Tenth Circuit

Legal Advisor

Jerry Hill, State Attorney

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Dear Friends,

As the year draws to a close, I want to take a moment to thank each of you for the good work you do.

While the holidays bring celebrations to many, they bring extra shifts and long hours to those who are entrusted with the public's safety. Please know that your efforts are appreciated.

On behalf of my entire staff, I wish you a joyous Christmas and prosperous New Year.

Investigative Procedures

By Gary Allen

Charging theft in rental and rent-to-own cases

The following three situations create many problems for law enforcement officers investigating thefts:

1. "Loaned" property
2. Commercial "Rental" businesses
3. Lease-Purchase Contracts

LOANED PROPERTY

One individual loans his car to another and it is not returned. This is a theft under the law; however, the element of "Knowingly" is important. If the borrower of the car has a heart attack before he can return the car and is hospitalized, he would not be guilty of theft.

Even though he did not return the vehicle when due, he did not "knowingly" keep the vehicle with the intent to steal it.

If the borrower disappeared with the property, then theft is the correct charge.

If there is an apparent conflict over the ownership, then it is probably a civil action and the complaining party should be so informed.

You should not charge theft in these cases until you contact the borrower for his side of the story.

You should determine the location of the property or whether both the subject and the property have disappeared.

If the borrower has the loaner's property in his possession and refuses to return it after demand, then theft is the proper charge.

Also, theft is the proper charge, if after several days beyond the time of the permitted use, the property or defendant have not been heard from.

COMMERCIAL RENTAL BUSINESS

In cases where a commercial establishment is in the business of renting property, the mere fact of failure to return the rented property when due does not merit a theft charge. This calls for additional investigation.

A victim complaint that an individual has failed to return rental property, without more, is not a basis for charging theft. The State must be able to show that the defendant, with a criminal intent, has deprived the victim of his property.

There are three ways of proving criminal intent:

A. By statute, the presentation of false identification not current with respect to name, address, place of employment or other material aspects gives rise to an inference that such property was obtained with intent to commit theft. Since this requires an affirmative act by the defendant, it is positive evidence, which can be used in prosecuting him.

The proof of the falsification cannot come from hearsay statements.

Witnesses must be located who can testify that the defendant does not live at their address or that he is not employed at their business. Affidavits will need to be obtained from these witnesses. (A reminder -- it is of no value to prove that the defendant is no longer living at the address he supplied. The issue is whether or not he lived at the address when he rented the property).

B. The legislature has also provided a statutory inference of fraudulent intent when property is not returned within 72 hours of the expiration of a rental agreement. Unlike the false identification inference, however, this inference is based on the defendant's inaction as opposed to his action. As a practical matter, this is of no value in proving the defendant's criminal intent. (That may be why the legislature has created a separate offense of Failure to

Return Hired Vehicle with regard to motor vehicles.) There are all sorts of innocent explanations as to why the property was not returned.

That is why a criminal prosecution, which must be based on proving the defendant's guilt beyond a reasonable doubt, cannot be based solely on his failure to return the property.

If the defendant can be located and a demand is made for the property, his unexplained failure to return the property normally is a sufficient basis for criminal prosecution for theft.

C. Criminal intent may also be shown by the defendant's act of pawning or selling the property. The sale or pawn of the property violates the victim's interest in or right to the property. A new statute, Section 715.0415 F.S., requires that a person who sells, pawns, or pledges property to a pawnbroker must sign a statement that he is the rightful owner of the property. As long as the defendant can be identified as the person who sold, pawned, or pledged the property, his actions are proof of the requisite criminal intent for theft.

LEASE/PURCHASE CONTRACTS

Lease/Purchase Contracts present special problems and must be distinguished from straight rental contracts. (Note that video tape rental stores fall under "Commercial Rental Business", number two above.)

The "rent-to-own" TV and appliance stores do business this way. In these cases, the purchaser gets the equitable title, but the legal title is retained by the seller. There are four situations that usually occur in these type contracts that involve law enforcement:

A. The purchaser has falsely obtained the property and then disappears with the property. He may have given a false name, address, etc. This is definately a theft and the purchaser should be charged. However, a lot of these businesses are so anxious to make

a sale that they do little, if anything, to verify information given by the purchaser.

One of the factors the State Attorney's Office will consider in deciding whether to prosecute will be the completeness of the data at the time the transaction is entered into as well as the efforts used by the company to verify that information at the time of the transaction.

B. The purchaser makes several payments and then disappears with the property. This may be either civil or removing property under lien. The circumstances of each case will determine the appropriate charge as set out in Section C.

C. The purchaser has made numerous payments and then disappears. The amount of the payments made is equal to or exceeds the value of the property in question. These are the hardest cases to handle. If a person purchases a $400.00 refrigerator and pays $500.00 on it and still owes an additional sum of $300.00 for interest, carrying charges, etc., then this should be handled through the civil courts. However, if he has payed less than the initial cost of the item, then Disposing of Property Under Lien (818.01) can be charged if the following can be proved:

1. First there must be a written conditional sale contract that sets up the terms of the transaction and the conditions under which the property is to be returned.

2. Next, we must be able to prove that the purchaser disposed of the property. This means we must have a witness who can say the purchaser gave away, sold, or pawned the property. Or, the witness must be able to say the purchaser has removed the property from the county. The situation of property gone/defendant gone won't work.

3. The proof that the property was disposed of as set out above, number 2, can be skipped only in one limited situation: If the terms of the contract work so that the property is now due to be returned and the company is able to actually

serve on the purchaser a notice to return the property and then the purchaser fails to return the property. It is very seldom you will be able prove the case in this manner.

D. The purchaser stops making payments, but both he and the property in question are still available. This case is strictly civil and adequate remedies are available to the seller.

Once it is determined in which category the case falls, we will still not be able to prosecute without the following:

1. Be sure and obtain a copy of the contract and/or agreement to attach to your investigative report.

2. The rent-to-own company must be able to establish positive identification of the suspect. Their employees must be able to testify.

3. The details of verification used in the initial stages of the transaction must appear on the information checklist.

4. The company must have exhausted all efforts to contact the suspect as evidenced by the details in the checklist.

INFORMATION CHECKLIST

To assist you in providing the necessary information, the attached checklist should be provided to the rental companies. This form is in common use by the Tampa Police Department. These cases cannot be efficiently or effectively handled without this checklist being completed by the rental company. The checklist should be included with affidavits submitted for prosecution.

Companies reporting missing property should provide information that indicates that the property has been stolen and not misplaced. In cases where the company cannot provide the VIN or serial number and the information cannot be confirmed, the complainant should provide police agencies with registration, title, or bill of sale. As a matter of policy, this office will

not prosecute cases involving the rental of jewelry.

Once the police agency receives the completed checklist, the agency should make an effort to locate the suspect and/or locate the property. The suspect may give a reasonable explanation or the property may be located. If the property is located, it can be returned to the business and he can sue for lost revenue. The effort to locate the suspect may reveal from the landlord or neighbors that the suspect left, possibly with the property.

In all these situations, discretion is the key.

There is usually no hurry to make the decision on whether to file charges or not. Further investigation is usually warranted to get the suspect's side of the story.

If you have any questions regarding the cases, please do not hesitate to contact us.

A copy of the Tampa Police Department Failure to Return Rental Property complaint form is attached to the back of this edition of Legal Advisor.

FROM THE COURTS

Edited by Chip Thullbery

Search prior to arrest was proper where officer had probable cause to arrest

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

The evidence on which the motion was based showed that a reliable informant assisted the police in targeting an area known for drug traffic.

The officers wired the informant with a body transmitting device to monitor his comments and

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"Search"

conversations from a nearby vehicle.

The informant over the wire advised the officers that he saw the defendant selling drugs.

The defendant then sold cocaine to the informant.

The officers moved in and seized the defendant.

The informant told the officers that he saw the defendant hide drugs inside his pants.

The officers took the defendant to a nearby bathroom where a plastic bag containing cocaine rocks was found in his pants.

The trial court granted the motion to suppress, ruling that the police did not have the right to search the defendant because they had not arrested him. On appeal, the Fourth District reversed, holding that the police may conduct a search incident to arrest prior to actually arresting a defendant where they have probable cause for the arrest.

State v. Brown 16 FLW D2507 (Fla. 4th DCA Sept. 25, 1991).

Giving false name supports resisting officer charge

The defendant was charged with resisting arrest without violence and filed a motion to dismiss.

The facts on which the motion was based were that an officer saw a vehicle speeding and pursued it. He then saw it turn into a parking lot and when he arrived he saw the defendant and another man standing outside the automobile.

The officer asked the defendant for identification, but the defendant stated he had none.

Upon further questioning, the

(See "resisting" next page)

"resisting"

defendant gave a false name, but after his arrest he gave his correct name.

The trial court granted the motion to dismiss, but on appeal, the Fifth District reversed, holding that a person is guilty of resisting arrest without violence when he gives a false name even though he gives his correct name after being placed under arrest but prior to booking.

State v. Townsend, 16 FLW D2379 (Fla. 5th DCA Sept. 12, 1991).

Movement of robbery victims justified kidnapping conviction

The defendant was charged with four counts of kidnapping and two counts of robbery.

The evidence at his trial showed that after the robbery of a clerk and a patron in a convenience store, he ordered all four occupants of the store to go to the back of the store and lie on the floor.

He threatened them with a gun to accomplish this purpose and at trial admitted that he had made this demand in order to enable him to escape.

He was convicted as charged, and on appeal, the Second District affirmed, holding that the evidence of movement was sufficient to constitute kidnapping.

Walker v. State, 16 FLW D2389 (Fla. 2nd DCA Sept. 11, 1991).

A defendant only needs to remove one VIN number to be guilty

The defendant was charged with possession of a motor vehicle with the vehicle identification number removed.

At his trial, the evidence showed that he was in possession of a vehicle which did not have a visible

(See "remove" next page)

"remove"

identification number on the dashboard but did have a concealed identification number.

Over defense objection, the court instructed the jury that it was illegal to remove a vehicle identification number.

The defendant was convicted as charged, and on appeal, the Fifth District affirmed, holding that the trial court's instruction was correct because the possession of a vehicle with the visible identification number removed is sufficient for conviction even if the hidden number is still present.

Cooper v. State, 16 FLW D2383 (Fla. 5th DCA Sept. 12, 1991)

Defendant's actions were sufficient to involve him in sale of cocaine

The defendant was charged with sale of cocaine and filed a motion to dismiss.

The facts on which the motion was based were that when an undercover officer attempted to purchase cocaine from a codefendant, the codefendant looked toward the defendant who nodded at him and motioned with his head towards a house where cocaine was kept.

The codefendant then went to the house and came back with cocaine.

The trial court granted the motion to dismiss, but on appeal, the Second District reversed, holding that the facts as set out in the motion presented a prima facie case for sale of cocaine.

State v. Walls, 16 FLW D2473 (Fla. 2nd DCA Sept. 20, 1991)

Tenth Circuit
LEGAL ADVISOR
Editorial Staff

Jerry Hill.....Publisher
Chip Thullbery.....Managing Editor
Mike Cusick..Legal Content Editor
Carl Weaver...Layout and Makeup

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VEHICLE STOLEN FROM INVENTORY - RENTAL AND SALES

Date Last Rented	Date Last Returned	Last Known Location of vehicle (storage, repair, etc.)
Date of Last Inventory	Who Conducted Inventory	
Date discovered Missing	By Whom	

Name of Person who can supply documentation to support above information

Additional Information

Statement of attempts to retrieve property. Include positive and negative findings.

Date /Time	Who Made Contact	Results (How was contact made? What was said?)

Complaint Filed By (Please Print Name and Company Title)

Signature

Date