

66917-6

66917-6

NO. 66917-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

TREVIN ELDER,

Appellant.

FILED  
COURT OF APPEALS & DIV I  
STATE OF WASHINGTON  
2011 OCT 28 AM 4:58

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Trevin Elder was charged with and convicted of two separate crimes for a single taking of a motor vehicle. Because the separate offenses are the same in fact and law, Mr. Elder's constitutional right to be free from double jeopardy was violated and the lesser conviction must be vacated.

B. ASSIGNMENT OF ERROR

The convictions for count one and count two violated Mr. Elder's constitutional right to be free from double jeopardy.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A criminal defendant's constitutional right to be free from double jeopardy is violated where the defendant is prosecuted for and convicted of two crimes that are the same in fact and in law. Was Mr. Elder's constitutional right to be free from double jeopardy violated where he was convicted of first degree taking a motor vehicle without permission and theft of a motor vehicle where, as prosecuted in this case, the two offenses were the same in fact and in law?

D. STATEMENT OF THE CASE

On December 20, 2009, Detective Douglas Clevenger and Detective Tyson Sagiao received notification that a Washington

State Patrol Honda Civic “bait car”<sup>1</sup> was moving from its parked location in a store parking lot in Kent, Washington. 3/7/11RP 38-39, 42, 63-64. The bait car was equipped with GPS and a camera recording system. 3/7/11RP 38-39.

The vehicle was eventually located at approximately 309<sup>th</sup> Street and 26<sup>th</sup> Avenue South in Federal Way. 3/8/11RP 37; 3/7/11RP 65. When Deputy Michael Smith arrived, he encountered a vehicle that matched the description parked on the side of a residence near the intersection. 3/8/11RP 37-38. A second vehicle “had pulled in behind it.” 3/8/11RP 38, 43. While his partner spoke with passengers in a pickup truck that was leaving the residence, Officer Smith observed Mr. Elder exiting the house. 3/8/11RP 39-40. Based solely on Mr. Elder’s proximity, Officer Smith detained him in the back of his patrol car. 3/8/11RP 40. The police contacted others in and around the residence. 3/8/11RP 40.

Mr. Elder was detained in the back of the patrol vehicle when Detective Sagiao arrived at the scene. 3/7/11RP 65. Upon

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<sup>1</sup> A “bait car” is a vehicle owned and maintained by law enforcement, in this case Washington State Patrol, to lure, track and catch car thieves and prowlers. The police set the car in a high-crime area. In this case, the bait car was equipped with motion-sensitive recording and GPS-tracking devices that notified law enforcement when the vehicle was moved from the set location and provided tracking information to locate the stolen car. See 3/7/11RP 36-42, 61-63; 3/29/11RP 5.

request, Mr. Elder provided Detective Sagiao his name. 3/7/11RP 65. The detective informed Mr. Elder he was not under arrest but was being detained. 3/7/11RP 66. Detective Sagiao provided Miranda<sup>2</sup> warnings to Mr. Elder, who responded to subsequent questioning. 3/7/11RP 66-67. When Detective Sagiao asked him about the Honda Civic, Mr. Elder responded “something to the effect that the one [sic] with LoJack.” 3/7/11RP 67 (Detective Sagiao testimony and describing LoJack GPS-location system). Mr. Elder also “mentioned something to that [sic] effect that he was the one that took the vehicle.” 3/7/11RP 68. In response to Detective Sagiao’s questions, Mr. Elder said he had not “messed up” the ignition and the jiggle key worked. 3/7/11RP 69. According to Detective Clevenger, a jiggle key is a key that has been filed or worn down over time and can be inserted into the ignition to defeat the pins in the locking system. “It [can] rotate [the] lock without creating a lot of damage.” 3/7/11RP 52, 71-72. Mr. Elder further stated he was alone when he took the vehicle. 3/7/11RP 69-70. Two jiggle keys were found among Mr. Elder’s personal effects. 3/7/11RP 70.

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The police recovered the recording from the bait car. 3/7/11RP 75. The battery that powers the video recording system lost most of its charge and only audio was recorded. 3/7/11RP 41, 44-45. The recording contains no video relevant to the theft of the vehicle. 3/7/11RP 56-57; 3/8/11RP 13. The initial audio portion contains two male voices and a female voice. 3/8/11RP 13. Though he only heard Mr. Elder speak a few words, Detective Sagiao testified that he recognized Mr. Elder's voice on the audio. 3/7/11RP 75; 3/8/11RP 10, 23-24. Detective Sagiao testified that he had not identified the other two voices and did not know whether those individuals were also in the bait car. 3/8/11RP 13-14 ("Once Mr. Elder said he acted alone I didn't look into it any further."). He also could not identify which voice derived from the driver's seat of the vehicle. 3/8/11RP 22-23.

When Detective Clevenger inspected the recovered bait car, he found virtually no damage to the vehicle. 3/7/11RP 51, 53. He testified that to steal a vehicle without causing damage, a person would typically use a jiggle key in the door and ignition. 3/7/11RP 52. When Detective Clevenger tested the factory key in the ignition of the bait car, it was difficult to turn the first few times. 3/7/11RP

53. He testified that the initial resistance was consistent with the use of a jiggle key. 3/7/11RP 52-53; accord 3/7/11RP 73.

The State initially charged Mr. Elder with one count of theft of a motor vehicle, RCW 9A.56.065 & .020(1). CP 1 (Information). Ten months later, the State added a charge of taking a motor vehicle without permission in the first degree, RCW 9A.56.070. CP 5 (Amended Information). A jury found Mr. Elder guilty of both counts. CP 39-40. Though he was sentenced on both counts, the sentences are concurrent. CP 112. Each crime counted as an "other current offense" for purposes of Mr. Elder's offender score. See CP 110, 115; CP \_\_\_ (Sub # 63, pp.7-8) (presentence statement).<sup>3</sup>

#### E. ARGUMENT

IMPOSITION OF CONVICTIONS FOR FIRST DEGREE TAKING A MOTOR VEHICLE WITHOUT PERMISSION AND THEFT OF A MOTOR VEHICLE VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

Mr. Elder was improperly convicted of two crimes which were legally and factually identical in violation of the Double

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<sup>3</sup> A supplemental designation of clerk's papers has been filed requesting the trial court transmit the State's presentence statement at Sub # 63 to the Court.

Jeopardy Clause. The conviction for count one, theft of a motor vehicle, must be vacated and dismissed with prejudice.

1. The Double Jeopardy Clause precludes multiple convictions for the same act.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.” Article I, Section 9 of the Washington State Constitution provides that “[n]o person shall . . . be twice put in jeopardy for the same offense.” The two clauses provide the same protection. In re Personal Restraint of Borrero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); State v. Weber, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The fact of conviction alone, even without the imposition of sentence, constitutes punishment for purposes of a double jeopardy analysis. State v. Womac, 160 Wn.2d 643, 651, 658, 160 P.3d 40 (2007) (“The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding. Courts may not, however, enter multiple convictions for the same

offense without offending double jeopardy.” (internal citations omitted, emphasis in original)); State v. Gohl, 109 Wn. App. 817, 822, 37 P.3d 293 (2001) (citing Ball v. United States, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); In re Pers. Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)).

The Legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). If the Legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. Id. at 368.

If, however, such clear legislative intent for multiple punishments is absent, then the Blockburger or “same evidence” test applies. Id.; see Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under this test, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision

requires proof of a fact which the other does not.” *Id.* If application of the Blockburger test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. The assumption underlying the Blockburger rule is that the Legislature ordinarily does not intend to punish the same conduct under two different statutes; the Blockburger test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent.* Hunter, 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial question is whether the legislature intended that multiple punishments be imposed. State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the Blockburger “same evidence” test to determine whether the crimes are the same in fact and law. State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).<sup>4</sup>

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<sup>4</sup> An alleged double jeopardy violation may be raised for the first time on appeal. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000).

2. The two offenses violated the Double Jeopardy Clause because they were the same in fact and law.

The statutes at bar, criminalizing taking a motor vehicle without permission and theft of a motor vehicle, do not explicitly authorize convictions for each arising out of the same theft. See RCW 9A.56.070; RCW 9A.56.065. Accordingly, Mr. Elder's convictions must be examined under the "same evidence" test. See State v. Schwab, 98 Wn. App. 179, 184-85, 988 P.2d 1045 (1999) (applying same evidence test where statutes contain no explicit authorization).

There is no question that Mr. Elder's convictions are the same in fact, as they are based on the same act of taking a police bait car. See, e.g., State v. Read, 100 Wn. App. 776, 791, 998 P.2d 897 (2000) (second degree murder and first degree assault convictions same in fact where based upon same act, directed at same victim). Mr. Elder's conduct of allegedly taking the police bait car from the store parking lot and intending to deprive the owner of the vehicle by selling it constituted the criminal conduct for both counts. The State acknowledged that the two counts charged the same crime in fact. In closing, the prosecutor argued "Count two is taking a motor vehicle in the first degree. Now, it's really the same

crime. We are asking you to define for us exactly how he committed the crime, and the real difference is the intent to sell.”  
3/8/11RP 52.

Moreover, the two convictions are the same in law. The question is whether, “as charged and proved at trial, . . . each offense required proof of a fact that the other did not.” State v. Meneses, 169 Wn.2d 586, 594, 238 P.3d 495 (2010). Here, each of the elements of count one was subsumed in count two. In other words, by proving count two (taking a motor vehicle without permission), the State necessarily proved count one (theft of a motor vehicle). See Gohl, 109 Wn. App. at 821 (crimes constitutionally the same where proof of one necessarily proves the other); see also State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979) (examining convictions for first degree rape, first degree kidnapping, and first degree assault and striking the kidnapping and assault convictions even though the offenses involve different legal elements because the kidnapping and assault were incidental to, and elements of, the first degree rape); Schwab, 98 Wn. App. at 184-85, 188-90.

In count one, Mr. Elder was prosecuted for theft of a motor vehicle, which required the State to prove he (1) wrongfully

obtained a motor vehicle of another, (2) intended to deprive the owner of the motor vehicle and (3) committed the act in Washington. CP 33 (“to convict” instruction). “Wrongfully obtains” was defined as “to take wrongfully the property of another.” CP 31.

For count two, Mr. Elder was prosecuted for first degree taking a motor vehicle without permission. This crime required the State to prove Mr. Elder (1) intentionally took or drove away a motor vehicle of another without permission of the owner or person entitled to possession, (2) intended to sell the motor vehicle and (3) committed any of the acts in Washington. CP 35 (“to convict” instruction). “Intentionally” was defined as “acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 32.

Thus, for both crimes the State was required to prove at least that Mr. Elder wrongfully took the police bait car with the intent to deprive the owner of the vehicle. Only one of the crimes required proof of facts that the other did not. The charged crime of taking a motor vehicle without permission required the State to prove the additional fact that the intent to deprive the owner was accomplished by intent to sell the motor vehicle and a more stringent mens rea, intentional as opposed to just wrongful taking.

Otherwise, as prosecuted in this case, the two crimes required proof of the same facts.

As the State acknowledged, the two crimes were the same in fact because they were based on the same underlying act. In addition, as prosecuted in this case, each crime did not require proof of a fact that the other did not. Therefore, they were the same in law. Meneses, 169 Wn.2d at 594. Thus, the two convictions violated Mr. Elder's constitutional right to be free from double jeopardy. See, e.g., Blockburger, 284 U.S. at 304.

3. The remedy is vacation of the conviction for the lesser offense.

Where two convictions violate the prohibition against double jeopardy, the remedy is to vacate the lesser conviction and remand for resentencing on the remaining conviction. E.g., State v. League, 167 Wn.2d 671, 672, 223 P.3d 493 (2009); Weber, 159 Wn.2d at 269. Thus, the conviction for theft of a motor vehicle must be vacated.

F. CONCLUSION

Where two convictions violate the prohibition against double jeopardy, the lesser conviction must be vacated. Mr. Elder was convicted of two offenses, the lesser of which was entirely

subsumed within the proof of the greater crime, taking a motor vehicle without permission in the first degree. The lesser conviction for theft of a motor vehicle must be vacated and the cause remanded for resentencing.

DATED this 28th day of October, 2011.

Respectfully submitted,

 (28724)  
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Attorney for Appellant

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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	)	
TREVIN ELDER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF OCTOBER, 2011.

X \_\_\_\_\_  
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