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WILLFUL CONCEALMENT OF MERCHANDISE

RICHARD A. KELLY  
NEW YORK STATE

Text of the statute of Willful Concealment of Merchandise;

(a) A person who, without authority, willfully conceals upon or about his person the goods or merchandise of a retail business establishment, not theretofore purchased by the person, while still on the premises of the retail business establishment, with intent to deprive the owner of the goods or merchandise, shall be guilty of a misdemeanor.

(b) Goods of merchandise found concealed upon or about the person and which have not theretofore been purchased by the person are prima facie evidence of a willful concealment.

(c) A person found guilty of willful concealment, as defined above, for the first time is guilty of a class B misdemeanor.

(d) A person found guilty of a second or subsequent offense of willful concealment of goods as defined above, is guilty of a class A misdemeanor.

Text of the statute of Merchant's right of Full View;

Any merchant shall have the right to request any individual on his premises to place or keep in full view any goods or merchandise any individual may have removed, from its place of display or elsewhere, whether for examination, purchase or for any other purpose. No merchant shall be criminally or civilly liable on account of having made such a request.

Text of the statute of Detention and Arrest by Merchant...

A merchant or a merchant's representative who has reasonable grounds for believing that goods or merchandise held for sale by the merchant have been willfully concealed by a person and that he can recover them by taking the person into custody, may, for the purpose of attempting to effect such recovery, take the person into custody and detain the person in a reasonable manner for a reasonable length of time. Such taking into custody and detention by a merchant, or merchant's representative, shall not render such merchant, or merchant's representative, criminally or civilly liable for false arrest, false imprisonment or unlawful detention. The person detained shall be informed promptly of the purpose of the detention and shall not be subjected to unnecessary or unreasonable force, nor to interrogation against his will.

COMMENT

RICHARD A. KELLY

In the area of effective social control of shoplifting, the need for statutory alteration of the common law has become increasingly apparent in recent years. In response to such needs,

many states have enacted shoplifting statutes. The common law rules, developed at a time when the modern merchandising methods were unknown, are ill-adapted to current needs. Since felonious intent is a necessary element of larceny, an honest merchant, if he fails to secure a conviction of the accused, subjects himself to liability for false arrest, false imprisonment or malicious prosecution. As a consequence, many merchants helplessly stand by observing a wrong, fearful of being prosecuted themselves lest their convictions be correct. Note, 64 W.Va. L. Rev. 431 (1962).

These three statutes attempt to deal with the problem of shoplifting by defining the merchant's rights and negating certain elements of the common law with regard to false arrest, false imprisonment and unlawful detention. Their main purpose is to give the merchant greater protection in the hope that his treatment of suspected shoplifters will be more aggressive.

To understand the elements of these three statutes it is first necessary to be familiar with the nature and scope of the problem of shoplifting.

Businessmen claim they lost between \$2-1/2 to \$3 billion due to shoplifting in 1969. According to recent surveys conducted by criminologists and the F.B.I. statistitions, shoplifting has increased by 150% since 1960. Some of the reasons proposed for these formidable figures are that they are the result of young people seeking a thrill, of drug addicts trying to support a habit, and of housewives struggling to balance a budget. In a period when people feel free to disregard social rules because they don't respect the people who are giving them the rules, it is not surprising that people are stealing. It would be very surprising if these people who were breaking the rules regarding the taking of drugs and regarding sexual activity were not breaking the rules about private property. With thinking like this it is no wonder that the F.B.I. calls shoplifting the fastest growing larceny in the nation. Thus the problem is not simply enforcement but rather, that, for most people shoplifting just isn't a crime.

A study made in a New York department store randomly selected and observed a number of "typical" shoppers. The result of the observation showed that one out of ten stole something before leaving the store. The observers commented that none of those observed were professional thieves. Also noted was that most of the thieves were women. From the shoplifters age and sex it appeared that most were middle aged housewives who were probably trying to stretch their budgets by stealing something they needed. Redbook, Oct. 1970, pps. 72-73. A later more exhaustive survey showed that one of twelve shoppers observed shoplifted, one of ten were females, one of sixteen males, one of twelve caucasian, one of eleven Negroes, that the average theft was \$7.15 and finally that the store lost \$.60 for each shopper each day. A significant

statistic was that the largest single group shoplifting tended to be the juvenile set. Yet the largest inventory losses are caused by adults. This was shown by the results of twelve arrests; eleven juveniles had stolen merchandise worth \$81, while the one adult had stolen merchandise worth \$4,750. Business Week, June 27, 1970, p. 72.

Although these incidents may seem trivial, individual stores reported that they lose 1/2% to 5% of their daily sales to shoplifters. The store's only recourse is to pass the incidence of this loss on to the ultimate purchaser. Thus the honest customer must bear the burden of his dishonest brethren. A sobering example of the stores position is that of a supermarket operating of a 1% to 1.3% profit margin. A loss of \$.89 will force the store to sell an additional \$68 to \$89 worth of goods just to cover the loss. Good Housekeeping, Oct. 1967, p. 157.

Because the increasing of prices will not allow the store to keep abreast of the thefts a number of preventive devices have been tried. Mirrors were once thought to be the answer to the problem. They let you see the potential thief and would naturally deter him from stealing. However the thief could see the merchant as well as the merchant could see him. In effect it became easier to steal; the thief just waited until the merchant wasn't looking. Next came guards, also thought to be of great deterrent value. However studies found that the presence of the guard made people more likely to steal, as a challenge to the system. T.V. cameras were shown to have the same effect on potential thieves as guards, it made them try harder. Signs proclaiming "shoplifters will be punished" failed to deter and studies showed that they actually instilled the idea in customers who would otherwise never have thought of the possibility of stealing. Security films shown to employees only gave the employees greater ability to steal effectively. In the final determination the only true deterrent is to have an honest salesman talk to the customer. The trend seems to be that the more obvious the deterrent device the more it causes people to steal. A not so obvious device is the use of sensitized tags and an alarm system. The idea is that when paid for the tag is de-sensitized. If not paid for the alarm will sound when the thief attempts to leave the store. The main problem is the potential failure of a salesperson to desensitize the tag. The result will cause a loss of good will and possibly a false arrest charge brought against the store.

It is clear from these reports that some changes in the law are necessary. It used to be impossible to arrest a shoplifter until the thief actually left the store. Now most states allow the store to apprehend a suspect before he leaves, hold him and search him. New York is not one of these states. For this reason these three statutes have been written.

The first statute creates the misdemeanor of willful concealment of merchandise while still on the premises of the retail establishment. Merely finding the merchandise concealed upon the person of the alleged perpetrator will establish a prima facie case for the state. The wording of parts (a) and (b) of this statute were adapted from a North Carolina statute. That statute was challenged as being void for uncertainty and unconstitutional because it does not require any felonious intent. However the North Carolina Supreme Court in State v. Hales, 122 S.E.2d 768, (N.C. 1961), upheld the statute. The court found that this statute was definite enough so as to inform the citizen with reasonable precision what acts it intends to prohibit. The court then went on to say that the Legislature has the inherent power to define and punish any act as a crime because it is undisputedly a part of the police power of the state. However, the act of the Legislature declaring what shall constitute a crime must have some substantial relation to the ends sought to be accomplished. Continuing, the court said that it is within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act. Thus the Legislature has the power to enact provisions concerning willful concealment of merchandise and when certain facts have been proved, they shall be prima facie evidence of the main fact in question. State v. Hales, supra.

Of the thirteen states which have willful concealment as a part of their shoplifting statutes, this is the only litigation thus far challenging the validity of the statutes. This litigation also brought out a judicial interpretation of "willfully conceal". The court said, "'willfully conceals' as used in the statute means that the concealing is done under the circumstances set forth in the statute voluntarily, intentionally, purposefully, and deliberately, indicating a purpose to do it without authority, and in violation of law, and this is an essential element of the statutory offense of shoplifting". State v. Hales, supra.

As defined in the case of Commonwealth v. Matheson, 328 Mass. 371, 103 N.E.2d 714, (1952), the word "conceal" . . . includes any act or conduct which assists the thief in converting the property to his own use, or which may prevent or render more difficult its recovery by the owner.

The whole thrust of this statute is to give the merchant the ability to apprehend a suspected thief before he leaves the store. Its effect is to negate the often bogus defensive plea made by the apprehended thief that he was going to pay for the goods anyway. However, it leaves with the merchant the discretion of prosecution or not. For if the suspects' plea seems realistic the merchant may simply allow the person to pay and leave the store.

To implement the first statute, especially part (b), a second statute dealing with the merchant's right to have all merchandise kept in full view is needed. This was based upon a Montana statute. Its usefulness is in the discovery of concealed merchandise. For once the merchant's demand is complied with either there are goods concealed and thus the crime is complete, or there are not and the

customer receives an apology. Discretion is again with the merchant. He may refrain from making such a demand for fear of losing good will and as a result lose his merchandise. Or he may make the demand and either catch a thief or at least put the customer on notice that he has experience with shoplifters and is willing to prosecute.

Willingness to prosecute should be dealt with at this point. Where stores once maintained a policy of letting most shoplifters go after a tongue-lashing, they are now much more inclined to prosecute. Still most shoplifters, even if caught, never wind up in court; one survey showed that only 10% of those caught were tried, and of these only a fraction received any kind of penalty. Newsweek, Dec. 29, 1969, p. 48. Many merchants are unwilling to go through the hassle of going to court because of the "general leniency" of the judges, time delays, and expense involved in prosecuting. Business Today, Summer 1970, p. 56. It is hoped that with the establishment of a prima facie case and the hope for speedy trial which will thus ensue that merchants will continue to change their stance and act to protect themselves by prosecuting. It is often stated that the law is most effective when it is most certain in its results. Certainty is what is sought for in these statutes.

The purpose of the third statute, giving the merchant and his representatives, who have reasonable grounds for believing that the merchant's goods have been unlawfully taken, a right to take the person into custody, is to assist merchants in reducing shoplifting crimes. Giving this right to the merchant or merchant's representative is necessary because of the great frequency of the crime and the relative infrequency of available police officers to carry out the detention and arrest.

This has always been a problem area due to the possibility of a wrongful arrest. The ensuing false arrest or false imprisonment litigation has been a factor deterring merchants from detaining a person suspected of shoplifting. With the negation, to some extent, of that liability by this statute merchants will be more likely to prosecute. This, as stated before will give the element of certainty to the enforcement of the crime which will be a key to the element of deterrence which this statute was designed to elicit. This negation is not complete. A merchant must promptly inform the suspect of the purpose of the detention and shall not subject the person to unnecessary force not interrogate him against his will. These limitations are in line with accepted common law and criminal law principles. The non-interrogation feature is taken directly from the decision in Miranda v. Arizona, 384 U.S. 436 (1966). Professor Prosser supplied the civil side of the exception in his treatise. With regard to recapture of chattles he stated: "If property is taken wrongfully, and the pursuit is fresh, the owner may use reasonable force to recover it which otherwise would amount to false imprisonment". Prosser, The Law of Torts 3d Ed., p.123 (1964). Also, the Restatement of Torts 2d. provides that: "One who reasonably believes that another has

tortiously taken a chattel . . . is privileged without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts". Restatement of Torts 2d., §120A, (1965).

A citizen now is entitled to be immune from false arrest even if the breach of the peace was not committed in his presence. This extension of the right to arrest is necessary due to the nature of the crime of shoplifting. By simple detention the merchant may now hold a suspect, after finding concealed merchandise, until an officer can be summoned without fear of false arrest charges being brought against him. This will allow the free use of such devices as the sensitized tags without fear of the expense of litigating a false arrest charge. Because these sensitized tags are perhaps the best method of discovering a shoplifter, the negation of false arrest liability in the instances spelled out by the statute will hopefully bring about a curtailment of frivolous shoplifting. If a person knows he will be caught and no easy way out is provided he will not steal. In other words enforcement of the crime will have certainty.

Reportedly, 85% of all shoplifters are highly neurotic. Their thefts cause them severe guilt feelings and anxiety. By exploiting these fears, merchants can cut down on thefts. If one is forced to go past a cashier with the knowledge sensitized tags are in use, the average shoplifter will not steal. Business Today, Summer 1970, p. 56. To fully implement these new laws a system of educating the teen-age thrill thief will be necessary. For by this education will be brought to the unknowing teen-ager the dangers of what he is doing. Sat. Eve. Post, May 18, 1968, p. 27.

Although shoplifting is not one of the most serious crimes almost everyone would agree that we would be better off if an end would be put to it.

STATE OF NEW YORK

4327

1971-1972 Regular Sessions

IN ASSEMBLY

February 10, 1971



Introduced by Mr. PISANI—read once and referred to the Committee on Codes

AN ACT

To amend the penal law, in relation to concealment of merchandise held for sale

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

- 1 Section 1. The penal law is hereby amended by adding thereto
- 2 three new sections to be sections 155.26, 155.27 and 155.28, to read,
- 3 respectively, as follows:
- 4 § 155.26 *Concealment of merchandise.*
- 5 (a) Any person who, without authority, willfully conceals upon
- 6 or about his person the goods or merchandise of a retail business
- 7 establishment, not theretofore purchased by the person, while
- 8 still on the premises of the retail business establishment, with
- 9 intent to deprive the owner of the goods or merchandise, shall be
- 10 guilty of a class B misdemeanor.

EXPLANATION — Matter in italics is new; matter in brackets [ ] is old law to be omitted.

1 (b) Goods or merchandise found concealed upon or about the  
2 person and which have not theretofore been purchased by the  
3 person are prima facie evidence of willful concealment.

4 (c) Nothing in the above provisions is to be construed as restrict-  
5 ing or limiting the prosecution for any other crime.

6 § 135.27 Merchant's right of full view of merchandise.

7 Any merchant or his authorized representative shall have the  
8 right to request any individual on his premises to place or keep  
9 in full view any goods or merchandise any individual may have  
10 removed from his place of display or elsewhere, whether for exam-  
11 ination, purchase or for any other purpose.

12 § 135.28 Detention and arrest of a person suspected of willful  
13 concealment of merchandise held for sale.

14 Any merchant, or his authorized representative, who has reason-  
15 able grounds for believing that goods or merchandise held for sale  
16 by the merchant have been willfully concealed by a person and  
17 that he can recover them by taking the person into custody, may,  
18 for the purpose of attempting to effect such recovery, take the  
19 person into custody and detain the person in a reasonable manner  
20 for a reasonable length of time. The person detained shall be  
21 informed promptly of the purpose of the detention and shall not  
22 be subjected to unnecessary or unreasonable force, nor to interro-  
23 gation against his will. Any unreasonable conduct on the part  
24 of the merchant will be subject to civil liability.

25 § 2. This act shall take effect on the first day of September next  
26 succeeding the date on which it shall have become a law.

State	I(a) Willful Concealment	I(b) Prima Facie Evidence	I(c) First Offense Penalty	I(d) Subsequent Offense Penalty	II Full View Right	III Merchants Right To Detain And Arrest
Alabama						X
Alaska	X	X		X		
Arizona						
Arkansas	X	X				X
California						
Colorado		X				X
Connecticut	X	X				
Delaware	X	X				X
D. C.						
Florida						X
Georgia						
Hawaii						
Idaho						
Illinois						X
Indiana						X
Iowa	X					
Kansas						X
Kentucky		X				X
Louisiana						
Maine	X	X				
Maryland						
Massachusetts						X
Michigan						X
Minnesota						X
Mississippi		X	X	X		X
Missouri	X	X				X
Montana					X	
Nebraska						
Nevada					X	
New Hampshire	X	X				
New Jersey	X	X				X
New Mexico						
New York						
North Carolina	X	X	X	X		
North Dakota						X
Ohio						
Oklahoma						X
Oregon						
Pennsylvania						
Rhode Island	X					X
South Carolina		X				
South Dakota		X	X	X		X
Tennessee						X
Texas						X
Utah						
Vermont					X	
Virginia	X	X	X	X		X
Washington						X
West Virginia	X	X				X
Wisconsin						
Wyoming	X					X