

NO. 92060-5

**THE SUPREME COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER,

v.

CLIFFORD MELVIN PORTER, JR., RESPONDENT

FILED

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Court of Appeals Cause No. 45796-2-II
Appeal from the Superior Court of Pierce County
The Honorable Judge Frank E. Cuthbertson

No. 13-1-00010-7

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

State of Washington, respondent in the Court of Appeals.

B. COURT OF APPEALS DECISION.

The petitioner seeks review of *State v. Porter*, 2015 WL 4252605 (No. 45796-2-II, July 14, 2015). The Court of Appeals filed an unpublished opinion on the matter.

C. ISSUE PRESENTED FOR REVIEW.

1. There is a conflict between the decision of the court of appeals and a decision of this Court regarding the necessity of definitional elements in an Information. Further, there is potential disagreement between two divisions of the Court of Appeals, and the public and lower courts have a substantial interest in clarifying the law relating to auto theft and possession of stolen property. Should this Court accept review of the sufficiency of the Information alleging unlawful possession of a stolen vehicle?

D. STATEMENT OF THE CASE.

On August 27, 2011, Pierce County Sheriffs responded to a report of a stolen car. 2RP 56.¹ The red 1990 Pontiac Firebird belonged to Jesus Longoria. 3RP 178. The car was parked at a house owned by Longoria and his ex-wife, Sally Lockard, although no one lived at the house when the car was stolen. 2RP 117, 3RP 180. In 2011, Lockard received a phone call from a neighbor regarding the car, called the sheriff, and met the sheriffs at the address where the car was reportedly being held. 2RP 117-118. Longoria accompanied Lockard to meet the sheriffs. 2RP 119, 3RP 188.

When Detective Witt and Deputy Reding arrived, defendant's girlfriend, Mareta Rodocker, met them at the fence. 2RP 60. After the sheriffs requested to speak to the property owner, Rodocker got Clifford Melvin Porter, Jr. (hereinafter "defendant"). 2RP 61. After the sheriffs said they believed a stolen car was inside the garage on the property, defendant allowed them to enter and look around. 2RP 62-63. However, a combination lock prevented access to the garage, and defendant said his father, Clifford Porter, Sr., had placed the lock on the door. 2RP 63. Defendant said he would go call his father to get the combination. 2RP 63. Instead, defendant left the property. 2RP 66.

¹ The verbatim report of proceedings will be referred to by the volume number, RP, and the page number (#RP #). The verbatim report of proceedings for sentencing will be referred to by the date, RP, and page number (12/20/13RP #).

As the sheriffs continued walking around the garage, they saw several car parts piled up, including an airbag and a red bumper, both of which had a Pontiac insignia. 2RP 64. After realizing defendant had left the property, Deputy Reding secured the scene to allow Detective Witt to apply for a search warrant. 2RP 67. After serving the warrant, sheriffs found a portion of a car inside the garage. 2RP 73. A VIN number check confirmed the car was Longoria's Pontiac Firebird. 2RP 73. The car had been cut in half. 2RP 73. The back half was gone. 2RP 73. Sheriffs found a receipt inside the car for R&R Recycling with a copy of defendant's photo identification attached. 2RP 73-74. A television found in defendant's garage belonged to Longoria as well. 3RP 194.

In his testimony, defendant said he only left the property while the sheriffs were there to find his father who had not answered his phone calls. 3RP 311. Defendant had been working with Rodocker to clean up the property for about a year. 3RP 297. Defendant said he did not have access to the locked garage, was shocked to learn the Pontiac Firebird was in the garage, and had no clue how it got there. 3RP 281, 3RP 303.

On January 2, 2013, the State charged defendant by information with unlawful possession of a stolen vehicle. CP 1; RCW 9A.56.068, RCW 9A.56.140. The Information read:

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse CLIFFORD MELVIN PORTER, JR. of the crime of UNLAWFUL POSSESSION OF A STOLEN VEHICLE, committed as follows:

That CLIFFORD MELVIN PORTER, JR., in the State of Washington, on or about the 27th day of August, 2011, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

CP 1.

The jury found defendant guilty as charged. CP 23; 5RP 396. Defendant was sentenced to forty-five days with the possibility of electronic home monitoring. CP 30. Defendant appealed to the Washington Court of Appeals, Division II. CP 41. After the opening, response, and reply briefs were filed, defendant filed a supplemental brief in light of Division II's *State v. Satterthwaite*, 186 Wn. App. 359, 344 P.3d 738 (2015), a decision released March 10, 2015. Based on *Satterthwaite*, Division II—in an unpublished opinion—reversed and remanded defendant's conviction for unlawful possession of a stolen motor vehicle because it found the information was defective. *Porter*, at *1.

The State now petitions this Court for review of that decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH A DECISION OF THIS COURT, THERE IS A POTENTIAL DISAGREEMENT BETWEEN TWO DIVISIONS OF THE COURT OF APPEALS, AND THE PUBLIC AND LOWER COURTS HAVE A SUBSTANTIAL INTEREST IN CLARIFYING THE LAW RELATING TO AUTO THEFT AND POSSESSION OF STOLEN PROPERTY.

RAP 13.4(b) sets forth considerations governing the acceptance of discretionary review:

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

- a. Division II's decision in *Porter* conflicts with this Court's decision in *Johnson* that the elements of crimes need not be defined in the Information. This Court should accept review to address this conflict.

An Information is constitutionally sufficient if it includes all essential elements of a crime. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). An "essential element" is an element whose specification is

necessary to establish the very illegality of the act charged. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). Requiring all statutory and non-statutory elements in the charging document provides the accused of fair notice of the charges against him to afford him the opportunity to prepare a defense. *Vangerpen*, 125 Wn.2d at 787.

Although essential elements are required to make an Information constitutionally sufficient, the State need not include definitions of the elements. *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014). In *Johnson*, the Information alleged the defendant “did knowingly restrain [J.J.], a human being.” *Id.* at 301 (alteration in original). The defendant challenged the Information because it did not define “restrain,” as “to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his liberty,” which he argued was an essential element. The Court rejected this argument, reaffirming that definitions of elements do not need to be included in the Information to make it constitutionally sufficient. *Id.* at 302.

The present case presents an issue similar to that addressed in *Johnson*. The Information alleged that defendant “did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing it had been stolen.” CP 1. *Satterthwaite* requires that the Information define “possess” as requiring that a defendant “withhold or appropriate [possessed stolen

property] to the use of any person other than the true owner or person entitled thereto.” 186 Wn. App. 359, 362, 344 P.3d 738 (quoting RCW 9A.56.140(1)) (alteration in original). Requiring the definition of an essential element is contrary to this Court’s holding in *Johnson* that no such definition is required. This Court should accept review to address this conflict.

- b. Division III recognized the tension between Division II’s holding in *Satterthwaite* and this Court’s precedent in *Johnson*. This Court should accept review to address this potential disagreement between the divisions.

In a Division III case, a defendant raised a supplemental assignment of error relying on *Satterthwaite*, requesting the court find the information constitutionally deficient. *State v. Torres*, 2015 WL 1609113 (No. 31616-5-III, Apr. 9, 2015). The court, however, declined to reach the merits of that assignment of error because the defendant raised it months after the filing of the original briefing. *Id.* at *5. In declining to find the defendant’s counsel was ineffective for failing to anticipate the new rule announced in *Satterthwaite*, the court said: “The new rule is not obvious. Although we decline to agree or disagree with the new rule, *we recognize the tension* with, and the *effort* Division Two made to distinguish, *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014).” *Torres*, at *5 (emphasis added).

Although Division III did not adopt or reject *Satterthwaite*, the court's statement that the new rule is "not obvious" and its recognition of the tension between *Satterthwaite* and *Johnson* indicates Division III's reluctance to accept the new rule *Satterthwaite* created. This Court should accept review of *Porter* to address this potential disagreement between Division II and Division III regarding what *Johnson* means regarding possession of stolen vehicles.

- c. This Court should accept review because auto theft—and possession of stolen property—is a recognized problem in Washington State, and it is in the interest of the public and the trial courts to have the law clarified.

Motor vehicle theft is an issue of substantial public interest in Washington. The legislative history for RCW 9A.56.068 recognizes the substantial interest Washingtonians have in auto theft crimes. According to the report, Washington ranks fourth per capita in the nation for auto theft crimes. H.B. Rep. 1001, 56th Reg. Sess. (Wash. 2007). The Washington Auto Theft Prevention Authority reported 28,068 auto thefts in Washington in 2014 alone. WASHINGTON AUTO THEFT PREVENTION AUTHORITY, *2014 Actual Stolen by County Worksheet*, (available at <https://watpa.waspc.org/images/WACIC%202014%20FINAL%20STATS.pdf>).

Further, the "withhold or appropriate" language *Satterthwaite* now requires for charging documents alleging unlawful possession of a stolen

vehicle applies to cases far beyond that crime alone. The definition relied upon comes from RCW 9A.56.140(1), which applies to all possession of stolen property crimes. “‘Possessing stolen property’ means knowingly to receive, retain, possess, conceal, or dispose of *stolen property* knowing that it has been stolen and to *withhold or appropriate* the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1) (emphasis added). It is unclear whether *Satterthwaite*’s newly required element will also apply to all other possession of stolen property crimes that rely on this “withhold or appropriate” language. Such an application would significantly impact the criminal justice system.

Auto theft, and the subsequent unlawful possession of those stolen vehicles, is a crime of high occurrence in Washington. The public and the trial courts have a substantial interest in insuring the charging documents for these crimes—and all other possession of stolen property crimes—are constitutionally sufficient across the State. This Court should accept review to clarify the language required in Informations alleging unlawful possession of a stolen vehicle.

F. CONCLUSION.

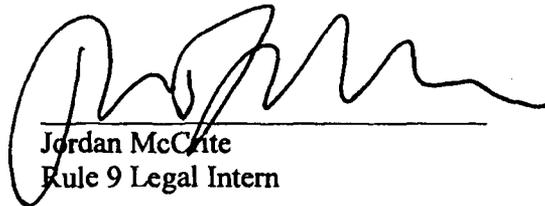
The State respectfully requests this Court accept review of Division II’s decision in *State v. Porter* because it conflicts with this Court’s decision in *Johnson*, there is potential disagreement between

Division II and Division III of the Court of Appeals, and Washingtonians and Washington courts have a substantial interest in the law of auto theft given its high occurrence.

DATED: August 11, 2015.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8-11-15 *Theresa Ka*
Date Signature

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
BY  DEPUTY

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD MELVIN PORTER, JR.,

Appellant.

No. 45796-2-II

UNPUBLISHED OPINION

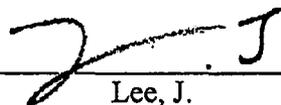
LEE, J. — Clifford Porter Jr. appeals from his conviction for unlawful possession of a stolen motor vehicle based on a defective information. We agree, reverse Porter's conviction and remand.

Porter argues that because his information alleged only that he "did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen," Clerk's Papers (CP) 1, and did not allege that he "with[e]ld or appropriate[d] the same to the use of any person other than the true owner or person entitled thereto," his information failed to allege an essential element of the crime of unlawful possession of a stolen motor vehicle. *State v. Satterthwaite*, 186 Wn. App. 359, 344 P.3d 738, 741 (2015) (quoting RCW 9A.56.140(1)).

The State acknowledges *Satterthwaite* but disagrees with its reasoning and asks us not to follow it. But it shows no basis for us to not follow *Satterthwaite*. The State also suggests that because Porter's information alleged that his acts were "contrary to RCW 9A.56.068 and 9A.56.140," CP 1, and because RCW 9A.56.140 contains the essential element of withholding or appropriating the stolen property, Porter's information is distinguishable from that in

Satterthwaite, which did not contain the statutory reference. But merely citing to the statute is insufficient to apprise a defendant of the essential elements of the crime with which he is charged. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). *Satterthwaite* is controlling, and accordingly, we reverse Porter's conviction and remand for further proceedings.¹

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Lee, J.

We concur:



Johanson, C.J.



Maxa, J.

¹ Because we reverse on the grounds of an insufficient information, we decline to address Porter's other assignment of error that he received ineffective assistance of counsel when his trial counsel failed to object to evidence that he possessed other stolen property and had engaged in burglary, theft and other crimes.

PIERCE COUNTY PROSECUTOR

August 11, 2015 - 4:16 PM

Transmittal Letter

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Court of Appeals Case Number: 45796-2

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