TENTH CIRCUIT

Legal Advisor

Jerry Hill, State Attorney

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FAILURE TO RETURN RENT-T0-OWN PROPERTY IS NOW A FELONY

by Michael Cusick

This year the legislature amended Florida Statute 812.155 to include rent-to-own transactions where the rental store retains title to the merchandise during the rental-purchase agreement period. Previously, this statute specifically excluded rent-to-own transactions, and even the new law contains some strict requirements which must be met before a case can be successfully prosecuted.

1. The Renter Must Initial the Notification That Failure to Return Is Evidence of an Intent to Defraud

The first requirement for prosecution is located in subsection (6) which states:

> NOTICE REQUIRED.--As a prerequisite to prosecution under this section, the following statement must be contained in the agreement under which the owner or person lawfully possessing the property or equipment has relinquished its custody, or in an addendum to that agreement, and the statement must be initialed by the person hiring or leasing the rental property or equipment:
>
> > Failure to return rental property or equipment upon expiration of the rental period and failure to pay all amounts due (including costs for damage to the property or equipment) are prima facie evidence of intent to defraud, punishable in accordance with section 812.155, Florida Statutes.

This language must be included in the rent-to-own contract or in an addendum and the statement must be initialed by the person renting the property. Since this is a new statute, rent-to-own businesses may not have had time to include this provision in the contract or as an addendum to the contract. **If an initialed copy of the statement is not part of an agreement or addendum, the case cannot be prosecuted under this statute.** The signing of the contract or addendum alone is not, I repeat, not sufficient.

2. Statutory Evidence of an Intent to Defraud

The statute also requires evidence of an intent to defraud. In subsection (4), the statute identifies types of evidence that can help to prove the fraudulent intent:

> (a) In prosecutions under this section, obtaining the property or equipment under false pretenses; absconding without payment; or removing or attempting to remove the property or equipment from the county without the express written consent of the lessor, is prima facie evidence of fraudulent intent.

Thus, if the renter obtains the property under false pretenses, a prosecution may be supported. False pretenses includes where the renter provides false identification, uses a phony address or supplies other material information to obtain the property which can be proven to be false. This information, however, cannot be based upon hearsay. If the renter stated that he lived at 123 Main Street, there must be a witness who has personal knowledge that the renter did not live at 123 Main Street. The store employee who talked to someone at 123 Main Street cannot be the witness to establish that the renter did not live there. Rather the evidence might come from a person who actually lives there or from a landlord who has personal knowledge as to who is living there. If the renter absconds without making payment or leaves the county with the property without the written permission of the business, this is also considered prima facie evidence of an intent to defraud. Again, there must be testimony from eyewitnesses who can establish this evidence.

If the alleged violation is under subsection (3) for failing to return the property, the statute identifies what may be evidence of a fraudulent intent:

> (b) In a prosecution under subsection (3), failure to redeliver the property or equipment within 5 days after receipt of, or within 5 days after return receipt from, the certified mailing of the demand for return is prima facie evidence of fraudulent intent. Notice mailed by certified mail, return receipt requested, to the address given by the renter at the time of rental shall be deemed sufficient and equivalent to notice having been received by the renter, should the notice be returned undelivered.
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> (c) In a prosecution under subsection (3), failure to pay any amount due which is incurred as the result of the failure to redeliver property after the rental period expires, and after the demand for return is made, is prima facie evidence of fraudulent intent. Amounts due include unpaid rental for the time period during which the property or equipment was not returned and include the lesser of the cost of repairing or replacing the property or equipment if it has been damaged.

Subsection (5) authorizes the business to demand the return of the property in person, by hand delivery or by certified mail, return receipt requested, to the address of the renter that was given in the rental contract. If the demand is sent by mail with return receipt requested, subsection (4)(b) allows the failure to return the property, 5 days after the demand was received or after the receipt has been returned, may be used as evidence of the renter's intent to defraud. Subsection (4)(c) provides that the failure to pay any amount due after the demand has been made to return the property is also evidence of fraudulent intent.

3. Weight to Be Given to that Evidence

The statute indicates that the types of evidence listed in subsection (4) are "prima facie" evidence of the renter's fraudulent intent. "Prima facie" evidence is evidence which can establish a fact unless satisfactorily explained. So, while such evidence is helpful to the criminal prosecution, if the renter is able give an explanation for the evidence which tends to disprove a fraudulent intent, additional evidence will be needed to prove the renter's guilt.

In some cases, there will be additional evidence. For instance, maybe not only did the defendant stop making payments or fail to return the property, but he also pawned the property or sold it to a third person. This is additional evidence of substance which can be used to prove his guilt beyond a reasonable doubt. Perhaps an employee of the business made demand in person for return of the property to the renter who admitted still having the property but refused to return it. Again, this is substantial evidence which can be used to prove the renter's criminal intent.

Where additional evidence is lacking, an interview of the renter may be essential. The prosecution must be able to eliminate any reasonable explanation that defendant might create to explain his failure to return the property. Depending on the circumstances of each case, the mere failure to return the property may not carry the day. Please remember that the longer the renter has possessed the property while making payments, the less likely there will be the basis for a criminal case. An interview of the renter, during which he cannot give a reasonable explanation for his failure to return the property, is sufficient additional evidence to file the charge.

4. Conclusion

As with any new legislation, it will take time to perfect the prosecution of a renter for failing to return rent-to-own property. We would urge you to share the requirements of the statute with the rent-to-own businesses in your area. Moreover, when you get a complaint regarding this type of activity, please review this article as well as the statute. If you have questions, please contact the Felony Intake attorney assigned to your department at 534-4802. We are always available to handle your questions regarding felony charges.

**********FROM THE COURTS**********

AGGRAVATED BATTERY IS PREDICATE OFFENSE FOR FELONY BATTERY

The defendant was charged with felony battery and filed a motion to dismiss, asserting that the state could not use a prior aggravated battery conviction as a predicate offense. The trial court granted the motion, but on appeal, the Supreme Court reversed, holding that an aggravated battery conviction can serve as a predicate offense for felony battery. *State v. Warren*, 26 FLW S434 (Fla. July 5, 2001)

OFFICER CORRECTLY ANSWERED QUESTION ABOUT THE SUSPECT'S RIGHTS

The defendant was charged with sexually assaulting his daughter and filed a motion to suppress his confession. The facts on which the motion was based were that while he was being interrogated by police, the defendant asked them if he needed an attorney. A detective responded, "Since you brought it up, let me read you your rights and you can make your decision based on me reading you your rights." The detective read the defendant his rights, and the defendant subsequently confessed. The trial court granted the motion, but on appeal, the Fourth District reversed, holding that the detective's response was consistent with an officer's responsibility to deal honestly and fairly with a suspect's questions about his rights. *State v. Contreras*, 26 FLW D1602 (Fla. 4th DCA June 27, 2001).

POCKET KNIFE MUST BE USED AS A WEAPON TO SUPPORT ARMED BURGLARY CHARGE

The defendant was charged with armed burglary. At his trial, the evidence established that he used a small pocket knife to tear through the screen of the porch of a home and then entered through the hole he made. The occupant of the home heard him and held him at gun point until police arrived. At some point during the confrontation, the defendant showed the home owner that what he had in his hand was the pocket knife and then he put the knife in his pocket. He did not point the knife at the home owner or brandish it about. He was convicted as charged. On appeal, the Second District reversed the armed burglary conviction and reduced it to burglary of a dwelling, holding that where an armed burglary charge is based on the possession of a common pocket knife, the state must show that the defendant used the knife as a deadly weapon. *McCoy v. State*, 26 FLW D1663 (Fla. 2d DCA July 6, 2001).

HITTING THE WRONG PERSON DOESN'T EXCUSE AGGRAVATED BATTERY

The defendant was charged with aggravated battery. At his trial, the evidence established that he intentionally threw a bottle at an individual. However, the bottle missed that individual and struck the victim in the head. The defendant was convicted as charged. On appeal, the Fourth District affirmed, holding that the doctrine of transferred intent operates in aggravated battery cases where the victim occupies the same status as the intended victim. *Sagner v. State*, 26 FLW D1762 (Fla 4th DCA July 11, 2001).

EVEN TEMPORARY POSSESSION WAS SUFFICIENT TO SUPPORT FIREARM CHARGE

The defendant was charged with possession of a firearm by a convicted felon and filed a motion to dismiss, asserting that the state could not establish a *prima facie* case. The facts on which the motion was based were that the defendant and his wife were moving from their residence. During that process, the wife asked the defendant to carry a rifle belonging to her to their truck. He did so and placed the rifle in the back of the truck. The trial court granted the motion, but on appeal, the Fifth District reversed, holding that ownership of the firearm was immaterial and that the defendant's possession of the firearm was sufficiently knowing and voluntary to support the charge. *State v. Green*, 26 FLW D1768 (Fla. 5th DCA July 13, 2001).

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LEGAL ADVISOR
Staff
Jerry Hill.....Publisher
Chip Thullbery.....Managing Editor
Michael Cusick.....Legal Content Editor

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