Law Enforcement Digest – April 2023

COVERING CASES PUBLISHED IN APRIL 2023

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Cases in the Law Enforcement Digest are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges. Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- **Washington Courts of Appeals**. The Washington Court of Appeals is the intermediate level appellate court for the state of Washington. The court is divided into three divisions. Division I is based in Seattle, Division II is based in Tacoma, and Division III is based in Spokane.
- **Washington State Supreme Court**. The Washington Supreme Court is the highest court in the judiciary of the U.S. state of Washington. The court is composed of a chief justice and eight justices. Members of the court are elected to six-year terms.
- **Federal Ninth Circuit Court of Appeals.** Headquartered in San Francisco, California, the United States Court of Appeals for the Ninth Circuit (in case citations, 9th Cir.) is a federal court of appeals that has appellate jurisdiction over the district courts in the western states, including Washington, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada and Oregon.
- **United States Supreme Court:** The Supreme Court of the United States is the highest court in the federal judiciary of the United States of America.

TOPIC INDEX

CASES

WASHINGTON LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** - WA Association of Prosecuting Attorneys [2018-2021] | [2022]

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- If you have questions/issues relating to using the ACADIS portal, please review the FAQ site.
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- Author: Linda J. Hiemer, JD| Program Administration Manager Legal Education Consultant/Trainer

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State v. Giberson

No. 56081-0-II

Washington State Court of Appeals, Division 2

April 4, 2023

TOPICS: Searches and seizures, warrantless searches, consent to search premises, common authority rule, constructive possession, containers

Factual Background

On May 30th, 2020, the Grays Harbor County Sheriff's Department received a tip from a confidential informant that Bradley Giberson and Ricky Dunlap, Jr. planned to conduct a drug deal at a motel in Montesano. Detective Richard Ramirez detained Dunlap and another individual, Kenneth Goedker, after they left room 106 of the motel. Goedker claimed to be the sole occupant of room 106 and stated that he had been staying in the room for 10 days. Goedker also said that Giberson and Dunlap had been at the room earlier in the day. Goedker provided written consent allowing the detectives to search his room, and mentioned that there were bags in the room that belonged to Giberson and Dunlap.

With Goedker's written consent and the key provided by the motel manager, Detective Darrin King and Detective Ramirez entered room 106. They found Giberson and another person, Ashley Hopkins, sitting at a table. Both were detained and removed from the room, while Goedker was brought inside. During the search, the detectives discovered controlled substances and drug paraphernalia in a bag on the bed, which Goedker acknowledged as his own. The detectives also searched two plastic grocery bags near the door of the room, where they found a digital scale and two baggies containing heroin. When asked about the bags, Goedker denied ownership and attributed them to Giberson and Dunlap.

Giberson was subsequently charged with possession of heroin with the intent to deliver. Before the trial, Giberson filed a motion to suppress the evidence found in the warrantless search of the plastic grocery bags. Giberson argued that Goedker could not give consent to search his belongings. The State countered that Goedker had the authority to consent to the search of the room and that they did not need Giberson’s consent because he was merely a guest in the room and had no expectation of privacy.

The trial court denied the suppression motion, ruling that Giberson lacked standing to challenge the search because he was a casual guest in the room and, therefore, did not have a legitimate expectation of privacy. The court further determined that, even if Giberson did have standing to challenge the search, because Giberson was a guest, the detectives did not need his consent to search the room. Rather, Goedker could consent to the search because he had dominion and control over the property and was the host of the room.

The trial court tried the case based on stipulated facts and found Giberson guilty of unlawful possession of heroin with the intent to deliver. Giberson timely appealed.

Analysis of the Court

Standing

Division 2 of the Washington State Court of Appeals (the Court) heard Giberson's appeal. The Court noted that the threshold issue was whether Giberson had standing to challenge the search of his bags. Giberson's argument was that the trial court made an error in concluding that he did not have standing to challenge the search of his bags because they were in his possession before they were searched and therefore he had automatic standing.

The Court reaffirmed that article I, section 7 of the Washington Constitution grants automatic standing to a defendant to challenge a search when **(1) possession is an essential element of the charged offense and (2) the defendant was in possession of the item searched at the time of the challenged search.**

The Court observed that possession was an essential element of the offense of possession of heroin with intent to distribute. See RCW 69.50.401(opens in a new tab)(1). Moreover, the State assumed for the sake of argument that Giberson had constructive possession of the grocery bags when he was removed from the motel room. The Court, therefore, held that Giberson had automatic standing to challenge the search of the grocery bags and that the trial court made an error when it concluded that Giberson did not have standing.

However, the trial court also concluded that Goedker could consent to the search of the room and that the detectives did not need to obtain consent from Giberson. The Court, therefore, addressed whether the search was lawful because Goedker could consent to the search of Giberson's bags.

Lawfulness of the search

Giberson argued the search was unlawful because Goedker did not have the authority to consent to the search of Giberson's grocery bags. The State countered that Goedker's consent to search the room was enough.

The Court reiterated that warrantless searches are per se unreasonable under article I, section 7 of the Washington Constitution unless it falls under a recognized exception. Valid consent is one such exception. Under the *"common authority rule,"* **a person with equal control over a premises shared with another person has authority to grant consent to law enforcement to search the premises as long as the other person is absent. If the other person with equal control is present, law enforcement must obtain consent to search from that person, as well.**

The Court was sure to note that the rule that law enforcement must also obtain the consent of a person who is present does not apply to a person who does not possess common authority over the

premises. In other words, **consent to search by a host is always effective against a guest within the common areas of the premises.** This means that an apartment tenant or the tenant of a motel room has the authority to consent to a search of the apartment (or motel room) even if guests are present.

In this case, Giberson was a guest in Goedker's motel room. Therefore, Goedker had authority to give consent to law enforcement to search his room. Because Giberson was a guest and not a co-occupant, law enforcement was not required to obtain his consent to search the room.

Giberson argued that even though the officers received Goedker's consent to search the room, Goedker could not consent to search Giberson's grocery bags inside the room. The Court addressed this argument by observing that consent to search an area does not necessarily provide the authorization necessary to search the belongings of a third person inside the area.

In a past case, *State v. Rison*(opens in a new tab), the court held that the tenant of an apartment does not have authority to consent to the search of a guest's closed container inside the apartment. In that case, the tenant gave consent to search the apartment and law enforcement searched the eyeglasses case of a guest that was required to leave. The court held that **the tenant did not have actual authority to consent to the search of the eyeglasses case because the tenant did not jointly own, use, possess, or control the case.**

In another case, *State v. Hamilton*(opens in a new tab), a husband gave the police consent to search a purse that his estranged wife had brought into their house. That court held that the husband had no authority to consent to the search, especially when the wife was present, because **he had no ownership or possessory interest in the purse, other than the fact that it had been left in his house.**

In this case, **Goedker did not own, possess, or control Giberson's grocery bags. Therefore, he did not have the authority to consent to the search of those bags.**

The State argued that the grocery bags were not readily identifiable as belonging to someone other than Goedker such that the scope of Goedker's consent would be limited. However, that argument did not hold water because the trial court entered an unchallenged finding of fact that when Goedker was first detained, he told Detective Ramirez that "there were bags in the room" that belonged to Giberson and Dunlap. Therefore, Detectives King and Ramirez had reason to know that Giberson owned the grocery bags before they were searched. At the very least, the Court opined, the knowledge that Giberson owned bags in the room required the officers to inquire with Goedker, who was present, about the ownership of the bags before searching them. See *State v. Holmes*(opens in a new tab) where the court required officers to inquire further when it was unclear that a person giving consent to search had the authority to do so.

The State brought the Court's attention to *State v. Cotton*, where the court stated that "It [was] clear that persons who do not own an item of property, but, who maintain common authority over the residence in which the property is located, can consent to the seizure and removal of the item from

the premises by law enforcement officers if the item is suspected to be evidence of a crime." The Court distinguished Cotton from the present case, however, by pointing out that the shotgun seized in Cotton was in plain view, and that court did not address whether the premises owner could give consent for law enforcement to open and search bags belonging to another that may contain evidence of a crime.

Given the weight of the authorities available, the Court concluded that the officers did not have consent to search Giberson's bags.

Even still, the Court noted that a search is not unconstitutional unless the defendant demonstrates that they had a reasonable expectation of privacy in the item searched. To establish their expectation of privacy, a defendant must show that (1) they had an **actual (subjective) expectation of privacy by seeking to preserve something as private, and (2) society recognizes that expectation as reasonable.**

The Court recognized that Giberson clearly sought to preserve the drugs and digital scale as private by placing them in his grocery bag. The only question left to be answered was whether that expectation of privacy was reasonable.

In the past, courts have found a reasonable expectation of privacy in **various traditional repositories of personal belongings**, like a *purse,* a *closed eyeglasses case,* a *zipped shaving bag kit,* a *closed and locked briefcase,* and *luggage*. The principal that emerges is that an expectation of privacy may exist for closed packages, bags, and containers.

The Court noted that in *Rison*, the court addressed whether a guest in an apartment had a reasonable expectation of privacy in their eyeglasses case when the apartment tenant had consented to a search of the premises. That court noted that a guest could reasonably expect that others would not open their closed container without consent. Therefore, the guest's eyeglasses case was associated with an expectation of privacy and was protected by the Fourth Amendment.

In Giberson's case, the question was whether Giberson had a reasonable expectation of privacy in his grocery bags. The Court acknowledged that the grocery bags could not be characterized as closed containers like a briefcase or luggage because there was no indication that Giberson had tied the bags shut. But the fact that the grocery bags were not completely closed did not resolve the issue. Grocery bags, after all, could be characterized as **traditional repositories of personal belongings** because people put personal grocery items and other personal items obtained in a grocery store in such bags (like prescription medication). The Court also leaned on common experience to inform it that people also use grocery bags to carry other personal items. For example, people experiencing homelessness might use grocery bags to store personal items that they do not have any other place for.

Therefore, the Court concluded that Giberson had a reasonable expectation of privacy in his grocery bags. **The Court noted that because grocery bags are not completely closed off, law enforcement may still be able to seize drugs or other contraband that is in *plain view* in a grocery bag.** That being

said, there was no finding that the drugs and digital scale found in Giberson's grocery bags were in plain view.

The Court held that Goedker's authority to give consent to search his hotel room did not extend to the search of Giberson's grocery bags and that Giberson had a reasonable expectation of privacy in the bags. It held that the trial court erred in failing to suppress the evidence of drugs and a digital scale found in the search of the grocery bags.

Giberson's conviction was reversed.

Training Takeaway

Warrantless searches are per se (by themselves) unlawful under article I, section 7 of the Washington State Constitution unless they fall under a recognized exception to the warrant requirement. Valid consent is one of the exceptions to the warrant requirement. **Under the "common authority rule," a person with equal control over a premises shared with another person has the authority to give consent to law enforcement to search the premises so long as the other person is not present.** If the other person with equal control is present, law enforcement must get that person's consent to search the premises, as well. However, **this rule does not apply when the person present does not have common authority over the premises.**

When possession is an essential element of the crime charged, and the defendant is in possession of the item searched, the defendant has automatic standing to challenge the search.

In this case, Giberson had automatic standing to challenge the warrantless search of his grocery bags because possession was an essential element of the possession of heroin with the intent to distribute charge and he had constructive possession of his grocery bags when he was removed from the hotel room.

Even still, the Court considered whether the "common authority rule" would allow the search of Giberson's grocery bags. Typically, **when a host gives consent to search, that consent is always effective against a guest within the common areas of the area searched (be it a motel/hotel room, apartment, home, etc.)** And a tenant has the authority to consent to a search of a motel/hotel room or apartment, even if there are guests present. However, the consent to search an area does not necessarily provide the authorization to search the belongings of a third person that is inside the area.

In this case, Goedker did not own, possess, or control Giberson's grocery bags. Therefore, he did not have the authority to consent to the search of Giberson's bags. Moreover, the detectives knew that there were bags in the motel room that belonged to Giberson because Goedker told them that when

he was first detained. Thus, the detectives knew, or had reason to know, that Giberson owned the grocery bags before they searched them.

However, **a search is not unconstitutional unless the defendant can demonstrate that they had a reasonable expectation of privacy in the item searched.** For a defendant to establish their reasonable expectation of privacy in the item searched, they must show that 1. they had an actual subjective expectation of privacy by seeking to preserve something as private, and 2. society recognizes that expectation as reasonable.

A reasonable expectation of privacy exists for closed packages, bags, and containers.

Here, while there was no indication that Giberson tied the grocery bags shut, he had a reasonable expectation of privacy in their contents because he could reasonably expect that others would not search his grocery bags without his consent. That being said, in other cases, officers may be authorized to seize drugs or other contraband in grocery bags if they are in *plain view*.

At its core, this case is about affirming a person's article I, section 7's privacy protections in the contents of their containers, even in an area that law enforcement has been given consent to search by the area's owner or tenant.

EXTERNAL LINK: View the Court Document

TOPICS: Terry stops, "in custody" status

Memorandum

In a short memorandum, the United States Court of Appeals for the Ninth Circuit stated the following:

Demetrius Ramos appealed his conviction and sentence for various charges related to transporting and harboring noncitizens unlawfully in the United States. The Ninth Circuit Court of Appeals (the Court) heard the appeal and the summary of the appeal is as follows:

> 1. Ramos argued that the district court made an error when it denied his motion to suppress evidence by determining that he was not "in custody" for Miranda purposes. The court reviews whether a defendant is "in custody" de novo and any factual findings for clear error. The court explained that **a person detained during a *Terry* stop is generally not considered "in custody" for Miranda purposes. However, if the questioning goes beyond a brief inquiry, Miranda warnings may be required.**
>
> **In this case, the court found that since the questioning was limited to the suspect's name, date of birth, and citizenship status, which is permissible during a *Terry* stop, Ramos was not "in custody" for Miranda purposes.** The court also noted that the border patrol agents diligently pursued their investigation during the stop, and Ramos contributed to the delay by refusing to provide his driver's license and contacting his attorney and a friend. Therefore, the district court's decision that Ramos was not "in custody" for Miranda purposes was not erroneous.
>
> 2. Both parties agreed that the district court made an error in imposing a special condition of supervised release in the written judgment that was not mentioned during the sentencing hearing. The written judgment required Ramos to participate in a substance abuse treatment program and contribute to the cost of treatment. However, the district court did not mention this condition during the sentencing hearing. Therefore, the Court vacated and remanded the case so that the district court could align the written judgment with the oral pronouncement of the sentence.

In summary, the Court affirmed the district court's denial of the motion to suppress evidence regarding Miranda rights but vacated and remanded the case to ensure consistency between the oral pronouncement and the written judgment regarding the special condition of supervised release.

Training Takeaway

Generally, a person is not considered “in custody" for Miranda purposes when they are detained during a *Terry* stop. However, if the questioning goes beyond a brief inquiry, Miranda warnings may be required.

Here, the Court affirmed that questions concerning a suspect’s name, date of birth, and citizenship status are permissible during a *Terry* stop and do not render a suspect “in custody” for Miranda purposes.

EXTERNAL LINK: View the Court Document

TOPICS: False pretenses, identity theft, forgery, sufficiency of the evidence

Factual Background

Richard and Marlene Trapp reported a book of stolen checks when they discovered that several missing checks had been cashed. Officer Aaron Davis of the Colville Police Department investigated the case and discovered that one of the checks had been cashed by Steven Stotts. The State charged Stotts with second-degree identity theft and forgery.

During the trial, Officer Davis testified that he had been investigating Sarah Hill for passing fraudulent checks using the Trapps' checking account. As part of his investigation, he obtained copies of the fraudulent checks and found a check made out to Stotts with the memo line stating "landscaping." Officer Davis contacted Stotts to inquire about the check. Officer Davis testified that Stotts was evasive, claiming that he had been hired by the Trapps for landscaping work. Officer Davis informed Stotts that the Trapps denied knowing him or hiring him for any work. Eventually, Stotts confessed that Sarah Hill had a habit of passing checks to individuals in exchange for them keeping a portion of the proceeds. Stotts admitted to taking the check from Hill, keeping $100 for himself, and giving the rest to Hill.

Officer Anthony Gorst of the Colville Police Department also testified and corroborated Officer Davis' account of the interaction with Stotts. Both officers stated that Stotts initially denied involvement but later confessed to receiving the check from Hill, not the Trapps.

In his defense, Stotts testified and contradicted the officers' testimony. He denied confessing to cashing the check for Hill and claimed that he had told Officer Davis that Hill gave him the check for cleaning up property. Stotts mentioned that his cousin, Josh, was present during the conversation with Officer Davis. Stotts asserted that he did not closely examine the check because it was dark, but he warned Hill that it "better cash." He attempted to deposit the check and stated it was highly likely that he deposited it along with other checks without realizing it was not from Hill. Stotts also disputed the accuracy of the statements in the police report.

Stotts' cousin, Jason Vaughan, also testified but could not provide specific details about the time he had helped Stotts with a garbage hauling job due to his heavy drinking during that period. Vaughan mentioned that he did not witness Stotts being paid for the job.

In the State's rebuttal, Officer Davis testified about the consequences for law enforcement officers deemed untrustworthy, mentioning that being listed on the Brady list could end their careers. Stotts did not object to this testimony.

The trial court instructed the jury on the elements required to find Stotts guilty of second-degree identity theft. The jury was instructed that Stotts needed to have knowingly obtained, possessed, transferred, or used someone else's identification or financial information with the intent to commit any crime, knowing that the means of identification or financial information belonged to another person.

Additionally, the jury was instructed that to find Stotts guilty of forgery, they needed to determine that he possessed, offered, or put off as true a written instrument, which the defendant knew had been falsely made, completed, or altered, with the intent to injure or defraud.

During closing arguments, the State emphasized Officer Davis' lack of motive to lie about his interactions with Stotts and questioned why Stotts had not called Josh, a cousin he claimed had been present during the conversation with Officer Davis, as a witness.

The jury found Stotts guilty of second-degree identity theft and forgery.

Stotts timely appealed.

Analysis of the Court

The Washington State Court of Appeals for Division III (the Court) heard Stotts' appeal. On appeal, Stotts challenged the sufficiency of the evidence and claimed ineffective assistance of counsel for failing to object to the prosecutor's characterization of Officer Davis' motives while testifying. For law enforcement purposes, we will focus on the sufficiency of the evidence challenge.

Second-degree identity theft and forgery

Stotts argued that there was insufficient evidence to show that he knew the checks were stolen and that Hill was not authorized to sign them.

When a defendant challenges the sufficiency of the evidence, the Court reviews the challenge to determine whether, after viewing evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. A defendant that makes a sufficiency challenge admits the truth of the State's evidence and all reasonable inferences that might be drawn from the evidence. An appellate court will not reverse a conviction unless no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *(Sound familiar?)*

The Court noted that to convict Stotts of second-degree identity theft, the State needed to prove that Stotts knowingly obtained, possessed, transferred, or used the financial information of another with

the intent to commit any crime knowing that financial information belonged to another person. See RCW 9.35.020(opens in a new tab)(1).

In this case, Officers Davis and Gorst testified that Stotts confessed to accepting the check written by Hill in exchange for keeping part of the proceeds and returning the remainder to Hill. The Court believed that when considered in a light most favorable to the State, this evidence could allow a jury to reasonably infer that Stotts possessed the financial information in the form of the check, knowing it belonged to someone other than Hill, with the intent to commit a crime against the true owners of the check. Therefore, there was sufficient evidence to support Stotts' conviction for second-degree identity theft.

The Court then addressed Stotts' conviction for forgery. The Court noted that the State had to prove that Stotts possessed, offered, or put off as true a written instrument which Stotts knew was falsely made with the intent to injure or defraud. RCW 9A.60.020(opens in a new tab). The Court observed that, in light of Stotts' admissions to Officer Davis, a jury could reasonably infer that he took a check made out by Hill, knowing that she did not own the check or have authority to sign the check, and presented the check to the bank with the intent to defraud the true owner of the check. Consequently, the Court held there was sufficient evidence to support Stotts' conviction for forgery.

Training Takeaway

This case was really about the importance of the well-founded testimony of law enforcement, prosecutorial misconduct, and the ineffectiveness of counsel. However, it is also a good review of the elements of second-degree identity theft and forgery.

To be found guilty of second-degree *identity theft*, the State must show that the defendant **(1) knowingly obtained, possessed, used, or transferred (2) a means of identification or financial information of another person (living or dead) (3) with the intent to commit (or aid or abet) any crime.**

To be found guilty of forgery, the State must show that **(1) with intent to injure or defraud a person, the defendant:**

> **(a) falsely made, completed, or altered a written instrument, OR**
> **(b) possessed, uttered, offered, disposed of, or put off as true a written instrument which they knew to be forged.**

RCW 9A.60.010 defines a written instrument as:

> (a) any paper, document, or other instrument containing written or printed matter or its equivalent, OR
> (b) any access device, token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.

In this case, the police officers' testimony that Stotts confessed to accepting a check written by Hill and made out to him in exchange for turning over some of the proceeds was sufficient to support Stotts' conviction for second-degree identity theft. Similarly, the officers' testimony was sufficient to support the Stotts' conviction for forgery.

EXTERNAL LINK: View the Court Document

TOPICS: False pretenses, factoring, sufficiency of the evidence

Factual Background

Restvedt and Jessica Stirling began dating and moved in together in 2016. Later that year, they started living together in Onalaska. During their time together, Restvedt worked under-the-table contracting jobs, while Stirling earned income from her Etsy shop and relied mainly on her savings. They later moved to Centralia, where Stirling purchased a home.

Throughout their relationship, Stirling owned a bank account at OnPoint Credit Union, and she had a debit card associated with it. Restvedt did not have access to Stirling's bank account and didn't have his own. However, when Stirling needed to withdraw cash, she would give her debit card to Restvedt at the ATM, as he was usually the one driving. Stirling claimed that she never gave Restvedt permission to use her card whenever he wanted, although she would provide him with the PIN.

Early in their relationship, Stirling noticed her debit card missing on several occasions, followed by unauthorized charges to her account. She suspected Restvedt was using her card without permission and replaced it multiple times. Stirling also tried to "hide money" from Restvedt by moving funds between her OnPoint account and other accounts she owned. Although she never witnessed Restvedt taking her card, she believed he was the only person with access to it.

In April 2020, Stirling realized her debit card was missing again. After confronting Restvedt about it, he patted his pockets and pulled out the card, jokingly referring to the withdrawals he made as her "asshole tax." This incident led to their separation. Restvedt claimed that their relationship ended because he found out Stirling was married, but she was not married during their time together.

A few weeks after Restvedt left, Stirling discovered video footage on a camera she owned, showing Restvedt making a withdrawal at an ATM. Stirling also accessed her bank account statements and found over 60 unauthorized transactions between January and April 2020. Some of these transactions were cash withdrawals and purchases at places Restvedt frequently visited.

Stirling reported Restvedt for theft to law enforcement, providing bank statements with marked unauthorized charges and the video evidence. She did not disclose that she had replaced her debit card and PIN multiple times during their relationship. The surveillance footage from the Morton Country Market ATM confirmed Restvedt's use of Stirling's debit card to check the account balance and make purchases.

Sergeant Humphrey, the investigating officer, contacted Restvedt, who initially denied making unauthorized transactions. However, when confronted with the video evidence, Restvedt admitted to withdrawing $400 and creating the video as a form of retribution, calling it a "tax" for Stirling's behavior. Restvedt then claimed that the withdrawals and purchases were a means of accessing cash he had given Stirling to deposit, but he later changed his story, suggesting that Stirling might have kept the cash in her safe.

Restvedt was charged with theft in the second degree and nine counts of unlawful factoring of credit card or payment card transactions. The charges alleged that he made unauthorized purchases and withdrawals totaling $1,859.60.

Restvedt was found guilty after a jury trial of one count of second-degree theft and six counts of unlawful factoring of a credit card or payment card transaction.

Analysis of the Court

Restvedt challenged the sufficiency of the evidence to support his conviction for unlawful factoring of a credit card or payment card transaction. His appeal was heard by Division 2 of the Washington State Court of Appeals (the Court).

When a defendant challenges the sufficiency of the evidence, the Court reviews the challenge to determine whether, after viewing evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. A defendant that makes a sufficiency challenge admits the truth of the State's evidence and all reasonable inferences that might be drawn from the evidence. An appellate court will not reverse a conviction unless no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt.

Unlawful factoring of a credit card or payment card transaction
Restvedt was charged with violating RCW 9A.56.290(opens in a new tab), which states that **a person commits unlawful factoring of a credit card or payment card transaction if that person "uses a scanning device to access, read, obtain, memorize, or store… information encoded on a payment card without the permission of the authorized user of the payment card or with the intent to defraud the authorized user, another person, or a financial institution.**

The following definitions are found in RCW 9A.56.280(opens in a new tab):

- "Credit card or payment card transaction" means **a sale or other transaction in which a credit card or payment card is used to pay for, or to obtain on credit, goods or services.** RCW 9A.56.280(4).

- "Person" is defined as **an individual, partnership, corporation, trust, or unincorporated association, but does not include a financial institution or its authorized employees, representatives, or agents.** RCW 9A.56.280(12).

- A "scanning device" is **any scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on a payment card.** RCW 9A.56.280(15).

- A "payment card" **includes credit cards and debit cards**. RCW 9A.56.280(11).

The Court noted that it reviews issues of statutory interpretation anew, and its purpose when interpreting a statute is to give effect to the legislature's intent. The Court derives legislative intent from the plain meaning of the statute, and it considers the text of the provision in question, the context of the statue in which the provision is found, related provisions, and the statutory scheme as a whole. Moreover, the Court may use dictionary definitions to discern the plain meaning of terms undefined by the statute.

In this case, Restvedt argued that RCW 9A.56.290(1) did not apply to his alleged conduct because he was not a merchant or a commercial agent. Restvedt asserted that the purpose of the statute was to criminalize unlawful transactions by merchants and money laundering. Restvedt further argued that there was insufficient evidence in the record that he used a scanning device to access information encoded on Stirling's debit card without her authorization.

The State countered, arguing that Restvedt's interpretation of the statute was not supported by the plain language of the statute. Specifically, the State asserted that any individual's fraudulent conduct, not just the conduct of merchants, is captured by the statutory language.

To determine whether the evidence supported Restvedt's conviction for unlawful factoring, the Court first had to address the threshold issue of what "factoring" is. The Court noted that "factoring" was not defined by the statute, so it had to look to the Webster's dictionary.

According to Webster's Third New International Dictionary:

- "Factoring" is the **purchase of accounts receivable from a business by a factor who thereby assumes the risk of loss in return for some agreed discount.**

- A "Factor" is **a person that acts or transacts business for another.**

Based on these definitions, the Court determined that **only a factor can engage in factoring**. Therefore, the plain meaning of "unlawful factoring" is when a factor purchases or utilizes some sort of business account in an unlawful manner as described by statute.

The Court noted that the statute does not use the term "factor" when defining who can commit the crime of unlawful factoring of a credit card or payment card transaction. Rather, it states that **"a person commits the crime of unlawful factoring of a credit card or payment card transaction…"** However, a person is statutorily defined as a natural person, a partnership, corporation, trust, or unincorporated association. This was in keeping with the notion that RCW 9A.56.290 pertains to businesses, business conduct, and business accounts.

The record was clear that Restvedt was not regularly employed during his time with Stirling. At trial, Restvedt testified that, *"I was doing small contracting jobs for neighbors and friends and those types of things."* The Court noted that even if Restvedt was self-employed or an independent contractor conducting business, there was no evidence that at any point he acted or transacted business for another. Therefore, there was insufficient evidence that Restvedt was a factor. Because there was insufficient evidence that Restvedt was a factor, his alleged conduct could not fall within the definition of "unlawful factoring."

The State argued that the Court should not apply the statute so narrowly. The State contended that "the conduct codified as unlawful by the legislature in RCW 9A.56.290 exceeds the narrow confines of the dictionary definition of factoring" and that the Court should give such definitions minimal consideration. The State asserted that the record showed that Restvedt used Stirling's debit card to make unauthorized purchases and ATM withdrawals. According to the State, because cash registers and ATM's are electronic devices that can be used to "access, read, scan, obtain, memorize, or store" information encoded on a debit card, they are scanning devices and Restvedt's conduct fits into the plain language of RCW 9A.56.290.

The Court did not accept this argument. It noted that if it were to adopt the State's argument, this literal reading of the statute would completely ignore the term "factoring." Courts should read and construe statutory provisions in their entirety and should avoid accepting literal readings with strained consequences, especially when those consequences do not align with the statute's purpose and plain meaning of its text.

Additionally, the State's reading would mean that if Restvedt had taken Stirling's debit card and made unauthorized online purchases, no scanning device would have been involved and Restvedt could not be charged or convicted under RCW 9A.56.290(1)(a) for essentially the same conduct that he was accused of (making unauthorized purchases). The Court found this to be a strained consequence of the State's literal reading of the statute.

Moreover, the State's interpretation of the statute would render the term "person" ambiguous. "Person" could mean "factor" or any individual or non-financial institution entity engaged in any kind of unauthorized conduct, not just business conducted on behalf of another. When statutes are ambiguous, the courts may turn to legislative history to discern the legislature's intent. The Court noted that in 1993, the legislature defined "unlawful factoring" when it first introduced the unlawful factoring statute.

Unlawful factoring was defined as:

> A business that wishes to accept credit cards from its customers must first enter into a merchant agreement with a financial institution. Credit card factoring occurs when a business that has a merchant agreement (the factor) processes the credit card transactions of a second business that has been unable or unwilling to obtain its own merchant agreement. In return, the second business pays a fee to the factor, which often is based on a percentage of the credit sales processed.
>
> It has been reported that certain "disreputable" operators use factoring in connection with schemes to defraud or deceive consumers. These deceptive transactions can produce significant losses to consumers who do not receive bargained-for products or services, and to financial institutions who must reimburse injured consumers.
>
> It has been suggested that criminalizing factoring used to facilitate unfair or deceptive trade practices would help to reduce the operations of "disreputable" businesses in this state.

The Court found that the legislative history made it clear that factoring statutes were intended to address unlawful merchant and business transactions, attempts to defraud financial institutions, and money laundering.

Finally, the Court opined that Washington State typically prosecutes unauthorized debit and credit card use under statutes prohibiting the possession of stolen property, theft, and identity theft. Given both the plain meaning of the language of the statute and the legislative history, and because there was no evidence in the record that Restvedt was a factor, the Court held that there was insufficient evidence to convict Restvedt of any of his unlawful factoring charges.

The Court reversed Restvedt's convictions for unlawful factoring and sent the case back to the trial court to dismiss those charges with prejudice.

Training Takeaway

Restvedt challenged the sufficiency of the evidence to convict him of unlawful factoring as defined by RCW 9A.56.290(1)(a). Courts review challenges to the sufficiency of the evidence to determine if any rational trier of fact could have found guilt beyond a reasonable doubt. In doing so, it views evidence in light most favorable to the State, and a sufficiency challenge admits the truth of the State's evidence. An appellate court will reverse convictions for insufficient evidence only when no rational trier of fact could have found all elements of a crime were proven beyond a reasonable doubt.

In this case, there was insufficient evidence to support the finding that Restvedt was a "factor." A "Factor" is **a person that acts or transacts business for another.** The evidence was that Restvedt was not regularly employed while he was with Stirling. While he did perform odd jobs as self-employed or as an independent contractor, there was no evidence that he acted or transacted business for

another – a requirement for someone to be considered a "factor." Therefore, there was insufficient evidence to support his conviction for unlawful factoring of a credit or payment card transaction when he used his girlfriend's debit card.

> **Take note: the Court stated that the unlawful factoring statute was aimed at merchant activity. Typically, unauthorized debit and credit card transactions are charged under the statutes prohibiting the possession of stolen property, theft, and identity theft.**

EXTERNAL LINK: View the Court Document

Law Enforcement Digest – April 2023

TOPICS

1. Searches and Seizures
2. Warrantless searches
3. Consent to search premises
4. Common authority rule
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7. Terry stops
8. **"In custody" status**
9. **False pretenses**
10. **Factoring**
11. **Identity theft**
12. **Forgery**
13. **Sufficiency of the evidence**

CASES & REFERENCES

1. State v. Giberson 56081-0-II (April 4, 2023)
    a. RCW 69.50.401
    b. *State v. Rison*
    c. *State v. Hamilton*
    d. *State v. Holmes*
    e. State v. Cotton
2. United States v. Ramos 21-10184 (April 10, 2023)
3. State v. Restvedt 56856-0-II (April 11, 2023)
    a. RCW 9A.56.290
    b. RCW 9A.56.280
4. State v. Stotts 38822-1-III (April 20, 2023)
    a. RCW 9.35.020
    b. RCW 9A.60.020
    c. RCW 9A.60.010

WA Legal Updates

For further reading, the following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** by WA Association of Prosecuting Attorneys [2018-2021] | [2022-present]