Tenth Circuit

Legal Advisor

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Vol. 5. No. 3 August 1991

When does shoplifting become robbery? Which retail theft statutes are likely to yield a conviction and which statute, when cited by officers, is likely to result in the suspect walking? SAO Intake Division director Mike Cusick clarifies retail theft statutes in this edition of Legal Advisor.

The "Tenth Circuit Legal Advisor" is published by The Office of the State Attorney Drawer SA, P.O. Box 9000

Investigative Procedures

By Mike Cusick

Be careful in selecting statute when charging shoplifters

Quite often where shoplifting has occurred the officer will charge retail theft and cite F.S. 812.015 as the charging statute. A careful review of Section 812.015, however, reveals that there is no criminal offense of retail theft under that section.

In order for a statute to be a chargeable offense, there must be a criminal penalty referred to in the statute. There is no such penalty for retail theft in Section 812.015.

The main purpose behind this statute is to permit the detaining of shoplifters by merchants and farmers and the arrest of shoplifters by law enforcement since law enforcement, in general, cannot arrest for a misdemeanor committed outside their presence.

The only actual crime established by Section 812.015, is the offense for resisting the reasonable efforts of a merchant or other specified person to recover stolen property. That offense is misdemeanor of the first degree.

Shoplifting as with other types of theft should be charged under Section 812.014. If it is a misdemenaor, subsection (2)(d) should be cited.

We see a number of cases come through where only petit theft is charged but where a felony petit theft could have been charged. Please remember to check the defendant's prior record when charging petit theft.

If the defendant has two or more prior petit theft convictions, he may be charged with felony petit theft.

If you are not familiar with the defendant's record, you may call one of our offices or the Clerk's Office in Lakeland, Winter Haven or Bartow to obtain the prior record.

The defendant must be charged by either a complaint affidavit or an arrest affidavit. He cannot be given a notice to appear for felony petit theft.

When does a shoplifting become a robbery?

In 1987, the robbery statute was amended to state that a theft became a robbery if an assault or act of force was used before, during or after the taking of property from the person or custody of another.

Previously, the courts had ruled that the assault or act of violence must occur before or at the same time as the taking of the property.

The amending of the statute now permits the charging of robbery in certain limited circumstances where previously only petit theft and resisting a merchant could have been charged.

In order to understand when you can charge robbery, it may be helpful to review some appellate cases which have interpreted the statute.

In Rumph v. State, 544 So.2d 1150 (Fla. 5th DCA 1989), the defendant was observed shoplifting two pairs of jeans. As he was leaving, an employee confronted him and asked for the jeans.

The defendant shoved the employee aside and ran out of the store. The defendant was charged and convicted of robbery.

The appellate court upheld the conviction stating that use of force in flight after the taking of property satisfies the elements of robbery.

In Simmons v State, 551 So.2d 607, (Fla. 5th DCA 1989), the defendant shoplifted merchandise and left the store. Two employees stopped her and took her back into the store.

Once inside, the defendant removed the merchandise from where she had hidden it on her person and threw it on the floor. As she was being escorted to

the office, she physically struggled with one of the employees. She was convicted of robbery.

On appeal, the Court reversed and reduced the charge to petit theft. The Court distinguished the facts here from those in Rumph finding that the taking was completed without the use of force and that the property was abandoned before force was used. Therefore, the use of force was not connected to the taking or recovery of property.

Finally, the case of Santilli v State, 570 So.2d 400 (Fla. 4th DCA 1990) dealt with a shoplifting where the defendant left the store and got into his car.

An off-duty officer working for the store ran to the car, identified himself as an officer and told the defendant that he was under arrest. The defendant attempted to flee in the car, striking and injuring the officer.

The defendant was convicted of robbery. On appeal, the defendant argued that the taking was over because he had left the store which was the scene of the theft.

The appeals court upheld the conviction finding that the progression from the store to the violent act against the officer was continous so that the jury did not err in convicting the defendant of robbery.

In conclusion, there are several observations that can be made based on these cases.

First, the act or threat of violence must be made in response to an attempt by the employee to recover the property, not to apprehend the suspect.

Second, the property must still be in the possession of the suspect when the threat or act of force is made.

Third, there must be an ongoing series of connected events between the taking of the property and the act or threat of violence used to prevent the attempt to recover the property.

If you have a case which you are not certain satisfies these requirements, you may call the Intake Division for assistance.

FROM THE COURTS

Edited by Chip Thullbery

Defendant's actions gave officer right to frisk him

In this Polk County case, the defendant was charged with possession of a concealed firearm and filed a motion to suppress.

The evidence on the motion showed that at approximately 1:14 a.m. one morning an officer saw the defendant, who was driving a vehicle with no visible license tag, make an illegal turn without signalling. The officer stopped the defendant who exited his vehicle and began to approach the officer.

The defendant was wearing a long, bulky winter coat and had both hands in the large front pockets of the heavy coat as he approached.

The officer testified that because he thought that it appeared that there might be something in the pockets that could possibly threaten his safety, he patted down the outside of the pockets and detected a flat, metal object. He inquired what was in the pocket, and the defendant produced a handgun.

The trial court granted the motion to suppress, ruling that the officer did not have grounds to pat down the defendant because he had no reason to believe that the defendant was armed.

On appeal, the Second District reversed, holding that the evidence presented sufficient facts which would have justified the officer in believing that the defendant was armed and dangerous and that therefore the frisk was proper.

State v. Callaway. 16 FLW D1811 (Fla. 2nd DCA July 10, 1991).

Gun without clip and bullets not a concealed firearm

The defendant was charged with carrying a concealed firearm and filed a motion to dismiss.

The evidence on the motion showed that the firearm was concealed under the passenger seat in the defendant's car, but its clip and bullets were lying separately in open view on the seat. The trial court denied the motion to dismiss, and the defendant was convicted as charged.

On appeal, the Second District reversed, holding that because the clip and bullets were lying separately in open view on the seat, the firearm was not readily accessible for immediate use and thus was not a concealed firearm within the meaning of the statute.

Amaya v. State, (Fla. 2nd DCA June 7, 1991).

Throwing marijuana not tampering with evidence

The defendant was charged with tampering with evidence. At his trial, the testimony showed that when officers approached him in a bar, one of them reached out to pat a bulge at the top of his shorts.

The defendant told the officer that it was only marijuana, reached in, grabbed a plastic bag containing brown material, threw it, and tried to run. Subsequently, the police were unable to locate the bag.

The defendant was convicted as charged, but on appeal, the Second District reversed, holding that the trial court erred in denying the defendant's motion for judgement of acquittal because the act of throwing the bag did not rise to the level of conduct which constitutes concealment or removal of something for the purpose of impairing its availability for trial. Thomas v. State, 16 FLW D1714 (Fla. 2nd DCA June 28, 1991).

Warning drug dealers of approaching police can be resisting charge

The defendant was charged with possession of cocaine and filed a motion to suppress.

The evidence on the motion showed that after a surveillance of an area, several police officers determined that drug dealings were taking place and began a sweep to catch the drug dealers by surprise. As they were moving into the area, the defendant, acting as a lookout, yelled certain code words to the dealers to alert them that the police were coming. The dealers then ran from the scene and escaped.

The officers arrested the defendant for interfering with them in the performance of their duties and searched him, finding cocaine.

The trial court denied the motion to suppress, and the defendant was convicted as charged. On appeal, the Fourth District affirmed, holding that based on the defendant's actions, to officers had probable cause to arrest him for obstructing or interfering with them while they were engaged in the performance of their duties.

Porter v. State, 16 FLW D1567 (Fla. 4th DCA June 12. 1991).

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