October 16, 2014

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RE: Maryland’s Consolidated Theft Statute

Dear Professor Sweeney:

You asked the Maryland Office of the Public Defender (OPD) to provide an assessment of the scope and divisibility of Maryland’s consolidated theft statute, Md. Code, Crim. Law § 7-101 et seq. In my thirteen years as an attorney with the OPD — including several years as a staff attorney in our trial and appellate divisions, five years as deputy chief of the appellate division, and two years, through the present, as chief of the appellate division — I have represented numerous clients charged under Maryland’s theft statute. Elizabeth Rossi is a staff attorney in the appellate division with a background in both criminal and immigration law. We respectfully submit this letter to explain the origin and function of Maryland’s theft statute.

I. INTRODUCTION

The Maryland General Assembly enacted a consolidated theft statute in 1978, the purpose of which was “to eliminate [the] technical and absurd distinctions that had plagued the larceny related offenses.” Jones v. State, 303 Md. 323, 328 (1985) (quoting the October 1978 Report by the General Assembly’s Joint Subcommittee on Theft Related Offenses). The statute “consolidated various common law larceny related offenses into a single offense designated as ‘theft.’” Id. at 343, and identified a nonexclusive list of “five different methods” of committing theft. Id. at 341; Md. Code, Crim. Law § 7-102(a) (“Conduct described as theft in this part constitutes a single crime and includes the separate crimes formerly known as (1) larceny; (2) larceny by trick; (3) larceny after trust; (4) embezzlement; (5) false pretenses; (6) shoplifting; and (7) receiving stolen property.”) (emphasis added). Maryland’s appellate courts have explained that the subsections of § 7-104 — which describe conduct previously constituting different common law crimes — “merely specify different acts or transactions
through which theft can be proved." Jones, 303 Md. at 338 (citing Whitehead v. State, 54 Md. App. 428, 442 (1983)). As the Maryland Court of Appeals stated in Jones: "It is readily evident from the language of the consolidated theft statute, and from its underlying history, that the legislature made 'stealing' property or services of another . . . a single criminal offense." 303 Md. at 339.

II. THE HISTORY OF MARYLAND'S CONSOLIDATED THEFT STATUTE SHOWS THAT THE LEGISLATURE INTENDED IT TO BE INDIVISIBLE.

Prior to 1979, Maryland common law defined larceny as "the wrongful taking and carrying away the chattels of another with a felonious intent to convert them to the taker's own use." Worthington v. State, 58 Md. 403, 409 (1882); see also Judge Charles E. Moylan, Jr., Maryland's Consolidated Theft Law & Unauthorized Use 1 (2001). Common-law larceny, however, excluded a wide range of theft crimes. Thus, for example, an individual who received stolen goods — but did not personally take them from their rightful owner — could not be convicted of larceny. See Fletcher v. State, 231 Md. 190, 192 (1963) (noting that common-law larceny requires "a felonious taking and carrying away" of another person's personal property). If a shopper at a retail store concealed merchandise or removed price tags, he, too, was not guilty of larceny because he never actually "carried away" the merchandise. Moylan at 5. Common-law larceny also excluded embezzlement, "[t]he fraudulent taking of personal property with which one has been entrusted," Black's Law Dictionary (9th ed. 2009) (West); see Nolan v. State, 213 Md. 298, 313 (1957) ("If a servant takes goods out of the master's possession, the crime is larceny, but if he takes goods before these reach his master's possession the crime is embezzlement.").), and failed to account for, among other criminal conduct, the theft of real property and the theft of services. The Maryland criminal code thus grew to fill these gaps, and theft-related offenses proliferated.

Maryland courts recognized the distinct crime of receiving stolen property. Fletcher, 231 Md. at 192 (citing Weddle v. State, 228 Md. 98, 102 (1962)). The General Assembly passed a shoplifting statute, making it easier to prosecute individuals who attempted to steal merchandise from retail stores. Moylan at 5 ("Absent the shoplifting law, merchants had frequently felt compelled to wait until the thief actually moved out of the store with the stolen item before making the arrest or sounding the alarm."). The criminal code eventually included seven different types of embezzlement, each of which involved a different variety of unlawful converter. Moylan at 3. The code also included the crime of larceny-after-trust, used specifically to prosecute servants who had received property directly from the rightful owner of the property, instead of from a third party. Moylan at 3. The legislature enacted the False Pretenses Act to criminalize the "acts of making, uttering and delivering a worthless check." Waye v. State, 231 Md. 510, 513 (1963). To address the fact that larceny applied only to personal property, Maryland enacted a statute to criminalize theft of realty, such as pipes, water fixtures, stoves, and bathtubs, and to address the fact that larceny covered only physical property, the state
enacted statutes that criminalized various types of thefts of services, including the failure to pay promised wages; fare evasion on public transportation; and refusal to pay a taxi driver for a ride. Id. Such was the landscape of Maryland theft law before the consolidated theft statute emerged on the scene.

As the Court of Special Appeals observed in 1970, without “a legislative enactment creating an all inclusive crime of theft[,] . . . precise factual circumstances determine what offense is committed[,] and one offense is distinguished from another by fine distinctions, always technical and frequently absurd.” Farlow v. State, 9 Md. App. 515, 516-19 (1970). A key concern with theft law prior to 1979 was that culpable individuals would go unpunished: “[If] the proof established deviates from the proof anticipated, . . . there may be acquittal of the offense pursued.” Id. (finding insufficient evidence of common-law larceny of monies, though the evidence supported the uncharged crime of larceny of goods); see also Nolan v. State, 213 Md. 298, 316 (1957) (finding the evidence insufficient to support a conviction for embezzlement, though the evidence supported the uncharged crime of larceny).

In enacting its consolidated theft statute, Maryland joined a national trend, the purpose of which was “to create a single statutory crime encompassing various common law theft-type offenses in order to eliminate the confusing and fine-line common law distinctions between particular forms of larceny.” Jones, 303 Md. at 333 (emphasis added) (noting that the Model Penal Code adopted a consolidated theft statute in 1962 and that at least 35 states had followed suit). The statute functions as an indivisible statute, in that it establishes “a single, indivisible set of elements.” Descamps v. United States, 133 S.Ct. 2276 (2013).

III. THE CONSOLIDATED THEFT STATUTE FUNCTIONS IN PRACTICE AS AN INDIVISIBLE STATUTE.

A. The charging language used to allege theft shows that theft is a single crime that can be committed in different ways.

In its description of the offense and its charging provision, Maryland’s General Assembly has made clear that, under the Consolidated Theft Statute, theft is a single crime that can be committed in different ways. In Criminal Law Article § 7-102(a), the General Assembly stated that “[c]onduct described as theft in this part constitutes a single crime.” Md. Code Ann., Crim. Law Art. § 7-102(a) (2002) (emphasis added). Accordingly, to properly charge an individual with any form of theft under § 7-104, a prosecutor need only state:

“([N]ame of defendant) on (date) in (county) stole (property or services stolen) of (name of victim), having a value of (less than $1,000, at least $1,000 but less than $10,000, at least $10,000 but less than $100,000, or $100,000 or more) in violation of § 7-104 of
the Criminal Law Article, against the peace, government, and dignity of the State.”

Md. Code Ann., Crim. Law Art. § 7-108(a) (2002 & 2009 Supp.). This charging language “allege[s] the essential elements of the offense charged.” Jones, 303 Md. at 336-37. In fact, it “charge[s] the crime of theft conjunctively by any or all of five methods,” and the prosecutor can prove the charge by showing that theft “was committed in any manner that would constitute theft under the statute.” Id. (citing Whitehead v. State, 54 Md. App. 428, 458 (1983). The language is adequate to inform an individual of the charges against him because “Maryland’s consolidated theft statute constitutes a single crime,” and the subsections of § 7-104 “merely specify different acts or transactions through which theft can be proved.” Id.

B. To convict an individual of theft, a jury need not agree on the manner in which the theft was accomplished.

A Maryland jury need not unanimously agree on the method by which a theft was committed to convict a defendant of violating the consolidated theft statute. See Rice v. State, 311 Md. 116, 125-26 (1987); Craddock v. State, 64 Md. App. 269, 278 (1985). The statute does not “encompass[] multiple crimes for jury instruction purposes.” Rice, 311 Md. at 124. Rather, it “posits a single offense.” Id.; see also Craddock, 64 Md. App. at 278 (“[T]he statute sets forth various acts that constitute the crime of theft. As long as jurors unanimously agree that theft in some form was committed, nothing more is required.”). As a result, “in jury deliberations, six jurors may think the defendant guilty of violating [section (a)] and six guilty of violating [section (c)]; but on neither (a) nor (c) do all twelve agree.” Rice, 311 Md. at 124-25. The Maryland Court of Appeals has held that such a situation is consistent with legislative intent, observing that the legislature that enacted the consolidated theft statute “was well aware that jurors might draw conflicting inferences from evidence,” id. at 125, and intended the statute to create a “straight and clear path” from proof of theft – by any means – to conviction. Id.

Similarly, in Craddock, the Court of Special Appeals reasoned:

Clearly, the gravamen of the offense of theft is the depriving of the owner of his rightful possession of his property. The particular method employed by the wrongdoer is not material; an accusation of theft may be proved by evidence that it was committed in any manner that would be theft under this subheading.

Generally, jurors are not required to uniformly accept all of the evidence presented in order to arrive at a unanimous verdict. Some jurors unquestionably reject evidence that others accept in determining guilt or innocence. In short, the
law requires unanimity only in the verdict, not in the rationale upon which the verdict is based. In the case sub judice, the statute sets forth various acts that constitute the crime of theft. As long as jurors unanimously agree that theft in some form was committed, nothing more is required.

Id. at 278 (internal citations and quotation marks omitted). The holdings and reasoning of Rice and Craddock make clear that theft under the Consolidated Theft Statute is a single offense that can be committed through a variety of means.

C. The prohibition on double jeopardy prevents an individual who is acquitted or convicted under § 7-104 from being prosecuted again for theft of the same property.

Because the consolidated theft statute "comprises the single crime of theft," a defendant once convicted or acquitted of theft "is protected from further prosecution for stealing the property particularized in the indictment." Jones, 303 Md. at 341. The prohibition on double jeopardy prevents the state from retrying a defendant for violating the theft statute with regard to the same property, even under a different theory. Id.; State v. Boozer, 304 Md. 98, 110 (1985) ("[T]here c[an] be no more than one conviction for the same taking of a person's property.").

IV. CONCLUSION

Maryland's consolidated theft statute criminalizes the single crime of theft and provides a list of methods by which the theft statute may be violated. The legislature that enacted the statute wanted to simplify theft law by relieving prosecutors of the need to commit themselves to a single theory of theft. The statute was intended to minimize the possibility that, due solely to a charging technicality, culpable conduct would go unpunished, for example, because a prosecutor charged larceny of monies instead of larceny of goods. See Farlow, 9 Md. App. at 516-19. Since it was enacted, the consolidated theft statute has functioned as intended: prosecutors use generic charging language; jurors need not agree on the method by which theft was committed to convict a defendant under § 7-104; and a conviction or acquittal under § 7-104 puts the defendant in jeopardy as to a prosecution for theft of the same property on any theory of theft. The history of the statute and its current use demonstrate that the consolidated theft statute does not establish multiple crimes consisting of different elements. Rather, it establishes a single crime — the crime of theft — and identifies a variety of ways in which the elements of the crime of theft might be proved.
Sincerely,

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