

To: New Jersey Law Revision Commission
From: Christian Weisenbacher
Date: November 6, 2017
Re: Meaning of “transfer” in N.J.S. 2C:20-3(b)

MEMORANDUM

Executive Summary

In the case of *State v. Kosch*, the Appellate Division considered the definition of the word “transfer” in N.J.S. 2C: 20-3(b). In doing so, the Court determined that the term in the statute is unclear and uncovered questions of legislative intent regarding the meaning of the word.¹

Background

In the underlying case, Robert J. Kosch was convicted in the Superior Court of the theft of immovable property and trafficking in personal identifying information.² Kosch appealed, arguing that the evidence did not support the jury’s finding that he committed theft of immovable property under N.J.S. 2C:20-3(b).³ The convictions relevant to the issue at hand include two counts of second-degree and one count of third-degree theft of immovable property by unlawful taking or disposition.

The jury heard evidence of several instances of the defendant’s theft of immovable property. The first instance involved property at 8 Tanglewood Drive, Highland Lakes, which was owned by M.G. M.G. moved out of the home in 2010 and was alerted by a neighbor in August 2011, that someone was living in the home.⁴ Investigation revealed that the defendant had prepared a fraudulent deed to the home, and was using the deed to lease the property.⁵

The situation concerning 13 Tanglewood Drive, Highland Lakes, involved similar circumstances. J.S. owned the property and in July 2011 agreed to sell it to defendant for \$185,000. In total, defendant paid \$8,500 toward the purchase of the home.⁶ After receiving a call from the electric company asking to remove her name from the service account in October 2011, J.S. learned that a family had moved into the home.⁷ Here, an investigation revealed that defendant had fraudulently prepared a deed to the home purporting that J.S. had transferred the property on August 16, 2011 to defendant for \$100.⁸

The circumstances concerning 61 Greenhill Road in Hamburg were different. M.S. owned the property and, facing a mortgage and financial difficulties, found herself with a tax lien

¹ *State v. Kosch*, 444 N.J.Super. 368 (App. Div. 2016).

² *Id.* at 377.

³ *Id.* at 378.

⁴ *Id.* at 374.

⁵ *Id.* at 374-5.

⁶ *Id.* at 375.

⁷ *Id.* at 375.

⁸ *Id.* at 375.

on the home.⁹ In 2010, defendant offered to purchase the property and M.S. authorized him to negotiate a settlement with the mortgage holder with the agreement that she would transfer the property to him for the settlement amount.¹⁰ M.S. signed a deed to be placed in escrow until the settlement was paid off and, after waiting two years, M.S. contacted defendant's attorney to seek return of the deed.¹¹ It was then that she discovered that defendant had leased the property to a family that had lived in the home since January 2012.¹²

On appeal, the court vacated the convictions concerning the taking of property and remanded the case for a new trial and eventual resentencing.¹³

A key issue in the case involved the definition of "transfer" under N.J.S. 2C:20-3(b), which reads as follows: "A person is guilty of theft if he unlawfully transfers any interest in immovable property of another with purpose to benefit himself or another not entitled thereto."

The *Kosch* Court explained that "there is no question these three properties were owned by others and, although, as the ostensible contract purchaser, defendant may have possessed a partial interest in 13 Tanglewood and 61 Greenhill, he never lawfully acquired the interest he was charged with taking. We, thus, turn to whether a 'transfer' occurred within the meaning of N.J.S.A. 2C:20-3(b)."¹⁴ New Jersey's Criminal Code does not define the term "transfer" and in the instant case the court looked to a variety of sources to find an appropriate definition.

The general rules of construction in N.J.S.A. 1:1-1 govern the interpretation of statutes and read in pertinent part below:

In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.

Pursuant to N.J.S. 1:1-2, however, the context of the term also factors into the interpretation.

Apparently unsatisfied with the breadth of the definition of "transfer" that appeared in *Black's Law Dictionary*, which defined "transfer" as "the act of 'convey[ing] or remov[ing]' something 'from one place or one person to another,' 'to pass or hand over from one to another,' and 'to change over the possession or control' of something"¹⁵ the Court looked to the Statute of Frauds to find a definition it considered more contextually appropriate.¹⁶ The Statute of Frauds, at N.J.S. 25:1-10, reads—and the court adopted—that "[t]ransfer of an interest in real estate" means "the sale, gift, creation or extinguishment of an interest in real estate."¹⁷ The Court explained that in "defining the word 'transfer' in N.J.S.A. 2C:20-3(b) in accordance with the

⁹ *Id.* at 376.

¹⁰ *Id.* at 376.

¹¹ *Id.* at 376.

¹² *Id.* at 376.

¹³ *Id.* at 393.

¹⁴ *Id.* at 381.

¹⁵ *Id.* at 382.

¹⁶ *Id.* at 382.

¹⁷ *Id.* at 382.

Statute of Frauds, which has a certain kinship with *N.J.S.A. 2C:20–3(b)*, we examine the matter at hand and conclude there was evidence from which the jury could find a theft of immovable property.”¹⁸ The Court also explained that the “statute does not criminalize just the unlawful transfer of title or the entire fee simple of immovable property; it criminalizes the unlawful transfer of ‘any interest’—an expression that fairly incorporates not only title but lesser interests as well.”¹⁹

The language of the statute, considered in context and supplemented by the definition that appears in the Statute of Frauds, raises the question of what conduct may or may not fall within its scope. Specifically, it raises two issues: first, whether or not the defendant’s conduct in the instant case is analogous to that of a squatter or if it is something more serious; second, whether the law intends to criminalize squatter and tenant conduct in the same manner. The Court looked to the legislative intent to determine the answers to these questions.

A New Jersey Criminal Law Revision Commission report on an earlier version of the statute in question, identical to the current iteration, suggests that the Legislature intended not to criminalize the conduct of squatters and tenants. The report reads, in relevant part, as follows:

[M]ere use of or occupation of land should not be classified as theft, even though it be an exercise of unauthorized control with a purpose of permanent appropriation. The immobility and relative indestructibility of real estate make unlawful occupancy a relatively minor harm for which civil remedies, supplemented by mild sanctions for trespassing, should be adequate.²⁰

The *Kosch* Court noted that it might be

inferable that in enacting *N.J.S.A. 2C:20–3* the Legislature agreed with these comments. *See State v. Garofola*, 252 *N.J.Super.* 356, 359–60... (Law Div.1988); *see also* Cannel, *New Jersey Criminal Code Annotated*, comment 2 on *N.J.S.A. 2C:20–3* (2015) (noting that “the framers of this section wanted to bar the criminalization of ‘mere use or occupation of land’ ”).

Assuming, without deciding, the Legislature's intention was consistent with the Commission's concerns, we nevertheless decline to interpret *N.J.S.A. 2C:20–3(b)* as placing beyond its reach all unlawful uses and occupations of immovable property. Although the Legislature may not have intended to criminalize the conduct of squatters and tenants, *see Garofola, supra*, 252 *N.J.Super.* at 358... *Model Jury Charge (Criminal), Theft of Immovable Property* (2011), we see nothing in the statute's plain language to suggest an unlawful exercise of dominion or control over immovable property—coupled with the actor's unlawful leasing of the property to another—cannot be

¹⁸ *Id.*

¹⁹ *Id.* at 383.

²⁰ Final Report of the New Jersey Criminal Law Revision Commission, *supra*, at 222; *see also State v. Garofola*, 252 *N.J.Super.* 356, 358-9 (1988).

prosecuted under this statute. What occurred here pales in comparison with the type of de minimis conduct that concerned the Commission.²¹

The consequence of interpreting the statute according to its plain language as above is that it may extend criminalization beyond the Legislature's intent. In addition to creating a conflict between the language of the statute and its apparent intent, this interpretation creates a situation in which squatters and tenants may face criminal penalties disproportionate to the relatively minor crime committed.

Conclusion

Staff seeks authorization to conduct additional research and outreach regarding this issue in order to determine whether the court's interpretation is consistent with common practice and whether modifying N.J.S. 2C:20-3(b) to clarify its scope as well as the meaning of "transfer" would aid in interpreting the provision and potentially remove the need for additional litigation regarding the issue addressed in *State v. Kosch*. As it does not appear that there is any current legislation addressing the issue in either the Senate or the Assembly, it may therefore be prudent to alert the Legislature to the issue.

²¹ *Id.* at 384-385.