

IN THE SUPREME COURT OF FLORIDA

LISA ROBERTS, :
Petitioner, :
vs. : Case No.
STATE OF FLORIDA, :
Respondent. :
_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The State charged Lisa Roberts with fraudulent use of personal information. (Appendix A) Ms. Roberts, an Indiana resident, was charged with using her aunt's personal information to open a utility account in Indiana. (Appendix A) Her aunt was a Florida resident. (Appendix A) The trial court dismissed the case because it lacked jurisdiction since no part of this crime occurred in Florida. (Appendix A) The State appealed and the case was reversed by the district court of appeal. (Appendix A)

The Second District Court of appeal found that "Ms. Roberts' failure to obtain her aunt's prior consent was both an omission of a duty imposed by Florida law and an element of the underlying offense..." (Appendix A). The court found that the trial court did have jurisdiction based upon this omitted duty and reversed the case (Appendix A). The court denied a motion for rehearing and rehearing in banc on July 14, 2014 (Appendix B)

A timely notice to invoke the discretionary jurisdiction of this Court was filed on July 21, 2014.

SUMMARY OF THE ARGUMENT

The ruling in this case created a duty that is imposed upon the residents of other states and countries. The court uses this duty as an element of the crime to create jurisdiction even when the entire act occurred in another state. This manufactured duty is overreaching. Consent is an affirmative defense and not an element of the crime.

The Second District's ruling in this case expressly and directly conflicts with this Court's ruling in Hicks v. State, 421 So. 2d 510 (1982) as well as the rulings in several district courts of appeal. This Court should resolve the conflict between the Second, Third and Fourth District Courts on whether the trial court has jurisdiction in a case where every element of the offense occurred in another state. This Court should also resolve the conflict between the Second District, this Court, and the First District regarding whether consent is an element of the offense or an affirmative Defense.

ARGUMENT
ISSUE I

THE DECISION OF THE SECOND DISTRICT IN STATE V. ROBERTS, 39 FLA. L. WEEKLY D668 (FLA. 2D DCA March 28, 2014), EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS BY THIS COURT, THE FIRST DISTRICT COURT OF APPEAL, THE THIRD DISTRICT COURT OF APPEAL AND THE FOURTH DISTRICT COURT OF APPEAL.

Florida courts have limited criminal jurisdiction over people residing in other states and countries. Section 910.005 grants jurisdiction to Florida courts as follows:

(1) A person is subject to prosecution in this state for an offense that she or he commits, while either within or outside the state, by her or his own conduct or that of another for which the person is legally accountable, if:

(a) The offense is committed wholly or partly within the state;

(b) The conduct outside the state constitutes an attempt to commit an offense within the state;

(c) The conduct outside the state constitutes a conspiracy to commit an offense within the state, and an act in furtherance of the conspiracy occurs in the state;

(d) The conduct within the state constitutes an attempt or conspiracy to commit in another jurisdiction an offense under the laws of both this state and the other jurisdiction; or

(e) The conduct constitutes a knowing violation of s. 286.011.

(2) An offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element, occurs within the state. In homicide, the "result" is either the physical contact that causes death, or the death itself; and if the body of a homicide victim is found within the state, the death is presumed to have occurred within the state.

(3) An offense that is based on an omission to perform a duty imposed by the law of this state is committed within the state, regardless of the location of the offender at the time of the omission.

In order to have jurisdiction, an element of the crime must occur in Florida. Subsection (3) also specifies that this includes omission of a duty committed within the state.

In this case, it was alleged that Ms. Roberts used her aunt's personal information to open an account in Indiana. Ms. Roberts lived in Indiana. She used the personal information in Indiana. The account opened was in Indiana. The trial court correctly determined that Indiana should have jurisdiction rather than Florida. The district court of appeal, however, ruled that Florida had jurisdiction.

The decision of the second District Court of Appeal directly and expressly conflicts with other Florida jurisdictions on this issue. It conflicts with the Third District Court of appeal in Battle v. State, 365 So. 2d 1035 (Fla. 3d DCA 1978), which holds that dismissal is required where the crime charged was committed outside of Florida even when the victim is a Florida resident. In that case, Battle solicited a felony where the victim of the

solicited crime lived in Florida. At that point, Battle flew to Florida for the purpose of committing the crime. The solicitation was complete in another state. Pursuant to section 910.005, the Third District Court held that the elements of the crime all occurred in another state even though the victim lived in Florida.

The decision in this case also conflicts with the Fourth District Court of Appeal's decision in Sanders v. State, 77 So. 3d 914 (Fla. 4th DCA 2012). In that case, Sanders was flying from Arizona to Florida when he took money from another passenger's purse. A flight attendant intervened and made Sanders return the money. The plane had not yet reached Florida when this occurred. When the plane landed in Florida, Sanders was charged with the theft. Pursuant to section 910.005, the court determined that there was no jurisdiction because the elements of the crime all occurred outside of Florida.

The decision of the Second District Court of Appeal is in conflict with the decisions by the Third and Fourth District Courts of Appeal regarding the application of section 910.005, Florida Statutes.

The decision in this case also conflicts with other districts on the elements of criminal use of personal identification. The opinion created a long-arm duty to be applied to all states and nations. If the victim lives in Florida, then consent and jurisdiction are in Florida even if all acts in the case are in another state or country. So if both parties are in Paris, the

crime still occurs in Florida if the victim is a Florida resident.

Other courts have held that consent is an affirmative Defense rather than constituting an element of the crime. By creating an affirmative duty to obtain consent rather than ruling that consent is an affirmative Defense, the Second District Court of Appeal is in conflict with This Court and the First District Court of Appeal on the issue of how consent should be categorized in cases where lack of consent is part of the statute.

In Hicks v. State, 421 SO. 2d 510 (1982), this Court looked at this exact issue in a burglary case. This issue in the case was whether non-consent to enter was an element of burglary or an affirmative defense. This Court held that lack of consent was an affirmative defense rather than non-consent being an element of the crime. The same conclusion was reached in by the First District Court in D.R. v. State, 734 So. 2d 455 (1st DCA 1999). The Second District Court of Appeal had previously held that consent was an affirmative defense rather than being an element of the crime. See Williams v. State, 57 So. 3d 904 (Fla. 2d DCA 2011). The decision in this case directly conflicts with this Court, the First District Court of Appeal and the Second District Court of Appeal's previous conclusion.

Conflict jurisdiction exists with the decision below in each of these areas. Based upon these direct and explicit conflicts, this Court's acceptance of jurisdiction in this case is requested.

CONCLUSION

This Court should find express and direct conflict as argued in this brief. This Court should exercise its discretion to accept this case for review in order to clarify the issue of jurisdiction in cases where all elements occur in another state and where there consent is at issue.

APPENDIX

PAGE NO.

- A. Opinion of the Second District Court of Appeal
in State v. Roberts, add cite
(Fla. 2d DCA May , 2014). 1-7
- B. Order denying motion for rehearing and
rehearing in blanc 1

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA,

Appellant,

v.

LISA ROBERTS,

Appellee.

Case No. 2D13-1213

Opinion filed March 28, 2014.

Appeal from the Circuit Court for Pinellas
County; R. Timothy Peters, Judge.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Peter Koclanes, Assistant
Attorney General, Tampa, for Appellant.

Howard L. Dimmig, II, Public Defender, and
Tosha Cohen, Assistant Public Defender,
Bartow, for Appellee.

LaROSE, Judge.

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The State appeals the trial court's order dismissing the information
alleging fraudulent use of personal identification against Lisa Roberts. See,
§ 817.568(2)(a), Fla. Stat. (2010). We have jurisdiction. See Fla. R. App. P.

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9.140(c)(1)(A). Because the trial court erred in ruling that it lacked jurisdiction, we reverse.

The State alleged that Ms. Roberts, an Indiana resident, used her aunt's name and social security number to establish an Indiana utility account. The aunt lives in Florida. The trial court dismissed the case for lack of jurisdiction; it concluded that no part of the offense occurred in Florida. See § 910.005(1)(a), Fla. Stat. (2010) (authorizing Florida prosecution for offenses committed wholly or partly within Florida). However, because Ms. Roberts' failure to obtain her aunt's prior consent was both an omission of a duty imposed by Florida law and an element of the underlying offense, the offense was committed, at least in part, in Florida.

Jurisdiction Statute

Section 910.005, governing State criminal jurisdiction, provides as follows:

(1) A person is subject to prosecution in this state for an offense that she or he commits, while either within or outside the state, by her or his own conduct or that of another for which the person is legally accountable, if:

(a) The offense is committed wholly or partly within the state;

(2) An offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element, occurs within the state.

(3) An offense that is based on an omission to perform a duty imposed by the law of this state is committed within the state, regardless of the location of the offender at the time of the omission.

(Emphasis added.)² Thus, Florida may exercise jurisdiction over Ms. Roberts if an element of the offense is an omission to perform a duty imposed by Florida law.

Elements of Criminal Use of Personal Identification

Section 817.568 provides, in pertinent part, as follows:

(2)(a) Any person who willfully and without authorization fraudulently uses, or possesses with intent to fraudulently use, personal identification information concerning an individual without first obtaining that individual's consent, commits the offense of fraudulent use of personal identification information

(Emphasis added.) Accordingly, fraudulent use of personal identification information includes the following elements:

- (1) willfully and fraudulently using or possessing with intent to fraudulently use;
- (2) another person's personal identification information;
- (3) without that person's authorization or prior consent.

Sibley v. State, 955 So. 2d 1222, 1226 (Fla. 5th DCA 2007) (emphasis added) (citing § 817.568(2)(a), Fla. Stat. (2003)); accord Williams v. State, 57 So. 3d 904, 905 (Fla. 2d DCA 2011) (holding that defense that victim consented to defendant's use of personal identification information, if proven, would render State unable to establish every element of the crime); Townshend v. State, 965 So. 2d 236, 237 (Fla. 5th DCA 2007) (vacating conviction for criminal use of personal identification information where State failed to prove that victim "had not authorized Mr. Townshend to use his personal information").

Omission of a Duty Imposed by Florida Law

Ms. Roberts' failure to obtain her aunt's prior consent—or the result that she fraudulently used the information without such consent—is an element of the offense. See § 817.568(2)(a); Williams, 57 So. 3d at 905. Ms. Roberts is subject to prosecution in Florida if that element occurred in Florida. See § 910.005(1)(a). The inquiry calls upon us to determine whether the failure to obtain her aunt's consent (or its result) constitutes an omission to perform a duty imposed by Florida law. See § 910.005(2), (3). We conclude that it does.

Case Law

No Florida case is directly on point. However, analogous cases from Florida and other jurisdictions support our conclusion. For example, in State v. Costa, 558 So. 2d 525 (Fla. 1st DCA 1990), the First District held that Florida had criminal jurisdiction for charges involving the appellee's moving of his children from his Louisiana home to Italy, in violation of a Florida restraining order. The offense was based on an omission to perform the duty imposed by the Florida court order and section 787.04(1), Florida Statutes (1987) (felony to remove a child in violation of court order).

Similarly, in People v. Caruso, 519 N.E.2d 440 (Ill. 1987), the court held that the father's acts of harboring his children in Ohio and failing to return them to the mother in violation of an Illinois custody order subjected him to prosecution in Illinois. The Illinois jurisdiction statute, almost identical to the Florida statute here, provided that "[a]n offense which is based on an omission to perform a duty imposed by the law of this State is committed within the State, regardless of the location of the offender at the time of the omission." Id. at 442. The Caruso court found this language consistent with the Supreme Court's holding in Strassheim v. Daily, 221 U.S. 280, 285 (1911), that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect." Caruso, 519 N.E.2d at 442. Obviously, "the detrimental effects of defendant's omission or failure to comply with the court order [we]re felt only in Illinois." Id. at 445. Caruso is also instructive in observing that the phrase "omission to perform a duty" indicates that the duty is an affirmative one, that is, a duty to act positively, rather than a passive duty of refraining to act." Id. at 443.

Ms. Roberts' duty to her aunt is best characterized as an affirmative obligation to obtain her prior permission in order to use her personal information to open a utility account, rather than a passive duty to refrain from failing to obtain prior permission. The Caruso court identified factors to consider in determining jurisdiction under the omission-to-perform-a-duty provision: (1) whether there is an alleged omission to perform a duty; (2) whether the charged offense is based on that omission, that is, "forms the foundation or essence of an offense," even though the omission is not the offense's only element; and (3) whether the interests to be protected by prohibiting the offense are substantially the same as the interests to be fulfilled by imposing the affirmative duty. Id. at 443. All three factors weigh in favor of the State.

In State v. James, 79 P.3d 169 (Kan. 2003), the appellee was the caretaker of dependent adults living in Kansas. The trial court convicted him of mistreating two of his Kansas charges by leaving them alone in a closed vehicle on a hot day across the border in Missouri. A Kansas statute prohibited omission of services necessary to maintain the health of a dependent adult. Id. at 175. The appellee argued that Kansas lacked jurisdiction because the offenses occurred in Missouri. Id. at 174. The Kansas jurisdictional statute included a provision nearly identical to section 910.005(3): "A crime which is based on an omission to perform a duty imposed by the law of this state, is committed within the state, regardless of the location of the person omitting to perform such duty at the time of the omission." James, 79 P.3d at 174 (citing § 21-3104(3), Kan. Stat. Ann. (2000)). The court held that Kansas had jurisdiction because the crimes were based on an omission to perform a duty imposed by Kansas law—a "negative act done outside the State"—and the appellee's location at the time of his omission was irrelevant. Id. at 175-76.

In State v. McGill, 836 P.2d 1371 (Or. Ct. App. 1992), a tribal Indian was convicted of criminal possession of rented property. See Or. Rev. Stat. § 164.140(1)(a). He rented a television in Oregon, then failed to make payments and failed to return the television upon demand from the rental company. Section 164.140(1)(a) provided, in pertinent part, as follows:

(1) A person is guilty of criminal possession of rented or leased personal property if:

(a) After renting an item of personal property from a commercial renter of personal property under a written agreement which provides for the return of the item to a particular place at a particular time, the person fails to return the item as specified, is thereafter served by mail with a written demand to return the item, and knowingly fails to return the item within 10 business days from the date of mailing of the demand.

Id. at 1372 n.1. On appeal, McGill argued that the state lacked jurisdiction because he was on the reservation, sovereign territory, when he stopped making payments. Id. at 1372.

The Oregon jurisdiction statute provided that jurisdiction for a crime of omission "reside[d] in the place where the legal duty omitted is required to be performed." Id. at 1373 (citing Or. Rev. Stat. § 131.215(5)). The court held that the gravamen of the offense was failure to return the television to the shop in Oregon; because it was a crime of omission, jurisdiction resided in Oregon, where the legal duty omitted (returning the television) was required to be performed. Id. The legal duty to return the television—or, using the statutory language, to not fail (omit) to return it—was an element of criminal possession of rental property. As applicable here, McGill teaches that Ms. Roberts had a legal duty under Florida law to obtain her aunt's prior consent to use her personal identification information—or, using the statutory language,

not to use it without her aunt's authorization or prior consent. The gravamen of the offense was failure to obtain her aunt's prior consent, and because it was a crime of omission, jurisdiction resided in Florida.

We reverse and remand for further proceedings.

DAVIS, C.J., and KHOUZAM, J., Concur.

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327**

July 14, 2014

CASE NO.: 2D13-1213
L.T. No. : CRC 12-16848 CFANO

State Of Florida

v.

Lisa Roberts

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing and certification is denied.
Appellant's motion for rehearing en banc is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

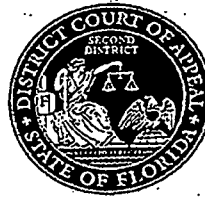
Peter Koclanes, A.A.G.

Tosha Cohen, A.P.D.

Ken Burke, Clerk

mep


James Birkhold
Clerk



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PUBLIC DEFENDER'S OFFICE**

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CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this ~~21st~~ day of July, 2014.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,



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