

FILED
SUPREME COURT
STATE OF WASHINGTON
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Supreme Court Case No.: 95105-5

SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Gary Bruce Farnworth,
Petitioner

PETITION FROM THE COURT OF APPEALS, DIVISION III

SUPPLEMENTAL BRIEF OF THE APPELLANT

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I. IDENTITY OF PETITIONER

COMES NOW, Petitioner, Gary B. Farnworth, II, by and through his attorney of record, Douglas D. Phelps, hereby files this supplemental brief in response to the State's cross-petition. The brief is to address the State's contention that the prosecution should continue to have discretion to aggregate felony thefts from one victim into distinct charging periods when it reduces the number of felony charges.

II. STATEMENT OF THE CASE

Defendant, Gary B. Farnworth, II, was charged with three (3) counts of first degree theft for defrauding the Washington State Department of Labor and Industries (L&I) between 2010 and 2012. CP 1-2; 462-465. Each count alleged thefts over a period of time, but all alleged based upon the same course of conduct or a common scheme or plan. A second amended information was filed by the State during the trial on 6/5/2015 (CP 462-465)

III. ARGUMENT

The RCW 9A.56.010(21)(c) addresses aggregating: "Whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions

are one part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum value of all transactions should be the value considered in determining the degree of theft involved.”

Any pay amount greater than \$750.00 would still constitute the lesser offense of third degree theft. An amount greater than \$750.00 does not require the charging of a greater offense of second degree theft. Given the language of the statute, it would appear that the legislature intended that all amounts be aggregated where there was a common scheme or plan. In accordance with RCW 9A.56.010(21)(c), the legislature intended that multiple offenses greater than \$750.00 involving a single criminal episode or a common scheme be aggregated into one count.

The interpretation of the statute in this manner would be consistent with common law aggregation of a series of thefts, so long as the accused took the property from the same owner and at the same place and the theft resulted in a single criminal impulse pursuant to a general course larcenous scheme. *State v. Garman*, 100 Wn. App. 307, 314-15, 984 P. 2d 453 (1999); *State v. Allerton*, 81 Wn. App. 470, 472, 915 P. 2d 535 (1996)

Additionally, *State v. Barton*, 28 Wn. App. 690, 694, 626 P. 2d 509, 512 (Div I, 1981) held that charging five second degree thefts as a single first degree theft was consistent with common law. RCW 9A.56.010(21)(c) is not unclear because anytime an allegation is greater than \$750.00, it may be charged as theft

in the third degree or the second degree. The legislature recognizing that a lesser included crime to second degree theft would be third degree theft required aggregation in one count in all cases chargeable as third degree theft.

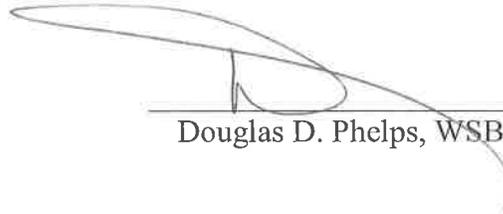
The application of the statute in such a manner avoids the conflicts of interpretation of RCW 9A.56.010(21)(c). It gives meaning to the language of the statute and the cases of *State v. Linden*, 171 Wash 92, 17 P. 2d 635 (Wash 1932) and *State v. Barton*, 28 Wn. App. 690, 626 P. 2d 509 (Div. I, 1981) It also is consistent with the aggregation at common law in cases where the accused took property from the same owner and same place and from a single crime impulse pursuant to a general larcenous scheme. *State v. Garman*, 100 Wn. App. 307, 314-15, 984 P. 2d 453 (1999); *State v. Allerton*, 81 Wn. App. 470, 472, 915 P. 2d 535 (1996); *State v. Vining*, 2 Wn. App. 802, 808-89, 472 P. 2d 564 (1970)

The legislature intended that multiple amounts be aggregated, and any other interpretation is contrary to the clear language of the statute. It is important in this case to remember that the State amended the charges during the trial to allege that the crimes were based upon a common scheme or plan. Alternatively, the statute is ambiguous and the court must apply the rule of lenity in interpreting the statute to benefit the criminal defendant. *City of Seattle v. Winebrenner*, 167 Wn. 2d. 451, 462, 219 P. 3d 686, 991 (Wash 2009).

VI. CONCLUSION

The legislature in RCW 9A.56.010(21)(c) clearly intended where there were any series of transactions that constitute theft in the third degree because of value... then the transactions may be aggregated in one count and the sum of all said transactions shall be the value considered in determining the degree of theft involved.

Respectfully submitted this 13 day of July, 2018.



Douglas D. Phelps, WSBA #22620

PHELPS & ASSOCIATES, P.S.

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