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State v. Bennett Appellant's Brief 2 Dckt. 34066

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 34066
	)	
v.	)	APPELLANT'S BRIEF
	)	IN SUPPORT OF
WILLIAM LYNN BENNETT,	)	PETITION FOR REVIEW
	)	
Defendant-Appellant.	)	
	)	

STATEMENT OF THE CASE

Nature of the Case

William Lynn Bennett asks the Idaho Supreme Court to review the Opinion of the Idaho Court of Appeals, 2009 Opinion No. 29 (Ct. App. April 16, 2009) (*hereinafter*, Opinion). He submits that the Opinion, which affirmed his Judgment of Conviction, is in conflict with previous decisions of this Court and the Court of Appeals, as well as the Idaho Constitution.

Statement of the Facts & Course of Proceedings

This case is about a business transaction gone awry, leading ultimately to Mr. Bennett being imprisoned for an alleged breach of contract. In October 2004, Mr. Bennett entered into a verbal contract with Mr. LeFave to purchase Mr. LeFave's travel trailer. (Tr., p.28, L.12 – p.30, L.23, p.96, L.13 – p.97, L.9.)[1] Mr. Bennett agreed to make payments to Mr. LeFave for the trailer, and Mr. LeFave agreed to bring the trailer to Mr. Bennett's friend's property where Mr. Bennett was going to be staying. (Tr., p.28, L.12 – p.30, L.23, p.96, L.13 – p.97, L.9.) Mr. Bennett made at least one payment toward the trailer; however, he never made full payment for the trailer.[2] (Tr., p.73, L.1 – p.75.) Mr. Bennett eventually moved to Ferndale, Washington, taking the travel trailer with him. (Tr., p.104, Ls.5-22.) After moving to Ferndale, Mr. Bennett contacted Mr. LeFave to provide him with his new information. (Tr., p.104, Ls.5-22.)

Mr. LeFave subsequently contacted law enforcement to pursue criminal actions against Mr. Bennett and to have the trailer registered as stolen. (Tr., p.49, L.23 – p.50, L.15.) Mr. Bennett was charged by Information with Grand Theft for wrongfully taking Mr. Lafave's travel trailer on or about October 30, 2004, violating Idaho Code §§ 18-2403(1) and 18-2407(1)(b). (R., pp.20-21.) An Information Part II was subsequently filed by the State charging Mr. Bennett with being a persistent violator. (R., pp.32-33.) The case eventually proceeded to trial.

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[1] For ease of reference, Mr. Bennett has cited the main transcript as "Tr.," the preliminary hearing transcript as "Prelim. Hr.," and the transcript of the opening and closing arguments as "Supp. Tr.,"

[2] The number of payments and the amount outstanding was disputed at trial as discussed below.

At trial, conflicting testimony was presented regarding the terms of the sale of the travel trailer. Mr. LeFave testified that in 2004 he owned a 1962 travel trailer, for which he had paid a little under $400. (Tr., p.20, Ls.4-14.) He testified that when he purchased it, the trailer was in poor condition, but he rebuilt the inside by installing new paneling, building a closet, moving the cooking facilities to the back, and making it wheelchair accessible. (Tr., p.20, Ls.4-14, p.22, L.23 – p.23, L.2.) Mr. LeFave eventually decided to sell the trailer. (Tr., p.28, Ls.2-4.) Mr. LeFave testified that he advertised the trailer for sale at $1800. (Tr., p.28, Ls.5-11.) Mr. Bennett contacted Mr. LeFave to purchase the trailer, and Mr. LeFave met Mr. Bennett at the T and A Truck Stop to discuss the trailer and to confirm that this was where Mr. Bennett was working. (Tr., p.28, Ls.12-18.) According to Mr. LeFave, he agreed to sell the trailer to Mr. Bennett for $1,500, he agreed to tow the trailer to where Mr. Bennett would be staying, and he agreed that Mr. Bennett could make payments on the trailer rather than pay the $1,500 up front. (Tr., p.28, L.21 – p.30, L.2.) Mr. LeFave testified that after he towed the trailer to the specified property, he put a chain on the trailer and a "tongue hitch lock system," and he told Mr. Bennett "if it would be moved, I would come out and move it personally so I would know where it was at all times." (Tr., p.29, L.24 – p.30, L.6, p.30, Ls.5-17.) Under the terms of the agreement, once Mr. Bennett finished paying for the trailer, he would receive the title, according to Mr. LeFave. (Tr., p.30, Ls.20-23.)

Mr. LeFave also testified that Mr. Bennett was not even required to make a down payment at the time Mr. Bennett received the trailer, instead he told Mr. Bennett "We'll just work on a few months to let you get build up, then we'll do it." (Tr., p.29, Ls.4-12.)

Mr. LeFave testified that during the course of his dealing with Mr. Bennett, he never received any payments from Mr. Bennett, although Mr. LeFave's wife had received one payment. (Tr., p.31, Ls.9-16.)[3] His wife later testified that Mr. Bennett came to her place of work and made a payment for an uncertain amount, possibly $200-$300. (Tr., p.73, L.1 – p.75, L.9.) Mrs. LeFave also testified that she was present when the agreement was originally entered into at the T and A Truck Stop, but she could not remember if any money was exchanged at that time or the terms of the agreement. (Tr., p.75, L.25 – p.77, L.20.)

According to Mr. LeFave, he became aware the trailer had been moved when he received a phone call from "Mike or Mike's wife"[4] stating the trailer was not there anymore. (Tr., p.31, Ls.7-12.) Mr. LeFave went to the lot to investigate, looked over the fence from the outside, did not see the trailer, and then "went home and proceeded to take the legal means into it." (Tr., p.32, Ls.15-17.)[5] According to Mr. LeFave, several months later he received a phone call from Mr. Bennett stating if he sent him the title, he would send him $1,000 and "[i]f I got the police involved, he would burn it." (Tr., p.33, L.5 – p.34, L.3.) After contacting law enforcement, Mr. LeFave decided to send Mr. Bennett a certified letter telling him to send the cash first and then he would send

[3] At the preliminary hearing, Mr. LeFave testified that he had never received any payments from Mr. Bennett, never mentioning the payment to Mr. LeFave's wife. (Tr., p.58, L.11 – p.66, L.4; Prelim. Hr. Tr., p.11, L.5 – p.12, L.5.)

[4] It is not clear from the testimony at trial, who exactly "Mike" is, although no objection was ever raised to referencing his name and the State never asked any questions to clarify the identity.

[5] Notably, this testimony is contradictory to Mr. LeFave's testimony a few moments later at trial when he testified that he and "Mike" went into the backyard to look around and found the upper part of the lock system he placed on the hitch. (Tr., p.32, L.21 – p.33, L.2.) This is also contradictory to Mr. LeFave's later testimony that Mr. Bennett called him several months later asking for the title and, after that call, Mr. LeFave pursued criminal charges. (Tr., p.33, L.5 – p.34, L.3.)

the title. (Tr., p.34, Ls.5-8.)[6] He determined what information needed to go into the letter after contacting Officer Jones in reference to the travel trailer. (Tr., p.49, L.23 – p.50, L.16.)[7] Mr. LeFave also testified that he knew where to send the letter because Mr. Bennett had given Mr. LeFave his address over the phone when he had called. (Tr., p.46, L.19 – p.47, L.7.) Unfortunately, Mr. Bennett never received this letter because it was returned to Mr. LeFave stating it had not been picked up, possibly because it was addressed to "Mr. Betten" or "Mr. Bittin" rather than Mr. Bennett. (Tr., p.34, Ls.5-20, p.36, Ls.16-23, p.47, Ls.21-22; State's Exhibit 2; State's Exhibit 3.) According to Mr. LeFave he also traveled with "Mike" to the address on the letter and discovered that Mr. Bennett was no longer at the address. (Tr., p.37, Ls.11-19.)

At trial Carolyn Ellinger confirmed that she had allowed Mr. Bennett to park the travel trailer on her property in October/November 2004. (Tr., p.82, Ls.16-23.) She testified that although the trailer was chained to a fence it was not locked. (Tr., p.83, Ls.8-16.) Ms. Ellinger testified that a couple months later, Mr. Bennett advised Ms. Ellinger that he would be moving. (Tr., p.83, L.24 – p.84, L.12.) He had obtained a second job helping a handicapped person and he would be living there with the trailer

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[6] The actual letter allegedly sent made no mention of exchanging money for the title, stating only "This letter serves notice that 10 days after receipt, MY trailer vin A98323478 will be entered N.C.I.C. as a stolen vehicle! If you have any Questions you can contact Officer Jones with the Boise Police Department." (State's Exhibit 3.) Notably, there were actually two letters contained in State's Exhibit 3 with very similar language, one of which was allegedly sent to Mr. Bennett (or Betten, as the envelope was addressed). (State's Exhibit 2; State's Exhibit 3.) Mr. LeFave testified that he could not remember which of the two letters were actually sent to Mr. Bennett. (Tr., p.35, Ls.16-23.) Because the language is almost identical and the exhibit was admitted without objection, counsel on appeal, has quoted the language from the first letter. (State's Exhibit 3; See Tr., p.36, Ls.9-13.)

[7] The demand letter, which purports to reference the VIN #, actually references the title number A98323478. (State's Exhibit 1; State's Exhibit 3; Tr., p.53, Ls.3-24.)

(Tr., p.83, L.24 – p.84, L.7.) Later that evening, Mr. Bennett and the trailer were gone. (Tr., p.84, Ls.9-12.)

At trial, Mr. Bennett testified that the sign on the trailer advertised the price as $1000 and that he had agreed to pay Mr. LeFave $850 for it. (Tr., p.96, Ls.13-20.) Mr. Bennett paid $150 on the day the transaction was entered into and he made payments every two weeks after that when he received his check. (Tr., p.97, Ls.1-9.) Mr. Bennett testified that he made payments of $150 on 11/1/2004 and $300 on 11/15/04 to Mr. LeFave at the truck stop, and $150 on 11/17/04 to Mrs. LeFave at her place of work. (Tr., p.98, Ls.15-20, p.99, L14 – p.100, L.6, p.100, L.23 – p.101, L.25.) Mr. Bennett testified that when he made the last payment to Mrs. LeFave, she said the title had been ordered and it was agreed when the title came in he would make the final payment in exchange for the title. (Tr., p.102, Ls.11-25.) Mr. Bennett also testified that when he started his second job, Mr. LeFave moved the trailer for him from Ms. Ellinger's property to the new location where he would be working and Mr. Bennett advised him at that time he might be moving again. (Tr., p.110, L.18 – p.111, L.16.) Finally, Mr. Bennett testified that when he moved to Ferndale, Washington, he contacted Mr. LeFave with his address and inquired again about the title. (Tr., p.104, Ls.5-22.)

Mr. Bennett was ultimately convicted by the jury of grand theft and stipulated that he was a persistent violator. (Tr., p.145, L.4 – p.149, L.12; R., pp.46, 50.) Mr. Bennett filed a *pro se* Notice of Appeal following the jury's verdict. (R., pp.51-57.) Counsel for Mr. Bennett also filed a Motion for Judgment of Acquittal arguing that "[t]he inculpatory evidence presented on the material element of value was so insubstantial that jurors could not help but have a reasonable doubt as to the proof of that element." (R., pp.58-

59, 62-64.) At the hearing on the motion, counsel for Mr. Bennett argued that because of the inconsistencies in Mr. LeFave's testimony and the fact that Mr. LeFave admitted his memory of the events was only about 85%, there was insufficient evidence to demonstrate the value of the trailer. (Tr., p.154, L.12 – p.160, L.23.)[8] The district court took the matter under advisement and issued a Memorandum Decision on Defendant's Motion for Judgment of Acquittal, denying the motion. (Tr., p.160, L.24 – p.161, L.4; R., pp.65-70.)

Mr. Bennett was eventually sentenced to concurrent sentences of eight years, with one and a half years fixed, for grand theft and for being a persistent violator. (R., pp.75-77.)[9] Mr. Bennett then filed a timely *pro se* Amended Notice of Appeal and Notice of Appeal from the district court's Judgment of Conviction. (R., pp.79-89.) Mr. Bennett also filed a timely Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion requesting his sentence be reduced to three years, with one a half years fixed. (R., pp.91-110.) The district court denied Mr. Bennett's Rule 35 request. (R., pp.111-114.)

In his Appellant's Brief, Mr. Bennett argued that the State failed to provide sufficient evidence that he was guilty of grand theft because it failed to demonstrate that Mr. Bennett unlawfully took the property, that Mr. LeFave owned the trailer when it was allegedly stolen, and that Mr. Bennett possessed the requisite intent to deprive the

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[8] Because this Court will not substitute its views regarding the credibility of witness and the weight of the evidence on appeal, and this would be a question of fact regarding the jury to determine the credibility of the witnesses and weight of the evidence, this issue is not being pursued on appeal. *State v. Crawford,* 130 Idaho 592, 595, 944 P.2d 727, 730 (Ct. App. 1997).

[9] This has subsequently been corrected by the department of corrections to properly reflect one sentence.

owner of the trailer or appropriate the trailer. (Appellant's Brief, pp.9-17.) Mr. Bennett also argued that the district court erred when it ordered a separate concurrent sentence for the persistent violator enhancement.[10] (Appellant's Brief, pp.17-18.) The Idaho Court of Appeals affirmed Mr. Bennett's conviction, finding their was sufficient evidence to sustain his conviction for grand theft that that a correction to his sentence should be pursued in the district court below. (*See* Opinion *generally.*) Mr. Bennett filed a timely Petition for Review.

[10] This issue is not being pursued in Mr. Bennett's Petition for Review.

ISSUE

Should Mr. Bennett's Petition for Review be granted because the Idaho Court of Appeals' Opinion affirming his Judgment of Conviction is in conflict with previous decisions of the Idaho Supreme Court and the Idaho Court of Appeals, as well as the Idaho State Constitution?

ARGUMENT

Mr. Bennett's Petition For Review Should Be Granted Because The Idaho Court Of Appeals' Opinion Affirming His Judgment Of In Conflict With Previous Decisions Of The Idaho Supreme Court And The Idaho Court Of Appeals, As Well As The Idaho State Constitution

A. Introduction

The Court of Appeals' Opinion finding that there was sufficient evidence to sustain Mr. Bennett's crirminal conviction for his failure to pay Mr. LeFave the full amount for his trailer is contrary to prior opinions by this Court and the Idaho Court of Appeals as well as article I, section 15 of the Idaho State Constitution. Therefore, he asks this Court to grant his Petition for Review, and if granted, to find there was not sufficient evidence presented to convict him of criminal grand theft.

B. Standard Of Review For Petition For Review

Idaho Appellate Rule 118(b) provides that, "[g]ranting a petition for review from a final decision of the Court of Appeals is discretionary on the part of the Supreme Court, and will be granted only when there are special and important reasons. . . ." Among the factors to be considered is whether the Opinion is in conflict with a previous decision of either the Idaho Supreme Court or the Idaho Court of Appeals. I.A.R. 118(b)(1)-(3).

C. Mr. Bennett's Petition For Review Should Be Granted Because The Idaho Court Of Appeals' Opinion Is In Conflict With Previous Decisions Of This Court And The Idaho Court Of Appeals As Well As The Idaho State Constitution

In affirming Mr. Bennett's conviction, the Idaho Court of Appeals found that there was sufficient evidence to convict Mr. Bennett for his removal of the trailer in question prior to finishing payment under the contract. In reaching this decision, the court found that 1) Mr. Bennett's conviction did not run afoul of the article I, section 15 of the Idaho

Constitution prohibition on incarceration for the failure to pay a debt; 2) that Mr. Bennett wrongfully took the property when he removed the trailer from the Ellingers' property without Mr. LeFave's permission; 3) that Mr. LeFave was the "owner" of the trailer because he retained the physical title and sole control over the location of the trailer, and therefore, by moving the trailer Mr. Bennett took property from the owner; and 4) that Mr. Bennett took the trailer with the intent to permanently deprive the owner of the property because Mr. Bennett was not the owner. (Opinion, pp.4-9.)

Mr. Bennett contends the Court of Appeals' Opinion is in conflict with the Idaho State Constitution as well as previous decisions of this Court and the Idaho Court of Appeals in several aspects. First, Mr. Bennett contends that his conviction does run afoul of the Idaho State constitutional provision prohibiting imprisonment for the failure to pay a debt contrary to the Court of Appeals' holding otherwise. Additionally, he contends that the Court of Appeals' finding that Mr. Bennett was only granted limited possession; therefore, grand theft exceeded the scope of that possession and took the trailer is contradictory to prior Court of Appeals case law as well as the charge of grand theft itself. He also contends that the Court of Appeals' finding that there was sufficient evidence that Mr. LeFave's ownership interest was superior to that of Mr. Bennett's is contrary to opinions by both this Court and the Court of Appeals. Finally, he contends the Court of Appeals finding that he intentionally deprived the owner of the trailer of the property is also contrary to prior opinions by this Court.

1. Mr. Bennett's Conviction Runs Afoul Of The Idaho Constitutional Provision Prohibiting Imprisonment For The Failure To Pay A Debt

In analyzing whether Mr. Bennett wrongfully took possession of the trailer, the Idaho Court of Appeals found that the jury's verdict in this case did not run afoul of the Idaho Constitutional provision prohibiting criminal enforcement of contractual obligations. (Opinion, p.7.) However, Mr. Bennett was not charged with any type of fraudulent theft involving misrepresentation or misappropriation of the property, but was charged with general theft for moving the trailer before making all of the payments, this is in conflict with article 1, section 15 of the Idaho Constitution which prohibits the failure to pay a debt except in cases of fraud. Therefore, contrary to the Court of Appeals' finding, Mr. Bennett was charged and convicted of theft for his failure to fulfill his contractual obligations, which is what article I, section 15 of the Idaho Constitution was designed to prevent.

In the context of criminal actions arising out of contractual obligations, there has evolved a tradition against enforcing civil contractual obligations through criminal proceedings. *State v. Jesser,* 95 Idaho 43, 50, 501 P.2d 727, 734 (1972); *State v. Henninger,* 130 Idaho 638, 642, 945 P.2d 864, 868 (Ct. App. 1997). This is reflected in article I, section 15, of the Idaho State Constitution, which prohibits the "imprisonment for debt in this state except in cases of fraud." Idaho Const. art I, § 15. The reasons underlying this tradition include "the improbability of preventing honest insolvency by threat of prosecution, the danger of discouraging healthy commercial risk-taking or of obtaining unjust convictions by hindsight, the futility of imprisoning a debtor unable to pay, and the concept that the seller or lender must select and accept his risks." *Jesser,* 95 Idaho at 50, 501 P.2d at 734; *Henninger,* 130 Idaho at 642, 945 P.2d at 868.

Although, at one time, imprisonment for failure to pay a debt was an acceptable "private civil remedy," as explained by the South Dakota Supreme Court, it quickly became disfavored in the nineteen century. *State v. Allison*, 607 N.W.2d 1, 3 (S.D. 2000). By 1853, the United State's Supreme Court stated:

> Imprisonment for debt is a relic of ancient barbarism. It has descended with the stream of time. It is a punishment rather than a remedy. It is a right for fraud, but wrong for misfortune. It breaks the spirit of the honest debtor, destroys his credit, which is a form of capital, and dooms him, while it lasts, to helpless idleness. Where there is no fraud, it is the opposite of a remedy. Every right-minded man must rejoice when such a blot is removed from the statute-book.

Id. (quoting *Magniac v. Thomson*, 56 U.S. (15 How.) 281, 302 (1853)). Today, imprisonment for the failure to pay a debt is often forbidden by state constitutional provisions like article I, section 15. *Id.* Such provisions are designed to protect the debtor who cannot pay from imprisonment, but also allow for the prosecution of those who act fraudulently or dishonestly. *Id.* (quoting *State v. Madewell*, 309 A.2d 201, 204 (1973)). Therefore, historically, courts have been reluctant to apply criminal culpability to a civil breach of a contract. *See State v. Hersch*, 445 N.W.2d 626, 633 n.10 (N.D. 1989) (stating that a false promise may not be inferred merely from nonperformance of a promise because "the crime of theft of property was not intended as a substitute for a breach of contract suit.") (citing Coment on Theft of Property Offenses: § 1731-1741, Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol 2, p.925 (1970)); *Wojahn v. Halder*, 39 N.W.2d 545 (Minn. 1949) (noting that although imprisonment for debt is forbidden by the Minnesota State constitution, imprisonment for fraud in contracting a debt was acceptable stating "[t]he imprisonment in such case is for the fraud and not for the debt"); *State v. Ripley*, 889 So.2d 1214 (La. Ct. App. 2nd Cir.

2004) (stating "[t]his case is essentially a civil breach of contract case arising out of the failure to pay rent. It is paramount that criminal intent, one of the several essential elements the state must prove for the crime of theft, be clearly established by the evidence" when finding the evidence was insufficient to sustain the defendant's conviction); *State v. Amanns*, 2 S.W.3d 241 (Tenn. Ct. App. 1999) (finding although the evidence presented by the State established a breach of contract, the defendant's conduct failed "to establish the commission of any offense recognized under our general theft statute."); *Evans v. State*, 508 So.2d 1205 (Ala. Ct. App. 1987) (recognizing that although the defendant's conduct constituted a breach of contract, it did not constitute the crime of theft by deception). *See also Commonweatlh v. Hensley*, 375 S.E.2d 182 (Va. Ct. App. 1988) ("[W]hile there was no explicit proscription in Virginia's Constitution against imprisonment for debt, it nevertheless was clear that a person could not be imprisoned, absent fraud, for mere failure to pay a debt arising from a contract."); *People v. Ryan*, 363 N.E. 2d 334, 337 (N.Y. Ct. App. 1977) (cautioning against expanding the scope of criminal liability for larceny by false pretenses because there was always a danger that the crime could reach into the civil realm of a mere breach of contract and stating, "the inference of intent must overcome to a moral certainty an implication of mere civil wrong.")

Much like under the Idaho Constitution, under the Washington State Constitution, "one cannot be imprisoned merely for failure to pay a debt," although it is acceptable to imprison for fraud. *State v. Pike*, 826 P.2d 152, 157 (Wash. 1992). In *State v. Pike*, the Washington Supreme Court stated that "general contractual debt cannot support a theft conviction" noting that "[w]e are loath to turn the criminal justice system into a

mechanism for the collection of private debts." Id. *See also State v. Sloan*, 903 P.2d 522 (Wash. App. Div 3 1995) ("[B]reach of contract without more does not support criminal liability.").

In Louisiana, the courts have specifically held that "a defendant lacks the requisite intent [to commit theft] when he makes an effort to pay the victim or to honor a promise made to him." *State v. Saucier*, 485 So.2d 584, 585 (La. App. 1986.) In *Saucier*, the defendant had been given the victim's dog to breed. *Id.* When it became apparent that no dogs would be bred, she stated that she would pay for the dog, but never actually paid. *Id.* She asserted that by attempting to breed the dog, she established that she intended to fulfill her obligations and that her failure to pay may give rise to a civil suit for breach of contract, but was not criminal theft. *Id.* The Louisiana Court of Appeals agreed. *Id.*

Similarly, in *Cox v. State*, 658 S.W.2d 668 (Tx. App. 1983), the Texas Court of Appeals also found that the evidence established nothing more than a contract dispute stating, "[t]he mere fact that one fails to return or pay back money after failing to perform a contract, for the performance of which the money was paid in advance, does not constitute theft." *Id.* at 671. In Cox, the alleged victim contracted with the defendant to have some home repair work done, paying the defendant in advance for parts and services. *Id.* at 669-670. The alleged victim admitted that the defendant performed "a great deal of the services" he said he would, but did not complete the job or return any of the money. *Id.* at 670. The court found that "the evidence in the present case established no more than a dispute over appellant's performance of a kitchen remodeling contract." *Id.* at 671. The court went on to find that the State failed to

establish that the defendant had the intent to deprive the alleged victim at the time he took the money from her. *Id.*

Like many of the other states cited above, the Idaho Constitutional provision prohibiting imprisonment for failure to pay a debt specifically creates an exception for cases of fraud. *See Id.* Const. art I, § 15. In fact, in *State v. Owen,* 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997), the Court of Appeals was asked to determine the extent to which article I, section 15, of the Idaho Constitution applies when the defendant is charged with theft by deception and theft by false promise. *Id.* at 928-29, 935 P.2d at 191-92. The Court noted that this provision "is intended to prohibit imprisonment over disputes which are contractual in nature." *Id.* at 928, 935 P.2d at 191. The Court cited *State v. Cochrane,* 51 Idaho 521, 6 P.2d 489 (1931), and found that these specific types of theft crimes were constitutional under *Cochrane* where they included "a component of dishonesty or falsehood" and thereby "advance the state's interest in preserving 'good morals and honest dealing.'" *Id.* at 929, 935 P.2d at 192 (quoting *Cochrane,* 51 Idaho at 527, 6 P.2d at 491.)

Here, however, Mr. Bennett was not charged with any type of fraudulent theft involving misrepresentation or misappropriation of the property, but was charged with general theft for moving the trailer before making all of the payments. Although the Court of Appeals concentrated on the fact that Mr. Bennett moved the trailer without Mr. LeFave's permission, moving the trailer without a showing fraudulent intent or misappropriation of property, proves only that Mr. Bennett breached the terms of the contract, not that he acted criminally. (*See* Opinion, pp.4-9.) Therefore, contrary to the Court of Appeals' finding, Mr. Bennett was charged and convicted of theft for his failure

to fulfill his contractual obligations, which is what article I, section 15 was designed to prevent.

2. Mr. Bennett Could Not Unlawfully Take The Trailer When He Moved It Because The Property Was Already Lawfully In His Possession

In its Opinion, the Idaho Court of Appeals stated that "it was reasonable for the jury to conclude that Bennett was not granted full possession but only a right to occupy the trailer on Ellinger's property" and found that "Bennett's act of removing the trailer from Ellinger's property without LeFave's permission and without first paying for it as the parties had agreed constituted a wrongful taking criminalized in the theft statute, as it far exceeded the limited control that LeFave had granted Bennett over the property." (Opinion, pp.4-5.) However, this finding is contrary to the Idaho Court of Appeals' Opinion in *State v. Henninger,* 130 Idaho 638, 945 P.2d 864 (Ct. App. 1997), because Mr. Bennett obtained possession of the trailer when Mr. LeFave dropped it off at the specified location and Mr. LeFave did not have a superior possessory interest in the trailer.

Idaho Code section 18-2402 defines obtaining property as bringing "about a transfer of interest or possession, whether to the offender or to another." I.C. § 18-2402. Mr. Bennett argued on appeal that this had already occurred lawfully when Mr. LeFave brought the travel trailer to the property where Mr. Bennett was living. (*See* Tr., p.29, L.24 – p.30, L.6; Appellant's Brief, pp.13-14.) Once Mr. LeFave dropped off the trailer at Ms. Ellinger's property, the trailer was in Mr. Bennett's possession and was under his control to live in, to care for, etc. Mr. Bennett argued his case was similar to *Henninger*, where the court found once the defendant drove off in the vehicle it was in

his control. *Henninger,* 130 Idaho at 641, 945 P.2d at 867 (noting that under the terms of the agreement, the dealership had "no further right to possession except to the extent that it would be entitled to repossess the vehicle upon default by terms of the security agreement."); (Appellant's Brief, pp.13-14.).

In *Henninger,* the Idaho Court of Appeals was faced with the question of whether the defendant had committed theft by unauthorized control as provided in I.C. § 18-2403(3), when the defendant failed to make payments on the installment contract for the pickup he purchased. *Henninger,* 130 Idaho at 640-42, 945 P.2d at 866-868. In making its determination that there was not substantial competent evidence to convict Mr. Henninger of the crime alleged, the Court noted that when Mr. Henninger drove the pickup away from the dealership he was the owner of the vehicle and his control was authorized. *Id.* at 641-42, 945 P.2d at 867-868. The Court went on to conclude that absent a more explicit expression by the legislature that it intended to abandon the customary separation of criminal law and civil contract enforcement, theft by unauthorized control was not intended "to encompass possession by a debtor who, by defaulting on a payment, has become contractually obligated to return the collateral to the creditor" or that it "intended the theft statute to be a mechanism that would aid the repossession efforts of secured creditors." *Id.* at 642, 945 P.2d at 868.

In the case at hand, the Court of Appeals found that *Henninger* was distinguishable because in *Henninger,* the car dealership relinquished "all the badges of ownership" to the defendant, whereas here "there was sufficient evidence that LeFave had not relinquished to Bennett 'all the badges of ownership,' but rather had explicitly retained both the title and his **right** to possession of the trailer in that Bennett was not to

move it without LeFave's assistance." (Opinion, pp.5-7 (emphasis added).) The Court then went on to find that because Mr. Bennett had not been given all the badges of ownership, his moving of the trailer could be criminal whereas *Henninger's* actions were not. (Opinion, p.7.) However, this comparison never actually resolves the question of whether Mr. Bennett had lawful possession of the trailer when it was moved. Clearly Mr. Bennett had lawful possession of the trailer prior to moving it. He could live in the trailer and use it how he saw fit.

Furthermore, unlike *Henninger*, there was not even an agreement reserving the right for Mr. LeFave to repossess the vehicle upon default. (*See* Tr., p.28, L.21 – p.30, L.2.) Although it was agreed that the physical title would not be given to Mr. Bennett until he made full payment, there was nothing specifying that Mr. LeFave had a right to enter the defendant's property and regain control of the trailer or move the trailer to another location himself. (*See* Tr., p.28, L.21 – p.30, L.2.) Even if Mr. LeFave maintained some kind of possessory interest in the location of the trailer, his interest was not greater that Mr. Bennett's. In fact, both Mr. LeFave's and Mr. Bennett's interests in the location of the trailer were subject to the permission of the Ellingers, whose property the trailer was located on and whose permission Mr. Bennett had obtained to keep the trailer there. Therefore, Mr. Bennett's case is not distinguishable from *Henninger* as the Court of Appeals found because his possessory interest in the trailer was equal to or greater than that of Mr. LeFave.

Finally, by finding that Mr. Bennett exceeded the scope of the "limited possessory rights" that he was granted, the Court of Appeals essentially found that Mr. Bennett was guilty of unauthorized control when Mr. Bennett was not charged with unauthorized

control nor was the jury instructed on the necessary elements. Compare I.C. § 18-2403 (3) ("A person commits theft when he knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the intent of depriving the owner thereof.") with I.C. § 18-2403(1) ("A person steals property and commits theft when...he wrongfully takes, obtains or withholds such property from an owner thereof.") In its Opinion, the Court of Appeals shifted Mr. Bennett's conviction away from his failure to pay a debt to his removal of the trailer stating, "Bennett was not prosecuted simply for his failure to complete payments to LeFave, but for his action of removing the trailer from Ellinger's property in contravention of LeFave's explicit instructions." (Opinion, p.7.) By making this finding, the Court of Appeals was actually finding that Mr. Bennett exercised unauthorized control over the trailer without Mr. Bennett ever being charged with or the jury having ever being asked to find the necessary elements of unauthorized control under I.C. § 18-2403(3). Thus, the Court of Appeals invaded the province of the jury and found Mr. Bennett guilty of theft by unauthorized control when he was actually charged with straightforward theft.

Therefore, the Court of Appeals finding that Mr. Bennett "wrongfully" took the trailer because he exceeded the scope of the possession he was given is contradictory to the Court of Appeals' prior Opinion in *Henninger* and required the court find Mr. Bennett guilty of an offense he was not charged with. Mr. Bennett obtained possession of the trailer when Mr. LeFave dropped it off at the specified location and any possessory interest retained by Mr. LeFave was not superior to that of Mr. Bennett.

Therefore, the State failed to prove that Mr. Bennett unlawfully took or obtained the trailer.

3. The Court Of Appeals' Finding That Mr. LeFave's Ownership Interest Was Superior To That Of Mr. Bennett's Is Contrary To Opinions By The Idaho Supreme Court And The Idaho Court Of Appeals

The Court of Appeals finding that Mr. LeFave was the "owner" of the trailer rather than Mr. Bennett is also contrary to prior decisions of the Idaho Supreme Court and the Idaho Court of Appeals. Idaho code § 18-2402(6) and the jury instructions in this case define owner as "any person who has a right to possession thereof superior to that of the taker, obtainer or withholder." I.C. § 18-2402(6); (Jury Instruction No.15 (replacing "taker, obtainer or withholder" with "defendant").) Here, the Court of Appeals found that under the definition of owner contained in I.C. §18-2402(6), there was sufficient evidence to find that Mr. LeFave "possessed a superior right to possession given that he retained both title and sole control over the location of the trailer." (Opinion, p.8.) However, Mr. Bennett contends this analysis was contradictory to this Court's Opinion in *State v. Jesser,* 95 Idaho 43, 501 P.2d 727 (1972) as well as the Court of Appeals' Opinion in *State v. Henninger,* 130 Idaho 638, 945 P.2d 864 (Ct. App. 1997).

In its' Opinion, the Court of Appeals found that here there was an explicit agreement that Mr. Bennett "would not receive title to the trailer until he had paid the full purchase price." (Opinion, p.8.) However, this finding ignores two things: 1) that Mr. LeFave testified that "the title" was to be delivered to Mr. Bennett after he completed payment, in other words the document of title, not necessarily title itself (Tr., p.30, Ls.20-23) and 2) the language in *Jesser* and § 28-2-401(2) stating that title passes upon delivery of goods "despite any reservation of a security interest and even though **a**

document of title is to be delivered at a different time or place." *See* I.C. § 28-2-401(2); *Jesser,* 95 Idaho at 51, 501 P.2d at 735.

Here, Mr. LeFave testified that "the title" was to be delivered to Mr. Bennett after he completed payment, in other words the document of title, not necessarily title itself. (Tr., p.30, Ls.20-23.) Therefore, there was not an explicit agreement regarding when title would pass as the Court of Appeals found, but rather an agreement as to when the document of title would be given to Mr. Bennett. (*See* Opinion, p.8.)

Furthermore, Mr. LeFave delivered the trailer to Mr. Bennett at the beginning of this transaction; therefore, title had passed at that point and Mr. Bennett continued to make payment to Mr. LeFave after this occurred. (*See*, Tr., p.28, L.21 – p.30, L.2.) In *Jesser,* the Court noted that under the uniform commercial code, "title is deemed to pass to the buyer at the time and place at which the seller completes his performance with to physical delivery of the goods, unless the parties explicitly agree otherwise." *Jesser,* 95 Idaho at 51, 501 P.2d at 735 (citing I.C. § 28-2-401(2) which currently states that "[u]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place."). Therefore, by accepting partial payment for the trailer and moving the trailer to Mr. Bennett's property, under *Jesser* Mr. LeFave was transferring ownership of the trailer to Mr. Bennett.

Additionally, in *Henninger,* the Court found that although it could legitimately be argued that a party holding a security interest in a property becomes the "owner" upon the defendant's default, this result was likely not the intention of the legislature because

it would render anyone who misses a payment on a secured credit purchase guilty of criminal conduct. *Id.* at 641, 945 P.2d at 867. Although here there was no evidence presented at trial establishing that Mr. LeFave even had a security interest in the trailer, even if he did, Mr. Bennett's default does not render Mr. LeFave's ownership interest superior to that of Mr. Bennett. (*See* Tr., p.28, L.21 – p.30, L.2.)

Therefore, the Court of Appeals' finding that there was sufficient evidence for the jury to find that Mr. LeFave possessed a superior ownership interest is contrary to both *Jesser* and *Henninger* and the State failed to establish that Mr. LeFave's ownership interest in the trailer was superior to Mr. Bennett's.

4. The Court Of Appeals' Finding Of Sufficient Evidence That Mr. Bennett Intentionally Deprived Mr. LeFave Of The Trailer Is Contrary To Prior Opinions By This Court

In its Opinion, the Court of Appeals found Mr. Bennett's argument that there was insufficient evidence of his intent to deprive Mr. LeFave of the trial was "unavailing" because Mr. Bennett was never an "owner" of the trailer and Mr. Bennett's argument was based solely on this basis. (Opinoin, pp.8-9.) However the finding that Mr. Bennett possessed the intent to permanently deprive Mr. LeFave of the property is also contrary to prior decisions by this Court which have held that the intent to deprive the owner of their property must exist at the time of the wrongful taking.

First, contrary to the Court of Appeals finding that Mr. Bennett's argument was based solely on the fact he never owned his trailer, Mr. Bennett also argued that his failure to pay for the trailer was insufficient to satisfy the intent element. (*See* Opinion, pp.8-9; Appellant's Brief, pp.15-16.) In his Appellant's Brief, Mr. Bennett argued that "the State failed to prove that Mr. Bennett wrongfully took the trailer with the intent to

deprive the owner of the property or to appropriate the property" and addressed the two theories the State presented regarding why this element was satisfied: because Mr. Bennett failed to pay for the trailer and because Mr. Bennett did not have permission to take the trailer. (Appellant's Brief, pp.15-16.) Therefore, Mr. Bennett's argument was more than just he was the owner of the trailer therefore he could deprive the owner, it was also that his failure to pay was not sufficient to satisfy this element. (*See* Appellant's Brief, pp.15-16.) This second argument was addressed further in Mr. Bennett's Reply Brief. (*See* Reply Brief, pp.10-12)

Furthermore, the Court of Appeals' the finding that Mr. Bennett possessed the intent to permanently deprive Mr. LeFave of the property is also contrary to prior decisions by this Court which have held that the intent to deprive the owner of their property must exist at the time of the wrongful taking. As Professor LeFave has noted, the defendant's conduct and his mental state must coincide for a larceny or theft to be completed. Wayne R. LeFave, Substantive Criminal Law, § 19.5(f) (2nd ed. 2003.) Thus, the taking and the intent to steal must concur or occur at the same time. *Id.* ("[O]ne who finds lost or mislaid property and picks it up intending to return it to the owner, but who later decides to steal it, cannot be guilty of larceny; for the taking and asportation, on the one hand, and the intent to steal on the other, do not coincide.") Likewise, the Idaho Courts have also stated that the intent required to deprive the owner of his property "must exist at the time of the wrongful taking or stealing." *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963). *See also Jesser*, 95 Idaho at 51, 501 P.2d at 735. Therefore, at the time Mr. Bennett took the property, which according to the

Court of Appeals was when it was moved from Ms. Ellinger's property, Mr. Bennett had to possess the requisite intent to deprive Mr. LeFave. (*See* Opinion, pp.6-9.)

Here, the State did not present any evidence that Mr. Bennett possessed the intent to deprive Mr. LeFave of the payment he was due under the contract at the time he moved the trailer. According to Ms. Ellinger, the trailer was placed on her property, after she gave Mr. Bennett permission to do so, in October/November and a month or two later, the trailer was moved. (Tr., p.82, L.16 – p.84, L.2.) Mr. LeFave only testified that he received a call stating the trailer was not at the property anymore and he went to investigate and several months later Mr. Bennett called. (Tr., p.32, L.10 – p.33, L.11.) It was after that call that Mr. LeFave sent Mr. Bennett the demand letter. (Tr., p.33, Ls.9-11, p.34, Ls.5-8.) Likewise, Mrs. LeFave remembered receiving a payment from Mr. Bennett, but could not remember when, stating "The fall. That's about the extent of what I remember." (Tr., p.73, Ls.19-22.) Notably, Mr. LeFave admitted that Mr. Bennett did offer to pay for the trailer when he called requesting the title. (Tr., p.34, Ls.1-3; p.39, Ls.10-20.)

Mr. Bennett's testimony also failed to demonstrate his intent to deprive Mr. LeFave. According to Mr. Bennett, the payment to Mrs. LeFave was made on November 17, 2004. (Tr., p.101, Ls.10-23.) Additionally, Mr. Bennett testified that he had already moved the trailer to a new location, with Mr. LeFave, prior to dropping off the money to Mrs. LeFave, and he moved to Washington immediately after giving the money to Mrs. LeFave. (Tr., p.111, L.22 – p.113, L.8.) He also testified that he called Mr. LeFave from Washington asking for the title on December 20, 2004, well after he had moved to Washington. (Tr., p.115, Ls.1-7.)

Furthermore, as argued above, by the time of the alleged taking, Mr. Bennett already had lawful possession of the trailer and was the owner. (*See* Supp. Tr., p.12, L.5 – p.13, L.16.) Mr. Bennett was lawfully in possession of the trailer once Mr. LeFave dropped the trailer off at the specified lot for his use. *See* Section I(C)(2) *supra*. Additionally, Mr. Bennett's ownership interest in the trailer was superior to Mr. LeFave's once the trailer was delivered. *See* Section I(C)(3) *supra*. Even if Mr. Bennett possessed the requisite intent to deprive Mr. LeFave of the property when he moved the trailer, he already had lawful possession of the trailer and had a superior ownership interest.

Therefore, the State's evidence failed to prove that Mr. Bennett had the intent to steal the trailer and not continue to make payments, at the time he took the trailer and the Court of Appeals' Opinion regarding this issue is contrary to prior decisions by this Court requiring the intent to deprive the owner to exist at the time of the taking.

D. If Mr. Bennett's Petition for Review Is Granted, Mr. Bennett Asks This Court To Find That The Evidence Presented At Trial Was Insufficient To Support The Jury's Verdict Finding Mr. Bennett Guilty Of Grand Theft

In this case, the State failed to provide sufficient evidence to prove Mr. Bennett was guilty of grand theft because it failed to prove beyond a reasonable doubt that Mr. Bennett committed a theft by moving the trailer, which was already in his possession and which he had made at least one payment toward. An appellate court's review of the sufficiency of the evidence to support a conviction is limited in scope. *State v. Knutson,* 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 2001). The reviewing court will not set aside the judgment of conviction following a jury verdict, if "there is substantial evidence upon which a reasonable trier of fact could have found

that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt." *State v. Crawford*, 130 Idaho 592, 594, 944 P.2d 727, 729 (Ct. App. 1997).

When reviewing the sufficiency of the evidence, the Court will conduct an independent review of the evidence in the record to determine whether a reasonable mind could conclude that each material element of the offense was proven beyond a reasonable doubt. *Willard,* 129 Idaho at 828, 933 P.2d at 117; *Knutson,* 121 Idaho at 104, 822 P.2d at 1001. The Court will not substitute its views for that of the jury when determining "the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence." *Crawford,* 130 Idaho at 595, 944 P.2d at 730. Furthermore, the Court will consider the evidence in the light most favorable to the prosecution. *Id.* In *State v. Mitchell*, 130 Idaho 134, 937 P.2d 960 (Ct. App. 1997), it was noted that, "[e]vidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proved." *Id.* at 135, 937 P.2d at 961.

Here, the dispute was contractual in nature and Mr. Bennett was not charged with theft by deception, theft by false pretenses, or theft by unauthorized control, by embezzlement, etc. but was simply charged with grand theft under the general portion of theft statute, and the instructions submitted to the jury only required the jury to find Mr. Bennett guilty of a general theft over $1,000. (*See* Jury Instructions Nos. 13, 17.) The elements of the crime of theft as charged in this case were:

1. On or about October 30, 2004
2. in the State of Idaho

3. the defendant William Lynn Bennett, wrongfully took property described as: at 1962 travel trailer,

4. from an owner, and

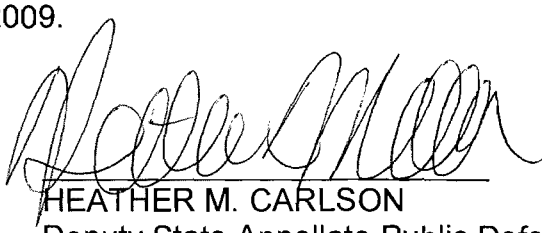
5. the defendant took the property with the intent to deprive an owner of the property or to appropriate the property.

(Jury Instruction No. 13.) The thrust of the State's case was that Mr. Bennett committed theft when he moved the trailer to Washington without Mr. LeFave's permission. (Supp. Tr., p.11, L.10 – p.12, L.16.) However, this theory fails to support Mr. Bennett's conviction of grand theft on the following three elements: (1) that Mr. Bennett wrongfully took the property, because the property was in Mr. Bennett's possession so it could not be "wrongfully" taken by him; (2) that the property was taken from an owner, because Mr. Bennett had contracted with Mr. LeFave for the trailer and was ostensibly the owner of the trailer; and (3) that Mr. Bennett took the property with the intent to deprive the owner of the property or to appropriate the property, because Mr. Bennett did not have the requisite intent to deprive Mr. LeFave when he moved the trailer. Therefore, as discussed above in section (C) and incorporated herein by reference, Mr. Bennett contends the State failed to establish the material elements of the crime in this case to support his conviction.

CONCLUSION

Mr. Bennett respectfully requests that this Court grant his Petition for Review. If granted, he asks this Court to vacate his conviction for grand theft with a persistent violator enhancement because there was insufficient evidence to support his conviction.

DATED this 18th day of June, 2009.



HEATHER M. CARLSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of June, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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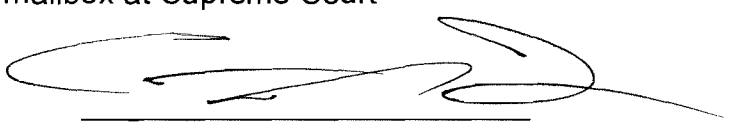

EVAN A. SMITH
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HMC/eas