

SUPREME COURT NO. 93829-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSHUA BARNES,

Respondent.

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

The Honorable T. W. Small, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE STATEMENTS

In 2007, the Washington Legislature passed the “Elizabeth Nowak – Washington auto theft prevention act,” a bill expressly designed to reverse the trend of increasing automobile thefts in Washington and which created the crime of Theft of a Motor Vehicle. In enacting this legislation, no mention was made of lawnmowers or any other lawn care equipment.

1. Given the legislature’s target of automobile theft when enacting the Theft of a Motor Vehicle statute, did the Superior Court and Court of Appeals correctly rule that it does not cover a stolen lawnmower?

2. Assuming the statutory scheme is ambiguous, does the rule of lenity require that Barnes receive the benefit of any doubt?

B. STATEMENT OF THE CASE

In June of 2015, the Chelan County Sheriff’s Department established probable cause to arrest Joshua Barnes on charges of Theft in the Second Degree and Criminal Trespass in the Second Degree, and Barnes was booked into jail. CP 22.

The charges were based on the report of Judy Fraker, who witnessed Barnes – accompanied by a female – arrive at her

property in a pickup truck, start her Sears lawnmower, and drive the riding mower up a ramp and into the back of the pickup truck. CP 21. When Fraker confronted Barnes, he said he was picking up the lawnmower at the request of "John." Fraker said she did not believe him and ordered him to put the mower back, which he did. CP 21. As Barnes drove away in the pickup, Fraker called 911, provided the truck's license plate number, and described Barnes and the female. CP 21. Deputies located Barnes two days later, and he admitted his attempt to steal the lawnmower. CP 21.

Although the only theft charge at booking was Theft in the Second Degree, the Chelan County Prosecutor's Office charged Barnes with Theft of a Motor Vehicle. CP 2. Defense counsel filed a motion to dismiss that charge under State Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), arguing the evidence was insufficient as a matter of law because a lawnmower does not qualify as a "motor vehicle" under the relevant criminal statutes. CP 5-17. The State opposed the motion. CP 24-26.

The Honorable T.W. Small heard argument from both parties. RP 2-22. Judge Small ruled a lawnmower is not a motor vehicle for purposes of Theft of a Motor Vehicle and granted the defense motion. RP 22-29; CP 37. A unanimous Court of Appeals affirmed

Judge Small's ruling. State v. Barnes, 196 Wn. App. 261, 382 P.3d 729 (2016). This Court subsequently granted the State's Petition for Review.

C. SUPPLEMENTAL ARGUMENT

THEFT OF A LAWNMOWER IS NOT THEFT OF A "MOTOR VEHICLE" UNDER RCW 9A.56.065.

This Court reviews a trial court's dismissal of a criminal charge under Knapstad de novo. State v. Montano, 169 Wn.2d 872, 876, 239 P.3d 360 (2010). Similarly, the de novo standard of review applies to issues of statutory interpretation. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). When interpreting statutes, this Court's "fundamental objective is to determine and give effect to the intent of the legislature." State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012).

"The surest indication of legislative intent is the language enacted by the legislature," and if the language is plain on its face, that language is given effect. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). "In determining the plain meaning of a provision, we look to the text of the statutory provision in question, as well as 'the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.'" Id.

(quoting State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). Even the apparent plain meaning of a provision must give way, however, if “some other section of the act expands or restricts its meaning.” State v. McDougal, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992) (quoting 2A N. Singer, Statutory Construction § 46.01 (4th ed. 1984)).

Moreover, “[w]e avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences.” State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). “The spirit or purpose of an enactment should prevail over the express but inept wording.” Id. (quoting State v. Day, 96 Wn.2d 646, 648, 638 P.2d 546 (1981)); accord State v. Evans Campaign Committee, 86 Wn.2d 503, 508, 546 P.2d 75 (1976). Stated another way, “Occasionally, . . . the literal expression of legislation may be inconsistent with the obvious objectives or policy behind it, and in such circumstances the spirit or intention of the law must prevail over the letter of the law.” State v. Brasel, 28 Wn. App. 303, 309, 623 P.2d 696 (1981).

If, after the above analysis, a statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and courts may look to the statute’s legislative history and other circumstances behind its enactment to determine legislative intent. Ervin, 169

Wn.2d at 820. Under the rule of lenity, ambiguous criminal statutes must be construed in the accused's favor. Jacobs, 154 Wn.2d at 603; see also United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (“[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.”).

In 2007, the Legislature enacted RCW 9A.56.065, which provides:

- (1) A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.
- (2) Theft of a motor vehicle is a class B felony.

This statute was enacted as part of the “Elizabeth Nowak – Washington auto theft prevention act” (hereinafter “Auto Theft Prevention Act”). See Laws of 2007 ch. 199, § 29, eff. July 22, 2007; RP 5. Elizabeth Nowak was a Seattle Police Officer killed in an accident involving the driver of a stolen car. RP 5.

Among other things, the Auto Theft Prevention Act removed crimes involving theft of a motor vehicle and possession of a stolen motor vehicle from the more general theft statutes and created separate statutory provisions to cover these crimes, made these

offenses more serious (class B felonies regardless of vehicle value), and tripled scoring for prior motor-vehicle related offenses. See Laws of 2007 ch. 199, at §§ 1-8; see also Final Bill Report, E3SHB, at 1, 3-7 (2007) (describing purpose of act as “combating auto theft” and summarizing changes in Washington law). The Auto Theft Prevention Act also created a “Statewide Auto Prevention Authority” to “study motor vehicle theft in Washington.” Laws of 2007 ch. 199, at §§ 19-28; Final Bill Report, at 3, 5-6.

RCW 9A.56.065 employs the term “motor vehicle,” but does not define it. RCW 9A.04.110, the definitional section of the criminal code, indicates that “vehicle” means “a ‘motor vehicle’ as defined in the vehicle and traffic laws”. Therefore, the applicable definition is found in Title 46 RCW, which has defined “motor vehicle” for decades and currently defines that term as follows:

“Motor Vehicle” means every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. “Motor Vehicle” includes a neighborhood electric vehicle as defined in RCW 46.04.357.¹ “Motor Vehicle” includes a medium-speed

¹ RCW 46.04.357 provides, “‘Neighborhood electric vehicle’ means a self-propelled, electrically powered four-wheeled motor vehicle whose speed attainable in one mile is more than twenty miles per hour and not more than twenty-five miles per hour and conforms to federal regulations under Title 49 C.F.R. Part 571.500.”

electric vehicle as defined in RCW 46.04.295.² An electric personal assistive mobility device is not considered a motor vehicle.³ A power wheelchair is not considered a motor vehicle. A golf cart is not considered a motor vehicle, except for the purposes of chapter 46.61 RCW.⁴

RCW 46.04.320.

The word “vehicle” also is defined by statute:

“Vehicle” includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles. “Vehicle” does not include power wheelchairs or devices other than bicycles moved by human or animal power or used exclusively upon stationary rails or tracks. mopeds are not considered vehicles or motor vehicles for the purposes of chapter 46.70 RCW. Bicycles are not considered vehicles for the purposes of chapter 46.12, 46.16A, or 46.70 RCW or RCW 82.12.045. Electric personal assistive mobility devices are not considered vehicles or motor vehicles for the purposes of chapter 46.12, 46.16A, 46.29, 46.37, or 46.70 RCW. A golf cart is not considered a vehicle, except for the purposes of chapter 46.61 RCW.

² RCW 46.04.295 provides, “‘Medium-speed electric vehicle’ means a self-propelled, electrically powered four-wheeled motor vehicle, equipped with a roll cage or crush-proof body design, whose speed attainable in one mile is more than twenty-five miles per hour but not more than thirty-five miles per hour and otherwise meets or exceeds the federal regulations set forth in 49 C.F.R. Sec. 571.500.”

³ An example of an “electric personal assistive mobility device” is a Segway personal transportation vehicle. See RCW 46.04.1695 (defining term); www.segway.com.

⁴ Chapter 46.61, entitled “Rules of the Road,” includes driving under the influence.

RCW 46.04.670.

These statutes make clear that the legislature did not intend the definition of “motor vehicle” to encompass every conceivable vehicle with a motor. Where questions have been raised regarding certain devices, the legislature has excluded them entirely or partially depending on the circumstances. These include electrical personal assistive mobility devices, power wheelchairs, and golf carts.

As Judge Small and the Court of Appeals recognized, solely examining the literal language of RCW 46.04.320 and 46.04.670, a power lawnmower (whether a self-propelled walk-behind mower or a riding mower) arguably falls within the definition of “motor vehicle” because it is self-propelled, capable of being moved upon a highway (albeit quite awkwardly), and may transport a person or property. RP 25-28; Barnes, 196 Wn. App. at 269.

But these courts also recognized that slavishly following the statutes’ literal language quickly leads to unintended and absurd results. Not only does the broad language ensnare lawnmowing equipment, myriad other items also fall within its reach, including remote-controlled toy cargo trucks, motorized skateboards, a child’s push scooter with electric motor attachment, a motorized unicycle, and any motorized child’s riding toy. Even a Roomba – a self-

propelled robotic vacuum cleaner – qualifies under RCW 46.04.320's definition of "motor vehicle" when topped with a small property item or household pet. Barnes, 196 Wn. App. at 271.

These courts held that the statutory scheme as a whole, including the Legislature's findings when adopting RCW 9A.56.065, demonstrate that a lawnmower was never intended to qualify as a "motor vehicle" for purposes of Theft of a Motor Vehicle. RP 25-27; Barnes, 196 Wn. App. at 271. The Court of Appeals specifically identified the legislative findings as important to its decision in Barnes's favor. Barnes, 196 Wn. App. at 265.

Focus on these findings was proper. Even if RCW 9A.56.065 is not ambiguous, it is still appropriate (indeed necessary) to interpret its plain language in the context of the entire legislation. Ervin, 169 Wn.2d at 820; McDougal, 120 Wn.2d at 351. As part of the legislature's 2007 enactment of the Auto Theft Prevention Act, the legislature enacted several express findings, which are found in subsection (1) of the legislation. It also enacted language in subsection (2), which became the language codified in RCW 9A.56.065. See Laws of 2007 ch. 199, §§ 1-2.

Subsection (1) reveals that the Washington Legislature enacted RCW 9A.56.065 to combat the growing number of

automobile thefts on the west coast generally and Washington specifically:

Sec. 1. (1) The legislature finds that:

(a) Automobiles are an essential part of our everyday lives. The west coast is the only region of the United States with an increase of over three percent in motor vehicle thefts over the last several years. The family car is a priority of most individuals and families. The family car is typically the second largest investment a person has next to the home, so when a car is stolen, it causes a significant loss and inconvenience to people, imposes financial hardship, and negatively impacts their work, school, and personal activities. Appropriate and meaningful penalties that are proportionate to the crime committed must be imposed on those who steal motor vehicles;

(b) In Washington, more than one car is stolen every eleven minutes, one hundred thirty-eight cars are stolen every day, someone's car has a one in one hundred seventy-nine chance of being stolen, and more vehicles were stolen in 2005 than in any other previous year. Since 1994, auto theft has increased over fifty-five percent, while other property crimes like burglary are on the decline or holding steady. The national crime insurance bureau reports that Seattle and Tacoma ranked in the top ten places for the most auto thefts, ninth and tenth respectively, in 2004. In 2005, over fifty thousand auto thefts were reported costing Washington citizens more than three hundred twenty-five million dollars in higher insurance rates and lost vehicles. Nearly eighty percent of these crimes occurred in the central Puget Sound region consisting of the heavily populated areas of King, Pierce, and Snohomish counties;

(c) Law enforcement has determined that auto theft, along with all the grief it causes the immediate victims,

is linked more and more to offenders engaged in other crimes. Many stolen vehicles are used by criminals involved in such crimes as robbery, burglary and assault. In addition, many people who are stopped in stolen vehicles are found to possess the personal identification of other persons, or to possess methamphetamine, precursors to methamphetamine, or equipment used to cook methamphetamine;

(d) Juveniles account for over half the reported auto thefts with many of these thefts being their first criminal offense. It is critical that they, along with first time adult offenders, are appropriately punished for their crimes. However, it is also important that first time offenders who qualify receive appropriate counseling treatment for associated problems that may have contributed to the commission of the crime, such as drugs, alcohol, and anger management; and

(e) A coordinated and concentrated enforcement mechanism is critical to an effective statewide offensive against motor vehicle theft. Such a system provides for better communications between and among law enforcement agencies, more efficient implementation of efforts to discover, track, and arrest auto thieves, quicker recovery, and the return of stolen vehicles, saving millions of dollars in potential loss to victims and their insurers.

(2) It is the intent of this act to deter motor vehicle theft through a statewide cooperative effort by combating motor vehicle theft through tough laws, supporting law enforcement activities, improving enforcement and administration, effective prosecution, public awareness, and meaningful treatment for first time offenders where appropriate. It is also the intent of the legislature to ensure that adequate funding is provided to implement this act in order for real, observable reductions in the number of auto thefts in Washington state.

Laws of 2007 ch. 199 § 1. These findings address efforts to combat automobile theft and to establish appropriate consequences for those who steal automobiles. The legislature uses the terms “car,” “auto,” “automobile,” “motor vehicle,” and “vehicle” interchangeably throughout. Nowhere does the legislature refer to lawnmowers or any other type of lawn care equipment.

Subsection (1) of this legislation, although uncodified, is still Washington law. See State v. Hennings, 129 Wn.2d 512, 520-521, 919 P.2d 580 (1996) (relying on uncodified section of legislation to determine retroactive application of codified section). And this uncodified section confirms that RCW 9A.56.065 is focused on, and intended to stop, automobile thieves.

This is not to say the crime is limited to theft of automobiles as that word is traditionally defined (i.e., cars, trucks, vans), since the legislature could have simply used the word “automobile” in RCW 9A.56.065 had that been the intent. Logically, in light of subsection (1) of the 2007 legislation, the statute likely also covers the theft of motor vehicles similar to automobiles in nature and use, including motorcycles, scooters, and perhaps even mopeds, since any of these vehicles may serve the same role as an automobile. But the exclusion of such items as Segway personal transportation

vehicles, power wheelchairs, and golf carts informs us that the Legislature did not intend to stray far from automobiles in establishing the statute's reach.

It seems particularly notable that golf carts are excluded from the definition of "motor vehicle" for purposes of RCW 9A.56.065. Since golf carts (which seem far more like automobiles than lawnmowers) are not considered motor vehicles for purposes of theft, the legislature would not have intended that machines used to cut grass should be. Nor is it likely the legislature envisioned that anyone would ever argue otherwise, which explains why it could not have anticipated the need to expressly exclude lawnmowers from the definition of "motor vehicle."

Lawnmowers simply stray too far from the express purposes behind RCW 9A.56.065. Returning to the language of subsection (1), unlike automobiles, lawnmowers are not "an essential part of our everyday lives," "a priority of most individuals and families," "typically the second largest investment a person has next to the home," or subsequently "used by criminals involved in such crimes as robbery, burglary and assault." Moreover, there is no evidence that "many people who are stopped in stolen [lawnmowers] are found to possess the personal identification of other persons, or to

possess methamphetamine, precursors to methamphetamine, or equipment used to cook methamphetamine.”

For RCW 9A.56.065, the definition of “motor vehicle” must be assessed in light of the statute’s express enacted purpose, which is to combat automobile theft. That purpose is not achieved by convicting lawnmower thieves of a class B felony. Instead, the legislature intended that those who steal lawn and garden equipment – whether a trimmer, an edger, a leaf blower, or even a lawnmower – be prosecuted under the general theft statutes based on the value of the property stolen. As the Court of Appeals correctly noted, a finding that RCW 9A.56.065 does not apply to lawnmowers does not mean Barnes faces no prosecution for his attempt to steal the mower. Rather, he still faces a charge of Theft in the Second Degree, a class C felony.⁵ Barnes, 196 Wn. App. at 265.

As previously discussed, statutes must be interpreted to avoid

⁵ In its petition for review, the State criticizes the Court of Appeals’ analysis because it also would exclude from RCW 9A.56.065 commercial tractors and other equipment valuable to those in the farming industry. Petition, at 5-6. Like lawnmowers, however, these items are protected under the general theft statutes. See State v. Hawkins, 181 Wn.2d 170, 173-177, 332 P.3d 408 (2014) (prosecution for possession of stolen farm equipment, including a tractor, under general statute for possessing stolen property). Any person stealing or possessing such equipment valued at over \$5,000.00 is already subject to conviction for a class B felony. See RCW 9A.56.030; RCW 9A.56.150. Even if farm equipment arguably deserves some even greater protection, the 2007 Auto Theft Prevention Act was never intended to provide it.

absurd results. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008) (citing Tingey v. Haisch, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007)); McDougal, 120 Wn.2d at 351; Elgin, 118 Wn.2d at 555. Since RCW 9A.56.065 is aimed at the uniquely troubling problem of automobile theft, it is absurd to punish lawnmower thieves similarly. Moreover, if the legislature intended to treat all thefts of lawnmowers as class B felonies, they also intended to treat thefts of other objects falling within the general definition of “motor vehicle” similarly, including motorized skateboards and children’s battery-powered toy vehicles. This also seems quite absurd.

Ultimately, the Court of Appeals recognized that it would be improper – and thwart express legislative intent – to conclude that a lawnmower is a “motor vehicle” under RCW 9A.56.065 even though it falls within the literal definition of that term.⁶

This Court’s prior decisions support the Court of Appeals decision. In State v. Day, 96 Wn.2d 646, 638 P.2d 546 (1981), the intoxicated defendant drove a pickup truck in a field owned by his

⁶ The Court of Appeals also recognized such a literal interpretation would conflict with RCW 9A.04.020(1)(d), which identifies as a purpose of the criminal definitional statutes, “[t]o differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.” Punishing theft of a lawnmower the same as theft of the family car, and exposing a lawnmower thief to a sentence potentially twice as long as that under the standard theft statutes, undermines this purpose. Barnes, 196 Wn. App. at 274-275

parents. He was charged under a statute for driving while intoxicated that made it “unlawful for any person who is under the influence . . . to drive . . . a vehicle within this state.” Former RCW 46.61.506 (1979) (emphasis added). A related statute indicated this prohibition applied “upon highways and elsewhere throughout the state.” RCW 46.61.005 (emphasis added). Day’s actions literally fell within the reach of these provisions, since there was no requirement that an offender drive on a public road. Nonetheless, a majority of the Court – recognizing that the clear legislative purpose behind the statutes was protection of the traveling public from drunk drivers – held that Day’s conduct was not a crime under the scheme. Day, 96 Wn.2d at 647-650. In doing so, this Court reiterated the principle quoted earlier in this brief, “We should avoid a literal reading [of a statutory scheme] resulting in unlikely, absurd or strained consequences. The spirit or purpose of an enactment should prevail over the express but inept wording.” Id. at 648 (citing State v. Burke, 92 Wn.2d 474, 478, 598 P.2d 395 (1979); Alderwood Water Dist. V. Pope & Talbot, Inc., 62 Wn.2d 319, 382 P.2d 639 (1963)).

This Court applied the same approach in State v. Elgin. A literal reading of former RCW 46.61.515(2), which addressed DWI sentences for repeat offenders, authorized a sentence of 1½ years

for a second or subsequent conviction, effectively converting the crime to a felony (since the authorized sentence exceeded one year). Elgin, 118 Wn.2d at 554-555. Recognizing its paramount duty to determine and give effect to legislative intent, and examining in particular the legislative history behind the statute, this Court declined to follow the statute's literal language. Id. at 555-556. Instead, attributing the problem to "inartful drafting," this Court provided a statutory interpretation that best reflected legislative intent and maintained the offense as a misdemeanor. Id. at 558.

Avoiding unintended and silly results from the literal language of statutes is nothing new. "That the spirit or the purpose of legislation should prevail over the express but inept language is an ancient adage of the law." Alderwood, 62 Wn.2d at 321. As this Court indicated more than 50 years ago:

* * * intent of statutes is more to be regarded and pursued than the precise letter of them, for oftentimes things, which are within the words of statutes, are out of the purview of them, which purview extends no further than the intent of the makers of the act, and the best way to construe an act of Parliament is according to the intent rather than according to the words * * *

Alderwood, 62 Wn.2d at 321 (quoting Evston v. Studd (England, 1574), 2 Plowden 460, 464). This sound approach ensures compliance with this Court's fundamental objective to determine and

give effect to legislative intent and it dictates the outcome in Barnes's case.

Finally, the Court of Appeals did not employ the rule of lenity because it found no unresolved ambiguity warranting its use. Barnes, 196 Wn. App. at 276. A statute is ambiguous if subject to more than one reasonable interpretation. State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). Barnes has undoubtedly offered a reasonable interpretation. Assuming this Court finds the scheme ambiguous, that finding would trigger review of the same legislative intent already properly reviewable (ambiguity or not) in uncodified section (1) of the 2007 legislation. And it would trigger review of the Final Bill Report for the Auto Theft Prevention Act, including its self-described purpose of "combating auto theft." See Ervin, 169 Wn.2d at 820. These statements of intent and history certainly resolve any ambiguity concerning whether RCW 9A.56.065 applies to lawnmowers. Moreover, under the rule of lenity, Barnes would receive the benefit of any lingering doubt. Jacobs, 154 Wn.2d at 603.

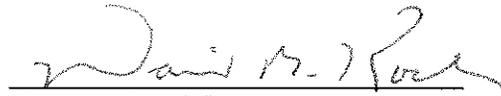
D. CONCLUSION

Lawnmowers do not fall within the reach of the 2007 Auto Theft Prevention Act, which was intended to reverse a growing trend in auto thefts on the west coast. As Judge Small and the Court of Appeals correctly and unanimously decided, Barnes cannot be tried for Theft of a Motor Vehicle. This Court should affirm dismissal of the charge.

DATED this 13th day of April, 2017.

Respectfully submitted,

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