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Division III
State of Washington
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No. 97283-4

NO. 35530-6-III

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JULIA ELIZABETH TUCKER,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

1. Julia Elizabeth Tucker’s conviction for “motor vehicle” theft does not comport with the state of the law and the trial court’s failure to arrest judgment is in error.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Does the Supreme Court decision in *State v. Barnes*, 189 Wn.2d 992 (2017) require reversal of Ms. Tucker’s conviction for “motor vehicle” theft and dismissal of the charge?

STATEMENT OF THE CASE

In February 2016 a cabin owned by Niel Nielsen located at 101 Sawmill Flats Road in Kittitas County was entered by Ms. Tucker and Imra Vanwolvelaere. (RP 62, ll. 19-23; RP 174, ll. 22-23; RP 184, ll. 8-11; RP 185, ll. 5-11)

Mr. Nielsen was not acquainted with either Ms. Tucker or Mr. Vanwolvelaere. He learned that deputies had discovered a broken window

at his cabin. He went to the cabin and noticed that an X-box, snowmobile helmets, snow boots, various items of clothing, and a snowmobile were missing. (RP 67, ll. 1-3; RP 68, ll. 4-8; RP 69, ll. 1-11; RP 109, ll. 10-12; RP 111, ll. 3-15)

Patrick Daley and Steven Choi, who both work at the Summit at Snoqualmie Pass, observed a 2001 Summit 800 snowmobile sitting outside the security office. The snowmobile taken from Mr. Nielsen's property was a 2001 Summit 800 valued at \$2,000.00. (RP 71, ll. 13-25; RP 72, ll. 5-6; RP 86, ll. 5-6; ll. 17-25; RP 97, ll. 14-15)

Mr. Daley and Mr. Choi saw a male and female arrive. They loaded the snowmobile onto a pickup (PU). Mr. Choi wrote down the license plate number of the PU. He later provided it to a Kittitas County Sheriff's Deputy. (RP 87, ll. 11-24; RP 101, ll. 1-2)

The key to the snowmobile was found in the PU. Deputy Foster later located the snowmobile. (RP 123, ll. 1-5; RP 124, ll. 15-23)

Ms. Tucker advised Deputy Foster that she stayed at Mr. Nielsen's cabin to warm up, shower and take a nap. She admitted she took the snowmobile. (RP 125, ll. 13-23; RP 128, ll. 16-19)

Mr. Vanwovelaere stated that he and Ms. Tucker were caught in a snow storm late at night. They had gone to the Stampede Pass area to visit

a friend. He was not at home when they arrived. (RP 177, ll. 4-19; RP 179, ll. 2-6)

Patrick O'Connor, a next-door neighbor of Mr. Nielsen's, knows Mr. Vanwolveaere. John Gardowski, another neighbor, and a friend of Mr. O'Connor's, had contact with Ms. Tucker and Mr. Vanwolveaere in February 2016. (RP 219, l. 23 to RP 220, l. 1; RP 220, ll. 10-11; RP 224, ll. 1-13; RP 225, ll. 10-21; RP 226, ll. 7-11)

An Information was filed on April 4, 2016 charging Ms. Tucker with residential burglary, second degree theft, "motor vehicle" theft and third degree malicious mischief. (CP 1)

Multiple continuances were granted. Ms. Tucker also signed time-for-trial waivers. A jury trial commenced on April 18, 2017. (CP 5; CP 11; CP 12; CP 13; CP 18; CP 19; CP 22; CP 26; CP 28; CP 30; CP 31; CP 33; CP 34)

The jury determined that Ms. Tucker was guilty of criminal trespass first degree (a lesser included offense of residential burglary) and "motor vehicle" theft. They could not reach agreement as to second degree theft. A mistrial was later declared on that count. (CP 140; CP 141; CP 168; RP 344, ll. 4-6)

On May 1, 2017 the Court entered an order extending time to file a motion to arrest judgment. The motion to arrest judgment was filed on May

5, 2017 and related to the “motor vehicle” theft conviction. (CP 143; CP 147)

Defense counsel relied upon *State v. Barnes*, 196 Wn. App. 261 (2016) in support of the motion to arrest judgment. (RP 336, l. 19 to RP 337, l. 20)

The trial court denied the motion to arrest judgment. It ruled that a snowmobile is a “motor vehicle” because it needs to be licensed by the State. The trial court also noted that it has a motor. (RP 341, ll. 7-20)

An order dismissing second degree theft without prejudice was entered on August 11, 2017. (CP 181)

Judgment and Sentence was entered on August 18, 2017. Ms. Tucker was sentenced to twenty-six (26) months in prison for the “motor vehicle” theft and three hundred and sixty-four (364) days for first degree criminal trespassing. The sentences were ordered to run concurrently. (CP 185; CP 206)

Ms. Tucker filed her Notice of Appeal on August 21, 2017. (CP 219)

SUMMARY OF ARGUMENT

A snowmobile is not a “motor vehicle”. *State v. Barnes, supra*, controls disposition of this conviction. The conviction must be reversed and dismissed.

ARGUMENT

I. SNOWMOBILE

RCW 46.04.546 defines a snowmobile as follows:

“Snowmobile” means a self-propelled vehicle that is capable of traveling over snow or ice that (1) utilizes as its means of propulsion an endless belt tread or cleats, or any combination of these or other similar means of contact with the surface upon which it is operated, (2) is steered wholly or in part by skis or sled-type runners, and (3) is not otherwise registered as, or subject to, the motor vehicle excise tax in the state of Washington.

A snowmobile is not meant to travel on the highways of this State. It is meant to travel, similar to all-terrain vehicles, in the fields and trails which exist throughout the State. It is generally used only during the winter months.

RCW 46.10.460 provides:

It shall be lawful to drive or operate a snowmobile **across** public roadways and highways other than limited access highways when:

The crossing is made at an angle of approximately ninety degrees to the direction of the highway and at a place where no obstruction prevents a quick and safe crossing; and

The snowmobile is brought to a complete stop before entering the public roadway or highway; and

The operator of the snowmobile yields the right-of-way **to motor vehicles** using the public roadway or highway; and

The crossing is made at a place which is greater than one hundred feet from any public roadway or highway intersection.

(Emphasis supplied.)

Again, it is apparent that the Legislature determined that a snowmobile was not a “motor vehicle”. The Legislature placed restrictions on how snowmobiles were to be operated when crossing a highway.

Further support for Ms. Tucker’s position that a snowmobile is not a “motor vehicle” can be found in RCW 46.10.490(1) which provides, in part:

It is a traffic infraction for any person to operate any snowmobile:

(f) Upon the paved portion or upon the shoulder or inside bank or slope of any public roadway or highway, or upon the median of any divided highway

RCW 46.10.490(1)(f) prohibits the operation of snowmobiles on a highway.

An exception does exist for operating a snowmobile upon a public roadway or highway. The exception is set forth in RCW 46.10.470 which provides, in part:

Notwithstanding the provisions of RCW 46.10.460, it shall be lawful to operate a snowmobile upon a public roadway or highway:

Where such roadway or highway is completely covered with snow or ice and has been **closed** by the responsible governing body **to motor vehicle traffic** during the winter months

(Emphasis supplied.)

Again, it is obvious that snowmobiles are prohibited from being operated on public roads or highways. Ms. Tucker contends that the reasoning behind the prohibition is that snowmobiles are not “motor vehicles.” The Supreme Court, in *State v. Barnes, supra*, 498, determined that a riding lawnmower is not a “motor vehicle.” The determination made by the Court is equally applicable to snowmobiles.

The State argued in *Barnes* that, because a lawnmower is “self-propelled” and is “capable of being moved upon a public highway” while carrying people or cargo, it meets the definitions contained in RCW 46.04.320 and RCW 46.04.670 pertaining to “motor vehicle” and “vehicle.”

The *Barnes* court analyzed legislative history and legislative intent in determining whether or not a lawnmower constituted a “motor vehicle” for purposes of the “motor vehicle” theft statute (RCW 9A.56.065).

RCW 9A.56.065 does not contain a definition of “motor vehicle.”

Based upon the fact that the Legislature did not define “motor vehicle” for the purposes of RCW 9A.56.065, the *Barnes* court ruled, at 496, that the term is undefined. The Court used the standard dictionary definition of “motor vehicle” as the basis for determining whether or not the lawnmower was a “motor vehicle”. The Court cited WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1476 (2002) in defining “motor vehicle” as “an automotive vehicle not operated on rails; *esp[ecially]*: one with rubber tires for use on highways.”

The *Barnes* court went on to rule at 496-97:

In the context of this statute, these definitions contemplate cars and other automobiles designed for transport of people or cargo, but not machines designed for other purposes yet capable of transporting people or cargo.

The Court went on to determine, at 497, that the intent of the legislative enactment pertained to the theft of “motor vehicles” since the Legislature consistently referenced the terms “car,” “auto,” or “auto theft.”

Finally, the Court ruled at 498:

The plain meaning of “motor vehicle” is clear. The legislature has explicitly indicated it intended to focus this statute on cars and other automobiles. It was responding to increased auto theft, not increased riding lawnmower theft. Though the definition of “motor vehicle” could be more expansive in other statutes, the only statute at issue here is the theft of a motor vehicle statute. Because of this, we hold that a riding lawnmower is not a “motor vehicle” under RCW 9A.56.065.

Based upon the same reasoning Ms. Tucker contends that a snowmobile is not a “motor vehicle” under RCW 9A.56.065.

CONCLUSION

Ms. Tucker’s conviction for motor vehicle theft must be reversed and dismissed. She is then entitled to be moved from prison to the Kittitas County Jail to serve the balance of her conviction on the first degree criminal trespass conviction.

/

DATED this 28th day of December, 2017.

Respectfully submitted,

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DIVISION III

STATE OF WASHINGTON

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|-------------------------|---|-------------------------------|
| STATE OF WASHINGTON, |) | |
| |) | KITTITAS COUNTY |
| Plaintiff, |) | NO. 16 1 00082 6 |
| Respondent, |) | |
| |) | |
| v. |) | CERTIFICATE OF SERVICE |
| |) | |
| JULIA ELIZABETH TUCKER, |) | |
| |) | |
| Defendant, |) | |
| Appellant. |) | |
| _____ |) | |

I certify under penalty of perjury under the laws of the State of Washington that on this 28th day of December, 2017, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

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