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RECEIVING STOLEN PROPERTY: STATE V. WATKINS AND THE NEW CRIMINAL CODE

Steven J. Harman

THE PROBLEM

The possessor of stolen property poses a frustrating problem for Montana's prosecuting attorneys. This is especially true where there is little evidence indicating whether the possessor is a thief or a receiver. The crux of the problem is that if the information charges him with receiving stolen property, the accused might claim in defense that he stole the property and is exempt from conviction for receiving. The Montana supreme court was confronted with this dilemma in *State v. Watkins*.¹

The purpose of this note is to examine the problem associated with cases involving the possessor of stolen property. The impact of *State v. Watkins*² on the area of receiving stolen property will be analyzed in some detail. Furthermore, special consideration will be given to the relevant provisions of the new Montana Criminal Code³ and the possible effect of the Code on the crime of receiving stolen property.

STATE V. WATKINS

Defendant Watkins was discovered with horses recently stolen from Colorado and California on his property near Roundup, Montana. Watkins claimed that he knew the horses were there but assumed that they belonged to a neighbor, except for one which he claimed as a gift from a friend for stud fees.⁴

The very presence of the horses on the defendant's property was presumptive evidence that he had stolen the horses.⁵ Rather than charging him with theft, the prosecution elected to charge Watkins with receiving stolen property, for which he was subsequently convicted. Watkins's contention on appeal was that the evidence invoked the statutory presumption that he was guilty of *theft* of livestock. Therefore, prosecution for *receiving* stolen property would exempt him from conviction.⁶ In dismissing this argument, the court stated:

¹*State v. Watkins*, 156 Mont. 456, 481 P.2d 689 (1971).

²*Id.*

³Laws of Montana (1973), Ch. 513, § 1 (MONTANA CRIMINAL CODE OF 1973, Title 94, REVISED CODES OF MONTANA (1947), effective January 1, 1974) [hereinafter cited as M.C.C. 1973].

⁴*State v. Watkins*, *supra* note 1 at 690, 691.

⁵REVISED CODES OF MONTANA, § 94-2704.1 (1947) [hereinafter cited as R.C.M. 1947]. This section reads as follows:

§ 94-2704.1. Possession of stolen livestock as evidence of larceny. The possession, claim of ownership, or control over recently stolen livestock shall be deemed prima facie evidence of guilt of larceny unless this presumption is rebutted or contradicted by other credible evidence.

⁶*State v. Watkins*, *supra* note 1 at 691.

. . . the special evidentiary presumption is to aid in the prosecution of livestock theft cases. This presumption must be overcome by the defendant in these cases of livestock theft. This presumption is specifically confined to cases brought under 94-2704.1, R.C.M., 1947, and in no case carries over as a burden for the State to overcome in the prosecution of receiving stolen property.⁷

Watkins also contended that the State had failed to prove that someone else had taken the horses. He cited *State v. Guilbert*⁸ as controlling authority for this proposition relying on the following statement in that case: "A necessary and essential element of the crime of receiving stolen property is that of establishing beyond a reasonable doubt that the property be stolen by someone other than the defendant."⁹ The court held that this statement was nothing more than an expression of the court's concern that the defendant be protected from being charged with both larceny and receiving stolen property arising out of the same act.¹⁰ The justices concluded that neither the receiving stolen property statute nor the case law prior to *Guilbert* imposed on the state the burden of proving that someone other than the accused had stolen the property.¹¹ Therefore, the case was overruled on that point.¹²

The supreme court was careful in overruling *Guilbert* to preserve the necessary elements of receiving stolen property and specifically restated them: "(1) that the property was stolen; (2) that the defendant bought it or received it knowing it to have been stolen; and (3) he did so for his own gain or to prevent the owner from regaining possession of it."¹³

With the elements of receiving stolen property firmly established and the presumptive evidence statute relating to livestock placed in its proper perspective, the next question raised is what effect the new theft statute in the new Code will have on receiving stolen property. A portion of Montana's new theft statute relevant to a discussion concerning receiving stolen property provides:

§ 94-6-302. Theft.

(1) A person commits the offense of theft when he purposely or knowingly obtains or exerts unauthorized control over property of the owner, and:

- (a) Has the purpose of depriving the owner of the property; or
 - (b) Purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or
 - (c) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.
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⁷*Id.* at 692.

⁸*State v. Guilbert*, 126 Mont. 171, 146 P.2d 814 (1952).

⁹*Id.* at 816.

¹⁰*State v. Watkins*, *supra* note 1 at 691.

¹¹Citing as authority: *State v. Moxley*, 41 Mont. 402, 110 P. 83 (1910); *State v. Simm*, 92 Mont. 541, 16 P.2d 411 (1933); *State v. Keays*, 97 Mont. 404, 34 P.2d 855 (1934).

¹²*State v. Watkins*, *supra* note 1 at 692.

¹³*Id.*

(3) A person commits the offense of theft when he purposely or knowingly obtains control over stolen property knowing the property to have been stolen by another, and: [has any of the mental states described above.]¹⁴

.....

Since Montana's new theft statute is based upon the Illinois Criminal Code,¹⁵ a brief history of case law dealing with receiving stolen property in Illinois before and after the adoption of their Criminal Code may indicate the approach that Montana will pursue.

ILLINOIS LAW

Prior to the adoption of their Criminal Code in 1961, Illinois had basically the same statute for receiving stolen property in Montana.¹⁶ The elements required for conviction were clearly stated in *People v. Holtzman*:¹⁷

To sustain a conviction for receiving stolen property, the proof must show: (1) that the property has in fact been stolen by a person other than the one receiving it; (2) that the one receiving it has actually received the property stolen or aided in concealing it; (3) that the receiver knew the property was stolen at the time of receiving; and, (4) that he received the property for his own gain or to prevent the owner from again possessing it.¹⁸

Except for the first element, Montana's requirements were substantially similar.

In 1961 Illinois adopted their new Criminal Code. The sections relevant to receiving stolen property provide:

§ 16-1. Theft.

A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over the property of the owner; or

.....

(d) Obtains control over stolen property knowingly the property to have been stolen by another or under such circumstances as would reasonably induce him to believe that the property was stolen, and

(1) Intends to deprive the owner of the use or benefit of the property; or

(2) Knowingly uses, conceals, or abandons the property in such a manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment will deprive the owner permanently of such use and benefit.¹⁹

The remarks of the Illinois commentators, which follow this section,

¹⁴M.C.C. 1973, § 94-6-302.

¹⁵ILLINOIS REVISED STATUTES 1963, Ch. 38, § 16-1 [hereinafter cited as Ill. Rev. Stat. 1963].

¹⁶SMITH-HURD ILLINOIS ANNOTATED STATUTES 1935, Ch. 38, § 492.

¹⁷*People v. Holtzman*, 1 Ill.2d 562, 116 N.E.2d 338 (1954).

¹⁸*Id.* at 342.

¹⁹ILL. REV. STAT. 1963, Ch. 38, § 16-1.

and those of the Montana Criminal Law Commission accompanying M.C.C., 1973, § 94-6-302 illustrate the respective drafting committees' intent to combine various acts and mental states to cover every conceivable type of theft.²⁰ The committees point out that Illinois Revised Statutes, 1963, § 16-1(d) and M.C.C. 1973, § 94-6-302(3), relating to receiving stolen property, were included to cover situations which might not be considered by the first subsection of the theft statute.²¹

In *People v. Berg*,²² the Illinois court required prosecutors filing informations under Ill. Rev. Stat., 1963, § 16-1(d) to prove the four traditional elements of receiving stolen property as set forth in the *Holtzman* decision. Apparently the new statute had no effect in changing the requirements of proof for receiving stolen property. Were the Illinois prosecuting attorneys to be shackled forever with the difficult common law elements of receiving stolen property? Definitely not! An important case, *People v. Marino*,²³ indicates that receiving stolen property is not confined exclusively to Ill. Rev. Stat., 1963, § 16-1(d). Thus, it appears that Illinois prosecutors are not required to establish two very difficult elements of proof: (1) that the property was stolen by someone other than the accused receiver; and, (2) that the defendant knew the property was stolen at the time he took possession.²⁴ A brief discussion of *Marino* will prove informative.

Defendant Marino and four companions were discovered by the police carrying cases of stolen drugs from Marino's garage and loading them into the back of a truck. Six months prior to this discovery, the same drugs had been stolen from the Louis Zahn Drug Company. The thief was neither apprehended nor identified. Evidence concerning the manner in which Marino came into possession of the drugs was unclear. This posed a puzzling situation to the prosecuting attorneys because it was difficult to determine whether the defendants were thieves or receivers. The information was filed under Ill. Rev. Stat., 1963, § 16-1(a) (1): "knowingly obtaining and exerting control over certain property of the Louis Zahn Drug Company, intending to permanently deprive the owner of the use and benefit of said property in violation of the Criminal Code."²⁵ Marino and three of the four others were found guilty. The three co-defendants filed a separate appeal.

The first contention of error raised by the defendants was that they were charged with the wrong section of the theft statute. They felt that they should have been indicted for "obtaining control over

²⁰COMMITTEE COMMENTS—1961 (Revised by Charles H. Bowman), ILL. REV. STAT. 1963, Ch. 38, § 16-1; CRIMINAL LAW COMMISSION COMMENT, REVISED PROPOSED MONTANA CRIMINAL CODE (1973), § 94-6-302.

²¹*Id.*

²²*People v. Berg*, 91 Ill.App.2d 166, 234 N.E.2d 400 (1968).

²³*People v. Marino*, 95 Ill.App.2d 369, 233 N.E.2d 245 (1968).

²⁴Note the requirement of (2) in M.C.C. 1973, § 94-6-302(3).

²⁵*People v. Marino*, *supra* note 23 at 253.

stolen property."²⁶ Therefore, prosecution under Ill. Rev. Stat., 1963, § 16-1(a) would exempt them from conviction.²⁷

The court held that the facts supported a conviction under Ill. Rev. Stat., 1963, § 16-1(a)(1), stating:

. . . the facts show that the defendants were caught moving cases of drugs which had been stolen from the Louis Zahn Drug Company from Marino's garage into a truck. This is clearly exerting control over the property of another. There is no question but that the defendants were concealing the property and intended to deprive the owner of the use and benefit thereof."²⁸

The defendants next argued that even if Marino's possession of the drugs was unlawful, he was still an "owner" as defined in the Criminal Code.²⁹ Therefore, they could only be charged under the lone subsection which did not contain the word "owner"; that being Ill. Rev. Stat., 1963, § 16-1(d).

The court concluded that this argument had been rendered moot by *People v. Nunn*.³⁰

This contention misses the mark, however, because 16-1(a)(1) is not limited to the theft of property in which only the actor who initiates the wrongful asportation is guilty of the offense. A person who 'knowingly obtains or exerts control' over the property includes but is not limited to the taking or carrying away of the property. It also includes (though still not exclusively) the bringing about of a transfer of possession of the property.³¹ (Emphasis added.)

Thus, regardless of whether the defendants stole the property in the first instance, if they later received possession, they "obtained control" of the property within the meaning of Ill. Rev. Stat., 1963, § 16-1(a). This plus the purpose of permanently depriving the owner of the property, was all that was required for conviction.

How the accused person acquired possession of another's property is no longer significant. What is important, however, is that at the time of arrest, the accused was purposely or knowingly exerting unauthorized control over the property evincing a purpose to deprive the owner of it. This point can be further illustrated by the following comparison of Illinois and Montana decisions.

The Illinois cases of *Nunn*³² and *People v. Bullock*³³ and the Montana decision of *State v. Fairbanks*³⁴ are very similar in factual contexts but opposite in holdings. The reason for the difference stems from the fact

²⁶ILL. REV. STAT. 1963, Ch. 38, § 16-1(d).

²⁷*People v. Marino*, *supra* note 23 at 253.

²⁸*Id.*

²⁹*Id.* at 253, 254.

³⁰*People v. Nunn*, 63 Ill.App.2d 465, 212 N.E.2d 342 (1965).

³¹*People v. Marino*, *supra* note 23 at 254, citing *People v. Nunn*, *supra* note 28 at 344.

³²*People v. Nunn*, *supra* note 30.

³³*People v. Bullock*, 123 Ill.App.2d 30, 259, N.E.2d 641 (1970).

³⁴*State v. Fairbanks*, 140 Mont. 243, 370 P.2d 497 (1962).

that present Illinois law no longer requires proof of the old common law elements of larceny while pre-1974 Montana courts were still burdened with them. All three cases involved an arrest of a person who was stripping another's automobile of parts. As in the *Marino* case above, there was little evidence produced at the trials to determine whether the defendants were thieves or receivers. Illinois prosecuting attorneys filed informations under Ill. Rev. Stat., 1963, § 16-1(a), and the appellate courts had little difficulty in finding that removing parts from another's automobile was such an act that reasonable men would conclude that it was a purposeful exercise of unauthorized control.³⁵ In each case the defendant's conviction was sustained. In *Fairbanks*, the auto stripper was charged with grand larceny. The Montana supreme court, burdened with the traditional requirements of taking and asportation, held that evidence of these two elements was lacking and reversed the defendant's conviction.³⁶ Suppose the *Fairbanks* case had been tried under Illinois law today? The apparent answer is that Nunn and Bullock would have had another cellmate. But what is most significant is that the new Code offers a new start, a fresh beginning, *IF* the traditional common law elements are cast aside.

CONCLUSION

The Montana Bar must realize that subsection (1) of the theft section of the new Code is intended by the Criminal Law Commission to cover *all* forms of theft, including receiving stolen property. Judicial support for this contention is found in *Marino*. Theft under the new Code simply requires that the accused ". . . purposely or knowingly exercise unauthorized control over the property of another with the purpose of depriving him of it."³⁷ Subsection (3) relating to receiving stolen property was included only because the Commission felt that subsection (1) may have been too concise considering the vast field of law that it covers.

It is unfortunate that Illinois carried over the old requirements of receiving stolen property into their new code. Whether Montana, like Illinois, incorporates the old elements of receiving as set forth in *Watkins* remains to be seen. However, the traditional elements of receiving which have plagued the legal system in the past should not be carried forward. To leave the tools of the past behind is not an easy task, especially for one who has struggled a lifetime to master them. The prosecuting attorney who forgets the past and concentrates on the simple, concise logic of the Code will be rewarded in the courtroom.

³⁵*People v. Nunn*, *supra* note 30 at 345; *People v. Bullock*, *supra* note 33 at 643.

³⁶*State v. Fairbanks*, *supra* note 34 at 498, 499.

³⁷M.C.C. 1973, § 94-6-302(1).