

COA Opinion: Stealing or retaining personal information which can be used to obtain money or a credit account is sufficient for conviction under MCL § 750.157

31. March 2010

On Tuesday, March 30, 2010, the Michigan Court of Appeals published its opinion in *People v. Malone*, Case No. 286958. In *Malone*, the Court considered whether the evidence presented at trial was sufficient to support defendant's three convictions for stealing or retaining a financial transaction device without consent, in violation of MCL § 750.157n(1), where defendant did not have physical possession of any bank, credit, or debit card belonging to any of the victims, but rather, defendant merely possessed the victim's personal information. In a unanimous opinion, the Court affirmed the trial court verdict concluding that, pursuant to the plain language of MCL § 750.157n(1), defendant was not required to possess the physical cards that allowed access to proprietary accounts. A more detailed discussion of the issues presented in this appeal can be found after the break. A copy of the Court's opinion can be found [here](#).

Malone concerned the identify theft of several high-ranking Wayne County employees. Specifically, several employees found their credit card documents were now being mailed to a different address and that new users had been approved on those cards. Through their investigation, police were able to determine DeJuan Whitehead was the source of the personal information belonging to Wayne County employees. Further research using the "auto track" system revealed that Mr. Whitehead lived with the defendant, a dietician employed by Wayne County. While defendant was assigned to the management and budget office, she occasionally worked in payroll.

While executing a search warrant on defendant's residence, police discovered a blue notebook filled with post-it notes containing personal information belonging to four Wayne County employees. At trial, the employees identified the post-it notes as containing their social security number, driver's license number, date of birth, phone number, and bank account number. Police discovered no bank, debit, or credit cards in defendant's possession. Following a jury trial, defendant was convicted of three counts of stealing or retaining a financial transaction device without consent, in violation of MCL § 750.157n(1).

Defendant appealed her conviction on four grounds. Specifically she argued that: (1) the evidence at trial was not sufficient to support a conviction; (2) MCL § 750.157n(1) was constitutionally vague; (3) she was wrongfully convicted because she had been tried in the wrong venue; (4) the prosecutor had improperly admitted other bad-acts evidence that was more prejudicial than probative; and (5) the search warrant lacked probable cause and defendant's motion to suppress the evidence should have been granted.

On this first issue, defendant argued that the evidence was insufficient to support a conviction of stealing or retaining a financial transaction device without consent because she did not have physical possession of any bank, debit, or credit cards. The Court of Appeals disagreed and held that MCL § 750.157m(f)(v) merely requires a defendant to have possession of information that can be used to obtain access to money, credit accounts, or anything of value. Here, the Court held that defendant's possession of the victim's personal information was sufficient to support a conviction under this statute.

Next, defendant asserted that her conviction had to be reversed because MCL § 750.157 is vague and overbroad, both on its face and as applied to her. The Court found this argument to be without merit. It held that the plain language of the statute punished retention or possession of information that can be used to access proprietary accounts. That is exactly what happened in this case.

Defendant also claimed she was wrongfully convicted because the action was tried in Wayne County, rather than Oakland County. She asserts that because the evidence introduced at trial was recovered in Oakland County, venue was proper in Oakland County. The Court disagreed and noted that the location of the commission of a crime is not limited to the place of the defendant's physical presence. Here, where the personal information was taken in the course of defendant's employment in Wayne County, venue was proper in either Wayne or Oakland County.

The fourth argument defendant raised on appeal is the admission of prior bad-act evidence at trial. Here, the prosecutor admitted evidence of defendant's prior criminal acts to show that the investigation was initiated by the report of identity theft of a number of employees and to demonstrate how the police came to focus on the defendant. Because evidence of other criminal acts is admissible when it explains the circumstances of a crime, the prosecutor was not required to file a motion seeking to admit such evidence under MRE 404(b).

Finally, the defendant asserted that the trial court erred in denying her motion to suppress the evidence recovered in the execution of a search warrant. The defendant argued that the search warrant lacked probable cause because her name was never mentioned in the warrant, there was no nexus to her home, the search warrant contained untrue statements, and the information was stale. The Court disagreed and held that an affidavit in support of the warrant detailed the facts necessary for probable cause to search her home, the information contained in the affidavit noting she was the "aunt" of a suspect did not constitute a falsehood which would invalidate the search warrant, and that the defendant had abandoned her argument that the warrant was stale.