

***Moore v. State*, 122 Nev. Adv. Op. 4 (January 19, 2006)<sup>1</sup>**

**CRIMINAL LAW – FRAUDULENT USE OF A CREDIT CARD**

**Summary**

Appellant Moore was convicted of fraudulent use of a credit card based on an incident that took place in a Las Vegas Wal-Mart. His suspicious behavior<sup>2</sup> while shopping attracted the attention of a loss prevention specialist. The loss prevention specialist suspected Moore might attempt to purchase goods with a credit card, and instructed a cashier to contact management if Moore presented a credit card without proper identification. Moore brought over \$300 worth of goods to the cashier's register and presented a credit card. When Moore could not produce identification, the cashier summoned a manager who took the credit card to the loss prevention specialist for examination.

The loss prevention specialist discovered that the credit card was reported stolen and detained Moore. Moore claimed to have the cardholder's consent to use the credit card, which was not verified. Moore was subsequently arrested and charged with one count of fraudulent use of a credit card, one count of possession of a credit card without the cardholder's consent, and one count of burglary. A jury found him guilty on all counts, and the court adjudicated him as a small habitual criminal.

Moore appealed his conviction on all counts. The Nevada Supreme Court upheld the convictions for burglary and possession of a credit card without the cardholder's consent and the adjudication as a small habitual criminal on those counts, but reversed the conviction for fraudulent use of a credit card. The court determined that a stolen credit card must be processed and charged to constitute fraudulent use. Since Moore's attempt to obtain goods with a stolen credit card failed, he did not actually "use" the stolen card and could not be convicted.

**Issue and Disposition**

**Issue**

Whether presenting a stolen credit card for the purchase of goods is sufficient "use" to establish fraudulent use of a credit card when no goods are obtained.

**Disposition**

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<sup>1</sup> By Stephanie Hamrick.

<sup>2</sup> According to a loss prevention specialist, Moore was "selecting merchandise in the men's and electronics' departments 'without rhyme or reason.'" *Moore v. State*, 122 Nev. Adv. Op. 4 at 2 (January 19, 2006).

Mere presentment of a credit card to purchase goods does not constitute “use” of a stolen credit card. The credit card must be processed and the account charged in order to support a conviction for fraudulent use of a credit card.

## **Commentary**

### **State of the Law Before *Moore***

This is an issue of first impression in Nevada, requiring the court to determine what constitutes fraudulent use of a stolen credit card. Nevada law states that a person who, with the intent to defraud, “[u]ses a credit card or debit card to obtain money, goods, property, services or anything of value where the credit card or debit card was obtained or retained in violation of NRS 205.690 to 205.750, inclusive” is guilty of a category D felony.<sup>3</sup>

Appellant Moore and the state disagreed regarding the meaning of the word “use” in the statute. Moore argued that a stolen credit card must actually be processed and charged to constitute “use.” However, the state argued that fraudulent “use” includes presenting a credit card in order to obtain goods, regardless of whether the goods are actually obtained. The jury convicted Moore based on instructions stating that “[a] person who, with the intent to defraud, uses a credit card where the person possesses the credit card without the consent of the cardholder is guilty of Fraudulent Use of a Credit Card.”<sup>4</sup>

The court recognized the ambiguous interpretation of the word “use” in the statute, and the legislative history did not reveal the meaning that the legislature intended. Consequently, the Nevada Supreme Court examined other jurisdictions’ interpretation of similar statutes to determine the proper interpretation of the Nevada statute.

### **Other Jurisdictions**

The Supreme Court of Arkansas considered a similar situation in *Davidson v. State*.<sup>5</sup> There, the defendant attempted to use a stolen credit card on two occasions, but neither transaction was completed.<sup>6</sup> The Arkansas fraudulent use statute employs similar language as Nevada, and states that “[t]he offense of fraudulent use of a credit card is committed if a person, with the purpose to defraud, ‘uses a credit card to obtain property or services with knowledge that: (a) the card is stolen.’”<sup>7</sup> The court stressed that the degree of the crime depends on the value of goods *obtained*,<sup>8</sup> therefore, if no goods were

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<sup>3</sup> NEV. REV. STAT. § 205.760(1)(a) (2005).

<sup>4</sup> *Moore*, 122 Nev. Adv. Op. 4 at 4.

<sup>5</sup> 810 S.W.2d 327 (Ark. 1991).

<sup>6</sup> *Id.* at 328.

<sup>7</sup> *Id.* (quoting ARK. CODE ANN. § 5-37-207 (Michie 1987)).

<sup>8</sup> If the value of the goods obtained exceeds \$100, the defendant is guilty of a Class C felony. If the value of the goods obtained is less, the defendant is guilty of a Class A misdemeanor. *Id.* (citing ARK. CODE ANN. § 5-37-207(b) (Michie 1987)).

obtained, there could be no crime under the statute.<sup>9</sup> The Supreme Court of Arkansas used this analysis and the rule of lenity to determine that fraudulent use of a credit card requires that the defendant actually obtain goods with the credit card.<sup>10</sup>

The Supreme Court of Rhode Island considered a similar situation, but reached the opposite conclusion after interpreting a slightly different fraudulent use statute. In *State v. Gonsalves*,<sup>11</sup> the defendant presented an altered credit card to purchase goods but then paid cash instead.<sup>12</sup> Rhode Island's statute<sup>13</sup> declares that "a person who, with the intent to defraud, uses a credit card for the purpose of obtaining goods or who obtains goods by representing that he is the cardholder is guilty of fraudulent use of a credit card."<sup>14</sup> The court reasoned that the legislature's use of the disjunctive "or" implied that the legislature intended to prevent unlawful use of a credit card, including unsuccessful attempts to use a credit card.<sup>15</sup> Even though Rhode Island, like Arkansas, penalized defendants differently based on the value of goods obtained, the court interpreted the statute broadly and declared that "the statutory language should be expanded to include goods obtained or *sought to be obtained*."<sup>16</sup>

### **Nevada's Interpretation**

The Supreme Court of Nevada decided to adopt the reasoning set forth by Arkansas in *Davidson*, and declared that fraudulent use of a credit card requires the credit card to be processed and charged. The court reasoned that this interpretation conforms with "a stricter reading of our criminal statutes required by the rule of lenity."<sup>17</sup>

In addition to *Davidson*, the court also relied on a prior version of the fraudulent use statute to support its finding. The current fraudulent use statute states that one who "[u]ses a credit card . . . to obtain . . . goods"<sup>18</sup> is guilty of fraudulent use. However, prior to a 1985 amendment, the statute read that one who "[u]ses a credit card for the purpose of obtaining" goods is guilty of the same.<sup>19</sup> The elimination of the language "for the purpose of" obtaining goods indicates that the fraudulent use statute is meant to protect merchants and credit card companies from suffering monetary loss. Consequently, the statute cannot apply to mere attempts to use a stolen credit card where no loss occurs.

Nevada does not penalize offenders differently like Arkansas and Rhode Island, but Nevada does impose mandatory restitution.<sup>20</sup> If no goods are obtained, the court

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 476 A.2d 108 (R.I. 1984).

<sup>12</sup> *Id.* at 109.

<sup>13</sup> R.I. GEN. LAWS § 11-49-4 (1956).

<sup>14</sup> *Moore*, 122 Nev. Adv. Op. 4 at 7 (citing *Gonsalves*, 476 A.2d at 110).

<sup>15</sup> *Gonsalves*, 476 A.2d at 111.

<sup>16</sup> *Id.*

<sup>17</sup> *Moore*, 122 Nev. Adv. Op. 4 at 8.

<sup>18</sup> NEV. REV. STAT. § 205.760(1)(a) (2005).

<sup>19</sup> *Moore*, 122 Nev. Adv. Op. 4 at 8-9 n.29.

<sup>20</sup> NEV. REV. STAT. § 205.760(1) (2005) ("In addition to any other penalty, the court shall order the person to pay restitution.")

cannot order restitution. This supports the conclusion that goods must actually be obtained in order to commit the crime of fraudulent use of a credit card; otherwise, part of the punishment would be a nullity.

### **Effect of *Moore* on Current Law**

Nevada has effectively limited prosecutions under NRS 205.760 to instances where credit cards are actually processed and charged. Consequently, failed attempts to use stolen credit cards will relieve criminal defendants of prosecution under this statute. Defendants who do not obtain goods with a stolen credit card may be subject to other charges which are also punishable as category D felonies.<sup>21</sup>

However, the court articulates its finding in two separate ways, resulting in an unclear determination of what activities are actually necessary to constitute fraudulent use. In one instance, the court states that “[i]n Nevada, for fraudulent use of a credit card to occur, the credit card must be *processed* and the *account charged*.”<sup>22</sup> However, in its conclusion, the court states that “Moore’s action of presenting a stolen credit card to obtain goods, when the credit card was neither processed *nor the goods obtained*, does not constitute fraudulent use of a credit card.”<sup>23</sup> Although it is conceivable that where a stolen credit card is processed and charged, the defendant will usually obtain the goods, this may not always be the case. What if an alert cashier discovers that a credit card is stolen immediately after processing the credit card but before handing over the goods? While this may be an unlikely scenario, there may be room to argue that the statute is not violated in such a circumstance.

Further, the court did not address the effect of NRS 205.800(1), which states that “[a] person who *receives* money, property, goods, services or anything of value obtained in violation of NRS 205.760, knowing or believing that the money, property, goods, services or other things of value were so obtained, is guilty of a category D felony.”<sup>24</sup> The court’s interpretation of the fraudulent use statute renders the two statutes virtually identical and punishable as independent category D felonies.

### **Conclusion**

The criminal charge of fraudulent use of a credit card is only appropriate where the defendant’s use of a stolen credit card results in the credit card being processed and the account charged. Nevada’s adherence to the rule of lenity prohibits a broader reading of the fraudulent use statute. A stricter reading serves to protect merchants from suffering actual losses at the hands of fraudulent purchasers. Therefore, Moore’s unsuccessful attempt to obtain goods by merely presenting a stolen credit card did not

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<sup>21</sup> See NEV. REV. STAT. § 205.690 (2005) (possession of a credit card without consent); NEV. REV. STAT. § 205.710 (2005) (sale or purchase of a credit card); NEV. REV. STAT. § 205.720 (2005) (Obtaining control of credit card or debit card as security for debt); NEV. REV. STAT. § 205.740 (2005) (forgery of a credit card); NEV. REV. STAT. § 205.750 (2005) (unauthorized signing of a credit card).

<sup>22</sup> *Moore*, 122 Nev. Adv. Op. 4 at 9 (emphasis added).

<sup>23</sup> *Id.* at 15 (emphasis added).

<sup>24</sup> NEV. REV. STAT. § 205.800(1) (2005) (emphasis added).

suffice for conviction under the statute, and the verdict on that count was reversed. However, the court upheld convictions on the remaining counts of burglary and possession of a credit card without the owner's consent.