IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1994 SESSION

FILED

May 19, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9311-CR-00363
	)	
	)	Sullivan County
v.	)	
	)	Honorable Edgar P. Calhoun, Judge
	)	
JACK DEWAYNE WILLIAMS,	)	(Theft over $500)
	)	
Appellant.	)	

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Jack DeWayne Williams, was convicted by a jury in the Sullivan County Criminal Court of theft of property valued between five hundred dollars and one thousand dollars, a Class E felony. He was sentenced as a Range III, persistent offender to five years in the custody of the Department of Correction and fined fifteen hundred dollars. In this appeal as of right, the defendant raises one issue, which he frames as follows:

> Whether it is permissible under Tennessee law for the State to charge two separate incidents of theft from two separate victims occurring on the same date but at different times and places as one offense.

Under the circumstances presented in this case, we conclude that the defendant's conviction should be affirmed.

The indictment charges that the defendant "did unlawfully and feloniously, with intent to deprive the owner of property, knowingly obtain or exercise control over two Super Nintendo games, the property of K-mart and a Sanyo VCR, the property of Wal-Mart, said property being valued at $633.97, and without the owner's effective consent . . . ." Before trial, the defendant moved to dismiss the one-count indictment, arguing that it was duplicitous because it alleged separate thefts against separate victims. The state responded that it expected the evidence to show that the defendant and his codefendant, Glenn Word,[1] were arrested in a car in which the items in issue were found. Upon the trial court determining that the state was relying upon the defendant's exercise of control over the items, not his actually taking them, it denied the defendant's motion.

At trial, Bristol Police Lieutenant Al Arrants testified that he received a report about two men leaving Kmart after taking two Super Nintendo games. The car's

[1] Word entered a guilty plea and was not tried with the defendant.

description and license plate number were included in the report. He said he went to the Wal-Mart store on a hunch and found the car in the fire lane with only a driver, the defendant, in it. By the time Lieutenant Arrants circled the lot, the car was leaving the fire lane and contained two men. Lieutenant Arrants testified that after he stopped the car, he found a VCR with a Wal-Mart sticker on the front floorboard and two Super Nintendo game units with Kmart stickers in the trunk.

On cross-examination, Lieutenant Arrants indicated that the initial report was that two men had left Kmart with two units. He said he made a report at the store before he went in search of the men.

A Wal-Mart employee identified the VCR as the store's and said that it was valued at about two hundred seventy-nine dollars. A Kmart employee identified the two Nintendo units as belonging to his employer and said that their combined value was about three hundred fifty-four dollars. What is apparent from these two individuals' testimony is that no one at either store saw the items actually being taken or saw the defendant or Word take them.

The factual claim by the defendant is that the evidence shows that the Wal-Mart and Kmart "thefts" were separate offenses. We note that if his contention were true, he would have been exposed only to two Class A misdemeanors, not a Class E felony, because each offense involved property valued at $500.00 or less. See T.C.A. § 39-14-105.

The defendant argues that "Tennessee case law has never permitted prosecution of multiple thefts from different victims as one offense unless the thefts were committed simultaneously." He cites to Williams v. State, 216 Tenn. 89, 390 S.W.2d 234 (1965), in which our supreme court concluded that the taking at one time

and place of property belonging to different owners constitutes a single larceny. He then notes that in State v. Goins, 705 S.W.2d 648, 651-652 (Tenn. 1986), the supreme court stated that a defendant may not be convicted of multiple offenses of receiving or concealing stolen property if the evidence does not show separate transactions of receiving or concealing particular items. In this context, the defendant concludes from these cases that he cannot be charged with or convicted of one offense if evidence exists from which it can be inferred that he took possession of the items at different times.

We believe that a flaw in the defendant's argument is that he is attempting to use former concepts of larceny-related crimes, such as, larceny, receiving stolen property, and concealing stolen property, and to apply them to the new offense of theft created in 1989. Under T.C.A. § 39-14-101, the offense of theft "constitutes a single offense embracing the separate offenses heretofore known as: embezzlement, false pretense, fraudulent conversion, larceny, receiving/concealing stolen property, and other similar offenses." The Sentencing Commission Comments to this statute state that it is intended to replace the former myriad larceny-related statutes. Relative to this case, the new definition of theft of property is in T.C.A. § 39-14-103:

> Theft of property. A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent.

By its terms, this statute provides alternative means of conduct by which the offense may be committed -- obtaining the property or exercising control over the property. See Coleman v. State, 891 S.W.2d 237, 239 (Tenn. Crim. App. 1994).

In this respect, we believe that the defendant's argument raises a type of issue that the new laws were meant to avoid. In State v. Barbara Byrd, No. 03C01-9505-CR-00145, Sevier County (Tenn. Crim. App. Nov. 6, 1996), applic. filed (Tenn. Jan. 6, 1997), this court dealt with the case in which the defendant was charged and

convicted for one offense of theft for items taken from various stores that were found in her possession. The defendant claimed that the one-count indictment should have been dismissed for multiplicity and her conviction overturned in that she was involved in the taking of the property from the various stores. She based her contention on the former law that the person who stole the goods from the victim could not be a receiver or concealer of the same goods. This court rejected the claim, concluding that the new theft statute did away with all of the former "antiquated and confusing" requirements of the former statutes.

We see no substantive distinction here. Unquestionably, the fact that the items from the different stores were found in the defendant's simultaneous possession showed that he was exercising control over them at the same time. The fact that an inference could be drawn from the evidence that the defendant may have taken possession of the property at different times did not bar the state from prosecuting and convicting the defendant for one offense involving all of the property found in his possession at the same time.

In consideration of the foregoing and the record as a whole, the judgment of conviction is affirmed.

_____
Joseph M. Tipton, Judge

CONCUR:

_____
Gary R. Wade, Judge

_____
James C. Beasley, Special Judge