
IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DERRICK ROBERT EVANS,
Appellant.

APPELLANT'S BRIEF
STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
TUMWATER, WA 98501
360-570-8339

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

 A. Assignments of Error 2

 B. Issue Pertaining to Assignment of Error . . . 3

 Whether the trial court erred in convicting Mr. Evans of identity theft when:

 a) Allube, Inc. is not a person in this context because the plain language of the identity theft statute states that the victim is a "person, living or dead," and a corporation cannot be considered either living or dead; or, in the alternative,

 b) Allube, Inc. is not a person in this context because the "where relevant" language in the definition of "person" makes the statute ambiguous and the rule of lenity requires ambiguous statutes to be construed in the criminal defendant's favor; or, in the alternative,

 c) The definition of "person," which includes corporations only "where relevant," is inherently subjective, ambiguous, and open to interpretation, rendering the identity fraud statute unconstitutionally void for vagueness in this context. 3

III. STATEMENT OF THE CASE 4

 A. Procedural History 4

 B. Facts Underlying the Conviction 5

IV. ARGUMENT: ALLUBE, INC., A CORPORATION, IS NOT A

PERSON AND VICTIM IN THE CONTEXT OF THE IDENTITY
THEFT STATUTE AND THIS COURT SHOULD REVERSE MR.
EVANS' S CONVICTION 5

A. A Corporation is Not a Person and Victim of
Identity Theft Because the Crime is Committed
Against a "Person, Living or Dead," Rendering
Corporations Irrelevant in this Context . . 7

B. The "Where Relevant" Definition of "Person"
Renders the Statute Ambiguous Such That the
Rule of Lenity Requires it Be Construed in
Mr. Evans' s Favor to Exclude Corporations as
Victims 9

C. The Identity Theft Statute is
Unconstitutionally Vague as Applied Because
it Defines "Person" to Include Corporations
"Where Relevant," an Inherently Subjective
Definition 15

V. CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Table of Cases

City of Spokane v. Douglass, 115 Wn.2d 171, 795 P.2d 693 (1990) 16

Johnson v. Morris, 87 Wn.2d 922, 557 P.2d 1299 (1976) 12

Seattle v. Huff, 111 Wn.2d 923, 767 P.2d 572 (1989) 16

State v. Allenbach, 136 Wn. App. 95, 147 P.3d 644 (2006) 15, 16

State v. Gilbert, No. 24100-9-III, 2006 WL 1851396 (Ct. App. 2006) 16

State v. Gonzalez, 168 Wn.2d 256, 226 P.3d 131 (2010) 7, 9, 11

State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993) 15

State v. Mandanas, 168 Wn.2d 84, 228 P.3d 13 (2010) 9, 10

State v. Meske, No. 36417-4-II, 2009 WL 449071 (Wn. App. 2009) 6

Statutes

RCW 9.35.001 11

RCW 9.35.005(4) 8, 10, 17

RCW 9.35.020(1) 1, 8, 16

RCW 9.35.020(3)	4
RCW 9A.04.110(17)	1, 8, 10

Constitutional Provisions

Const. art. 1, § 3	15
U.S. Const. amend. 14, § 1	15

Other Authority

E.S.S.B. 5449, 57th Leg., Reg. Sess. (Legislative Reports) at 198 (Wn. 2001)	13
E.S.S.B. 5449, 57th Leg., Reg. Sess. (Wn. 2001)	12
S.H.B. 1250, 56th Leg., Reg. Sess. (Wn. 1999)	12
Terrance J. Keenan, The Fact Act of 2003: Securing Personal Information in an Age of Identity Theft, 2 Shidler J.L. Com. & Tech. 5, Autumn, 2005	14

I. INTRODUCTION

The defendant-appellant in this case, Derrick Robert Evans, took a blank payroll check from Allube, Inc., a corporation, without permission; presented it to a Rent-a-Center with a forged signature; and received \$480 cash in exchange. The State charged him with and the superior court convicted him of Identity Theft in the Second Degree.

On appeal, Mr. Evans contends that the trial court erred in finding he committed identity theft against a corporation when a corporation cannot be deemed a victim of this crime. The identity theft statute provides that no person may, *inter alia*, knowingly possess a means of identification or financial information of "another person, living or dead," with the intent to commit a crime. RCW 9.35.020(1). The term "person" includes "any natural person" and "where relevant," corporations. RCW 9A.04.110(17).

Corporations cannot be deemed victims of identity theft for three reasons: 1) Given the plain language of the identity theft statute, which characterizes

victims as "persons, living or dead," corporations are not relevant victims of the crime and thus not persons in this context; 2) To the extent the "where relevant" language in the definition of "person" leaves open the question of whether a corporation may be a victim of identity theft, the statute is ambiguous and the rule of lenity requires it be interpreted in Mr. Evans's favor; and 3) To the extent this Court holds that the definition of "person" includes corporations, the inherently subjective "where relevant" provision renders the definition void for unconstitutional vagueness in this context.

For these reasons, Mr. Evans's conviction should be reversed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The superior court erred in holding Allube, Inc. to be a person as that term is defined by statute. Clerk's Papers on Appeal (CP) at 11.

2. The superior court erred in determining Mr. Evans guilty of Identity Theft in the Second Degree. CP at 12.

B. Issue Pertaining to Assignment of Error

Whether the trial court erred in convicting Mr. Evans of identity theft when:

a) Allube, Inc. is not a person in this context because the plain language of the identity theft statute states that the victim is a "person, living or dead," and a corporation cannot be considered either living or dead; or, in the alternative,

b) Allube, Inc. is not a person in this context because the "where relevant" language in the definition of "person" makes the statute ambiguous and the rule of lenity requires ambiguous statutes to be construed in the criminal defendant's favor; or, in the alternative,

c) The definition of "person," which includes corporations only "where relevant," is inherently subjective, rendering the identity fraud statute unconstitutionally void for vagueness in this context.

III. STATEMENT OF THE CASE

A. Procedural History

On November 19, 2009, the State filed an information charging Mr. Evans with Identity Theft in the Second Degree in violation of RCW 9.35.020(3) and occurring on or about October 12, 2009. The information charged Mr. Evans knowingly possessed a means of identification and financial information of Allube, Inc., with the intent to commit or aid or abet the crime of theft and/or forgery. CP at 1.

Mr. Evans was convicted after a bench trial, the Honorable David Foscue presiding pro tem, held on January 12, 2010. CP at 10-12.

On January 12, 2010, the court sentenced Mr. Evans to 6 months in the county jail, followed by 12 months of community custody. Costs, fees and assessments were imposed. CP at 13-22.

Appeal was timely filed on January 22, 2010. CP at 23.

B. Facts Underlying the Conviction

The undisputed facts underlying the conviction are set forth in the court's "Findings of Fact and Conclusions of Law Re: Bench Trial." CP at 10-12. Mr. Evans took a blank payroll check from his employer, Allube, Inc. On October 12, 2009, he presented it to a Rent-A-Center in Grays Harbor County, Washington, as a legitimate payroll check. The now-completed check was purportedly signed by an authorized signatory and made payable to Mr. Evans in the amount of \$500. The check was cashed and Mr. Evans obtained \$480. CP at 10-11.

Allube, Inc. is a business that is organized as a corporation. CP at 11.

IV. ARGUMENT

ALLUBE, INC., A CORPORATION, IS NOT A PERSON AND VICTIM IN THE CONTEXT OF THE IDENTITY THEFT STATUTE AND THIS COURT SHOULD REVERSE MR. EVANS'S CONVICTION

Mr. Evans's conviction cannot stand when it rests on the incorrect determination that a corporation is a person and victim under the identity theft statute. The trial court's determination was erroneous for the following reasons: 1) a corporation cannot be a person

in this context because the plain language of the statute states that the victim is a "person, living or dead," and a corporation cannot be considered either living or dead; 2) to the extent the definition of "person" is ambiguous, there is no indication of a legislative intent that it include corporations, and, thus, this Court must apply the rule of lenity to exclude corporations from the definition; and 3) to the extent this Court holds that the definition of "person" in the identity theft statute includes corporations, the statute is unconstitutional for vagueness under the due process clauses of the federal and state constitutions. For all of these reasons, this Court should reverse Mr. Evans's conviction.¹

1. In an unpublished opinion, this Court held that "person," as defined in the identity theft statute, included corporations. However, the Court apparently did not address the specific challenges Mr. Evans now raises. See State v. Meske, No. 36417-4-II, 2009 WL 449071 (Wn. App. 2009).

A. A Corporation is Not a Person and Victim of Identity Theft Because the Crime is Committed Against a "Person, Living or Dead," Rendering Corporations Irrelevant in this Context.

The plain language of the identity theft statute reveals that a corporation cannot be a person/victim of the crime. Questions of statutory interpretation are reviewed *de novo*. A court's primary objective in statutory interpretation is to give effect to the intent of the Legislature, beginning with the plain language of the statute. Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010) (en banc) (citations omitted). In this case, the plain language of the identity theft statute, read together with the definition of person, compels the conclusion that a corporation is not a person against whom identity theft can be committed.

The statute criminalizes actions against "another person, living or dead":

No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

RCW 9.35.020(1). "Person" is defined "to include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association." RCW 9A.04.110(17); RCW 9.35.005(4) (emphasis added). Thus, while a natural person is always a "person," a corporation is a "person" only "where relevant."

Reading the identity theft statute together with the definition of "person" makes plain that a corporation cannot be a person/victim of the crime. Under the definition of "person," a corporation is a person only "where relevant." RCW 9A.04.110(17). A corporation cannot be "relevant" to the description of the victim in the identity theft statute because that victim must be "another person, living or dead." RCW 9.35.020(1). The phrase, "living or dead," can only apply to a natural person, not a corporation. If a corporation is considered a person/victim, this

provision of the statute is rendered an absurdity: "another corporation, living or dead." Accordingly, this context is not a relevant one in which to consider a corporation within the definition of person. Thus, the plain language of the statute compels the conclusion that Allube, Inc. was not a person in this case and this Court should reverse Mr. Evans's conviction. When the plain meaning of the statute resolves the issue, the court's inquiry is at an end. Gonzalez, 168 Wn.2d 256, 263.

B. The "Where Relevant" Definition of "Person" Renders the Statute Ambiguous Such That the Rule of Lenity Requires it Be Construed in Mr. Evans's Favor to Exclude Corporations as Victims.

If this Court holds that the plain language of the statute does not resolve this issue, the identity theft statute is ambiguous as to whether the crime may be committed against a corporation. When a statute is subject to more than one reasonable interpretation, it is ambiguous. State v. Mandanas, 168 Wn.2d 84, 87, 228 P.3d 13 (2010) (citations omitted). The rule of lenity requires a court "to interpret an ambiguous statute in

favor of a criminal defendant absent legislative intent to the contrary." Id. at 87-88.

In this context, "person" is defined "to include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association." RCW 9A.04.110(17); RCW 9.35.005(4). Thus, as noted earlier, while a natural person is always a "person," a corporation is a "person" only "where relevant." This definition itself creates an ambiguity in the definition of person. It leaves open the question of when it is relevant to consider a corporation a person. Thus, the statute is ambiguous. Accordingly, the rule of lenity requires this Court "to interpret [the] statute in favor of [the] criminal defendant absent legislative intent to the contrary." See Mandanas, 168 Wn.2d at 87-88.

Here, the statute should be interpreted in Mr. Evans's favor because nothing in the statute indicates a legislative intent that victims of identity theft may be corporations. Indeed, as explained in Part A, above, the plain language of the statute indicates that

corporations were not intended to be victims.

Moreover, the stated intent of the act itself may be read to indicate the object of protecting individuals, not corporations:

The legislature finds that means of identification and financial information are personal and sensitive information such that if unlawfully obtained, possessed, used, or transferred by others may result in significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain, possess, use, and transfer another person's means of identification or financial information.

RCW 9.35.001 (emphases added). The terms "personal" and "privacy" are inappropriate in the context of a corporate victim. Thus, this provision also indicates that the statute was not designed to protect corporations.

Legislative changes can also be considered when determining legislative intent. Gonzalez, 168 Wn.2d 256, 265. The legislative history of the instant statute reveals that the Legislature specifically deleted a provision of the original statute in which

"person" was defined to always include corporations. This change shows that the Legislature intended that corporations will not necessarily be "persons" under the identity fraud statute.

The original statute, enacted in 1999, specifically included corporations in the definition of "person." S.H.B. 1250, 56th Leg., Reg. Sess. (Wn. 1999) (defining "person" to include "an individual, partnership, corporation, or association"). That definition was changed the next legislative session. In 2001, the Legislature deleted that definition and incorporated the current definition, which only includes corporations as victims "where relevant." E.S.S.B. 5449, 57th Leg., Reg. Sess. (Wn. 2001).

A well-established tenet of statutory construction states that a new legislative enactment is intended to amend existing law. Johnson v. Morris, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976). Accordingly, the 2001 enactment may be seen as a deliberate amendment to the definition of "person," so that corporations are no longer necessarily "persons" in the identity theft

context. This, in turn, may be read to indicate the Legislature's primary intent of protecting individual victims, not corporate victims.

In fact, in passing the 2001 version of the statute, the Legislative Report indicated the legislation was intended to help consumers who are victims of identity theft:

In July 1999, the Attorney General formed a consumer privacy task force representing a wide variety of interests including retailers, banks, the technology industry, legislators, and victims of identity theft. During the public hearing phase of the task force, many consumers testified about identity theft. From this testimony and other consumer inquiries and complaints, the Attorney General concluded that the incidence of identity theft is growing rapidly, and that victims need help in obtaining information to reestablish their identity, deal with creditors, and help assist law enforcement.

E.S.S.B. 5449, 57th Leg., Reg. Sess. (Legislative Reports) at 198 (Wn. 2001). No mention was made in the report of corporate victims of the crime. Accordingly, the legislative history supports the conclusion that, under the current version of the law, corporations were not intended to be victims of identity theft.

Indeed, identity theft is a personal crime that, as its name implies, is a crime against individuals, in which perpetrators steal an individual's identity. One commentator described the crime in the context of federal criminal statutes:

Personal information that is valuable to identity thieves includes Social Security numbers, driver's license or identification card numbers, financial account numbers, credit or debit card numbers, and personal passwords or unique identifiers used to verify identity or gain access to information via telephone or on-line services. Once identity thieves are in possession of this information, they may use it to perpetrate a wide variety of fraudulent activities. The FTC reported that in 2003 the most common identification theft complaints were related to credit card fraud, followed by phone or utility fraud, bank fraud, employment-related fraud, government document or benefit fraud, and loan fraud.

Terrance J. Keenan, *The Fact Act of 2003: Securing Personal Information in an Age of Identity Theft*, 2 *Shidler J.L. Com. & Tech.* 5, Autumn, 2005. Given the nature of the crime, it makes no sense to convict someone for committing identity theft against a corporation, which has no personal identity to be stolen.

Thus, to the extent the definition of "person" is ambiguous, the evidence of legislative intent indicates that corporations were not intended to be considered victims in this context. Accordingly, this Court should apply the rule of lenity and interpret the statute in Mr. Evans's favor to exclude corporations as victims.

C. The Identity Theft Statute is Unconstitutionally Vague as Applied Because it Defines "Person" to Include Corporations "Where Relevant," an Inherently Subjective Definition.

If this Court reads the identity theft statute to include corporations as victims, the statute is unconstitutionally vague and this Court should reverse Mr. Evans's conviction. The due process vagueness doctrine under both the federal and state constitutions serves two purposes: to provide citizens with fair warning of what conduct they must avoid and to protect them from arbitrary, ad hoc, or discriminatory law enforcement.² State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993) (citations omitted). The party asserting a vagueness challenge bears the heavy burden

2. U.S. Const. amend. 14, § 1 and Const. art. 1, § 3.

of proving the statute's unconstitutionality beyond a reasonable doubt. The presumption of the statute's constitutionality is overcome only in exceptional cases. State v. Allenbach, 136 Wn. App. 95, 100, 147 P.3d 644 (2006), citing, City of Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

First, the statute failed fairly to inform Mr. Evans of the conduct to avoid. This test is satisfied if a person of ordinary intelligence cannot understand what the law prohibits: "Vagueness in the constitutional sense means that persons of ordinary intelligence are obliged to guess as to what conduct the [law] proscribes." Douglass, 115 Wn.2d 171, 179. The challenged language is not examined in a vacuum, but in the context of the entire enactment. Seattle v. Huff, 111 Wn.2d 923, 929, 767 P.2d 572 (1989).

Here, the identity theft statute criminalizes, *inter alia*, possessing "a means of identification or financial information of another person, living or dead." RCW 9.35.020(1).³ It is in the definition of

3. This Court has previously held the definition of "financial information" passed the vagueness test.

"person" that the statute becomes vague. "Person" is defined "to include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association." RCW 9A.04.110(17); RCW 9.35.005(4) (emphasis added).

Thus, while a natural person is always a "person," a corporation is a "person" only "where relevant." This open-ended definition is vague on its face as it pertains to corporations. The "where relevant" language means that an individual must guess as to whether taking identifying or financial information from a corporation is identity theft. Under these circumstances, the statute fails to inform a person of ordinary intelligence when identity theft can be committed against a corporation. Because Mr. Evans was convicted of identity theft against a corporation, the statute was vague as applied to him and this Court should reverse his conviction.

Allenbach, 136 Wn. App. 95, 147 P.3d 644. In an unpublished opinion, Division 3 held that the conduct prohibited by the statute was not void for vagueness. State v. Gilbert, No. 24100-9-III, 2006 WL 1851396 (Ct. App. 2006).

Even more glaringly, the statute is vague as it failed to protect Mr. Evans from arbitrary, erratic, or discriminatory law enforcement. The due process clause forbids "criminal statutes that contain no standards and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case." Douglass, 115 Wn.2d 171, 181. The United States Supreme Court holds this to be the more important aspect of the vagueness doctrine. Id. at 180, n.6.

The test for this prong of the vagueness challenge is whether the statute is "inherently subjective": "In determining if a penal statute provides adequate standards for enforcement, one must decide whether the ordinance proscribes conduct by resort to 'inherently subjective terms.'" Id. at 181 (citation omitted).

Here, the "where relevant" language is by definition subjective, rendering the statute blatantly unconstitutional. The language gives police officers and prosecutors the unfettered discretion to determine when identity theft is committed against a corporation.

The statute creates the very problem the due process requirement of definiteness is designed to prevent: It allows "police officers, judge, and jury to subjectively decide what conduct the statute proscribes." Accordingly, the provision is void for vagueness under this prong of the constitutional test.

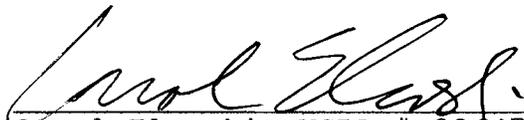
For all these reasons, the definition of "person" in the identity theft statute is unconstitutionally vague as applied to Mr. Evans and this Court should reverse his conviction.

V. CONCLUSION

For all of these reasons, Derrick Robert Evans respectfully requests this Court to reverse his conviction.

Dated this 27th day of August, 2010.

Respectfully submitted,


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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 27th day of August, 2010, I caused a true and correct copy of Appellant's Brief to be served by U.S. mail on:

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COURT REPORTS