No. 30524 - *State of West Virginia v. David Anderson*

Albright, Justice, concurring:

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While I fully concur with the majority decision, I write separately to address the dissent's proposition that this Court should have assumed an activist role in order to eliminate an established element of the offense of transferring stolen property by modifying our decision in *State v. Taylor*, 176 W.Va. 671, 346 S.E.2d 822 (1986). In more specific terms, the dissent opines that because the offense of transferring stolen property occurs subsequent to the larceny of the goods, the element of proof that the property was previously stolen by a person other than the accused is unnecessary. By eliminating this element, an accused could be charged and convicted of both larceny of the property and of transferring the stolen property.

The majority correctly declined the State's invitation to abandon an established element of the crime of transferring stolen property because this Court simply has no defensible reason for reaching that issue. Even though we may not have considered in *Taylor* all of the possible reasons why the Legislature included the term "transfer" in the provisions of § 61-3-18 when the statute was recodified in 1931, the Legislature has taken no steps to clarify a different intent regarding the elements of the crime since *Taylor* was handed down in 1986. Additionally, the text of the statute, which actually has not been amended since the

1931 recodification, provides ample support for the elements of the crime of transferring stolen property as defined by *Taylor*.[1]

It is readily apparent from the majority's recitation of facts that the prosecution sought this change in the law in order to correct its mistakes of failing to prove the questioned element, proposing a jury instruction which did not contain this element and losing the conviction on the basis of these omissions. By advocating for this change proposed by the prosecution in order to uphold the defendant's conviction in this case, the dissent ignores federal and state constitutional ex post facto proscriptions. It is quite clear from our holding in syllabus point one of *Adkins v. Bordenkircher,* 164 W.Va. 292, 262 S.E.2d 885 (1980), that any change in the elements of this offense could not be applied to the defendant because "[u]nder *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him."

Consequently, I concur with the majority because I see absolutely no

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[1]Since 1931, West Virginia Code § 61-3-18 has stated:

> If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be deemed guilty of the larceny thereof, and may be prosecuted although the principal offender be not convicted.

justification for disregarding our deep-rooted dedication to the principle of stare decisis in circumstances such as these where the law is clear. Casting aside well-settled law for no reason other than to substitute judge-made law is particularly reprehensible in the area of criminal law where clarity and fairness are overriding concerns.

I am authorized to state that Justice Starcher joins me in this concurring opinion.