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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Maynard, Justice, concurring, in part, and dissenting, in part:

I concur with the majority's decision in this case to the extent that it reverses the appellant's conviction. The failure to instruct the jury on all elements of the offense with which a defendant has been charged is reversible error. I dissent in this case, however, because I believe the majority should have taken this opportunity to revisit the decision in *State v. Taylor*, 176 W.Va. 671, 346 S.E.2d 822 (1986).

In *Taylor*, the Court recognized that "W.Va.Code, 61-3-18, contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct." 176 W.Va. at 676, 346 S.E.2d at 826-27. The *Taylor* Court further concluded that "there is sufficient disparity between the crime of transferring stolen property from that of receiving or aiding in the concealing of stolen property to warrant the conclusion that it is a separate offense." 176 W.Va. at 675, 346 S.E.2d at 826. The Court then determined that:

The elements of transferring stolen property are: (1) the property must have been stolen by someone other than the accused; (2) the accused must have transferred the property knowing or having reason to believe that the property was stolen; (3) the property must have been transferred to someone other

than the owner; and (4) the accused must have transferred the property with a dishonest purpose.

Syllabus Point 1, in part, *Taylor*.

In making this determination, the *Taylor* Court relied upon cases previously decided in accordance with W.Va. Code § 61-3-18 that involved buying, receiving, or aiding in the concealment of stolen goods. In particular, the Court focused upon cases that enumerated the elements of those offenses. A review of that case law shows that the elements of those offenses were first determined in the case of *State v. Smith*, 98 W.Va. 185, 126 S.E. 703 (1925).

At the time *Smith* was decided, the relevant statute provided:

If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted.

98 W.Va. at 187, 126 S.E. 704. The *Smith* Court stated that:

Our statute is identical with that of the state of Virginia, and has remained as it came to us from the Virginia Code of 1860. In *Hey v. Commonwealth*, 32 Grat. (Va.) 946, 34 Am. Rep. 799, it was held:

“To sustain the prosecution under the statute four things must be proved. 1. That the goods or other things were previously stolen by some other person. 2. That the accused bought or received them from another person, or aided in concealing

them. 3. That at the time he so bought or received, or aided in concealing them, he knew they had been stolen. 4. That he so bought or received them, or aided in concealing them *malo animo*, or with a dishonest purpose.”

Id. The *Taylor* Court applied the long-standing elements of receiving stolen property as set forth above to the offense of transferring stolen property. Although the *Taylor* Court recognized that the term “transfer” was not added to W.Va.Code § 61-3-18 until 1931, this fundamental change in the statute was not taken into consideration.¹ 176 W.Va. at 674, 346 S.E.2d at 825 (footnote added). In that regard, I believe the *Taylor* Court erred.

It is well-established that the offense of receiving or concealing stolen property requires proof that the property was stolen by someone other than the accused. Such proof is necessary because an accused cannot be convicted of both larceny and receiving or concealing the same property.

The reason for the rule, prohibiting conviction of both larceny and receiving or concealing the same stolen property, lies in the fact that the actions which constitute the taking or asportation of the property so far as the larceny is concerned are inseparable from those actions which constitute the receiving or concealment of the property. Thus, the receiving or concealment is considered not something that occurs subsequent to the larceny, but is in fact a part of it.

¹Virginia’s corresponding statute does not include the term “transfer.” Va. Code Ann. § 18.2-108 (1975) (“If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted.”)

Coley v. State, 391 So.2d 725, 727 (Fla. Dist. Ct. App. 1980). However, the offense of transferring stolen property is something that does in fact occur subsequent to the larceny. Moreover, the actions which constitute the offense of transferring stolen property are separate and distinct from the offense of larceny. Accordingly, I see no reason why a person cannot be found guilty of both larceny and transferring the same stolen property.

In this case, the State pointed out in its brief that several jurisdictions recognize that a person can be convicted of both theft and trafficking, i.e., transferring, the same property. I believe the majority should have taken this opportunity to bring West Virginia's jurisprudence in line with modern decisions on this issue.

Thus, for these reasons, I concur in part, and dissent, in part.