

No. 92060-5

NO. 45796-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD PORTER, JR.,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

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SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT IN REPLY

BECAUSE IT DID NOT INCLUDE AN ESSENTIAL ELEMENT OF POSSESSION OF A STOLEN VEHICLE, THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT

The State concedes that, under this court's decision in State v. Satterthwaite, \_\_\_ Wn.2d \_\_\_, 344 P.3d 738 (2015), "the Information in this case is deficient because it did not include to 'withhold or appropriate.'" Suppl. Br. of Resp't at 2. Rather than concede that Porter's conviction must be reversed, however, the State disagrees with Satterthwaite's reasoning, contending Satterthwaite is inconsistent with our supreme court's decision State v. Johnson, 180 Wn.2d 295, 325 P.3d 135 (2014). Suppl. Br. of Resp't at 2-3. The State is incorrect.

In Johnson, the defendant argued the information charging him with unlawful imprisonment was deficient because it did not provide a definition of the word "restrain." 180 Wn.2d at 301-02. "Restrain" was defined under the pertinent statute as restricting a person's movements without consent and without legal authority in a manner that interferes substantially with his or her liberty. Id. at 301. Johnson contended that under this definition "the State must prove that he knew that he lacked legal authority to restrain the victim," and thus the information should have stated he restrained the alleged victim "without legal authority." Id. Our supreme court disagreed, confirming that the charging document need only contain the essential

elements of the charged crime, not definitions of those essential elements.  
Id. at 302-03.

Unlike Johnson, Satterthwaite was not about defining an essential element in possession of stolen property crimes. Instead, this court considered whether “withhold or appropriate” *is* an essential element of all possession of stolen property crimes, and answered yes. Satterthwaite, 344 P.3d at 740. As this court thoughtfully explained,

It is the withholding or appropriation of a stolen item of property to the use of someone other than the owner that ultimately makes the possession illegal, thus differentiating between a person attempting to return known stolen property and a person choosing to keep, use, or dispose of known stolen property.

Id. Thus, “‘withhold or appropriate’ is a term whose specification is necessary to establish the very illegality of the behavior charged in chapter 9A.56 RCW’s possession of stolen property offenses, *rather than a term that defines and limits the elements’ scope.*” Id. (emphasis added). Contrary to the State’s argument, Satterthwaite’s holding that “withhold or appropriate” is an essential element of possession of stolen property crimes—not a definition of an essential element—amply distinguishes Satterthwaite from Johnson. See Suppl. Br. of Resp’t at 3.

Lastly, even if this court were inclined to entertain a challenge to its recent controlling precedent, the State bears the burden of making a “clear

showing” that Satterthwaite is both “incorrect and harmful.” In re Rights to Waters of Stranger Creek, 77 Wn.2d 649,653, 466 P.2d 508 (1970). The State has made no attempt to do so. This court should accordingly follow its well reasoned decision in Satterthwaite and reverse.

B. CONCLUSION

The information was constitutionally deficient under Satterthwaite, which requires reversal.

DATED this 6<sup>th</sup> day of May, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'K March', written over a horizontal line.

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**May 06, 2015 - 3:38 PM**

**Transmittal Letter**

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