Was Lee Guilty of Larceny?

Lee v. State, *474 A.2d 537 (Ct. App. Md. 1984)*

Appellant, Joe William Lee, Jr. (Lee)[,] was convicted by the Circuit Court for Baltimore County of two separate charges of theft under $300.00 and sentenced to the Division of Correction for two consecutive one year sentences.

In the second conviction, however, Lee urges this Court to decide that his concealment of a bottle of liquor in his trousers while shopping in a self-service liquor store does not constitute evidence sufficient to convict him of theft. Since Lee was accosted with the merchandise in the store, abandoned it and then departed from the premises, this case poses a substantial question regarding the law of theft which has never specifically been resolved in this state: May a person be convicted of theft for shoplifting in a self-service store if he does not remove the goods from the premises of that store?

An employee of a pharmacy-liquor store observed Lee displacing two $16.47 bottles of cognac. Lee concealed one of the bottles in his pants and held the other in his hand. When approached by the employee, Lee returned both bottles to the shelf and fled the store. He was chased by the employee who flagged down a passing police cruiser. Subsequently, Lee was arrested and convicted. For the reasons set forth in our discussion, we uphold the theft conviction despite the fact Lee was accused and "returned" the merchandise before he left the store.

Larceny at common law was defined as the trespassory taking and carrying away of personal property of another with intent to steal the same. The requirement of a trespassory taking made larceny an offense against possession. . . . [T]he courts gradually broadened the offense by manipulating the concept of possession to embrace misappropriation by a person who with the consent of the owner already had physical control over the property. . . . [T]he courts began to distinguish "possession" from "custody," thereby enabling an employer to temporarily entrust his merchandise to an employee or a customer while still retaining "possession" over the goods until a sale was consummated. These distinctions and delineations, which ultimately laid the foundation for the statutory offense of theft as it exists today, provided the courts with the judicial machinery with which to sustain a larceny conviction when the customer who had rightful "custody" or "physical possession" converted the property to his own use and thereby performed . . . the requisite "trespassory taking."

The evolution of theft law is particularly relevant to thefts occurring in modern self-service stores where customers are impliedly invited to examine, try on, and carry about the merchandise on display. In a self-service store, the owner has[,] in a sense, consented to the customer's custody of the goods for a limited purpose. . . . [T]he fact that the owner temporarily consents to custody does not preclude a conviction for larceny if the customer exercises dominion and control over the property by using or concealing it in an unauthorized manner. Such conduct would satisfy the element of trespassory taking as it could provide the basis for the inference of the intent to deprive the owner of the property.

From this perusal of cases, we conclude that several factors should be assessed to determine whether the accused intended to deprive the owner of property. First, concealment of goods inconsistent with the store owner's rights should be considered. "Concealment" is conduct which is not generally expected in a self-service store and may in many cases be deemed "obtaining unauthorized control over the property in a manner likely to deprive the owner of the property." Other furtive or unusual behavior on the part of the defendant should also be weighed. For instance, if a customer suspiciously surveys an area while secreting the merchandise this may evince larcenous behavior. Likewise, if the accused flees the scene upon being questioned or accosted about the merchandise, as in the instant case, an intent to steal may be inferred. The customer's proximity to the store's exits is also relevant. Additionally, possession by the customer of a shoplifting device with which to conceal merchandise would suggest a larcenous intent. One of these factors or any act on the part of the customer which would be inconsistent with the owner's property rights may be taken into account as relevant in determining whether there was a larcenous intent.

In the instant case, Lee knowingly removed the bottle of liquor from the shelf and secreted it under his clothing. This act in itself meets the requirement of concealment.

The fact that this concealment was brief or that Lee was detected before the goods were removed from the owner's premises is immaterial. The intent to deprive the owner of his property can be inferred from his furtive handling of the property. Lee not only placed the bottle in the waistband of his pants, but did so in a particularly suspicious manner by concealing the bottle such that it was hidden from the shop owner's view. It cannot be so as a matter of law that these circumstances failed to establish the elements of theft. Once a customer goes beyond the mere removal of goods from a shelf and crosses the threshold into the realm of behavior inconsistent with the owner's expectations, the circumstances may be such that a larcenous intent can be inferred.