

NO. 78782-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN GEORGE AND
TOMMY GEORGE,

Petitioners.

CLERK
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07/19/23 11:00
[Signature]

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE

Whether "value" for purposes of the degree of theft is determined by the amount of money received or the difference between the amount of money received and the market value of the item sold.

B. FACTS

John and Tommy George offered a truck for sale and lied about its history and condition in order to artificially inflate its value. They said they were the original owners, when they were not. They said the car had been garaged, when it had sat outside for two years. They said that it was in original condition, when they knew it had been modified. They said that it had 70,000 miles on the odometer, when they knew it had 185,000 miles.

Two detectives assigned to thwart such frauds spotted the Georges' ad and negotiated with them for the sale of the truck. The detectives ultimately purchased the truck with a \$5,500 cashier's check. The Georges were subsequently arrested and charged with attempted theft in the first degree. They were convicted as charged.

On appeal, the Georges argued that the State had failed to prove the value of the truck, or, alternatively, that the theft statute was unconstitutionally void for vagueness because it failed to require proof of actual loss to the victim. Brief of Appellant (BOA) at 1-3. The Court of Appeals rejected their argument, holding that, "[w]e do not believe the legislature intended an inquiry into the thief's net gain or the victim's net loss once the fact of a deprivation is established. ... [I]n theft by deception cases, the statute requires a different analysis. RCW 9A.56.020(b) looks only to the value of the property obtained, not the net result of the exchange." State v. George, 132 Wn. App. 654, 661, 133 P.3d 487 (2006). The court also rejected the Georges' constitutional challenges. George, 132 Wn. App. at 661-62.

The Georges filed a petition for review raising both the statutory and the constitutional questions. Pet. for Review at 1-2. This court granted review only as to the statutory construction question set forth above. Ruling Granting Review, 1/31/07.

C. ARGUMENT

WHERE AN ITEM IS DECEPTIVELY SOLD FOR A FIXED PRICE, THE "VALUE" OF THE ITEM IS THE AMOUNT OF MONEY OBTAINED IN THE DECEPTIVE SALE.

The defendants contend that, under RCW 9A.56.010(18), "value," is the difference between the value of the property given and the value of the property received. BOA at 15. They argue that otherwise a defendant may be punished for "significantly more than he took." BOA at 16. The defendants' argument should be rejected because nothing in the language of the statute supports their interpretation. In fact, cases from Washington and elsewhere show that, in a theft by deception case, the seriousness of the offense is measured by the amount of money the defendant deceptively received, not by the amount of the victim's loss.

In Washington, theft may be committed in three ways: taking, deception, or misappropriation.¹ Taking occurs by wrongfully obtaining or exercising unauthorized control over the property or services of another, with intent to deprive that person of

¹ Before 1975, theft was called "larceny" and included these three types of theft. State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993). Former RCW 9.54.090 divided larceny into grand larceny, a felony -- stealing property worth more than \$75 -- and petit larceny, a misdemeanor -- stealing less than \$75. State v. Wiley, 124 Wn.2d 679, 880 P.2d 983 (1994).

the property or services. RCW 9A.56.020(1)(a).² Theft by deception is committed by obtaining control over the property of another by color or aid of deception, with intent to deprive that person of the property. RCW 9A.56.020(1)(b).³ Misappropriation is committed by appropriating lost or misdelivered property or services of another. RCW 9A.56.020(1)(c).

Each of these ways of committing theft will fall into one of three degrees, depending on the value of the property or services illegally obtained. If the property exceeds \$1,500 in value, or if it is taken from the person of another, the crime is theft in the first degree. RCW 9A.56.030(1).

"Value" is defined in RCW 9A.56.010(18). Generally, value means the market value of goods or services obtained, RCW 9A.56.010(18)(a), but, where cash, checks or other instruments are obtained, the money, check or instrument has its face value. See RCW 9A.56.010(18)(b)(i).⁴

² "Wrongfully obtain or exert unauthorized control" is defined in RCW 9A.56.010(19).

³ "By color or aid of deception" is further defined in RCW 9A.56.010(4) and (5).

⁴ "The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied."

Value is measured differently, however, depending on the type of theft that is alleged. In a theft by deception, value is measured solely by the amount of property received by the defendant; the victim's loss is immaterial. In State v. Sargent, 2 Wn.2d 190, 97 P.2d 692 (1940), for example, the defendant deceptively sold the victim shares in a mining company. On appeal, the defendant claimed that the victim may have recouped some losses on the stock such that he may not have lost money after all. He claimed that the State must allege and prove the amount of the victim's loss. This Court disagreed, holding that "the gist of [larceny] is obtaining property from an owner by the use of false and fraudulent representations or pretenses, and whether or not the owner suffered a pecuniary loss is immaterial." Sargent, 2 Wn.2d at 193 (citing State v. Miller, 212 Mo. 73, 111 S.W. 18 (1908); and People v. Bartels, 77 Colo. 498, 238 P. 51 (1925)).

Even earlier, in In re Rudebeck, 95 Wash. 433, 163 P. 930 (1917), this Court noted that in deceptive theft prosecutions the amount of loss to the victim is not relevant:

The owner is actually defrauded when he parts with his property or money and fails to receive in exchange that for which he bargained. When the accused falsely represents to the owner that he is to receive in exchange for the money and property obtained from

him a particular thing, and instead he receives another and entirely different thing, he is, in legal contemplation, actually defrauded.

Rudebeck, 95 Wash. at 440 (italics and internal quotations omitted).

This theory makes sense because, if the entire transaction is grounded in a deception, then it cannot be said that the victim would ever have made the deal in the first place, absent the deception. The defendant is punished by society via the criminal law because he has cheated the victim; opportunities for the victim may have been lost, needs of the victim might go unmet, and there is a deterrent effect in punishing such behavior, regardless of its impact on a particular victim. Thus, the gravity of the defendant's conduct is measured by the value of money or property that changes hands. Otherwise, the victim would be left holding an item he doesn't want or need, and the burden would be shifted to the victim to mitigate his losses by attempting to sell the property that the defendant foisted upon him through fraud.

Whereas a civil suit for damages may focus only on a victim's actual loss, the crime of theft by deception is different. The victim has no obligation to mitigate damages from a theft by deception. The defendant is punished according to the overall

value of the theft. 3 Wayne R. LaFave, Substantive Criminal Law § 19.7(i)(3) at 135 (2nd ed. 2003) (citing W. Prosser & W. Keeton, Torts § 101 (5th ed.1984)).

This theory of criminal liability was best described by Judge Learned Hand who, in affirming land fraud convictions, said:

Civilly of course the action would fail without proof of damage, but that has no application to criminal liability. A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed.

United States v. Rowe, 56 F.2d 747 (2nd Cir.1932).

There is simply nothing in Washington's theft statutes, or in Washington case law, to support the Georges' argument that the "value" of property deceptively obtained must be offset by the value of the property the victim received.⁵ In other words, the victim's actual loss is not relevant to proof of "value" in a theft by deception case. The Georges' argument should be rejected.

⁵ Odometer roll-back cases have previously been prosecuted in Washington as larceny. See State v. Rentfrow, 15 Wn. App. 837, 552 P.2d 202 (1976) (equal protection clause not violated by charging larceny instead of misdemeanor statute pertaining to alteration of odometers); and State v. Waldenburg, 9 Wn. App. 529, 513 P.2d 577 (1973) (same).

Indeed, many, many state and federal courts have rejected arguments like the Georges' as applied to thefts by deception under similar facts. For example, in State v. Roche, Inc., 246 Neb. 568, 520 N.W.2d 539 (1994), a corporation deceptively sold copiers with rolled-back copy meters. The Nebraska Supreme Court affirmed, rejecting an argument identical to that made by the Georges:

...In theft by deception cases, the property obtained by the defendant and the "thing involved" are the same. The value of the property obtained or the thing involved is therefore the amount of money received by the defendant through its deceptions.

The Court of Appeals erroneously determined that the value of the thing involved was determined by subtracting the actual value of the copier received by each buyer from the total amount of money the seller received through its deception. Under that analysis, the grading would be determined by measuring the increase in value due to the deceptions-in this case, the increased value due to the turning back of the meters to give the impression of less use and wear and tear.

Roche, Inc., 520 N.W.2d at 540.

Likewise, in State v. Forshee, 588 P.2d 181 (Utah 1978), the defendant was charged with the deceptive sale of automobiles with rolled-back odometers. The court held that the State need not prove the victim's actual loss.

Defendant argues that the Smiths received a quid pro quo and that the fair market value of the

vehicle should be deducted from the money received by defendant in determining the degree of the crime.

* * *

The value of the property determines the degree of the offense and must be proved by the State. But the degree of the crime must be measured by the value of the property obtained by the defendant as a result of the deception, rather than the value of any property received by the victim.

Forshee, 588 P.2d at 184.

Similarly, in People v. Ross, 25 Cal.App.3d 190, 195, 100 Cal.Rptr. 703, 706 (1972), the defendant was charged with deceptively altering automobile odometers to inflate the vehicle's value. In rejecting an argument much like the Georges' argument, the court held:

Nor does the 'actual loss,' as the defendant asserts, determine the existence of theft or the degree thereof. If the victim is induced to part with money or property in exchange for other property fraudulently misrepresented, the crime is committed; it is not a defense that no permanent loss occurred; the victim is defrauded if he did not get what he bargained for, even though he may not have suffered a net financial loss; the victim is defrauded even though he may eventually recover the money or property taken from him.

Ross, 25 Cal.App.3d at 195, 100 Cal.Rptr. at 706.

Other state and federal courts apply the same reasoning to slightly different fact-patterns. State v. Martinez, 95 N.M. 795, 801, 626 P.2d 1292, 1298 (App.1979) (deceptive land transactions; no

offset for property obtained by victim); State v. Aurgemma, 116 R.I. 425, 429-30, 358 A.2d 46, 49-50 (1976) (contractor fails to complete home remodel; "the crime is committed at the moment the victim is fraudulently induced to part with his money or property. It is the amount of that money or the worth of that property that is pivotal, and the extent of a victim's ultimate loss is immaterial on the issue of the degree of the offense charged. ... Moreover, even proof that a victim has suffered no loss whatsoever or that the money fraudulently obtained has been repaid will not suffice as a defense...");⁶ LaMoyne v. The State, 53 Tex.Crim. 221, 228-29, 111 S.W. 950 (1908) (swindling prosecution for obtaining farm implements by fraudulently promising that seller would receive goods for payment but buyer could not deliver; value measured by the value of the farm implements deceptively obtained). See also United States v. Kucik, 844 F.2d 493 (7th Cir.1988); Clemons v. United States, 400 A.2d 1048 (D.C.App.1979); Nelson v. United States, 227 F.2d 21 (D.C.Cir.1955).

⁶ The court cited several cases in support of its holding. See State v. Mills, 96 Ariz. 377, 379-82, 396 P.2d 5, 7-8 (1964); Stewart v. State, 256 Ark. 619, 509 S.W.2d 298 (1974); People v. Brady, 275 Cal.App.2d 984, 994-95, 80 Cal.Rptr. 418, 424 (1969).

The evidence in this case showed plainly that "by color or aid of deception" (misrepresentations by the defendants regarding the truck's mileage and previous ownership), the Georges attempted "to obtain control over the property . . . of another" (Detective O'Donnell's \$5,500), "with intent to deprive him . . . of such property" (Tommy George accepted the \$5,500 money order from Detective O'Donnell and returned a certificate of sale to finalize the transaction). The Georges, not the undercover detectives, created their deceptive claims and set the value of their attempted theft at the advertised price of \$5,500. The efforts of the Georges to sell the truck by misrepresenting the mileage and previous ownership clearly fit within the plain meaning of RCW 9A.56.020(1)(b), which prohibits the use of such deception but does not require proof of actual loss. Of course, this amount exceeds the \$1,500 jurisdictional amount for first degree theft. RCW 9A.56.030(1)(a).

The Georges claim that this interpretation conflicts with State v. Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1988). They are mistaken. Lee rented a house to a couple who had been burned out of their own house. The Red Cross, which was helping the couple, paid Lee \$700 in rent. But Lee had no right to rent the house in the first place because he did not own it -- Hanson did.

Lee was charged with theft, but Hanson was not named as a victim; instead, the couple and the Red Cross were named as victims.

Under these unique facts, this Court said that "a loss to the victim is key in assessing whether an unlawful taking has occurred." But this language, as applied to the real victim -- Hanson -- was dictum. The court's holding was not that there was no theft because the owner of the rental property suffered no loss. Instead, the Court held that the prosecution failed to establish second degree theft because it presented no evidence that the defendant wrongfully obtained property from the owner -- Hanson -- or any other potential victim worth more than \$250. Neither the couple nor the Red Cross was harmed.

In short, this Court in Lee simply held that the alleged victims received what they bargained for, so there had been no taking, and thus no theft had been committed. That holding is distinct from an argument that proof of a real victim's actual loss is part of proof of value in a theft by deception. In fact, this Court distinguished a Lee - type argument in Sargent:

It will be noted ... that a crime is not committed if the person from whom the property is obtained gets in exchange what he bargained for. It is contended that the information shows on its face that Marion got exactly what he bargained for; that is, 50,000 shares

of Globe Silver stock, and, therefore, that the information does not state a crime. We cannot agree with this contention.

Sargent, 2 Wn.2d at 194-95. Thus, in Sargent this Court held that no offset for victim loss is required in a larceny prosecution; at the same time, the Court rejected an argument that the victim received what he bargained for. The issues are distinct; there is no conflict between Lee and the Court of Appeals' holding in this case.

In essence, the defendants simply disagree with the nature of the offense created by the legislature. But their argument misunderstands the crime of theft by deception. Further, when they lied about the truck's mileage and previous ownership and general condition, the Georges were not only attempting to induce buyers to purchase the truck at that price, but they were also inducing the buyers to purchase a truck that the buyers might not otherwise have purchased. Thus, the gravity of the theft is best measured by the amount unlawfully obtained. Under long-standing Washington law, a thief deceptively selling automobiles will generally be guilty of theft in the first degree, whereas a thief conning people into purchasing lesser goods will be guilty of lesser degrees of theft.

The plain language of the theft statutes does not support the Georges' argument, and long-standing authority refutes it. This

court should hold that the amount of the victim's loss is immaterial to a theft by deception.

D. CONCLUSION

For the foregoing reasons, the Georges' convictions for attempted theft in the first degree should be affirmed.

DATED this 28th day of March, 2007.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jeffrey Smith, the attorney for the Petitioners, at 323 Queen Anne Ave N #102, Seattle, WA, 98109-4544, containing a copy of the Supplemental Brief of Respondent, in State v. John and Tommy George, Cause No. 78782-4, in the Supreme Court for the State of Washington.

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



Name
Done in Seattle, Washington

3/28/07
Date 3/28/07