WISCONSIN SUPREME COURT
September 9, 2019
10:45 a.m.

2017AP913-CR State v. Autumn Marie Love Lopez
& 2017AP914-CR State v. Amy J. Rodriguez

These consolidated appeals come to the Supreme Court from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals' decision reversed the Green County Circuit Court's decision, Judge James R. Beer, presiding, that dismissed retail theft charges against Autumn Lopez and Amy Rodriguez.

This appeal asks the Supreme Court to determine if several incidents of retail theft can be aggregated, such that smaller retail thefts that would result in misdemeanor convictions, if charged singly, may be lumped together and charged as one felony count of retail theft.

The thefts at issue in this case occurred seven times over a 15-day period in January 2017. Autumn Lopez, a WalMart employee, assisted Amy Rodriguez to steal items from WalMart. Rodriguez would walk up to a self-checkout terminal where Lopez would appear to assist her. Lopez would pretend to scan items, would intentionally fail to scan items, and would void items that had been scanned. The per-trip value of the items for which Rodriguez did not pay varied from $126.33 to $313.95. The total value from all seven incidents was $1,452.12.

The State charged both women with retail theft of merchandise worth between $500 and $5,000, as a party to the crime, in violation of Wis. Stat. §§ 943.50(1m)(c) and (4)(bf). Given the total value of merchandise stolen in all seven incidents, the statute would classify the retail theft, if aggregated, as a Class I felony. The complaint aggregated the value of the seven incidents as one continuing crime under Wis. Stat. § 971.36(3)(a) in order to reach that threshold.

Both Lopez and Rodriguez moved to dismiss the charge. They argued that Wis. Stat. § 971.36(3)(a) allows for the aggregation of value from multiple incidents only when the State is charging "theft" under Wis. Stat. § 943.20. Because the State charged "retail theft" under Wis. Stat. § 943.50, they argued that Wis. Stat. § 971.36(3)(a) did not apply.

The circuit court granted the defendants' motions to dismiss. It concluded that because Wis. Stat. § 971.36 referred only to "thefts," it applied only to counts alleging the crime of theft under Wis. Stat. § 943.20 and did not apply to counts alleging the crime of retail theft under Wis. Stat. § 943.50.

The State appealed, and the Court of Appeals reversed the dismissal of the charge against the two defendants. It construed Wis. Stat. § 971.36(3)(a) to apply to all types of theft, not just to theft under § 943.20. It rejected the defendants' arguments as reading into the statute a limitation that the plain language of the statute does not contain. See State v. Kozel, 2017 WI 3, ¶39, 373 Wis. 2d 1, 889 N.W.2d 423. It noted that there are ten separate statutes that criminalize various forms of theft and that even the general theft statute, Wis. Stat. § 943.50, identifies five distinct theft offenses. The Court of Appeals reasoned that if the Legislature had intended Wis. Stat. § 971.36(3)(a) to apply only to one or more of those numerous types of theft, it would have identified those specific types in the statute. Since it did not do so, the Court of Appeals concluded that the Legislature did not intend to limit the scope of the statute.

The Supreme Court granted Lopez's petition for review, which raises the following issue: Does Wis. Stat. § 971.36 or prosecutorial charging discretion allow for seven separate acts of

retail theft of merchandise valued at $126-$314 each and committed over a two-week period to be charged as a single count of felony retail theft of merchandise totaling $1,452.12?