



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WAGGONER CARR
ATTORNEY GENERAL**

July 8, 1965

Honorable R. L. Lattimore
Criminal District Attorney
Hidalgo County
Edinburg, Texas

Opinion No. C-462

Re: Whether a corporation court has jurisdiction on a complaint charging theft of personal property of the value of \$5.00 or under, where such property is stolen from a retail establishment under conditions defined by Article 1436e, V.P.C. (The Shoplifting Statute)

Dear Mr. Lattimore:

You recently requested an opinion of this office on the following question:

" . . . Where . . . property of the value of \$5.00 or under is taken under conditions which constitute shoplifting, as defined in Article 1436e, Vernon's Penal Code⁷ may the prosecution be instituted in Corporation Court under the misdemeanor theft statute, Article 1422, P. C.?"

Article 1436e, Vernon's Penal Code, is a special statute defining the offense of shoplifting. *Sullivan v. State*, 354 S.W.2d 168 (Tex.Crim. 1962). Article 1422, Vernon's Penal Code, is a general penalty provision of the ordinary theft statute, Article 1410, Vernon's Penal Code. Under Article 4, Vernon's Penal Code, a special provision controls over a general provision on the same subject, if there be a conflict.

"An examination of Article 1436e and Article 1410 reveals a difference in the essential elements of each offense. First, and most importantly, the Shoplifting Statute does not require the element of want of consent essential to a prosecution under ordinary theft. Further, the Shoplifting Statute requires that the person be on the retail business premises legally. Obviously

no such element is required under ordinary theft." Attorney General's Opinion WW-1478 (1962).

By thus comparing the provisions of these articles, it will readily be found that the elements of the offenses are quite distinct, while there may be one or more common to both, and that these articles define different offenses. This being true, there is no conflict which would impair either statute's validity, and the clear meaning of Section 7 of Article 1436e would apply, giving the State the right of election between the offenses in a proper case. This provision of the Penal Code reads as follows:

Article 1436e, Section 7.

"Sec. 7. Where property is obtained in such manner that the acquisition thereof constitutes both shoplifting and some other offense, the party thus offending shall be amenable to prosecution at the state's election for shoplifting or for such other offense as may have been committed by him."

Article 1423, Vernon's Penal Code, states that Article 1422 does not apply to theft of property from the person nor to cases of theft of any particular kind of property where the punishment is specially prescribed. Section 3 of Article 1436e provides for special punishment for violation of the Shoplifting Act. However, Section 7 of Article 1436e gives the State the election to prosecute an offending party for shoplifting or for such other offenses as may have been committed by him. It is the opinion of this office that if the State elects under Section 7 of Article 1436e to prosecute an offending party for theft under Article 1410, this election would prevent Article 1423 from applying and the punishment for violation of Article 1410 would be prescribed by Article 1422.

Jurisdiction for a violation of Article 1436e would lie in the County Court or District Court by reason of Section 3 thereof.

Jurisdiction for violation of Article 1410 would lie in either the Justice of the Peace Court or the Corporation Court if the property involved is of the value of five dollars or under. Article 60, V.C.C.P.; Article 5, Section 19 of the

Honorable R. L. Lattimore, page 3 (C-462)

Constitution of the State of Texas; Article 62, V.C.C.P., and Article 1195, V.C.S.

The Court of Criminal Appeals did not rule on the question presented herein in Sullivan v. State, supra. In the Sullivan case the State elected to try the accused under the Shoplifting Statute. Under these facts, the Court held:

"It is apparent that the legislature intended to enact a special statute defining the instant offense. It /Art. 1436e, P.C., Shoplifting/ controls over the general statute. /Article 5, Section 19, Texas Constitution and Article 60, C.C.P./"

It is, therefore, the opinion of this office that where property of the value of \$5.00 or under is taken under conditions which constitute either theft or shoplifting, the State may elect to try the accused either under the Shoplifting Statute in the County or District Court or under the misdemeanor theft statute in the Justice of the Peace or Corporation Court.

SUMMARY

Where property is obtained in such manner that the acquisition thereof constitutes both shoplifting and misdemeanor theft of property of the value of \$5.00 or under, the party thus offending shall be amenable to prosecution at the State's election for shoplifting or for misdemeanor theft. Where the State elects to prosecute for misdemeanor theft, jurisdiction of the complaint is in the Justice of the Peace or the Corporation Court.

Yours very truly,

WAGGONER CARR
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By: *Douglas H. Chilton*
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Honorable R. L. Lattimore, page 4 (C-462)

APPROVED:

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APPROVED FOR THE ATTORNEY GENERAL
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