

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

State of North Dakota,)
)
Plaintiff-Appellee,) **Sup. Crt. Nos.: 20160383 & 20160384**
)
vs.) **Dist. Crt. Nos.: 53-2015-CR-01563**
) **53-2015-CR-01564**
Mearlyse Fallon Carson,)
)
Defendant-Appellant.)

On appeal from the October 31, 2016 Restitution Order from the
Northwest Judicial District,
The Honorable Paul Jacobson, Presiding

Brief of the Appellee,
State of North Dakota

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Statement of the Issues

[¶1] I. The District Court correctly set restitution at the October 31, 2016 restitution hearing.

Statement of the Case

[¶2] The District Court held a consolidated restitution hearing in 53-2015-CR-01563 and 1564 on October 31, 2016. Previously, the District Court held a consolidated Change of Plea and Sentencing Hearing in 53-2015-CR-01337, 1338, 1339, 1563, 1564, and 1681 on October 20, 2015. Initially, Ms. Carson was charged out with multiple offenses related to the contact with law enforcement on July 1, 2015, to which the theft charges were added in 53-2015-CR-01563 and 1564 after cross-referencing with the Thome burglary.

[¶3] At the October 20, 2015 change of plea hearing, Ms. Carson pled guilty to possession of the stolen F-250 which was partially the subject of the other matters in 53-2015-CR-01337.1. Ms. Carson later filed a copy of the Affidavit of Probable cause in the 1337, 1338, and 1338 series of cases as Exhibit “A” in opposition to the State’s restitution motion for Mr. Thome’s matters. (53-2015-CR-01563 Doc. No. 33).

Statement of the Facts

[¶4] On July 1, 2015, law enforcement made contact with a Gaylen Oas, an employee of Key Energy, who had reported the presence of a Ford F-250 pickup which had been stolen from Key Energy. The vehicle still sported Key Energy badging that had been spray painted over. (53-2015-CR-01563 Doc. No. 33). The F-250 had been reported as stolen on July 26, 2015.

[¶5] Gaylen Oas stated that he had observed Ms. Carson taking various items out of the F-250 and putting them in the back of his son, Jared Oas' black Impala. Jared Oas indicated that he just had a pair of boxers and a blanket in the vehicle. During a consent search of the Impala, law enforcement located the four rifles referenced in this case along with various calibres of ammunition, keys, and other items which were stolen from Mr. Thome's residence. The black Impala contained two purses, which were linked to Ms. Carson.

[¶6] Ms. Carson claimed that her ex-boyfriend, Chyson Morgan, had purchased the F-250 3-4 days prior to July 1, 2015 for \$1,000.00. The Defendant claimed that she had gotten the truck from Morgan "one afternoon" when they were at Carolville to travel to apply for jobs. (53-2015-CR-01563 Doc. No. 33). Ms. Carson admitted to having driven the F-250 for the last 3-4 days prior to her July 1st contact with law enforcement, and after having been "gifted" the truck by Mr. Morgan.

[¶7] Various items of property stolen from Mr. Thome's residence were recovered from the materials that Ms. Carson transferred out of the F-250 on July 1, 2015 and placed in a black Chevrolet Impala. The burglary at Mr. Thome's residence occurred on June 29, 2015 and the Denali and trailer were recovered from a rural part of Williams County on June 30, 2015.

[¶8] The State introduced Exhibit "1" which was the initial incident report for the burglary at Mr. Thomey's residence. This exhibit listed the address of Mr. Thome's property, which was the same address where a white Ford F-250 had been reported at on June 29, 2015.

[¶9] During the restitution hearing, Mr. Thome testified that he had recovered the key(s) to his Denali from the collection of materials that Ms. Carson had been loading into the black Chevrolet Impala. Mr. Thome noted that the key(s) are specially configured to work with the vehicle, and that, barring getting replacements from the dealership, they would be necessary to operate the vehicle. (Restitution Transcript “R.T.” 16-17). The vehicle would not run without the correct key(s) being used.

[¶10] Mr. Thome also testified that law enforcement recovered .17 calibre ammunition from the Impala that had been stolen from his residence along with a Savage Arms rifle chambered for the matching .17 calibre cartridge.

Law and Argument

[¶11] The State notes that Mr. Carson attempts to claim that the date of July 2, 2015 should be the date that she was in possession of the various items, which was an error corrected by Detective McNamee, and shown by the Defendant’s own Exhibit “A” filed as document number 33 in 53-2015-CR-01563). She was actually found to be in possession of them on July 1, 2015 when she was observed transferring items out of the stolen F-250 and into the black Chevrolet Impala. Mr. Carson then contends that July 1 is three days after June 29, which is incorrect as June only has 30 days. This would place the difference at two (2) days, or less than the amount of time that Ms. Carson admitted to operating/driving the vehicle after having it “gifted” to her three-to-four days before July 1, 2015.

[¶12] The affidavit of probable cause for 53-2015-CR-01337, 1338, and 1339 was introduced by Ms. Carson in opposition to the restitution motion as Exhibit “A”. (53-2015-CR-01563 Doc. No. 33). Paragraph 6 of that document notes:

That after being mirandized, Carson stated: a) Her ex-boyfriend Chyson told her that he had bought the pick-up for \$1,000.00 3-4 days ago; b) That Chyson gave her the truck one afternoon when they were in Carolville at Getzlaff's property; c) That she didn't know the vehicle was stolen; d) She had been driving the vehicle around for the past 3-4 days...

[¶13] From Ms. Carson's own filings in opposition to the State's motion, the Court could see that she had been actively operating the vehicle at the time of the burglary at the Thome residence. Three-to-four days before July 1, 2015, would put Ms. Carson's operation of the stolen F-250 both before and during the burglary and the theft of the SUV and other items. Further, Ms. Carson's own Exhibit "A" shows that she was "given" the truck by her ex-boyfriend before the burglary at the Thome residence.

[¶14] Ms. Carson admitted to the action of transferring items out of the F-250 and placing them into the black Impala. Her own attached documents show that she was the person operating and controlling the F-250 for 3-4 days prior to the July 1, 2015 encounter with law enforcement. She also claimed that law enforcement had "checked" the F-250 in regard to the presence of an unknown white F-250 at Mr. Thome's address on June 29, 2015. (53-2015-CR-01563 Doc. No. 33). While Ms. Carson's claim of the vehicle being "checked" makes little sense given the fact that it still had Key Energy badging on it, the presence of a white F-250 at Mr. Thome's residence on June 29, 2015 fits with the items removed from the vehicle by Ms. Carson on July 1, 2015.

[¶15] Unlike the defendant in Pippin, Ms. Carson was not simply in passive possession of the items inside of a residence. Compare. State v. Pippin, 496 N.W.2d 50 (N.D. 1993). Ms. Carson had been the operator of the stolen F-250 which was being used to transport the proceeds of the burglary at Mr. Thome's since before the burglary

occurred. She had been actively manipulating and/or transferring the proceeds from the Thome burglary.

[¶16] No proceeds from the Thome burglary, other than what was with the Denali and attached trailer were recovered with that combination, which had suffered significant damage and was essentially inoperable, and required a tow. Ms. Carson had the key to the Denali in her purse and had proceeds from the Thome burglary in the stolen F-250 that she had been driving. That indicates Ms. Carson had access to the Denali while having access to the stolen F-250; the key is useless without the Denali and the Denali is useless without the key.

[¶17] Ms. Carson's statements demonstrate that she had possession and control over the F-250 during both the 29th and 30th, and the presence of items from the Thome residence, including the key to the inoperable Denali inside of her purse, with the F-250 show the link between her and the burglary that was not present in Pippin.

[¶18] Instead of leaving the items inside of the stolen F-250 Ms. Carson began transferring the items to another vehicle, purportedly because she believed that law enforcement was going to take the F-250 and she wanted to clean it out for them. In Pippin, there was no evidence of the defendant actually moving, transferring, concealing, or manipulating the items.

[¶19] Here, there is such evidence, including Ms. Carson working to actively transfer/conceal the items when she knew that law enforcement was going to take the F-250. These actions demonstrate a willingness on the part of Ms. Carson to transfer, discard, or dispose of property. Ms. Carson would have known that she was not supposed to be in possession of the firearms, as she was recently convicted of felony

level offenses for Theft of Property in 53-2015-CR-00295 and Possession of Drug Paraphernalia in 53-2015-CR-00296.1, with both convictions occurring on April 28, 2015. (53-2015-CR-01563 Doc. No. 33).

[¶20] Ms. Carson has presented no authority requiring either a charge or a conviction of someone for a specific crime in order to assess restitution. In Pippin, it was not that the defendant pled guilty to the thefts instead of the burglary charges that made the difference, it was that the defendant was that nothing indicated that there was an “immediate and intimate causal connection” between the defendant’s conduct and the damages. Pippin, 496 N.W.2d 50 (N.D. 1993). The Pippin Court also noted that there was insufficient evidence that, but for the defendant’s act of possession, the other property was discarded, sold, or otherwise disposed of. Id.

[¶21] Here, there is such evidence showing that Ms. Carson was directly involved in the transportation, transfer, and/or disposition of property from one location to the other, including property that she knew she could not legally possess. This property included firearms and ammunition, and ammunition which matched with a Savage rifle removed from the storage safe at Mr. Thome’s residence.

[¶22] Here, there is evidence that Ms. Carson possessed the key necessary to operate Mr. Thome’s Denali, a vehicle that requires a special key to operate. The Denali itself was found abandoned and inoperable in rural Williams County on June 30, 2015. The Denali key was found in Ms. Carson’s purse, which would have come from the stolen F-250. Ms. Carson had admitted to operating the stolen F-250 for three-to-four days prior to July 1, 2015, which would have included June 30, 2015. This evidence

demonstrates Ms. Carson's involvement with regard to the stolen Denali and accompanying trailer.

[¶23] The State presented evidence, a good portion of which came from Ms. Carson's own statements linking her to the burglary at Mr. Thome's. The Denali and trailer were found inoperable in rural Williams County, which means that the operator either had to call for assistance or was working with someone at the time of the vehicle's abandonment. The vehicle's key, which is unique to the Denali, was found in Ms. Carson's purse, which would be a very personal location. Ms. Carson presented no evidence contradicting the conclusion that Ms. Carson was involved in the ultimate disposition of the Denali whether through directly operating the vehicle herself or through providing transportation away from the site of the disposition.

[¶24] The State presented evidence, much of which came from Ms. Carson herself, that she had been "gifted" the F-250 before the Thome burglary and that she had been the operator of the F-250 for the period of time that covered both the Thome burglary and the abandonment of the Denali.

[¶25] The State also presented evidence that Ms. Carson was willing to transport, transfer, and/or conceal items which were stolen from the Thome residence. Ms. Carson's Exhibit "A" demonstrated that she was willing to transport, transfer, and/or conceal items which were obviously not hers including paperwork and credit/debit cards belonging to Mr. and Mrs. Clandening along with multiple items of UPS labeled clothing with the name "Alexander S." on them which had been stolen out of Mr. Scott's vehicle between June 29th and 30th of 2015. Ms. Carson presented nothing to contradict the evidence that she was involved in the active manipulation and transfer of stolen property

for thefts/burglaries that occurred while she stated she was the operator of the stolen F-250.

[¶26] The conviction for resisting arrest in 53-2015-CR-01337.2 came from her fleeing from law enforcement and having to be physically restrained when she learned that she was going to be arrested for the theft of the F-250. She fled from the location on her own volition, and demonstrated a willingness to discard items, including materials from Mr. Thoen's residence, when convenient. An additional connection between Ms. Carson and discarding/abandoning property relates to the abandoned Denali, which she had the key to.

[¶27] Instead, Ms. Carson attempted to argue that the matter should be blamed on the unnamed person Mr. Morgan supposedly got the vehicle from. (R.T. 57-58). She tried to blame the matter on Chyson Morgan, since he was the person Ms. Carson supposedly got the vehicle from. Ms. Carson tried to blame Ms. Morgan's roommates/housemates because they lived with him. The arguments were wholly unsupported by the evidence presented, as Ms. Carson, by her own admissions was the person in possession and in operation of the F-250 on both June 29th and June 30th of 2015.

[¶28] Ms. Carson attempted to claim that she did not know about the aspects of the Thome burglary. (R.T. 55-56). It is unclear as to how she did not know as she would have received what was marked as State's Exhibit #1 (53-2015-CR-01563 Doc. No. 45) during the pre-trial process for these cases. Ms. Carson made no assertions that she did not receive discovery including the incident report. What was filed as Exhibit "A" by

Ms. Carson even referenced that keys were removed from the items she transferred to the black Impala.

Conclusion

[¶29] Ms. Carson was far more than the passive holder of items as found in Pippin. Unlike Pippin, evidence was presented showing Ms. Carson taking an active role in the transportation, transfer, and/or concealment of items taken from the Thome residence. As such, the State respectfully requests that this Court affirm the decision below.

Dated this 18th day of May, 2017.

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State of North Dakota,) **CERTIFICATE OF SERVICE**
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 vs.) **Dist. Crt. Nos.: 53-2015-CR-01563**
) **53-2015-CR-01564**
Mearlyse Fallon Carson,)
)
 Defendant-Appellant.)

¶ I, Nathan Kirke Madden, hereby certify that on May 18, 2017, a true and accurate copy of the State’s Brief was served on Atty. Misty Nehring via email.

Dated this 18th day of May, 2017.

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