IN THE

Supreme Court of Virginia

RECORD NO. 080775

CHARLENE MARIE WHITEHEAD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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DISCUSSION OF LAW AND ARGUMENT

I. The Commonwealth has failed to show that Whitehead received the stolen property or aided in concealing it.

The Commonwealth argues that Whitehead knew that the recovered property was stolen; therefore, she is guilty of receiving stolen property and aiding in concealing it.

However, if, in fact, such knowledge had been established at trial, which Whitehead disputes, that evidence would satisfy only the *mens rea* of the offense. In order to have a completed crime, there must be evidence of an overt act as well. Brickhouse v. Commonwealth, 276 Va. 682, 668 S.E.2d 160 (2008).

The Commonwealth concedes that the record is devoid of any overt act committed by Whitehead to support these convictions. The Commonwealth stated, "While there may not have been evidence that Whitehead physically touched the property and actively hid it, the evidence was that she knew it was there and aided in concealing it." (Commonwealth's brief at page 26.)

While conceding that whitehead committed no overt act to show she received the stolen property or aided in concealing it, the Commonwealth

argues that Whitehead is guilty of these offenses because she received a benefit from Walden's criminal enterprise and that she failed to return the property or report Walden to the police. (Commonwealth's brief at page 15, 24.) The Commonwealth states, "Indeed, at the very least, Whitehead, knowing that Walden had stolen of all the property concealed throughout the apartment she shared with him, made no attempt to return the items to the rightful owners or call the police." (Commonwealth's brief at page 26.)

However, Whitehead had to duty to return the property that someone else stole or turn in the thief to police. The Commonwealth does not cite to any legal authority which places upon Whitehead a duty to return property that someone else stole or to turn in Walden to the police.

The only overt acts by Whitehead in the record is an affirmative showing that she was not a party to Walden's criminal activity. Whitehead argued with Walden that she suspected he was involved in criminal behavior and informed him that she not only refused to be a party to it, but that she would cooperate with police should Walden get arrested for his activities. This is hardly the acts of a person in receipt of stolen property or one who is aiding Walden in concealing his stolen property.

More importantly, Whitehead did not directly benefit from Walden's criminal enterprise. Walden stole to pay the rent on the apartment that he

rented. Because the lease was in his name, he was obligated to pay the rent whether or not Whitehead lived there. Walden would have had to pay his utility bills at the abode he rented whether or not Whitehead lived there. No evidence was presented that Walden paid any of Whitehead's bills that she was individually obligated to pay such that it could be said that Whitehead benefited from Walden's criminal conduct.

The case cited the Commonwealth for this proposition is readily distinguishable. In People ex rel. Briggs v. Hanley, 226 N.Y. 453, 123 N.E. 663 (1919), Briggs' boyfriend told her about a scheme in which he could use fraudulently obtained stock certificates to secure a fraudulent loan for at least $100,000.00. Briggs **urged him** to secure the fraudulent loan and after the first draw she **congratulated him**. More importantly, she convinced him to give her $20,000.00 of the money. Upon **accepting and receiving** the stolen money, Briggs and her boyfriend concocted a scheme in which **she deposited the fraudulently obtained money into a bank account, to which she would have access, under a fictitious name**.

Unlike Briggs, Whitehead did not encourage Walden to commit the thefts. In fact, she argued with him in an attempt to dissuade him from stealing. Unlike Briggs, Whitehead did not congratulate Walden when she suspected he was stealing. She made affirmative statements indicating

that she was not a party to Walden's actions and she did not approve of it. Unlike Briggs, Whitehead did not accept the stolen property. As the Commonwealth concedes, there is no evidence in the record to show that Whitehead ever touched the property. And, unlike Briggs, Whitehead did not stash the stolen property in a place where only she would have access to it. Also, contrary to the Commonwealth's assertion, Briggs **did physically receive the stolen property**. She received $20,000.00 of the loan proceeds that her boyfriend obtained using the stolen securities as collateral. And, she physically took possession of the $20,000.00 and deposited it into an account for herself, using a fictitious name.

By contrast, Whitehead did not receive the stolen property in this case. As the Commonwealth concedes, there is no evidence that Whitehead received, touched or aided in concealing the stolen property. In fact, the evidence shows just the opposite.

Here, we have Whitehead's mere presence at a place where Walden stole property and sold it to pay **his** rent, **his** utilities, and to support **his** child. Whitehead's mere presence at the apartment is insufficient to show that she was involved in Walden's criminal enterprise. Smith v. Commonwealth, 185 Va. 800, 40 S.E.2d 273 (1946). As the Smith Court stated, "Even a willingness that it be done is not sufficient unless such

willingness issues into suggestion or encouragement or help. Id. at 818-19, 40 S.E.2d at 281-82. Accord Hall v. Commonwealth, 225 Va. 533, 536, 303 S.E.2d 903, 904 (1983); Augustine v. Commonwealth, 226 Va. 120, 124, 306 S.E.2d 886, 888-889 (1983); Underwood v. Commonwealth, 218 Va. 1045, 1048, 243 S.E.2d 231, 233 (1978).

In Brickhouse, the evidence showed that Brickhouse knew why the police came to the residence, who they were looking for and why. This Court held that while such evidence indicated that Brickhouse was aware of the drug activity going on inside of the home, the evidence must prove more than the defendant's knowledge. Id. at 687, quoting Hall, Augustine, Underwood.

Further, the Commonwealth points to Whitehead's statements, in which she laments regarding her dereliction, arguably, of her moral duty to turn in Walden to police. However, dereliction of her moral duty does not supplant an unrecognized legal duty to act. The law does not require Whitehead to return the property, turn in Walden to police or move out. The law only punishes a failure to act where the law requires a duty to act. Here, Whitehead had no duty to act and the Commonwealth cites no legal authority which would require Whitehead to act in this circumstance. Therefore, Whitehead's act of remaining silent when there was no duty

under the law to speak could not possibly supply the *actus reas* necessary to support these convictions.

Also, the Commonwealth asserts that "The agreement stated the room was being rented to both Whitehead and Walden." (Commonwealth's brief at page 5.) And, as such, Whitehead "had a possessory interest in the apartment . . ." (Commonwealth's brief at page 23.) These assertions are a mischaracterization of the facts. The rental agreement is signed only by Walden as "**Tenant**. " Whitehead's name is written on the lease as a person authorized to stay there because the lease prohibits overnight guests. (Commonwealth's exhibit 5, number 3). Because the lease was signed by Whitehead as the "Tenant," Whitehead had no possessory interest in the apartment, and she had no exclusive possession or control over the property. As such, she was a guest, without any authority to exclude Walden or his stolen property from the apartment. Whitehead's reference to the property as "her house" does not confer upon her legal control over the property, or a possessory interest in the property recognized under the law.

Also, the fact the Whitehead handed the rent money to Eaton on one or two occasions out of ten does not confer "Tenant" status upon her. A

reasonable interpretation of this fact is that Whitehead was acting as an accommodation to Walden, the "Tenant."

II. Whitehead's suspicion or general knowledge that Walden was stealing property or engaged in illegal activities is insufficient to support the convictions.

The Commonwealth is unable to show that Whitehead was aware that each item of recovered property was stolen property at the time Walden brought the items into the apartment.

In her statement to police, Whitehead stated, "**I really have no idea how much stuff Jamil [Walden] has actually stolen**. Of course, she could not have known that each item recovered was stolen property because she did not see each of the stolen items when Walden brought them to his apartment. The Commonwealth's evidence shows that Walden left the items outside, sold them before he went home, or carried them into his apartment, hidden inside of closed containers and bags. Because the closed containers and bags were opaque, there is no way she could have seen the items to know what they were or whether or not they were stolen.

Once inside of the apartment, Walden hid the closed containers inside of closets, dresser drawers and any other place in which he could conceal them from Whitehead. Walden did not want Whitehead to know what he was doing and he went to great lengths to hide the stolen property from her – even leaving it outside of the apartment on occasions. It appears that Whitehead only became aware that the items recovered were stolen property at the time she assisted the police in determining whether any of the recovered property belonged to Whitehead or Walden. She identified the 13 items in the photos as stolen property through a process of elimination. Whitehead told the officer that the 13 items did not belong to her or Walden. As a result, the items must be stolen property. It was only through this process that Whitehead was able to identify the 13 items of property as stolen property for the first time.

Whitehead suspected that Walden was stealing. When she would confront him about her suspicions, he would not admit it. However, Whitehead knew that Walden did not have a job; yet, he was paying the rent. She knew that Walden was going out about three times a week and bringing closed containers and bags into the apartment. Therefore, when Whitehead stated that "she knew Walden was stealing or was going to do something wrong to get money," her knowledge was based upon logical

reasoning. There is no evidence in the record to show that Whitehead saw each item of stolen property or that she knew a particular item of property was stolen if, in fact, she did view any of the stolen property prior to viewing it at the time she assisted the officer in determining which property in the photos belonged to she or Walden.

However, Whitehead's suspicions, or eventual, general knowledge that Walden was stealing personal property and selling it for money is insufficient to show her knowledge that each of the recovered stolen items were, in deed, stolen items at the time Walden brought each item into the apartment.

More importantly, even if the evidence had established that Whitehead saw each piece of personal property when Walden brought it into the apartment and knew that the item was stolen, which Whitehead disputes; still, the evidence of her knowledge, without more, is insufficient to sustain a conviction. (Brickhouse, supra.)

III. The probation revocation should be deemed invalid where the convictions upon which the probation revocation is predicated is invalid.

The Commonwealth argues that Whitehead committed other offenses which would support a probation violation; therefore, the probation violation should be affirmed. (Commonwealth's brief, pages 28-29.) However, Whitehead's probation was not revoked for any of these reasons prior to the 32 convictions she suffered. The trial court purposefully waited until the resolution of the 40 count indictment against Whitehead prior to holding the probation revocation hearing and making a determination that Whitehead's probation should be revoked. A reasonable inference to be drawn from the trial court's actions is that the court considered the outcome of Whitehead's trial to be a determining factor in its decision whether or not to revoke Whitehead's probation, and/or to impose any active sentence.

Had Whitehead been acquitted at trial, it is reasonable to believe that a probation violation hearing never would have occurred. After all, a probation violation hearing was not held prior to Whitehead's trial, despite the fact that these other offenses had occurred prior to Whitehead's arrest in the instant case. Therefore, because the probation violation appears to be predicated upon her convictions in the instant case, should the convictions be reversed, so too, should the trial court's determination that Whitehead is in violation of her probation.

At the very least, the case should be remanded to the trial court for a new probation violation hearing, because it is unknown to what extent the trial court's decision was predicated upon Whitehead's 32 convictions as opposed to these other reasons.

CONCLUSION

For the foregoing reasons as well as the reasons previously stated, the appellant, Charlene Marie Whitehead, prays that this Court reverse her convictions and dismiss the indictments against her. Further, the appellant prays that this Court reverse the trial court's determination that Whitehead is in violation of the terms of her probation; or, alternatively remand the case to the trial court for reconsideration of its revocation decision in light of this Court's ruling on Whitehead's 32 convictions.

RESPECTFULLY SUBMITTED,
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CERTIFICATE

I, Patricia P. Nagel, Esquire, Counsel for Appellant, do hereby certify that on this 30th day of March, 2009, I filed by hand fifteen copies of this Reply Brief with the Clerk of the Supreme Court of Virginia, and filed an electronic copy addressed to scvbriefs@courts.state.va.us as required, and on the same day mailed three copies of the same to Jennifer C. Williamson, Esquire, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219.

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