Criminal Law Review

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The Thief as Imposter —

Identity Fraud and Financial Transaction Offenses

by Harry L. Sivley

On Feb. 23, 2003 the New York Police Department arrested Abraham Abdallah for identity theft and various other offenses.[1] This humble busboy from Brooklyn, N.Y., managed to parlay his theft of identities into $100 million worth of purchases on the Internet and a blanket access to victims' credit cards and investment accounts.[2]

The only thing that separates these acts from the approximately 9.9 million acts of identity theft last year is the relative magnitude.[3] The cost of financial identity theft to society is enormous, tallying an aggregate impact to consumers and businesses of approximately $53 billion in the past year.[4] However, to limit the analysis of the problem facing victims of this crime to financial terms is to miss the mark. Identity theft is a personal crime, affecting the victim's very interest in themselves. Aggravating the effect of the crime is the fact that victims will rarely be able to guard against such crimes proactively, and usually discover the crime about 12 months after the occurrence.[5] Compounding the burden of identity theft on victims is the Supreme Court holding in *TRW, Inc. v. Andrews*,[6] which held that a general discovery rule does not apply to toll the statute of limitations for suits under the Fair Credit Reporting Act.

Thus, the victim is left with little chance of recovery because the perpetrator will rarely have any assets to indemnify the victim for his or her loss, and the victim will rarely discover, let alone establish facts sufficient to prove negligent disclosure of personal information by a credit reporting agency within the two-year statute of limitations under the Fair Credit Reporting Act.[7]

Therefore, it is to the state that the victim will look for redress of the wrong committed against them. The personal nature of the crime coupled together with the high likelihood of non-recovery of absconded assets and personal reputation

vis a vis credit worthiness make this a matter of great import to the victim, and of great moment to the state seeking to deter and punish identity theft. The Georgia Legislature has acted in this regard, and has amended the criminal code to allow prosecutors to meet this new epidemic effectively.[8] However, prosecutors must be wary of certain provisions of the revised code, and bear the burden of proving a case that at its heart is but a paper trail leading to the perpetrator.

On June 30, 2003 the Georgia Supreme Court held that O.C.G.A. § 16-9-31(d) was unconstitutional.[9] O.C.G.A. § 16-9-31(d) provides that possession of two or more financial transaction cards issued in names of persons other than members of his immediate family or without the consent of the card-holder is prima facie evidence that the financial transaction cards have been obtained in violation of subsection (a) of the code section.[10] The Court held that this language of the code unconstitutionally shifted the burden from state to defendant.[11] However, the implication of this holding is of little significance to prosecutors as they attempt to prove their case in chief. This is because the presumption of this code provision is an echo of the jury's common sense, and the implication of holding cards that are not your own, without the consent of the cardholder, still remains significant.[12]

Identity theft is a personal crime, affecting the victim's very interest in themselves. Aggravating the effect of the crime is the fact that victims will rarely be able to guard against such crimes proactively, and usually discover the crime about twelve months after the occurrence.

Nevertheless, the Supreme Court has spoken on the burden shifting that the legislature incorporated into the revised code. Prosecutors must be wary of other burden shifting provisions when prosecuting financial transaction offenses or risk reversal. Particularly, O.C.G.A. § 16-9-32(f) provides for a similar burden shifting when a person other than the purported issuer possesses two or more financial transaction cards. Although this portion of the code has yet to be challenged, prosecutors should be wary of jury instructions that subsume this portion of that code section upon the pain of reversal.

Despite the Supreme Court's holding on at least one of the burden shifting provisions incorporated into the revised code, prosecutors are still armed with a potent statutory framework for the prosecution of identity fraud and financial transaction offenses. A prosecutor should seek to prove that a suspect is holding a credit card without the consent of the proper cardholder with the intent to commit fraud.[13] Establishing that the card was actually used by the offender to his pecuniary advantage will decisively establish the intent to defraud.[14] Also, more times than not the offender will use the identifying information to deprive an individual of their resources; namely, gaining access to their credit. Here, the prosecutor can establish the offense of identity fraud by proving the application for credit was filled out by the offender. Generally, the application for the credit card can be obtained, the handwriting analyzed, and the billing address cross-referenced with the address of the offender. If the offender can be connected to the application, then the elements required for identity fraud will be established.[15] The crucial factors in proving these types of criminal cases are tied to their essence as a "paper" crime. The prosecutor should make all efforts to create a paper trail to present to the jury. A jury will seize upon what can be seen, and credits this type of evidence disproportionately.

As to venue, there is a significant difference between identity fraud and financial transaction offenses. Venue for identity fraud is proper in the county where the victim resides or in any county where any part of the offense took place, regardless of whether a defendant was ever actually present.[16] It should be noted that even though offenses occurring in multiple counties can be tried in one county, O.C.G.A. § 16-1-8(b) does not bar separate prosecutions of these crimes as double jeopardy.[17] In distinction, offenses under O.C.G.A. 16-9-30 et seq. must be proven to have commenced or occurred in the county that seeks to prosecute the offense.[18] Because financial transaction offenses and identity fraud are typically both found to exist in an investigation, counties should cooperate in the prosecution of these offenses. It is easy to envisage an instance where a county may have venue for identity fraud but not the related financial transaction

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Recent Decisions from West Georgia Case Law

CRIMINAL LAW

(E) Arguments and Conduct of Counsel

699. Control by court in general

Ga. 2003. The statutory limitation of one counsel "heard in conclusion" applies to the party exercising the privilege of the final jury argument chronologically, whether under the criminal procedure statute governing number of counsel permitted to argue a case or its indetical civil counter-part; overruling *White v. Cline*, 174 Ga.App. 448, 330 S.E.2d 386, *Bridges v. Schier*, 195 Ga.App. 583, 394 S.E.2d 408, *City of Monroe v. Jordan*, 201 Ga.App. 332, 411 S.E.2d 511, *Bently v. BMW, Inc.*, 209 Ga.App. 526, 433 S.E.2d 719, *Parker v. Hospital Authority*, 214 Ga.App. 113, 446 S.E.2d 766. West's Ga.Code Ann. §§ 17-8-80, 9-10-182. — Sheriff v. State, 587 S.E2d 27. 277 Ga. 182.

XVII. EVIDENCE

(D) Facts in Issue and Relevance

338(6). Evidence for purpose of testing, sustaining, or impeaching credibility or character of witnesses and others

Ga. 2003. Evidence intended solely to impugn the character of a victim of a crime is inadmissible. — Smart v. State, 587 S.E.2d 6. 277 Ga. 111.

XVI. NOLLE PROSEQUI OR DISCONTINUANCE

303.45.— Reinstatement

Ga. 2003. Criminal charges which had been the subject of a previous order of nolle prosequi could not be revived, where those charges had not been reindicted, the term of court in which the nolle prosequi was entered had expired without the trial court having vacated its entry of the order, and the statute of limitations for prosecution of those offenses had run. West's Ga.Code An. § 17-3-3. — Carlisle v. State, 586 S.E.2d 240.

An order of nolle prosequi may be vacated by the court in the same term of court in which it was rendered where the State has demonstrated a meritorious reason and there is no prejudice to the accused, which would amount to an abuse of the court's discretion. — Id. 277 Ga. 99.

(I) Competency in General

394.1(3). Effect of illegal conduct on other evidence

Ga.App. 2003. The exclusionary rule does not apply to the fruits of a voluntary statement obtained after a violation of Miranda's procedural rules but not a violation of the constitution. — Smith v. State, 585 S.E.2d 888. 262 Ga.App. 614.

(N) hearsay

419(1). In general

Ga.App. 2003. Hearsay testimony is not only inadmissible but wholly without probative value, and its introduction does not give it any weight or force whatever in establishing a fact. — Ingram v. State, 585 S.E.2d 211. 262 Ga.App. 304.

(R) Opinion Evidence

450. — Matters directly in issue

Ga.App. 2003. Police officer's testimony that she believed rap victim was being untruthful when victim denied penetration and that she believed crime had been committed when victim later admitted partial penetration, thereby implying that victim was then being truthful, should not have been admitted in prosecution for statutory rape. West's Ga.Code Ann. § 16-6-3(a). — Orr v.State, 584 S.E.2d 720. 262 Ga.App. 125

(K) Demonstrative Evidence

404.30 — Chain of Custody

Ga.App. 2003. When no showing of tampering has been made and only a bare speculation of possible tampering exists, the chain of custody is not broken and the evidence is admissible, with any doubts going to its weight. — McKinney v. State. 582 S.E. 2d 463. 261 Ga.App. 218.

(L) Scope of Review in General

1134(6). Theory and grounds of decision in lower court

Ga.App. 2003. Where the superior court is right for any reason, its judgment will be affirmed. — Collier v. Merck, 584 S.E.2d 1. 261 Ga.App. 831.

(Q) Harmless and Reversible Error

1166.19 — Swearing jury

Ga.App. 2003. A conviction by an unsworn jury is a mere nullity; however, a record that fails to show whether the jury was sworn, without more, does not constitute reversible error. West's Ga. Code Ann. § 15-12-139. — Keller v. State, 583 S.E.2d 591. 261 Ga.App. 769.

(R) Opinion Evidence

486.(4). Sources of data

Ga.App. 2003. Even when an expert's testimony is based on hearsay, the lack of personal knowledge on the part of the expert does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion. — Richey v. Satte, 583 S.E.2d 539. 261 Ga.App. 720.

XV. PLEAS

273(4.1). — In general

Ga.App. 2003. Although Supreme Court's decision in *Alford* does permit a criminal defendant to plead guilty while claiming to be innocent, where the defendant intelligently concludes that it is in his best interest to enter such a plea, the plea is one of guilt and may be accepted only if the court determines there is a factual basis for a determination of guilt. — Argot v.State, 583 S.E.2d 246.

An *Alford* plea is a guilty plea and places the defendant in the same position as if there had been a trial and conviction by a jury. — Id. 261 Ga.App. 569.

(V) Weight and Sufficiency

564(1). In general

Ga.App. 2003. Proof that traffic offense occurred within city limits of Atlanta was sufficient to establish venue in the City Court of Atlanta, since venue for the City Court of Atlanta was based on territorial limits of City of Atlanta, rather than county lines; overruling *Walker v. State*, 258 Ga.App. 354, 574 S.E.2d 317. West's Ga.Const. Art. 6, § 1, Par. 1. — Gardner v.State, 582 S.E.2d 566. 261 Ga.App. 425.

XX. TRIAL

(A) Preliminary Proceedings

625.30. — Determination; acquittal

Ga. 2003. A hearing on the issue of a defendant's mental competency to stand trial may, by agreement of the parties, be conducted before a judge sitting without a jury. West's Ga.Code Ann. § 17-7-130(a). — Hughes v. Hall, 578 S.E.2d 888.

Explicit findings of a defendant's competency to stand trial are not legally required as long as some determination is made on the issue of the defendant's competence. — Id.

627.8(6). Failure to produce information

Ga. 2003. When defense counsel mentions evidence in opening statement despite having failed to give a required notice or make a preliminary showing, trial court does not abuse its discretion in granting a mistrial. — Tubbs v. State, 583 S.E.2d 853. 276 Ga. 751.

(I) Competency in General

594.5(4) Presumptions and burden of proof

Ga.App. 2003. While the state's evidentiary burden to prove a warrant valid vel non goes without saying, it does not follow that such evidentiary burden negates a defendant's statutory burden to plead facts showing wherein the search and seizure were unlawful, thereby raising an issue for the state to rebut with its proof. — Watts v. State, 582 S.E.2d 186. 261 Ga.App. 230.

(F) Other Offenses

371(12). Motive.

Ga.App. 2003. Gang membership is admissible to show motive for a defendant's criminal conduct. — Johnson v. State, 581 S.E.2d 715. 261 Ga.App. 98.

(D) Facts in Issue and Relevance

359. Incriminating others

Ga. 2003. A defendant is permitted to introduce evidence tending to show that another person committed the crime, but such evidence must be relevant to the questions being tied by the jury, either directly or indirectly. — Sweet v. State, 580 S.E.2d 231. 276 Ga. 545.

(N) Hearsay

419(1). In general

Ga.App. 2003. Evidence is "hearsay" when witness at trial offers evidence of what someone else said or wrote outside of court, and proponent's use of evidence essentially asks jury to assume that out-of-court declarant was not lying or mistaken when statement was made. — Shelton v. State, 581 S.E.2d 378. 260

Ga.App. 855.

(J) Issues relating to jury trial

858(3). Documents or demonstrative evidence.

Ga.App. 2003. Admission of charts prepared by state's forensic auditor and order allowing them to go with jury to deliberation room did not violate continuing witness rule, in trial for securities fraud and theft by taking, where charts were merely designed to illustrate auditor's testimony. — Rasch v. State, 579 S.E.2d 817. 260 Ga.App. 379.

The continuing witness rule precluding testimonial documentary evidence from going with jury into deliberation room is usually applied to evidence such as affidavits, depositions, written confessions, statements and dying declarations. — Id.

VII. Parties to Offenses

59(5). Aiding, abetting, or other participation in offense.

Ga.App. 2003. Mere approval of a criminal act that does not rise to encouragement is not sufficient evidence to establish that the defendant was a party to the crime. West's Ga.Code Ann. § 16-2-20. — James v. State, 579 S.E.2d 750. 260 Ga.App. 350.

(R) Opinion Evidence

465. — Facts forming basis of opinion

Ga. 2003. Lay witnesses may state their opinion only when it is based upon their own observations, and their opinions are admissible only when it is necessary in order for a witness to convey those same observations to the jury. — Hines v. State, 578 S.E. 868. 276 Ga. 491.

ARSON

9. — Ownership or possession of property.

Ga.App. 2003. In cases of arson, it is not necessary to prove who has legal title to the property, only that lawful possession is in another. West's Ga.Code Ann. § 16-7-61. — Wisham v. State, 585 S.E.2d 675. 262 Ga.App.380

SEARCHES AND SEIZURES

121.1 — In general.

Ga.App. 2003. In determining if information submitted in support of issuance of a search warrant is stale, the proper procedure is to view the totality of the circumstances for indications of the existence of a reasonable probability that the conditions referred to in the sworn testimony would continue to exist at the time of the issuance of the search warrant. U.S.C.A. Const. Amend. 4. — State v. Graddy, 585 S.E.2d 147. 262 Ga.App. 98.

II. WARRANTS

125. — Objects or information sought.

Ga.App. 2003. Absent greater specificity, warrant issued to search defendant's home for "videotapes" as evidence of alleged offense of child molestation was constitutionally inadequate and improperly left the determination of what items were to be seized entirely to the discretion of the officers executing the warrant and conducting the search, and thus videotapes seized were inadmissible as evidence against defendant; there was no evidence that alleged victim was exposed to any videotapes, and warrant did not specify what type of videotapes were to be seized, whether commercially or privately produced, pornographic, or otherwise. U.S.C.A. Const.Amend. 4. — State v. Kramer, 580 S.E.2d 314. 260 Ga.App. 546.

ASSAULT AND BATTERY

II. CRIMINAL RESPONSIBILITY

(A) Offenses

56. Assault with dangerous or deadly weapon.

Ga.App. 2003. Aggravated assault with a deadly weapon cannot be committed by criminal negligence; proof of criminal intent is essential for conviction. West's Ga.Code Ann. § 16-5-20(a)(1). — Easley v. State, 584 S.E.2d 629. 262 Ga.App. 144.

ARREST

63.5(5). — Particular cases

Ga.App. 2003. Police officer was not required to have reasonable, articulable suspicion of criminal activity when he approached defendant and asked to speak with him; officer did not stop defendant, rather, defendant voluntarily stopped to talk with officer. U.S.C.A. Const.Amend. 4. — Higdon v. State, 583 S.E.2d 556. 261 Ga.App. 729.

BAIL

II. IN CRIMINAL PROSECUTIONS

49(5). Hearing and determination

Ga.App. 2003. Trial court is required to explain its reasons for denying bond. — Bailey v. State, 582 S.E.2d 487. 261 Ga.App. 291.

Identity

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offense(s). In these instances it is in the interest of prosecutorial economy to prosecute the defendant in a county where all of the offenses can be consolidated into one prosecution.[19] Therefore, a corollary to effective prosecution is the cooperation between jurisdictions in the prosecution of these types of offenses.

Identity Fraud, and its related offenses, effects all strata of society. To the unsuspecting victim comes the outrage of a faceless crook depriving them of their resources and living under the pretense of their identity. The damage done to the victim is pecuniary to be sure, but it also includes the lost credit reputation and the time and stress of stopping future abuses of their identity. This is a crime of general outrage, whose victims have the common traits of being credit worthy and law abiding. Vigorous law enforcement is the only means of deterring these types of crimes and protecting the sanctity of citizen identity.

Endnotes

1. See Erin M. Stout, Identity Theft: Victims "Cry Out" for Reform (hereinafter Identity Theft), 52 Am. U.L. Rev. 339, 340 (Oct. 2002); see also Murray Weiss, How NYPD Cracked the Ultimate Cyber Fraud-B'klyn Busboy Busted in Theft of 200+ Tycoon IDs, Post, Mar. 20, 2001, at 4 (reporting that Abdallah used the Internet, cellular phones, and voice mailboxes to steal identities of the wealthiest Americans listed in Forbes 400).

2. See Id.

3. Wall Street Journal, Section D; Page 2, Column 1 (FTC tallied 9.9 million victims of identity theft last year, costing consumers $5 billion and businesses and financial institutions nearly $48 billion; victims spent a total of 297 million hours resolving problems related to the thefts).

4. See Id.

5. See 52 Am. U.L. Rev. at 358, Identity Theft.

6. See 534 U.S. 19 (2001)

7. See 15 U.S.C.S. § 1601

8. See Lawrence Dietrich, 19 Ga. St. U.L. 81, 84 (Fall 2002)

9. See Mohamed v. The State, 583 S.E. 9 (Ga. 2003)

10. See Id. at 708.

11. See Id. citing Sandstom v. Montana, 442 U.S. 510 (1979) (holding that mandatory presumptions that shift the burden of proof to the defendant are impermissible in criminal cases).

12. See Slack v. State 283 S.E.2d 283 (Ga. App. 1981)(holding that when an individual comes into possession of a credit card, and without consent withholds the card from the proper cardholder, O.C.G.A. §16-9-32 is violated.)

13. See O.C.G.A. § 16-9-32

14. See O.C.G.A. § 16-9-33 and Goswick v. State, 412 S.E.2d 293 (Ga. App. 1991).

15. See O.C.G.A. §§ 16-9-4 and 16-9-121

16. See O.C.G.A. § 16-9-125

17. See Summers v. State, 2003 Ga. App. LEXIS 1101 (2003)(holding that O.C.G.A. § 16-9-126(c) makes each violation of that code section a separate offense, and is thus distinguishable from offenses that are barred under O.C.G.A. §§ 16-1-7(b) and 16-1-8(b).)

18. See O.C.G.A. § 16-9-33(g) and Coursey v. State, 395 S.E.2d 574 (Ga. App. 1990)(holding that conviction for Identity Card Theft was improper because venue was improper where testimony showed that cards were taken or obtained in a county other than Gwinnett County, and there was no evidence that the defendant obtained the credit cards in Gwinnett County.); Newsom v. State, 359 S.E.2d 11 (Ga. App. 1998)(holding that conviction for Financial Transaction Card Fraud was improper because venue was improper where evidence showed that the card was presented, and goods received, in a county other than the county in which the defendant was prosecuted.)

19. Prosecutorial Economy may also be served by simply indicting the Identity Fraud in lieu of both Identity Fraud and the Financial Transaction offense. The punishment for Identity Fraud is 1 to 10 or 3 to 15 years (O.C.G.A. § 16-9-126), whereas the punishment for a Financial Transaction offense is 1-3 years (O.C.G.A. § 16-9-38(b)).

from the chairman

Reflections of the Past Year

by J. Michael Cranford

I am enjoying being the chairman of the Criminal Law Section and have met a lot of my colleagues across the state. We had a retreat recently to discuss plans for this year and were fortunate enough to be staying at the same hotel as Justice Robert Benham. He was gracious enough to have breakfast with co-chairman Pat McMahon and me.

Justice Benham spoke very highly about drug courts and was interested in getting them in every jurisdiction. Here in the Macon district we just celebrated the 10th anniversary of our drug court and I'm proud to have been some small help in getting this program started. Our program has been very successful.

At the State Bar's Midyear Meeting on Jan. 16, the section held a luncheon where Michael Mears spoke about experts and DNA. We had booked him prior to his taking his new position and we all wish him well.

Our finances are strong and our membership is steady. We are planning more social events and seminars for this year so keep in touch. If you have any thoughts about events please don't hesitate to call. After all, working together is what makes the system work.

You can reach me via e-mail at mike@macon-law.com or via phone at (478) 746-0704.

Note From the Editor

by A. Thomas Jones

Happy New Year everyone! I hope you have a safe and prosperous 2004. I want to thank Johanna Merrill for the excellent job she did on our last newsletter. Johanna is the new section liaison for the State Bar of Georgia. I hope you like the new format.

In this edition Harry Sivley has written an article on identity theft. I know many of us have fallen victim to this new crime.

If you have any suggestions for articles, please give me a call!

Tom Jones — (404) 969-4035

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State Bar of Georgia
Criminal Law Section
104 Marietta Street
Suite 100
Atlanta, GA 30303

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