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1999 Survey of Rhode Island Law: Cases: Criminal Law

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Criminal Law. *State v. Alejo*, 723 A.2d 762 (R.I. 1999). The Rhode Island Supreme Court interpreted section 12-1.3-2 of the Rhode Island General Laws,[1] the criminal records expungement statute, and held that persons who receive a suspended sentence are treated the same as those who serve a term of imprisonment. In addition, the court implicitly held that a plea of nolo contendere[2] is a conviction for purposes of the statute.

FACTS AND TRAVEL

The appeal before the supreme court in this case arose from three separate matters. On August 26, 1997, a superior court judge heard three motions to expunge criminal records brought pursuant to Rhode Island General Laws section 12-1.3-2, the expungement statute.[3] The first case involved defendant Alejo, who was charged with possession of a firearm by an alien.[4] She pled nolo contendere to the felony charge, and was given a five-year suspended sentence.[5] The second case involved defendant Berry.[6] He pled nolo contendere to two amended and reduced charges of simple assault, a misdemeanor.[7] He received two concurrent one-year suspended sentences.[8] The last case involved defendant McCreadie.[9] He was charged with conspiracy to commit larceny over $500.[10] He also pled nolo contendere to the felony charge and received a term of one-year probation.[11]

The superior court granted all three motions.[12] The State objected, arguing that under the expungement statute, none of the defendants had waited the statutorily proscribed period before ap-

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1. R.I. Gen. Laws § 12-1.3-2 (1956) (1994 Reenactment).

2. *See* Black's Law Dictionary 1048 (6th ed. 1990). Black's Law Dictionary defines nolo contendere as "phrase meaning 'I will not contest it'; a plea in a criminal case which has similar legal effect as pleading guilty. . . ." *Id.*

3. *See* State v. Alejo, 723 A.2d 762, 763 (R.I. 1999).

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.* (The original charges against Berry were for second-degree sexual assaults.).

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

plying for expungement.[13] The State appealed the decision of the superior court on those same grounds.

ANALYSIS AND HOLDING

Section 12-1.3-2 of the Rhode Island General Laws reads:

> (a) Any person who is a first offender may file a motion for the expungement of all records and records of conviction for a felony or misdemeanor by filing a motion in the court in which the conviction took place, provided that no person who has been convicted of a crime of violence shall have his or her records and records of conviction expunged.
> (b) Subject to subsection (a), a person may file a motion for the expungement of records relating to a misdemeanor conviction after five (5) years from the date of the completion of his or her sentence.
> (c) Subject to subsection (a), a person may file a motion for the expungement of records relating to a felony conviction after ten (10) years from the date of the completion of his or her sentence.[14]

The State argued that the trial justice improperly granted the defendants' motions because none of the defendants had standing to file the motions for expungement of their criminal records.[15] The language of the statute permits a first offender to request expungement of his record after a certain period of time has passed since the completion of his sentence.[16] Therefore, the defendants must wait the proscribed statutory period, five years in the case of a misdemeanor conviction, or ten years in the case of a felony conviction, from the date of the completion of the sentence, before they have standing to request expungement. The court did not illuminate the defendants' arguments. Presumably, it opposed the State's interpretation of the statute, arguing that the language of the statute is ambiguous and within the province of the superior court judge's discretion.

The Rhode Island Supreme Court agreed with the State.[17] It first laid out the oft stated principle that when a statute is clear

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13. *See id.*
14. R.I. Gen. Laws § 12-1.3-2 (1956) (1994 Reenactment).
15. *See Alejo*, 723 A.2d at 763.
16. *See* R.I. Gen. Laws § 12-1.3-2 (1956) (1994 Reenactment).
17. *See Alejo*, 723 A.2d at 764.

and unambiguous, the court will apply the statute literally.[18] The court then held that in order to seek expungement, one must first wait until the length of their sentence has passed, "regardless of whether the sentence was for imprisonment, suspension of imprisonment or probation, or any combination thereof."[19]

The court implicitly held that a plea of nolo contendere is a conviction for purposes of the expungement statute. Therefore, before a superior court judge can consider expunging a criminal record, he or she must first find that the original sentence received has expired, regardless of whether it included jail time.[20]

In this case, the supreme court addressed three instances of expungement. Defendant Alejo was sentenced to a five-year suspended sentence for a felony conviction in 1992.[21] Her sentence expired in 1997.[22] Under section 12-1.3-2(c), she must wait ten years, until the year 2007, to request expungement.[23] Defendant Berry was sentenced to two concurrent one-year suspended sentences for misdemeanor convictions in 1993.[24] His sentence expired in 1994.[25] He is eligible to request expungement in 1999 under section 12-1.3-2(b).[26] Lastly, defendant McCreadie was sentenced in 1996 to a one-year term of probation for a felony conviction.[27] His term of probation expired in 1997. Under section 12-1.3-2(c), he may request expungement in 2007.[28] According to the court's calculations, all three defendants lacked standing to request expungement at the time their motions were filed.[29]

CONCLUSION

Before requesting expungment of his criminal record, a person convicted of a felony offense must wait ten years, and a person convicted of a misdemeanor offense must wait five years, from the date

18. *See id.* (citing Pizza Hut of Am., Inc. v. Pastore, 519 A.2d 592, 593 (R.I. 1987)).
19. *Id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.* at 765.
28. *See id.*
29. *See id.*

of completion of his sentence. Furthermore, the Rhode Island Supreme Court found that the Rhode Island General Assembly intended to treat all sentences alike for purposes of the expungement of criminal records. A first offender sentenced to a lengthy term of incarceration will carry the mark on their record for the same length of time as a first offender who receives a slap on the wrist and is sent home. The person who receives a suspended sentence has a false sense of relief, since they may have a criminal record for as long as fifteen years after their offense.

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Criminal Law. *State v. Mullen*, 740 A.2d. 783 (R.I. 1999). When the General Assembly modifies a portion of a criminal statute, the effect of the modification upon pending prosecutions should: (1) be considered on a case-by-case basis; (2) while taking into account the provisions of section 43-3-2 of the Rhode Island General Laws; and, (3) while taking into account the intent of the legislature in enacting the modification.

In *State v. Mullen*,[1] the Rhode Island Supreme Court determined whether a defendant, charged with sodomy, should be prosecuted after the legislature decriminalized sodomy between persons who had attained the age of consent (sixteen years), by repealing the sodomy provisions from that portion of the statute prohibiting "abominable and detestable crimes against nature."[2] The supreme court upheld dismissal of the charges pending against the defendant, concluding that it would interfere with the intent of the legislature to apply the general savings statute and prosecute defendant for alleged violations of section 11-10-1 of the Rhode Island General Laws.[3]

FACTS AND TRAVEL

The defendant, Timothy Mullen (Mullen), was charged with nine counts of abominable and detestable crimes against nature (sodomy) under section 11-10-1 of the Rhode Island General Laws.[4] The indictment alleged that Mullen committed sexual acts upon the victim when the victim was between the ages of fourteen and seventeen.[5] However, the State's bill of particulars stated that the alleged acts took place when the victim was over sixteen years of age.[6]

During the pendency of this indictment, the General Assembly repealed certain provisions of section 11-10-1.[7] The trial justice

1. 740 A.2d 783 (R.I. 1999).
2. *See id.* at 785.
3. *See id.* at 786.
4. *See id.* at 784; R.I. Gen. Laws § 11-10-1 (1956) (1994 Reenactment).
5. *See Mullen*, 740 A.2d at 786.
6. *See id.*
7. *See id.* at 785. Section 11-10-1 was amended to read as follows: "Every person who shall be convicted of the abominable and detestable crime against nature, with any beast, shall be imprisoned not exceeding twenty (20) years nor less than seven (7) years. P.L. 1998, ch. 24, § 1." *Id.*

dismissed the nine counts of sodomy because the legislature repealed that portion of the statute prohibiting such conduct.[8] The justice reasoned that the intent of the legislature was to "decriminalize sodomy between persons who had attained the age of consent."[9]

BACKGROUND

The general rule at common law was that without a saving clause, "the repeal of a penal statute operated to bar prosecution for prior violations of the statute."[10] The common law rule was based on the theory that the legislature, by its repeal, determined that the conduct in question should no longer be prosecuted as a crime.[11] Rhode Island's general savings statute, section 43-3-23 of the Rhode Island General Laws, states:

> no suit, prosecution, or indictment pending at the time of the repeal of any statute for any offense committed . . . shall in any case be affected by the repeal, but the suit, prosecution, or indictment may be proceeded with, and the act shall be deemed to be in force for the purpose of prosecuting the act to final judgment and execution or sentence, as the case may be.[12]

Section 43-3-23 has the effect of saving criminal proceedings pending at the time of the repeal of any penal statute. However, the savings statute does not apply if such construction would be clearly repugnant to the express provisions of the statute that has been repealed.[13]

ANALYSIS AND HOLDING

The Majority Opinion

The Rhode Island Supreme Court held that the trial justice was correct in determining that it was the intention of the legislature to decriminalize the act of sodomy between adults of con-

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8. *See Mullen*, 740 A.2d at 785.
9. *Id.*
10. *See id.* at 785 (quoting State v. Babbitt, 457 A.2d 1049, 1053-54 (R.I. 1983)).
11. *See id.*
12. *See id.* at 785 (quoting R.I. Gen. Laws § 43-3-23 (1956) (1999 Reenactment)).
13. *See id.* (quoting State v. Lewis, 161 A.2d 209, 212 (R.I. 1960)).

senting age.[14] When the General Assembly repealed the portion of section 11-10-1 making criminal the act of sodomy "with mankind," it intended that such activity be regulated solely by the sexual assault criminal statute.[15] Section 11-37-6 of the Rhode Island General Laws[16] designates the age of consent to be sixteen years of age, and applies to sodomy as well as other forms of sexual behavior.[17] Thus, under section 11-37-6, a sixteen-year-old person may be considered a consenting adult.[18]

The Rhode Island Supreme Court then looked to the savings statute, and determined that the prosecution of the charges pending against Mullen would be inconsistent with the intention of the legislature to decriminalize sodomy between consenting adults.[19] The court reasoned that when the legislature, by virtue of modification of a statute, decriminalizes certain conduct, the prosecution of that conduct can have no deterrent effect.[20] Thus, the majority held that the pending charges of sodomy against Mullen were inconsistent with and repugnant to the express provisions of the repealing statute, and the trial justice was correct in dismissing the nine counts of sodomy.[21]

In addition, the majority stated the following analysis should be applied in future cases where the defendant is charged with a crime that has been repealed by the General Assembly. When the legislature repeals or amends a portion of a criminal statute, the effect of the modification upon pending prosecutions should: (1) be considered on a case-by-case basis; (2) while taking into account the provisions of section 43-3-2; and, (3) while taking into account the intent of the legislature in enacting the modification.[22]

The Dissenting Opinion

In their dissent, Justice Flanders and Justice Bourcier asserted that "[i]t was the legislative intent that [§ 43-3-23] was to have the effect of saving criminal proceedings pending at the time

14. *See id.* at 786.
15. *See id.*
16. R.I. Gen. Laws § 11-37-6 (1956) (1994 Reenactment).
17. *See Mullen*, 740 A.2d at 786.
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.* at 786-87.
22. *See id.* at 786.

of the repeal of any penal statute *unless such construction would be clearly repugnant to the express provisions of the repealing statute.*"[23] The dissent reasoned that when the General Assembly enacts a repealing statute without including a specific saving clause, the court will presume that the legislature enacted it with the intention that the saving statute would have application, unless such presumption is repugnant to the terms of the repealing statute.[24] The dissent noted that the General Assembly's intent here was to decriminalize sodomy as of the effective date of the repeal, however, the legislature said nothing about pending prosecutions for acts of sodomy committed before the repeal.[25]

The dissent disagreed with the majority's suggestion that prosecution of a person for prior conduct that is no longer a violation of law is fundamentally unfair.[26] Second, the dissent did not believe that prosecution of a person for an offense that was unlawful at the time it was committed "can have no deterrent effect."[27] Third, the effect of the general saving statute is that pending prosecutions shall be unaffected by the later decriminalization of the conduct absent an expressed and clear legislative intention to the contrary.[28] Finally, the dissent expressed concern that the court's ruling in this case will revive the common-law rule extinguishing all pending prosecutions upon repeal of a criminal statute, notwithstanding the absence of any indication in the repealing statute that the legislature intended to do so.[29]

CONCLUSION

In *State v. Mullen*, the Rhode Island Supreme Court held that repeal of a statute criminalizing sodomy between consenting adults operated to bar prosecution of an individual who committed that crime before the provision was repealed by the General Assembly. In so holding, the court declined to apply the saving statute, which would enable the State to prosecute criminal charges under the statute pending at the time the statute was repealed. As

23. *Id.* at 787 (Flanders, J., dissenting).
24. *See id.*
25. *See id.* at 787.
26. *See id.* at 789.
27. *Id.*
28. *See id.*
29. *See id.* at 790.

the dissent noted, because this decision ran contrary to the savings statute, this case will be cited for the proposition that whenever the legislature decriminalizes conduct without indicating any retroactive effect, it intended to override the saving statute and quash all pending prosecutions for the repealed offense.[30]

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30. *See id.*

Criminal Law. *State v. Ratchford*, 732 A.2d 120 (R.I. 1999). Defendants facing revocation of parole have no right of allocution prior to reinstatement of a suspended sentence. However, defense counsel may, in some circumstances, be afforded the opportunity to address the court regarding factors that could mitigate punishment or other issues which may affect the decision of the court.

FACTS AND TRAVEL

One night in November of 1996, Warwick police began following a car after determining that the occupants were possible suspects of a robbery committed in the area.[1] When police attempted to pull the car over, the driver led police into a chase.[2] The police pursued the car until it was driven up an embankment and crashed into a tree.[3] When authorities reached the car, three men were inside.[4] Eventually, two men died as a result of their injuries.[5] The driver, Anthony Ratchford (Ratchford), survived and was charged with operating a vehicle in reckless disregard of the safety of others, death resulting, and possession of a stolen vehicle.[6]

Because Ratchford was on probation at the time of the crash, a probation revocation hearing was held.[7] The court learned that in 1988 he was convicted of an offense and sentenced to ten years, with seven and a half years of probation upon release.[8] In 1993, he was again charged with an offense.[9] He was sentenced to five years with an additional four years suspended and four years probation.[10] Ratchford's 1993 sentence was to run consecutively after the 1988 conviction.[11]

At the conclusion of the hearing, the hearing justice found that Ratchford did indeed violate the conditions of his probation.[12] The

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1. *See* State v. Ratchford, 732 A.2d 120, 121 (R.I. 1999).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.* at 122.
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.* at 121.

hearing justice abruptly lifted the suspended sentences on the original crimes.[13] Ratchford was not given an opportunity to address the court, commonly know as the right of allocution, prior to the decision of the hearing justice.[14] In addition, his lawyer was not able to address the issue of whether the suspended sentences would be served concurrently or consecutively with the new sentence.[15] Ratchford appealed.[16]

Analysis and Holding

At the probation revocation hearing, the hearing justice did not state on the record whether Ratchford's sentences should be served consecutively or concurrently.[17] Consequently, Ratchford's first argument to the Rhode Island Supreme Court was that the hearing justice erred by imposing the sentences to be served consecutively, rather than concurrently.[18] The supreme court noted that the judgement of conviction form signed by the hearing justice explicitly stated the sentences were to run consecutively.[19] Furthermore, corroboration was provided by other documents in the record relating to the 1993 conviction, which stated that the 1993 sentence should run consecutively to the 1988 sentence.[20] Therefore, the supreme court failed to find error with the decision of the hearing justice.[21]

Ratchford also argued that the hearing justice admitted improper hearsay testimony regarding identification of Ratchford as the driver of the car.[22] At the hearing, Officer Cardon testified that Ratchford was the driver of the car, although he admitted that his knowledge of Ratchford's name was not firsthand.[23] Ratchford argued that Cardon's testimony should not have been admitted and without it there was not enough evidence to show that he was the driver.[24]

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13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.* at 122.
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.* at 124.
23. *See id.*
24. *See id.*

The supreme court rejected this claim on three grounds. First, the rules of evidence do not apply strictly in a probation revocation hearing.[25] Therefore, Cardon's testimony may be admissible although it is hearsay.[26] Second, the State must prove the violation occurred only by reasonably satisfactory evidence.[27] Cardon's testimony certainly was reasonable. Third, the findings of the hearing justice will stand unless the hearing justice acted arbitrarily or capriciously.[28]

The significance of this case is rooted in Ratchford's third claim. Rule 32(a)(1) of the Superior Court Rules of Criminal Procedure provides that:

> [b]efore imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask the defendant if he or she wished to make a statement in his or her own behalf and to present any information in mitigation of punishment.[29]

The opportunity presented by Rule 32(a)(1) is the constitutional right of allocution.[30] Ratchford argued that this constitutional right attaches prior to reinstatement of suspended sentences in a probation revocation hearing.[31] At Ratchford's hearing, the hearing justice heard the witnesses' testimony and the parties' arguments on the issue of whether Ratchford had violated his probation.[32] He then adjudged Ratchford on the violation and terminated the proceedings.[33] The hearing justice failed to give Ratchford or his counsel an opportunity to speak regarding factors which may have mitigated punishment or affected the application of the suspended sentences.[34] The State argued that this practice is constitutionally firm, since a defendant enjoys the right of allocution when the sentence is originally imposed and the reinstatement at the probation revocation hearing is merely the execution.[35]

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25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. R.I. Super. Ct. R. Crim. P. 32(a)(1).
30. *See* R.I. Const. art. I, § 10.
31. *See Ratchford*, 732 A.2d at 122.
32. *See id.* at 123.
33. *See id.*
34. *See id.*
35. *See id.* at 122.

The Rhode Island Supreme Court, in a per curiam opinion, held that the right of allocution does not attach to probation revocation hearings because Rule 32(a)(1) refers only to the original imposition of sentencing.[36] Furthermore, Rule 32(f), which directly addresses the procedure at the revocation hearing, does not provide the right of allocution.[37] Instead, it provides that the "defendant shall be afforded the opportunity to be present and apprised of the grounds on which such action is proposed."[38] The legislature has also provided that during the revocation hearing the "defendant shall have the opportunity to be present and to respond."[39] The court found neither the rule nor the statute could be read to provide the right of allocution.[40]

However, the court did find the hearing justice erred when he failed to give defense counsel an opportunity to address the court before execution of the sentence *in this case*.[41] The statute from which the superior court derives its authority to reinstate the suspended sentence grants broad discretion as to what portion, if any, of the suspended sentence shall be served.[42] This discretion also applies to the decision of whether the sentences should run consecutively or concurrently.[43] The court held that in order to make the decision, the court must hear from defense counsel for two reasons.[44] First, there may be factors that mitigate punishment.[45] Second, in the interests of economy, counsel may raise issues that the justice has failed to address.[46] For example, in this case the justice did not discuss whether the sentence was to run consecutively or concurrently.[47] This issue ended up being a subject of this appeal, which could, and should have been, addressed below.[48] Because of the error, the court remanded the case for resentencing.[49]

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36. *See id.* at 123.
37. *See* R.I. Super. Ct. R. Crim. P. 32(f).
38. *Id.*
39. R.I. Gen. Laws § 12-19-9 (1956) (1994 Reenactment).
40. *See Ratchford*, 732 A.2d at 123.
41. *See id.*
42. *See* R.I. Gen. Laws § 12-19-9 (1956) (1994 Reenactment).
43. *See Ratchford*, 732 A.2d at 123.
44. *See id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.* at 123-24.

The Dissent

Justice Flanders, joined by Justice Bourcier, wrote separately to dissent.[50] Justice Flanders disagreed with the court's decision to provide defense counsel a right to respond during the probation revocation hearing in this case.[51] First, since Rule 32(f) and section 12-19-9 of the Rhode Island General Laws are the sources for probation revocation hearing procedure, the failure to mention the right makes the opportunity unavailable.[52] Justice Flanders also stated that any issues counsel wishes to address regarding mitigation or other issue should be discussed during general argument.[53] Second, Justice Flanders found that the issue should have been considered waived on appeal, since the defendant did not raise it with the trial justice below.[54]

CONCLUSION

In *State v. Ratchford,* the Rhode Island Supreme Court held that the basic criminal constitutional right of allocution is unavailable in the context of probation revocation hearings. At the same time, the court also held that in certain circumstances, defense counsel should be allowed to address the court. This opinion produces confusing results. First, the court found that defense counsel deserved the right to address the court regarding factors to mitigate punishment. It seems that the defendant's own testimony would be essential on this point. Second, the court did not address when "certain circumstances" will arise to trigger defense counsel's right to address the court. Therefore, the applicability of the court's rule is unclear.

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50. *See id.* at 124.
51. *See id.*
52. See R.I. Gen. Laws § 12-9-9 (1956) (1994 Reenactment).
53. *See Ratchford*, 732 A.2d at 125.
54. *See id.*

Criminal Law. *State v. Shepard*, 726 A.2d 1138 (R.I. 1999). A charge of attempted larceny from the person may be sustained with evidence that the object of the attempted taking was within the presence and immediate control of the victim. Evidence of attempted physical trespass is not required.

FACTS AND TRAVEL

In February of 1995, the defendant, Daniel S. Shepard (Shepard), was involved in a traffic accident.[1] The other driver involved in the accident, a woman driving a mini-van, determined that she had enough time to proceed through the intersection before the defendant's car would reach her.[2] Unfortunately, she was wrong and the defendant's car struck her car in the rear driver's quarter as her car was about three-quarters of the way through the intersection.[3] The driver's side of the victim's car was pushed up against a building, trapping her inside.[4]

Shepard approached the victim's car, opened the passenger door and demanded that the victim pay him for the damage sustained to his car.[5] He proceeded to grab the victim's wallet, which was located on the passenger seat.[6] He looked through it, but put it down when he found that it was empty.[7] The victim, in an attempt to get away from Shepard, put the vehicle into reverse.[8] However, Shepard again reached into the car, pulling the victim's car phone from the plug.[9] The victim grabbed the cord and struggled with the defendant for possession of the phone.[10] Ultimately, Shepard dropped the phone, jumped out of the victim's car and left the scene.[11]

Shepard was charged with assault with intent to commit robbery.[12] After the State presented its case, the defendant moved for

1. *See* State v. Shepard, 726 A.2d 1138 (R.I. 1999).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.* at 1139.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*

a judgment of acquittal.[13] The trial justice granted the motion, finding that there was no evidence to support the charge.[14] He reduced the charge to the lesser included offense of attempted larceny from the person.[15] Shepard then moved to dismiss the attempted larceny from the person charge.[16]

The language of the larceny from the person statute reads, "[e]very person who shall steal or attempt to steal from the person of another, any money, goods, chattels, or other article . . . shall be imprisoned . . . ."[17] The defendant interpreted "from the person" to require that the attempt be made on the actual person of the victim, not merely something within her presence.[18] Shepard then requested that the jury be instructed on the lesser included offense of attempted larceny under section 11-41-6, which has no "from the person" language.[19]

The trial justice denied Shepard's motion to dismiss.[20] Instead, he instructed the jury "that it was not a defense to the crime to assert that the property in question was not literally in the hands of the victim or directly on her person when the attempt to take it from her occurred."[21] Thus, the court adopted a broader view of the "from the person" language.[22] Shepard appealed.[23]

ANALYSIS AND HOLDING

In deciding this appeal, the Rhode Island Supreme Court had to determine whether the superior court's statutory interpretation of "from the person" was correct. However, before doing so, it noted that under either a strict or broad interpretation, Shepard's conviction would still stand.[24] This is because during the struggle over the car phone, where the defendant was trying to take the phone from the victim, the victim managed to grab hold of the

13. *See id.*
14. *See id.*
15. *See id.* (citing R.I. Gen. Laws § 11-41-7 (1956) (1994 Reenactment)).
16. *See id.*
17. R.I. Gen. Laws § 11-41-7.
18. *See Shepard*, 726 A.2d at 1139.
19. *See id.* (citing R.I. Gen. Laws § 11-41-6 (1956) (1994 Reenactment)).
20. *See id.*
21. *Id.*
22. *See id.*
23. *See id.*
24. *See id.* at 1140.

cord.[25] Therefore, when Shepard was trying to wrestle the victim's phone away from her, there was an attempted larceny.[26]

The court then proceeded to the substantive issue regarding the proper construction of section 11-41-7 of the Rhode Island General Laws.[27] Shepard argued that at common law there were two distinct crimes: the crime of larceny from the person and the crime of simple larceny.[28] The first crime, larceny from the person, was codified in order to criminalize pickpocketing and required an actual taking from the person.[29] The less offensive conduct of taking property from the immediate presence of the person would not be enough to charge someone with larceny from the person.[30] The defendant argued that the language contained in section 11-41-7 is derived from the common law and therefore, it should be subject to the same strict interpretation.[31]

The State disagreed.[32] It argued that there is ample support in the common law for the broad interpretation of "from the person."[33] For example, when North Carolina state courts faced a similar question of statutory construction, they relied on common law definitions to hold that "[p]roperty is stolen 'from the person,' if it was under the protection of the person" at that time.[34] Further, the North Carolina court concluded that "[p]roperty may be under the protection of the person although not actually attached to him."[35] The State argued that Rhode Island should follow this broader interpretation.

The Rhode Island Supreme Court recognized the argument implicit in the defendant's advocacy for strict construction: if larceny from the person could be committed absent an actual taking, then what difference from the crime of robbery?[36] In Rhode Island, the applicable definition of robbery is taken from the common law

25. *See id.*
26. *See id.*
27. *See id.* (citing R.I. Gen. Laws § 11-41-7 (1956) (1994 Reenactment)).
28. *See id.*
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.*
33. *Id.*
34. State v. Buckom, 401 S.E.2d 362, 365 (N.C. 1991) (quoting R. Perkins & R. Boyce, Criminal Law 342 (3d ed. 1982)).
35. *Id.*
36. *See Shepard*, 726 A.2d at 1140.

and reads, "the felonious taking of money or goods of any value from the person of another, *or in his presence*, against his will, by violence, or putting him in fear."[37] Shepard argued that the absence of the phrase "in his presence" from the larceny statute must signify the intent of the legislature to require an actual taking.[38] Shepard's view was adopted in a similar case by the Utah Supreme Court in *State v. Lucero*.[39] However, the Minnesota Supreme Court disagreed on the exact same issue.[40]

The Rhode Island Supreme Court was faced with the bottom line that jurisdictions were split over whether constructive taking satisfied the larceny from the person statute.[41] Making the decision for Rhode Island, the court chose to adopt the broader interpretation advocated by the State.[42] First, it noted that in answer to the question regarding the distinction between robbery and larceny from the person, the element of violence makes the two crimes different.[43] Second, it reasoned that the policy behind allowing a "constructive taking" to satisfy the larceny statute is the "potential for violence that inheres in a theft of property taken when it is in the immediate presence of the victim."[44]

In this particular case, Shepard's conduct justified a charge of attempted larceny from the person, even if there were no actual trespass, because of the "assaultive nature" of his attempted taking.[45] Not only did he grab the victim's wallet while she was trapped in the car, he also attempted to wrestle her car phone

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37. *Id.* (quoting State v. Domanski, 190 A. 854 (R.I. 1937)).

38. *See id.* at 1141.

39. 98 P.2d 350, 351 (Utah 1972).

> If *immediate presence* means the same as *from the person* in the grand larceny statute, then one would wonder why the same would not apply to robbery. Why would the legislature have included the phrase 'or immediate presence' in the definition of robbery if the words 'from his person' also meant 'immediate presence'?

Id. at 351.

40. *See In re* Welfare of D.D.S., 396 N.W.2d 831, 832 (Minn. 1986) (neglecting to find that legislature's failure to use the phrase 'in his presence' in the larceny statute meant that it intended to exclude constructive taking from the statute, though it used the same phrase in the robbery statute).

41. *See Shepard*, 726 A.2d at 1141.

42. *See id.* at 1142.

43. *See id.* at 1141.

44. *Id.*

45. *See id.* at 1142.

away.[46] Both items were within the purview and presence of a dazed and confused victim.[47] The court was satisfied that this conduct was within the contemplation of the aim of the larceny from the person statute.

CONCLUSION

In *State v. Shepard*, the Rhode Island Supreme Court held that the crime of attempted larceny from the person does not require an actual trespass on the physical person of the victim. As a result, a broader range of conduct is criminalized under section 11-41-7 of the Rhode Island General Laws. Some of this conduct previously amounted only to the crime of attempted larceny, a less serious charge. In addition, this holding makes larceny more like robbery and puts the judiciary in the position of determining whether the conduct was sufficiently assaultive or violent in nature to justify a larceny from the person charge.

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46. *See id.*
47. *See id.*