

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D03-4180

JONATHON OSCAR MOORE,

Appellee.

Opinion filed February 15, 2005.

An appeal from the Circuit Court for Duval County.
Michael R. Weatherby, Judge.

Charles J. Crist, Jr., Attorney General; Felicia A. Wilcox, Assistant Attorney
General, Tallahassee, for Appellant.

Charles B. Lembcke of Law Office of Charles B. Lembcke, P.A., Jacksonville, for
Appellee.

DAVIS, J.

The state appeals the trial court's dismissal of a second amended information
charging the appellee, Jonathon Oscar Moore, with one count of fraud involving a

security interest in violation of section 817.562(2), Florida Statutes (2000). Because Moore's actions do not constitute the charged offense as defined by section 817.562(2), we affirm the trial court's dismissal of the second amended information.

Moore owed the law firm of Smith, Hulsey and Busey approximately \$250,000 for legal fees and costs arising from the law firm's representation of Moore. As a result, Moore executed a security agreement with the law firm, creating a security interest in Universal Beverages Holdings Corporation stock certificate #2030. Under the security agreement Moore had no right of sale or other disposition of certificate #2030. Nonetheless, Moore executed an affidavit certifying that certificate #2030 had been lost or stolen, and Moore was issued a replacement certificate, certificate #2080. Thereafter, Moore exchanged certificate #2080 for three separate stock certificates, and he subsequently sold the underlying stock. The law firm, which continued to be in physical possession of certificate #2030, had no knowledge of Moore's actions.

Subsequently, the state charged Moore with one count of fraud involving a security interest in violation of section 817.562(2). Moore filed a motion to dismiss the information, contending that the information failed to allege this offense because he could not dispose of certificate #2030, as it was in the law firm's possession. The trial court granted the motion and this appeal followed.

On appeal, the state contends that Moore's conduct constituted fraud as defined by section 817.562(2) because Moore replaced stock certificate #2030 with stock certificate #2080 under false pretenses thereby invalidating the instrument that the law firm could use to access the pledged stock. We disagree.

Section 817.562, provides in relevant part,

(2) A person is guilty of fraud involving a security interest when, having executed a security agreement creating a security interest in personal property, including accounts receivable, which security interest secures a monetary obligation owed to a secured party, and:

...

(b) Having under the security agreement no right of sale or other disposition of the property, he or she knowingly **secretes, withholds, or disposes of such property** in violation of the security agreement.

(emphasis added). Chapter 817, Florida Statutes, does not define the terms "dispose" or "secrete"; therefore, we employ the plain and ordinary meaning of these terms. See State v. Burris, 875 So. 2d 408, 410 (Fla. 2004). The term "dispose" is defined to include the act of transferring an item to the control of another. Webster's New Collegiate Dictionary 327 (1979). Likewise, "secrete" is defined as the act of concealing or secretly transferring property, particularly in an attempt to prevent creditors from finding the property. Black's Law Dictionary 1355 (7th ed. 1999).

In this case, the security agreement created a security interest in stock certificate #2030. A stock certificate, however, is only tangible evidence of a legal right to stock. See Williams Mgmt. Enters., Inc. v. Buonauro, 489 So. 2d 160, 164 n.3-4 (Fla. 5th DCA 1986). As such, the security interest was effectively in the intangible property right to stock represented by stock certificate #2030. Therefore, the dispositive issue is whether Moore disposed of, or otherwise withheld, the law firm's right to the stock represented by certificate #2030. To resolve this issue we must look to chapter 678, Florida Statutes (2000), governing certificated securities, to determine whether the facts of this case gave rise to a disposition or transfer of the stock represented by certificate #2030.¹

Section 678.4051(1), Florida Statutes (2000), provides that an owner of a certificated security is entitled to a replacement certificate if the original certificate is lost, destroyed, or taken. After the issuance of the new certificate, however, the stock issuer must accept the original certificate, if presented by a "protected purchaser," and then seek recovery from the person that requested the replacement certificate. Id. § 678.4051(2). A protected purchaser is one who gives value for the security, does not

¹ Contrary to the assertion made in the dissenting opinion, we have not read the provisions of chapter 678 in pari materia with section 817.562 so as to resolve any inconsistencies in section 817.562. Instead, we looked to chapter 678 to determine whether Moore transferred or disposed of the stock represented by certificate #2030 within the meaning of section 817.562(2)(b).

have notice of any adverse claim to the security, and obtains control of the stock certificate. Id. § 678.3031(1). The law firm is a protected purchaser because the stock certificate served as collateral or security for Moore's monetary obligation to the firm, and the firm remained in actual physical possession of the certificate at all times. See First Nat'l Bank of Fla. Keys v. Rosasco, 622 So. 2d 554, 555 (Fla. 3d DCA 1993). As a protected purchaser, the law firm's right to the stock represented by certificate #2030 is inalienable. Therefore, although Moore may have defrauded the stock issuer or committed some other criminal act, he did not commit fraud in violation of section 817.562(2) because he could not dispose or otherwise withhold the law firm's right to the stock represented by certificate #2030.

Accordingly, we affirm the trial court's order dismissing the second amended information.

HAWKES, J., CONCURS; ERVIN, J., DISSENTS WITH WRITTEN OPINION.

ERVIN, J., dissenting.

The majority erroneously relies on the provisions of section 678.4051, Florida Statutes (2000), relating to the replacement of lost, destroyed, or wrongfully taken security certificates, to support its affirmance of the order dismissing the information. Section 678.4051 is, however, altogether irrelevant to a determination of whether the owner of a certificated security may be charged with violating the provisions of section 817.562, Florida Statutes (2000), under circumstances where, as here, he is accused of falsely disposing of a stock certificate after previously transferring his interest in same to a protected purchaser of the original certificate. Whether Smith, Hulsey and Busey's right to the issuance of stock, by reason of its possession of the original certificate, may be unaffected by the transfer of the replacement certificate to Moore² does not mean that he cannot be prosecuted for illegally disposing of the certificate under the terms of section 817.562.

As is clearly expressed in the first part of section 817.562(2)(b), a person may be prosecuted for fraudulently disposing of a security interest that is the subject of a security agreement if such person has "*no right of sale or other disposition of the property.*" (Emphasis added.) A disposition is defined as, among other things, "a

²Its right to receive full value for the certificate, moreover, as indicated from the discussion *infra*, is problematic.

transfer to the care or possession of another.” Merriam Webster’s Collegiate Dictionary 335 (10th ed. 1998). Moore obviously had no right to dispose of the certificate, which he had previously placed in possession of Smith, Hulsey and Busey; yet he falsely reported that it was lost or stolen and later exchanged the replacement for separate certificates which he sold. In my judgment, such acts constitute a disposition that is prohibited by the statute.

In deciding to affirm the lower court’s order of dismissal, the majority is essentially construing the terms of section 817.562 *in pari materia* with those of section 678.4051. Such a construction, however, is inapplicable “[u]nless [the] statutes have a common aim or purpose and scope, and relate to the same subject, object, thing or person.” Dep’t of Health & Rehab. Servs. v. McTigue, 387 So. 2d 454, 456 (Fla. 1st DCA 1980). The two statutes clearly serve different purposes, and the provisions of 817.562 should be enforced solely in accordance with their terms without reference to section 678.4051.

The latter statute, placed under part IV of chapter 678 of the Uniform Commercial Code (UCC), relating to the registration of investment securities, was enacted for the purpose of changing the law as it had previously existed, which had rendered ineffective the redemptions of original certificates following the issuance of replacement certificates, except as to the right of a purchaser for value without notice

to bring an action for damages. § 678.4051, Fla. Stat. Ann., UCC Comment 2 (West 2003). By reason of the revision, the corporation is now required to honor both the original and new certificates that are in the possession of protected purchasers unless an overissue results, in which event the purchaser retains only a right to an action for damages. Id. Although Smith, Hulsey may be a protected purchaser under civil law, this does not exonerate Moore, a person who obviously does not have the status of a protected purchaser, from criminal liability for his act of obtaining a replacement certificate under false pretenses and later profiting therefrom.

Because an order granting a motion to dismiss an information is subject to *de novo* review, Bell v. State, 835 So. 2d 392, 394 (Fla. 2d DCA 2003), we need give no evidentiary deference to any considerations that may have motivated the court's order. In my judgment, the lower court erred as a matter of law in its application of the law to the facts. I would therefore reverse the order of dismissal and remand the case for further proceedings.