State of New Hampshire
Supreme Court

NO. 2007-0667

2008 TERM

MAY SESSION

State of New Hampshire

v.

Graham Jensen

RULE 7 APPEAL OF FINAL DECISION OF
ROCHESTER DISTRICT COURT

REPLY BRIEF OF DEFENDANT GRAHAM JENSEN

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ARGUMENT

I. State Does Not Dispute that Toll Tokens are a Tangible Manifestation of a Contract that the State was Obligated to Accept

The State does not dispute significant issues raised by Mr. Jensen: that there exists a contract between Mr. Jensen and the State formed when Mr. Jensen bought toll tokens, that the contract was a bargain exchanging Mr. Jensen's pre-payment for future use of New Hampshire's toll highways, that upon having bought tokens Mr. Jensen became a creditor of the State for the purposes of using toll highways, that the tokens given Mr. Jensen at the time the contract was formed are the tangible manifestation of the parties' arrangement, and that the contract allows Mr. Jensen to use highway services upon relinquishment of the tokens. The State has not sought to undermine the applicability of the two on-point cases cited in Mr. Jensen's opening brief, *Ganci v. New York City Transit Authority*, 420 F.Supp.2d 190, 199 (S.D.N.Y. 2005), *aff'd*, 163 Fed.Appx. 7 (2nd Cir. 2005) and *Barry v. New Jersey State Highway Authority*, 585 A.2d 420, 423 (N.J.Super 1990).

These issues are thus waived. *State v. Davis*, 149 N.H. 698, 703 (2003) ("arguments not briefed are deemed waived").

Rather the State points out that toll tokens provide a discount for those who use them, and that the discount is either sanctioned or demanded by statute. This is undoubtedly true, as RSA 237:11,V, which the State cites, specifies the discounts enjoyed by drivers of various types of vehicles.

But the State is merely dickering about price. It makes no attempt to explain toll tokens as anything other than what Mr. Jensen said they are – physical representations of a contract between he and the State that the State is obligated to accept when Mr. Jensen offered them at the toll booth in Rochester.

II. Mr. Jensen Cannot be Barred from Referencing a Contract

In its Memorandum the State alleges that Mr. Jensen is barred from defending himself on the grounds that tokens represent a contract, because contracts are an issue of civil law.

The statute under which Mr. Jensen was convicted makes it a theft to get something for which no payment was made.[1]

An obvious defense to the charge is: "I paid." *See e.g., State v. Kelly*, 125 N.H. 484 (1984) (theft conviction reversed where amount received by victim at least as much item worth); *State v. Leonard*, 707 P.2d 650 (Utah 1985) (in theft of hotel services, defendant not guilty as to nights for which he paid); *Cox v. State*, 224 S.E.2d 845 (Ga.App. 1976) (evidence showed defendant paid for items allegedly stolen).

Similarly: "I can't steal what I already own." *See e.g., State v. Gard*, 742 N.W.2d 257 (S.D. 2007) (claim-of-right defense); *Commonwealth v. Vives*, 854 N.E.2d 1241 (Mass.2006) (same); *Owens v. State*, 866 So.2d 129 (Fla.App. 2004) (same); *People v. Tufunga*, 987 P.2d 168 (Cal. 1999) (same); *see also*, Annotation, *Robbery, Attempted Robbery, or Assault to Commit Robbery, as Affected by Intent to Collect or Secure Debt or Claim*, 88 A.L.R.3d 1309.

That these defenses require reference to a contract or civil law to determine whether the defendant already paid or already owns does not somehow make the defense inaccessible.

Crimes are routinely prosecuted where application of contract law is necessary for determining an element of the crime charged. *See e.g., State v. Marion*, 122 N.H. 20 (1982) (in arson case, court construed mortgage contract to determine whether house was "property of

[1] "A person commits theft if he obtains services which he knows are available only for compensation by deception, threat, force, or any other means designed to avoid the due payment therefor." RSA 637:8.

another"); *State v. Moran*, 151 N.H. 450 (2004) (in consumer protection act criminal prosecution, timing of contract evidenced criminal inducement); *State v. Qualters*, 121 N.H. 484 (1981) (in prosecution for carrying uncovered loads of particulate matter on a public highway, state offered and court construed defendant's contract with municipality to show defendant was not carrying his own farm material which was exempted by the statute); *State v. Groulx*, 106 N.H. 44 (1964) (gambling shown by reference to betting contract); *State v. Del Bianco*, 96 N.H. 436 (1951) (in gambling prosecution, court determined whether lack of intent by one party obviated meeting of the minds to create a betting contract).

Criminal defendants routinely (and successfully) point to contracts, documents, and civil law statutes as defenses to charges of theft. In *State v. Davison*, 74 N.H. 10 (1906), charged with embezzling corporate funds, the defendants offered a contract and other corporate documents to show the funds were theirs, and not the property of the corporation. In *State v. Story*, 97 N.H. 141 (1951), charged with wrongfully obtaining money of the State by false pretenses, this Court approved the defendants having submitted to the jury the contract under which they were operating as part of their defense. *See also*, *State v. Stewart*, 155 N.H. 212 (2007) (reversing conviction for issuing bad check, where defendant bargained with payee to not deposit check until sufficient funds available).

Similarly, the State routinely brings theft prosecutions stemming from what might otherwise be civil disputes. *See e.g.*, *State v. Beede*, 156 N.H. 102 (2007) (theft of real estate proceeds between business partners shown by business records offered by state); *State v. Sharon*, 136 N.H. 764 (1993) (theft by deception regarding failure to perform construction contract); *State v. Gruber*, 132 N.H. 83 (1989) (theft for withholding information from insurance company

proved with reference to insurance policy); *State v. Hill*, 115 N.H. 37 (1975) (theft of services proved with reference to statutory lien on car); *State v. Skaff*, 94 N.H. 402 (1947) (charge of intent to obtain money by false pretenses proved by construction contract language and timing); *State v. Rousten*, 84 N.H. 140 (1929) (prosecution for theft by "prevent[ing] an electric meter from duly registering the quantity of electricity supplied," state offered timing of contract with electric company to show defendant, and not his business, culpable).

It is apparent that reference to contracts, legal documents, and civil statutes are part of the routine backdrop of criminal allegations involving money. Not allowing Mr. Jensen to reference the contract between he and the State would be contrary to routine practice, would deprive him of his obvious "I paid" and "I own" defenses, and would violate his constitutional right to present all favorable proofs. N.H. CONST. pt. I, art. 15; U.S. CONST. amds 5 & 6.

Morever, because the State routinely brings cases which rely on references to contracts, it should be equitably estopped from suggesting that a criminal defendant, who the *State* has haled before the court, to do the same. Similarly, as it is the *State* which has refused to perform on its contract and instead arrested Mr. Jensen for forcing performance, it is disingenuous to request the Court maintain ignorance of the contract. There is irony in the State's argument – by arresting Mr. Jensen, it is the *State* that turned what should have been a civil issue into a crime.

Lastly, Mr. Jensen is requesting reversal of an unjust criminal conviction, not contract remedies. *State v. Kinne*, 39 N.H. 129 (1859) ("a court of criminal jurisdiction alone has, in the absence of statutory provisions, no power to issue any process for the collection of the sums forfeited"). Accordingly the State's suggestion, that Mr. Jensen's defenses are barred because they involve a contract, should be rejected.

III. State Cannot Unilaterally Cancel Contracts

The State's central argument seems to be that despite entering contracts, it has the unilateral authority to cancel them. It says that although "the legislature authorized the governor and council to set toll discounts by using … tokens," it then in 2005 "struck the provision … and expressly forbade the department of transportation from selling or collecting them." STATE'S MEMORANDUM at 8. While that is an accurate recital of the facts, it does not excuse the State's action in failing to accept the tokens offered by Mr. Jensen.

The State cannot unilaterally change or breach contracts unless some authority – either in the contract or pre-existing statute – provides for that. Many State contracts, for example, have provisions allowing the State to back out if funds are not appropriated. *See e.g., Morgenroth & Associates, Inc. v. Town of Tilton*, 121 N.H. 511 (1981) (contract conditioned on towns' receipt of federal grant money); *Alexandropoulos v. State*, 103 N.H. 456 (1961) (no breach by State when statute did not authorize contract). Silence concerning a term does not imply such authority. *Opinion of the Justices*, 135 N.H. 625, 633 (1992) (Court does not "condone such a violation merely because the issue … is not explicitly discussed").

In the absence of explicit language in either the contract or a pre-existing statute – and the State has not cited any – unilateral alteration violates the contract clauses of both the Federal and New Hampshire Constitutions. N.H. CONST. pt. 1, art. 23; U.S. CONST. art. 1, § 10, cl. 1.

> [W]here the State attempts to abridge its own contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."

Opinion of the Justices, 135 N.H. at 635, *quoting United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977). In *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412 n.14 (1983), the United States Supreme Court said, "[w]hen a State itself enters into a contract, it cannot simply walk away from its financial obligations." A state "cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *United States Trust Co.*, 431 U.S. at 29. "The contract clause, if it is to mean anything, must prohibit the State from dishonoring its existing contractual obligations when other policy alternatives are available." *Opinion of the Justices*, 135 N.H. at 636 (brackets and quotations omitted).

Likewise, in the absence of explicit contractual or statutory authority, reneging on a contract also violates provisions barring retrospective laws of both the Federal and New Hampshire Constitutions. N.H. CONST. pt. I, art. 23; U.S. CONST. art. I, § 10; *see Opinion of the Justices*, 135 N.H. at 625; *Morgenroth & Associates, Inc. v. Town of Tilton*, 121 N.H. at 511.

> A retrospective law is one that takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

In re Grand Jury Subpoena, 155 N.H. 557, 564 (2007).

Here, what were once valid tokens, by operation of statute became apparently worthless. The State purported to unilaterally cancel the contract with Mr. Jensen. Its claim that it has the authority to do so cannot be reconciled with our constitutions, and therefore should not be condoned by this Court.

IV. Mr. Jensen Intended to Pay

A. Mental State

The theft of services statute provides that "A person commits theft if he obtains services which he knows are available only for compensation by … means *designed* to avoid the due payment therefor." RSA 637:8 (emphasis added).

In Mr. Jensen's opening brief he specified no mental state, and in the State's appellate Memorandum it declined to specify a mental state. Both parties have assumed that the mental state applicable to the statute is "purposely."

Upon a more careful reading of the statute, however, it is apparent that it does specify a mental state. In order to be guilty of the crime, the defendant must have "designed" to avoid payment. "Designed" means "[t]o create or contrive for a particular purpose or effect" or "[t]o have as a goal or purpose; intend." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004).

For example, in *Bouchard v. Pennell*, 232 A.2d 800 (Me. 1967), a real estate broker acquainted a seller and potential buyer of a certain property with each other's interest, and then conducted protracted negotiations between them which "awakened a lively and continuing interest on the part of the purchaser." The buyer and seller then conducted "direct negotiations," leaving the broker out of the loop. The land was sold to the buyer's sister, and was then reconveyed to the buyer the same day. The Maine Court found that the seller and ultimate buyer engaged in a "mere subterfuge *designed to avoid payment* of an earned commission." *Bouchard v. Pennell*, 232 A.2d at 803 (emphasis added).

B. Intent to Pay

When Mr. Jensen encountered the Rochester toll, as the State points out, he knew that tokens had been discontinued by the State – by learning of government officials' debates regarding the matter, by seeing the sign at the booth, and by hearing the attendant and then the arresting officer tell him.[2] Based on his research and diligent understanding of contract, statutory, and constitutional law, Mr. Jensen reasonably believed that tokens were a valid form of payment, despite the debates, the sign, or the officer.

Because Mr. Jensen had a legal right to use tokens, he lacked the *mens rea* for the crime. There is no evidence, such as the Maine real estate subterfuge in *Bouchard v. Pennell*, that he intended to avoid payment altogether. Had he attempted to pay with monopoly money or some other object valueless or not intended as a medium of exchange, a design to avoid payment might be inferred. *United States v. Church*, 888 F.2d 20, 24 (5th Cir. 1989) (upholding attempted bank fraud conviction where defendant's "plan was no more likely to succeed than a request that the Bank exchange monopoly money for its face value in U.S. currency"); *see e.g., United States v. Milton*, 12 Fed.Appx. 643 (10th Cir. 2001) (conviction for impeding administration of tax law by submitting counterfeit money orders to IRS as purported tax payment); *State v. Reynolds*, 746 N.W.2d 837 (Iowa 2008) (theft convictions for paying car loan with counterfeit notes).

But Mr. Jensen paid with a *toll token*, which he reasonably expected (and this Court should hold) was a valid form of payment. Accordingly, he had no design to avoid payment, and cannot be guilty of theft.

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[2]The State attempts to amplify its argument by suggesting that Mr. Jensen may have bought the tokens after he knew they were discontinued. First, the evidence does not bear that out. Mr. Jensen testified that his "suspicion is that I purchased them prior to the expiration, … prior to the announcement that they were going to be terminated," but that he did not know exactly. STATE'S MEMORANDUM at 9; *Trn.* at 56-57. Second, the date he bought them is not relevant to the analysis of whether a crime was committed. Tokens are fungible and not dated; that is, they are functionally identical, the date of purchase cannot be determined from an examination of them, and nothing in the statutory description of the theft crime suggests its application turns on distinguishing among tokens in drivers' coin trays.

V. Tokens are Written

The State's sole substantive argument against the applicability of the recent gift certificate amendments to the Consumer Protection Act (CPA) is that "[t]okens are not a 'written' promise in the plain-meaning sense of the word." STATE'S MEMORANDUM at 11. The State cites Webster's Dictionary, but does not quote the Webster's definition. In relevant part Webster's defines "write" as:

> 1. To set down, as legible characters; to form the conveyance of meaning; to inscribe on any material by a suitable instrument; as, to write the characters called letters; to write figures.
>
> 2. To set down for reading; to express in legible or intelligible characters; to inscribe; as, to write a deed; to write a bill of divorcement; hence, specifically, to set down in an epistle; to communicate by letter.

WEBSTER'S REVISED UNABRIDGED DICTIONARY (2008).

As noted in Mr. Jensen's opening brief, the "legible or intelligible" "characters called letters" which are "set down for reading" and "inscribe[d]" on the packaging "material" "to form the conveyance of meaning" "communicate" the following:

> "[F]are value, 25 cents. Not redeemable for cash. Use of tokens restricted to two-axle, two and four-tired vehicles."

Trn. at 23. It is thus "written."

Finally, the State repeats its procedural argument. It claims that recognizing tokens as a "gift certificate" under the CPA (and thus un-expirable and perpetually valid to pay tolls) is somehow not allowed in a criminal case. As noted above, however, "I paid" and "I own" are valid defenses to theft which routinely necessitate citation and construction of civil statutory law. Accordingly, Mr. Jensen cannot be barred from relying on it.

VI. State Seeks to Diminish Effect of Possible Opinion

The State filed a Memorandum of Law in lieu of a brief. The practical effect of this is to waive oral argument, N.H. SUP.CT.R.16(4)(b), thereby decreasing the likelihood of a published opinion, N.H. SUP.CT.R.18(1)&(2), and concomitantly decreasing the opinion's likely precedential value. N.H. SUP.CT.R.20

In his opening brief Mr. Jensen requested oral argument:

> because of the ubiquity of toll tokens, because the outcome of this case is important to numerous types of government contracts that cannot be unilaterally terminated, because the facts of this case are novel in New Hampshire, and because of the injustice of Mr. Jensen's conviction.

JENSEN'S OPENING BRF. at 11.

Estimates are that at the time the State purported to discontinue toll tokens there were five million of them remaining in circulation. Larry Clow, *After E-Z Pass, Tokens Find a New Home*, THE WIRE, Aug. 31, 2005, http://www.wirenh.com/News/News_-_general/after_E-ZPass,_tokens_find_a_new_home_20050831699.html (quoting Bill Boynton, spokesman for the New Hampshire Department of Transportation); *see also* Meg Heckman, *Tokens' Demise Won't Be Easy Senate Debates E-ZPass Timeline*, CONCORD MONITOR, June 8, 2005 ("millions of tokens still in circulation").

While perhaps not crucial to the State's budget, by discontinuing tokens the State has realized a windfall at the expense of Mr. Jensen and others. If Mr. Jensen prevails in this appeal, and the opinion is published with precedential value, one can assume that a redemption program will be established by the State on its own or after civil litigation. The State's filing of a Memorandum rather than a brief appears nothing more than a maneuver to avoid the natural consequences of its unilateral discontinuance.

CONCLUSION

Based on the foregoing, Graham Jensen requests this Court reverse his conviction.

Respectfully submitted,

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Dated: May 22, 2008

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CERTIFICATION

I hereby certify that on May 22, 2008, copies of the foregoing will be forwarded to Thomas E. Boxian, Esq., Office of the Attorney General.

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