs. Hong eventually reported her housing details, DSHS contacted the Walla Walla Housing Authority and learned that Mrs. Hong had admitted to them that she was receiving unemployment income from the State of Oregon. CP 3. This was income that had never been reported to DSHS in Mrs. Hong's applications for cash, medical, and food assistance.

CP 3. DSHS contacted the State of Oregon and determined that Mrs. Hong had been receiving unemployment income from June 15, 2009 and through the date of investigation. CP 3.

On September 16, 2010, Mrs. Hong was interviewed first by a DSHS investigator and then by federal housing agents making a separate investigation. CP 4.

On January 13, 2011, in Walla Walla Superior Court No. 11-1-00015-7, Debra Lyn Hong was charged with Theft in the First Degree, Perjury in the Second Degree, and False Verification of a Welfare Form. CP 6-8. The theft count is described as welfare fraud under RCW 74.08.331(1). CP 6. This appeal is from that case number only. CP 36, 42.

In plea negotiations, the prosecutor referenced another case, Walla Walla Superior Court No. 11-1-00061-1 in which the parties negotiated a guilty plea to second degree theft together with a guilty plea to count one in 11-1-00015-7. CP 12, 19; RP 2, 3, 5. At the initial guilty plea hearing, Mrs. Hong challenged the truth of the charge regarding "the Housing Authority." RP 13. The court put the change of plea hearing aside for a day. RP 14.

When the parties returned on June 8, 2011, defense counsel presented to the prosecutor a letter resulting from a Housing Authority hearing. RP 15.

The prosecutor explained that "the charges on the 11-1-61-1 case were based on fraudulently obtaining housing by stating that she had children living with her that were not." RP 15. After reviewing the letter, the prosecutor learned that, in fact, the Housing Authority determined that Mrs. Hong had only stated that she was "in the process of trying to obtain custody of her children." RP 15. Apparently the misunderstanding had been on the Housing Authority's part and not due to any false representation of Mrs. Hong's. RP 16. However, the Housing Authority had failed to share this new information with the prosecutor. RP 16. The prosecutor promptly dismissed the charges in No. 11-1-00061-1, and Mrs. Hong pled guilty to count one in No. 11-1-00015-7 only. CP 9-19; RP 16-19.

On June 20, 2011, Mrs. Hong was sentenced to thirty days confinement and restitution in the amount of $6,664.84 was ordered to be paid to DSHS. CP 20-33 (23, 26). There was no objection to the imposition of restitution. RP 24.

V. ARGUMENT

A. THE RESOLUTION OF A SEPARATE CASE ALLEGING A DIFFERENT OFFENSE DOES NOT UNDERCUT THE FACTUAL BASIS FOR THE GUILTY PLEA IN THIS UNRELATED MATTER.

Before a trial court accepts a guilty plea, the judge must be satisfied that there is a factual basis for the plea. CrR 4.2(d). This plea and conviction in 11-1-00015-7 are supported by a factual basis. CP 1-5, 9-19.

The Defendant's specific claim is that the dismissal of her Housing Authority case undercuts the factual basis for her DSHS fraud case. Brief of Appellant at 7-9. This is incorrect. The offenses and acts in the two cases are distinct. In the dismissed case, 11-1-00061-1, Mrs. Hong was accused of misrepresenting her ***cohabitation with her children*** in order to receive public ***housing*** from the ***Walla Walla Housing Authority***. In the instant case 11-1-00015-7, the case in which Mrs. Hong is convicted, Mrs. Hong was accused of misrepresenting her ***income*** in order to wrongfully obtain ***cash, food, and medical assistance*** from ***DSHS***.

It is apparent from the Certificate of Probable Cause that this case was wholly unrelated to alleged fraud of the Walla Walla Housing Authority and that there was no allegation in this case that Mrs. Hong misrepresented to DSHS that her children were living with her. Therefore, the information

provided on June 8, 2011 was not at all related to the offense for which she is convicted. It does not touch on the facts underlying this offense.

B. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

A defendant alleging ineffective assistance of counsel bears the burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

The Defendant's ineffective assistance claim stems from the previous claim, which misunderstands the two separate cases. One regards a misrepresentation of income and the other a misrepresentation of household occupants. Because the Housing Authority matter is unrelated to the crime of conviction, trial counsel made no error. Nor could there have been any prejudice.

C. THE INFORMATION CHARGING WELFARE FRAUD CORRECTLY RECITED THE ELEMENTS, WHICH DO NOT REQUIRE ANY SPECIFIC VALUE OF BENEFITS WRONGLY OBTAINED.

The Defendant argues that the charging information should have specified a value of loss (greater than five thousand dollars). Brief of Appellant at 13-15. The value of benefits fraudulently obtained is NOT an element under RCW 74.08.331.

Count One is described in the charging information as welfare fraud under RCW 74.08.331(1), a "Class B Felony (15 years or fine of $20,000 or both)." CP 6. Felony welfare fraud is defined in this way:

> Any person who by means of a willfully false statement, or representation, or impersonation, or a willful failure to reveal any material fact, condition, or circumstance affecting eligibility or need for assistance, including medical care, surplus commodities, and food stamps or food stamp benefits transferred electronically, as required by law, or a willful failure to promptly notify the county office in writing as required by law or any change in status in respect to resources, or income, or need, or family composition, money contribution and other support, from whatever source derived, including unemployment insurance, or any other change in circumstances affecting the person's eligibility or need for assistance, or other fraudulent device, obtains, or attempts to obtain, or aids or abets any person to obtain any public assistance to which the person is not entitled or greater public assistance than that to which he or she is justly entitled is guilty of theft in the first degree under RCW 9A.56.030 and upon conviction thereof shall be punished by imprisonment in a state correctional facility for not more than fifteen years.

RCW 74.08.331(1).

The Defendant observes that the plain language of RCW 74.08.331(1) does not, in fact, have any dollar value element. Brief of Appellant at 13. She argues, however, that the courts should look to legislative history and intent in order to ***insert*** this element.

The State disagrees. The statute's meaning is plain and unambiguous.

"If the statute's meaning is plain on its face, then ***the court must give effect to that plain meaning as an expression of legislative intent***." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (emphasis added). It is only when a statute is ambiguous that a court need "look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent." *Five Corners Family Farms v. State*, No. 84632-4, 2011 WL 6425114 at *3 (Wash. Dec. 22, 2011), *quoting Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). The statute includes no ambiguity and no dollar value element. RCW 74.08.331.

The Defendant's argument appears to be influenced by *State v. Campbell*, 125 Wn.2d 797, 888 P.2d 1185 (1995). In that case, the Washington Supreme Court resolved a conflict between divisions of the courts of appeals regarding "whether the dollar amount is an essential element of the crime of unlawfully obtained public assistance (welfare fraud) under [the former] RCW 74.08.331." *State v. Campbell*, 125 Wn.2d at 799. At the time, the language "theft in the first degree under RCW 9A.56.030" had not yet replaced "grand larceny" by Laws of 2003, ch. 53, sec. 368.

The *Campbell* court noted that the "grand larceny" language was

ambiguous, because of a 1975 legislative revision, which equated larceny to theft, but did not specify the degree of theft. *State v. Campbell*, 125 Wn.2d at 802-03; RCW 9A.56.100. Absent this specificity, the court held that value would need to be pled and proven. *State v. Campbell*, 125 Wn.2d at 803-04.

In 2003, the legislature did ***not*** adopt the court's interpretation that value was an element of welfare fraud. Rather, the laws resolved the ambiguity that had opened the door for such an unintended interpretation with an amendment intended to "***clarify*** and simplify the identification and referencing of crimes." Laws of 2003, ch. 53, sec. 1 (emphasis added). The degree of theft was laid out so that there could be no claim of ambiguity which would require interpretation or permit the judicial insertion of elements.

It is clear from the legislative language that there is no intent that the value of benefits fraudulently obtained should be an element of the crime.

It is noteworthy that a crime of theft is elevated to the first degree in several ways. Value of the property stolen is only one possible way. RCW 9A.56.030 describes two additional ways (theft of a search and rescue dog or theft directly from the person of another). RCW 74.08.331 describes a further means of first degree theft – by welfare fraud. Unlike the other variants,

which have maximum sentences of ten years (RCW 9A.20.021(b); RCW 9A.56.030(2)), theft by welfare fraud has a maximum penalty of fifteen years. RCW 74.08.331(1).

Because there is NO ambiguity in the language of the statute, "the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d at 9-10. There is no hidden element in the crime of welfare fraud. Therefore, there was no error in the charging document.

D. THE DEFENDANT'S CHALLENGE TO THE RESTITUTION ORDER IS UNTIMELY.

The Defendant challenges the restitution amount and asks this Court remand for a restitution hearing. Brief of Appellant at 15-16. The State objects to the claim which was not raised at the appropriate time before the appropriate court.

When the trial court ordered restitution, the Defendant made no objection. RP 24. This Court should refuse to hear this claim, which is raised for the first time on appeal. RAP 2.5(a).

> RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *See, e.g., State v. Coe,* 109 Wash.2d 832, 842, 750 P.2d 208 (1988); *State v. Peterson, supra* 73 Wash.2d at 306, 438 P.2d 183. The rule reflects a policy of encouraging

> the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial. *See Seattle v. Harclaon,* 56 Wash.2d 596, 597, 354 P.2d 928 (1960).

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

In *State v. Danis*, 64 Wn.App. 814, 822, 826 P.2d 1015 (1992), *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992), the court of appeals refused to hear a challenge to the restitution order when the defendant Danis objected to the restitution amount for the first time on appeal.

> Issues not raised below will not be considered on appeal. In *State v. Sly,* 58 Wash.App. 740, 749, 794 P.2d 1316 (1990), the defendant appealed the trial court's finding of several bases for an exceptional sentence. The appellate court refused to review the issue as to one of the bases, stating that the "absence of an objection in the court below deprived the trial court of the opportunity to make a proper record to sustain its observation." The same concern is present in the case at bar; with no objection the court had no reason to spell out the basis of the order. In any event, the record strongly suggests that the overtime was easily ascertainable.

State v. Danis, 64 Wn.App. at 822-23 (footnotes omitted).

In the same way, DSHS records are easily ascertainable. The thoroughness of their records would have been apparent to defense counsel after receipt of discovery.

The State urges this Court to deny the untimely challenge to the

restitution order.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: February 2, 2011.

Respectfully submitted:

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