

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 23, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

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**No. 97-0725-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DARRELL C. SOLFEST,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

SNYDER, P.J. Darrell C. Solfest appeals from a judgment of conviction and a trial court order denying his motion to vacate his guilty plea. He contends that the criminal complaint does not allege a sufficient factual basis for the charge of fraudulent use of a credit card. See § 943.41(5)(a), STATS. Specifically, he contends that because he did not complete the transaction and leave the store with the merchandise, he did not actually *use* the credit card. We

disagree. He also maintains that trial counsel's failure to address the above inadequacy gives rise to an ineffective assistance of counsel claim and also underpins his claim that his guilty plea was not voluntarily, knowingly and intelligently made. These issues will be resolved by our answer to the main issue.

Solfest was in Laurie Moesler's home as a guest of her mother. While there, he took Moesler's wallet which contained various credit cards, including a Radio Shack card. Later that morning he went to a Radio Shack store. He presented Moesler's credit card to the salesman along with a camcorder and indicated his desire to purchase the camcorder by credit card. The salesman, who was aware that the credit card was stolen, took it into the back room to show his manager.<sup>1</sup> When the salesman and manager returned to the sales floor, they discovered that Solfest had left. He was later arrested.

Solfest pled guilty to theft and fraudulent use of a credit card. *See* §§ 943.20(1)(a) & 943.41(5)(a), STATS.<sup>2</sup> Both charges carried habitual criminality enhancements. *See* § 939.62(1)(a)2, STATS. He now appeals, requesting review of the trial court's denial of a motion to vacate his guilty plea.

Although Solfest seeks approval from this court to vacate his plea, the issue presented by this case is one of statutory construction. As such, a de novo standard of review will apply as statutory construction is a question of law. *See State v. Dawn M.*, 189 Wis.2d 480, 484, 526 N.W.2d 275, 276 (Ct. App.

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<sup>1</sup> The manager of this Radio Shack was Moesler's cousin. Moesler had contacted him when she discovered her wallet was missing. He then informed his salesman about the theft. The salesman was aware of the stolen card when Solfest presented it, but he did not inform Solfest of this.

<sup>2</sup> Solfest does not contest his plea to the theft charge which was based on the theft of the wallet.

1994). Solfest's assertion is that the State failed to allege in its complaint that he *used* the Radio Shack card for the purposes of obtaining money, goods, services or anything else of value. Solfest argues that in order for him to have "used" the card, he must have completed the transaction and left with the camcorder. We disagree.

Because this argument turns upon the interpretation of the term "use," we begin with the provisions of § 943.41(5)(a), STATS.<sup>3</sup>

FRAUDULENT USE. (a) 1. No person shall, with intent to defraud the issuer, a person or organization providing money, goods, services or anything else of value or any other person:

a. Use, for the purpose of obtaining money, goods, services or anything else of value, a financial transaction card obtained or retained in violation of sub. (3) or a financial transaction card which the person knows is forged, expired or revoked; or

b. Obtain money, goods, services or anything else of value by representing without the consent of the cardholder that the person is the holder of a specified card or by representing that the person is the holder of a card and such card has not in fact been issued.

We begin by construing the statute. "[I]t is a basic rule of statutory construction that in construing statutes, effect is to be given, if possible, to each and every word, clause and sentence in a statute and a construction that would result in any portion of a statute being superfluous should be avoided wherever possible." *County of Columbia v. Bylewski*, 94 Wis.2d 153, 164, 288 N.W.2d 129, 135 (1980).

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<sup>3</sup> Although the criminal complaint did not specify whether Solfest was charged under § 943.41(5)(a)1.a or b, STATS., the facts of the case require the application of subp. a. The State never alleged that he actually obtained the camcorder, which would have led to the application of subp. b.

A statute will be enforced in harmony with its plain meaning. *See State v. Dawson*, 195 Wis.2d 161, 167, 536 N.W.2d 119, 121 (Ct. App. 1995). If words that are used in a statute are not specifically defined, they should be accorded their commonly accepted meaning. *See State v. Dekker*, 112 Wis.2d 304, 311, 332 N.W.2d 816, 820 (Ct. App. 1983). There is a presumption favoring the common meaning. *Cf. State v. Morse*, 126 Wis.2d 1, 4-5, 374 N.W.2d 388, 390 (1985). This meaning may be established by reference to a recognized dictionary. *See Dekker*, 112 Wis.2d at 311, 332 N.W.2d at 820. The verb “use” is defined in the RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2097 (2<sup>nd</sup> ed. 1987) as:

1. to employ for some purpose; put into service; make use of: *to use a knife*. 2. to avail oneself of; apply to one’s own purposes: *to use the facilities*. 3. to expend or consume in use: *We have used the money provided*.

Although Solfest advances this same definition, he asks us to find that his expression of desire to purchase the camcorder and the handing of the card to the salesman to accomplish this goal was not “use” of the card. We cannot so conclude.

Applying the above tenets, we look to the language of the statute and find that completion of the transaction is not required. In viewing § 943.41(5)(a)1, STATS., as a whole, particularly the inclusion of subp. a and b, it is clear that they were intended to mean different things. If we were to assume, as Solfest suggests, that “use” means a completed transaction in which goods are obtained, subp. a and b are redundant. When the legislature included the language “[u]se, for the purpose of obtaining” in subp. a, it was addressing a different means of committing the crime of fraudulent use from that outlined in subp. b. *See* § 943.41(5)(a)1.a. The word “obtain,” which describes the conduct prohibited in

subp. b, suggests a completed transaction. In contrast, subp. a requires only “use, *for the purpose of obtaining.*”<sup>4</sup> See § 943.41(5)(a)1.a and b.

Another well-settled principle of statutory construction is that statutes must be interpreted in a way that avoids absurd or unreasonable results. See *State v. Pham*, 137 Wis.2d 31, 34, 403 N.W.2d 35, 36 (1987). The interpretation that Solfest proposes would not only render subp. a superfluous, but would lead to the result where the only persons prosecuted would be those who were able to actually complete the fraudulent transaction. This would be an absurd and unreasonable result.<sup>5</sup>

Solfest nevertheless maintains that the statute is ambiguous. However, “[t]he fact that the parties here disagree as to the meaning of the statute is not a controlling consideration. The test is whether well-informed persons *should have* become confused. Here, we find no well-founded reason for such confusion.” *Town of Two Rivers v. DNR*, 105 Wis.2d 721, 728-29, 315 N.W.2d

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<sup>4</sup> We further note that WIS J I—CRIMINAL 1497 lists four elements to § 943.41(5)(a), STATS.

First, that the defendant used a financial transaction card. Second, that such card was stolen. Third, that the defendant *used such a card for the purpose of obtaining ... goods....* Fourth, that the defendant acted *with intent to defraud* the issuer of the card or any person or organization providing money, goods, services or anything else of value. [Emphasis added] [footnotes omitted.]

These jury instructions require that a card be used “for the purpose of obtaining” goods and “with intent to defraud.” There is no requirement, even in the broadest sense, that the transaction must be completed and goods obtained.

<sup>5</sup> This would suggest that a person could present the card and if at some point before the completion of the sale the clerk were to learn that the card was fraudulent, likely through the credit card company, the person would be free to walk away, secure in the knowledge that he or she had not committed a crime.

377, 381 (1981) (citations omitted). As in *Town of Two Rivers*, there is no ambiguity here.

In pressing his claim that our interpretation of the statute should include asportation as an element, Solfest relies on a recent supreme court decision. See *State v. Johnson*, 207 Wis.2d 240, 558 N.W.2d 375 (1997). In that case, a conviction of armed robbery was overturned on the grounds that the prosecutor could not prove the asportation element because the property, a vehicle, had not been taken or carried away. See *id.* at 244, 558 N.W.2d at 376. Solfest would have us adopt this element as part of the language of the fraudulent use statute, § 943.41(5)(a), STATS. However, the supreme court in *Johnson* cited to *Moore v. State*, 55 Wis.2d 1, 197 N.W.2d 820 (1972), in which it had previously concluded that asportation is an element of armed robbery. See *Johnson*, 207 Wis.2d at 243, 558 N.W.2d at 376. Not only are we lacking such precedent in the instant case, as our analysis above outlines, we conclude that the requirements of the fraudulent use subsection are clear and unambiguous.

We further support this conclusion with the supreme court's holding in *Mack v. State*, 93 Wis.2d 287, 286 N.W.2d 563 (1980). In that case, the appellant challenged the prosecutor's discretion in choosing to charge forgery rather than fraudulent use of a credit card. See *id.* at 292, 286 N.W.2d at 565. The court held that "the credit card crimes statute does not refer to forgery of the credit card slip but refers to fraudulent representation and use of credit cards. It is possible to use a credit card without committing a forgery." *Id.* at 300, 286 N.W.2d at 569.

We conclude that our reasoning in the instant case is analogous. A forgery would ordinarily occur at the moment one signs a credit transaction slip,

which is prior to receiving the goods. Our construction of § 943.41(5)(a), STATS., as requiring only the fraudulent presentation of a credit card for the purpose of obtaining goods is consistent with *Mack*.

We will now address Solfest's remaining issues. He contends that he received ineffective assistance of counsel because his counsel was deficient in that she did not know and inform him that the charge against him could not be proven by the State. However, in light of our holding above, this argument necessarily fails. Solfest's counsel interpreted the statute in the correct way and gave Solfest information and advice based on that interpretation. Therefore, her performance was not deficient. The trial court properly denied Solfest's request for a *Machner*<sup>6</sup> hearing.

A second related issue is whether Solfest made a knowing, voluntary and intelligent guilty plea. The only argument he makes to support his assertion that he did not was that at the time of the plea, he was not aware that the State could not prove the elements of fraudulent use of a credit card because he did not "use" the card. Because we have rejected his interpretation of the statute and the word "use," we must also reject this claim.

Based upon the foregoing analysis, it is clear that Solfest's arguments fail. He has not persuaded us that "use" means "obtain." Therefore, the trial court's judgment and order are affirmed.

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<sup>6</sup> *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.



