

Detective O'Neill summarized the burglary at Mallinak Jewelers that occurred between 11-11-16 and 11-14-16. He also made reference to Mr. Denham's prior convictions for burglary and described Mr. Denham's interaction with Jeweler, Andy Le when he sold a 5.29 diamond to Mr. Le on 11-19-16. CP 420-21-ER; CP 418-19-ER.

Prior to the issuance of the search warrant, which was issued on 12-22-16 at 9:40am, Detective O'Neill was specifically informed by Jeweler Andy Le, his only witness to Mr. Denham's sale and possession of the 5.29-carat diamond. Andy Le unequivocally informed Detective O'Neill that Mr. Denham came into his store on 11-19-16 with the diamond. Mr. Le informed O'Neill that Mr. Denham provided him with his valid identification and documentation for the diamond. He also informed him that Mr. Denham showed him the receipt for how he obtained the diamond. Andy Le provided Detective O'Neill with a sworn written statement on a Kirkland P.D. witness form, which was completed on 12-17-16, 6 days before he procured the warrant. RP 709, 719 ER.

Detective O'Neill informed the warrant issuing Judge that there was probable cause for Mr. Denham's arrest for 1st degree trafficking in stolen property, which was referenced to the date of 11-19-16, the very same day that Mr. Denham sold the diamond to Andy Le and where he not only produced the receipt for the diamond, but also the certification for the diamond. Every jeweler who testified before Hon. Helen Halpert stated they had no reason to believe the diamond was stolen, given the GIA certification, which accompanied the diamond at the time of the sale. Four different jewelers purchased this same diamond and testified.

"The certification shows you own it," RP 255, 275, 578-79, 725-27, 1005-05-1010; RP 1003. ER.

Mr. Denham's strong belief with regard to the status of the diamonds he purchased is remarkably identical to that of each jeweler whom Detective O'Neill contacted with regards to their purchase and subsequent sale of the stolen diamond. Yet, they were not charged. Mr. Denham gave Mr. Le the diamond's GIA certificate and averred under penalty of perjury that the gem was not stolen, by writing federal statute, 28 USC 1746 on a document, Mr. Le prepared titled "Not Stolen." RP 707-08, 713, 725-27, 814-18. ER

Therefore, Mr. Denham, like every other jeweler who possessed the certification for the diamond was the diamond's owner. Mr. Denham's course of conduct is no more distinguished from the others and yet Detective O'Neill never accused any of them of trafficking in stolen property. Mr. Denham alone cannot be accused of trafficking in stolen property as each subsequent possessor of the diamond was an owner of the diamond and equally guilty of trafficking in stolen property. State v. Essex 57 Wn App. 411, 418, 788 – p-2d 589 (1990) announcing the accomplice liability doctrine, underpinned by "knowledge." Knowledge is a specific element for the conviction of

trafficking in stolen property. Mr. Denham and all other subsequent owners had no knowledge the property was stolen.

In order to be found guilty of trafficking stolen goods in the first-degree, Washington State Legislature R.C.W. 9A.82050(1) states: A Person who knowingly initiates, organizes, plans, finances, directs, manages, supervises the theft of property for sale to others or who “knowingly” traffics in stolen property is guilty of trafficking in stolen property in the first-degree. See *State v. Killingsworth*, 155 Wn. App. 283,288-90 – 269 P.3d 1064 (2012).

Moreover, the crime of trafficking envisions a person who steals then sells to a middleman (fence) who in turn buys the stolen property with the intent to sell to a third person. It suggests at least a two-party transaction and reflects legislative intent to punish all parties who knowingly deal in property stolen by others. *Michielli*, 81 Wn. App. 773 916 P.2d 458: (1996).

In all of O’Neill’s allegations about Mr. Denham, there was no evidence demonstrating that Mr. Denham had violated any of the criminal statutes. O’Neill, then gave a description of Mr. Denham’s home, stating because of the volume of missing jewelry, Mr. Denham’s home was a place where he could hide stolen jewelry and tools used to commit the listed crimes. CP 423.ER.

On 10-9-17, the State charged Mr. Denham with one count of second-degree burglary R.C.W. 9A.520.030 and one count of first-degree trafficking in stolen property R.C.W. 9A.82.050. CP 1-2. ER.

It is a fact, that neither Detective O’Neill nor the State possessed or amassed facts that Mr. Denham “stole” the diamond. They equally never amassed that Mr. Andy Le or the other jewelers were either “middlemen” or “fences.” None of these legislative prongs, which reflect punishment, was ever concrete pursuant to the plain language of this unambiguous statute, at the time the affidavit was submitted on 12-22-16 and at the time the State charged Mr. Denham on 10-9-17.

Further, the allegations by the State and by O’Neill are materially in conflict with the plain language of the law and the statute. Their assertions are certainly misplaced from the key facts of the only witness to Mr. Denham’s possession and sale of the gem on 11-19-16, Andy Le!

The courts finding on the issue is certainly misplaced and is erroneous as to the date of 11-19-16. CP 323. ER. Therefore, the allegation and conviction for this crime, which Mr. Denham has been sentenced for must be rescinded and reversed because the statute has been misapplied or has been interpreted to freely, AND to broadly one of the two parties. *Michielli* 132 Wn. 2d 229 (1997).

A textbook example of trafficking in stolen property is noted in Strohm at 310-11. Strohm paid others to steal motor vehicles. He then stripped off the parts, rebuilt

other vehicles with stolen parts, and then sold the vehicles. Strohm was convicted of leading organized crime, trafficking and theft. R.C.W. 9A.92.050 (1).

Thus the Strohm facts fit the definition of trafficking and theft. The facts here, as related to Mr. Denham, do not.

Argument No. 2

The criminal statutes attributed to Mr. Lynell Denham on 12-22-16, are inapplicable and unconstitutional AND are invalid on their face as a matter of law.

An ambiguous statute is construed strictly against the state and in favor of the accused.

When the court interprets a criminal statute the court gives it a literal and strict interpretation.

Mr. Denham's actual course of conduct did not violate or offend the peace and dignity of the first-degree trafficking in stolen property statute on 11-19-16 per the plain language under RCW 9A.82.050 (1).

Mr. Denham's actual course of conduct did not violate or offend the peace and dignity of the second-degree burglary statute between 11-11-16 and 11-14-16 per the plain language under RCW 9A.52.030 (1).

The criminal statutes attributed to Mr. Denham must be declared invalid on their face and Mr. Denham's conviction must be summarily vacated.

Relevant Facts

On 10-9-17, the State also charged Mr. Denham with one count of second-degree burglary, in reference to Detective O'Neill's 12-22-16 affidavit, accusing Mr. Denham of second-degree burglary, contrary to R.C.W. 9A.52.030 (1).

This criminal statute shares the same deficiency as the trafficking allegation and statute attributed to Mr. Denham. There is nothing ambiguous about this statute in the presence of the essential elements governed by the statutory plain language, including evidence – if any.

On the contrary, the evidence that would support a claim under this statute is absent – literally. There was never any evidence, at any phase of the investigation or at the time the State wrongfully charged Mr. Denham for burglary.

This statute is not ambiguous and because there is no evidence that Mr. Denham committed the crime of burglary on or about said dates, the statute is lawfully inapplicable and is literally invalid on its face as a "matter of law."

In order to be found guilty of burglary in the 2nd degree, Washington State Legislature R.C.W. 9A.52.030 (1) states:

“A person is guilty of burglary in the second degree if with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or dwelling.” See *State v. Schroeder*, 67 Wn. App. 110, 116-117, 834 P.2d – 105 (1992).

In this case at bar, the States evidence and the counts ruling against Mr. Denham is not based on any element of the burglary statute. Rather, it is based on the ratification of Detective O’Neill’s suspicions about Mr. Denham alone ... prior burglary arrest. CP 418-419. ER.

A prior criminal history cannot alone establish reasonable suspicion or probable cause to support a detention or an arrest. *Burrell v. Mcllroy*, 423 F.3d 1121 (9th Cir 2004) citing *Brinegar v. United States* 338 U.S. 160 (1949).

The total calculus of information in the State and Detective O’Neill’s determinations to seek an arrest coupled with a conviction is overwhelmingly contrary to the burglary statute because it was very clear at the outset and thereafter considering:

- Mallinak’s shop and the utility room were dusted for fingerprints. RP 791. ER;
- The only fingerprints of value came from an electrical panel in the utility room and belonged to a person who had serviced the panel and who was automatically exempted from any charges. RP 947-53. ER;
- There were no prints or D.N.A. recovered from other items. RP 799 – 803, 947 ER; RP 57-58, 1033-34. ER

A.F.I.S.S. Latent Division conveyed these facts to Detective O’Neill for prints¹ and **Washington State Patrol Crime Lab Division “D.N.A.”**

The court, Detective O’Neill and especially the State are not in any position to feign or argue the crime of burglary when two credible agencies relied upon by O’Neill, never implicated Mr. Denham as they did another. RP 947-53. ER.

Therefore, there is no argument, which the State can invoke to explain away the forensic fact that “no forensic” evidence linked Mr. Denham to the Mallinak burglary, including surveillance; which was noted by O’Neill and the storeowner, Mallinak who explained that his store has “no cameras.” RP 322, 333 ER.

¹ D.N.A., latent prints and surveillance cameras - evidence - are sources that can unequivocally establish prima facie evidence that a person unlawfully “entered” or “remained” in a building under R.C.W. 9A.52.030(1). This is not the case here. An uncontroverted fact.

The State charging Mr. Denham on 10-9-17 for both trafficking and burglary are totally misplaced and is frivolous because each of these crimes, individually, or in combination, are not subject to the two statutory interpretations (E.g. to criminalize those who offend these criminal statutes, then in a contradictory fashion, still criminalize those who never offended these criminal statutes, such as Mr. Denham.)

The State and the trial court have taken a hybrid approach in their application of the law and the applicability of the statute. Subjecting the statutes to two interpretations – their own and the legislatures. Where a statute is subject to two interpretations, that interpretation which best advances the legislative purpose should be adopted. See *State v. Gilbert* 33 Wn. App. 753, 755-56, 657 P.2d – 350 (1983).

The State is not the legislature, therefore their interpretation of the criminal statutes attributed to Mr. Denham does not “best advances the legislative purpose,” and should not be adopted. The constitutionality of a statute is reviewed de novo. See *State v. Jorgenson*, 179 Wn. 2d. 145, 150, 312 P.3d 960 (2013). See generally *Descamps*, 570 U.S. 254 (2013).

The constitutionality of the 2nd degree burglary statute and the 1st degree trafficking in stolen property statute, under the facts, and the lack of evidence in this case, undoubtedly render both statutes unconstitutional as applied to Mr. Denham.

Furthermore, the party challenging the constitutionality of the statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt. See *State v. Leatherman* 100 Wn. App. 318, 321, 997 P.2d 929 (2000).

Based on the plain language of the trafficking statute, which state, “First degree trafficking in stolen property requires knowledge that the property is stolen.” R.C.W. 9A. 82. 050 (1). Nothing in the record testifies that Mr. Denham and any of the other four jewelers knew the diamond was stolen. RP 709, 719. ER. Furthermore, Detective O’Neill never submitted a single element of trafficking when he submitted his affidavit on 12-22-16. The same is true also for the State who never received evidence of trafficking when they charged Mr. Denham on 10-9-17. CPI-2. ER. The evidence has to exist if any of the allegations made by the State is true. The evidence can only come from an informant, which there is none, in this case. No “fences” or “middlemen.”

Two interpretations of this statute make it ambiguous. An ambiguous statute is construed strictly against the State and in favor of the accused. *State v. Jackson*, 61 Wn. App. 86 809 P.2d 221 (1991).

As for the burglary allegation and the conviction, this allegation is based on blatant acts of flagrant malfeasance and fabricated evidence, on the part of Detective O’Neill, and then enabled by the State. R.C.W. 9A.52.030. Second-degree burglary and first

degree trafficking in stolen property, R.C.W. 9A.82.050(1) have two distinctive, codified statutes, which means one “interpretation” for each – not two for one.

It does not mean the State gets to use or “bootstrap” the crime of burglary into a “trafficking” allegation equation because O’Neill lacked evidence linking Mr. Denham to the burglary. Two credible crime lab agencies were used, which O’Neill and the State relied on in linking Mr. Denham to the unlawful entry – unlawful remaining. The facts revealed there was no evidence linking Mr. Denham to the burglary!

Mr. Denham’s possession of the diamond like Andy Le, Edwin Jue, Bryan Chrey, and Mark Miceli is not prima facie case of burglary. Nor is it an element of burglary, something that the State knows or should have known. In charging Mr. Denham, the State outlined the plain language of the burglary statute in their 10-9-16 charging document, where “possession” is not an element of burglary R.C.W. 9A.52.030 (1) CP 1-2 ER.

Using the language and the elements from a different codified criminal statute to cure deficient elements from another criminal statute to make an arrest or to procure a conviction based on “a want of probable cause” will not suffice. In fact it is illegal. Moreover, under “Mace” 97 Wn. 2d at 843 possession of recently stolen property is not an element of burglary and is insufficient, as a matter of law, to prove burglary.

Again, if any of the allegations were true, all jewelers, who had possession of any amount of jewelry from the burglary should be charged and convicted, not just Mr. Denham who had more than one item from the burglary. This fact of possession still does not rise to any level of burglary, much less trafficking, per the plain language of each statute. Put simply, Detective O’Neill’s and the State’s lack of evidence against Mr. Denham and their lack of confidence in procuring a lawful conviction manifested into a fabrication of evidence case. See *Devereaux v. Abbey* 263 F.3d 1070, 1076 (9th Circuit 2001).

Devereaux held that a claim of deliberate fabrication by circumstantial evidence required a showing that; (1) defendants continued their investigation of [plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information.

Mr. Denham’s circumstances fit the facts and the framework in *Devereaux*. The State and Detective O’Neill were in possession of facts from Andy Le - Denham receipt - RP 709, 719; RP 707-08, 713, 725-27, 814-18. O’Neill had these exonerating facts – exculpatory evidence – on 12-17-16, 6 days prior to drafting his affidavit on 12-22-16. CP 417-29; 430-33 ER. He then fabricated an allegation of burglary into the equation as well, despite the fact that he was fully aware and

apprised by Washington State Patrol Crime Lab Division and A.F.I.S.S. Latent Print Division.

- No latent prints of value (meaning Denham) was located RP 791.
- Prints lifted came back as belonging to another RP 947-53.
- No D.N.A. of value RP 948, 953-54, RP 799-803, 947 ER.

Detective O'Neill and the State were fully aware of these facts, the State being aware almost a year earlier and after on 10-9-17. CP 1-2. ER.

Another issue with this case is a case of "selective enforcement" on the part of Detective O'Neill. A case of "selective prosecution" on the parts of Gavriel Jacobs and Susan Harrison.

In the Ninth Circuit Court of Appeals² precedents hold that a prima facie case of racial discrimination can be fully shown by similarly situated individuals of a different race who were not prosecuted for the same offenses:

Andy Le (Asian)RP 698-703. ER.
Edwin Jue (Asian).....RP 243-57. ER.
Bryan Chrey (White)..RP 262-63, 566-68, 574. ER.
Mark Miceli (White)...RP 574-76, 581, 994-97, 1005-07. ER.

Mr. Denham is an Afro-American, the only person charge and convicted; home raided. The others have not been convicted; stores and homes were not raided. All were buyers of the same 5.29 ct gem.

Conclusion

For the aforementioned reasons cited herein this court should reverse and remand Mr. Denham's case back with instructions to dismiss with prejudice pursuant to Superior Court Rule CrR 8.3(b).

Respectfully Submitted,

(Lynell Denham – Electronically Signed)

Lynell Denham
28 USC 1746

Dated 5-9-19

² See Lee v. City of Los Angeles 250 F.3d 668 (9th Circuit 2000)

NIELSEN, BROMAN & KOCH P.L.L.C.

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