



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Diversion of Stream: California Appellate Court Addresses Whether Individual Can be Convicted of Petty Theft

Arkansas Environmental, Energy, and Water Law Blog

10/04/2016

A California appellate court in a September 27th opinion addressed whether an individual could be prosecuted and convicted of petty theft of water because of his diversion of the natural course of a California stream. See *People v. Kenneth Ralph Davis*, 2016 WL 5390153.

A jury in 2014 had found Defendant Kenneth Ralph Davis ("Defendant") guilty of certain misdemeanors, one of which included petty theft (of water).

After a California Appellate Court affirmed the judgments of the lower court, the Court of Appeal, 3rd District, ordered the case's transfer solely:

...on the issue of whether Defendant could be prosecuted and convicted of petty theft of water.

Defendant argued that the crime of petty theft was inapplicable to his actions as a matter of law because the natural stream at issue was nuisance groundwater that the owner was diverting from its property. He further argued that the State of California has only a regulatory interest in use of these public waters that otherwise are not personalty that can be the subject of a larceny.

The opinion states that a sheriff's deputy conducted checks of a field of marijuana that Defendant had maintained. The deputy asked Defendant whether he was taking water from a stream. Defendant denied that he was doing so, showing the deputy a well on the property that supplied his water.

A neighbor disputed Defendant's account and took the deputy to what is described as a "makeshift well." The facts associated with this were described as:

...about 130 feet north of train tracks, on what was Union Pacific Railroad ("Union Pacific") property, there was a 2,500-gallon tank embedded in a large hole in the ground. Only the top of the tank was visible. It appeared that almost the entirety of water that was flowing from a train tunnel for about 80 feet along the north side of the tracks was being captured in a large PVC pipe to fill the tank. Some of the water continued spilling down what looked like it had been the water's previous streambed, which led to

Rich Gulch. Rich Gulch (in which water flowed intermittently to Lake Oroville) ran under the train tracks through a culvert about 100 feet away and 30 feet lower. A makeshift electrical panel powered a submersible pump in the bottom of the tank that sent the water in the tank uphill through more PVC piping to the marijuana field.

A warden identified riparian vegetation both above and below the diversion that would require a constant water supply. As a result, a watercourse was considered to be a stream flowing to Rich Gulch which was subject to state regulation. Defendant was stated to have failed to obtain permission from the State and railroad for the diversion.

Also referenced was a drainage system used to relieve hydrostatic pressure from an aquifer in the hill above the train tunnel. Collected water was discharged through the tunnel's entrance to a sluice box diverting water on the south side to the north side. The water was described as grayish (because it percolates through concrete).

An expert hydrologist for the prosecution who had investigated the site after removal of the tank concluded water flowed year round. It was also stated that the water used to flow below the diversion site because water-loving plants had grown below it. The hydrologist therefore believed it was a tributary to Rich Gulch streambed. However, defendant's expert hydrologist concluded there had not been an established waterway.

The prosecution argued in its closing argument in regards to the theft:

. . . in this case I have to prove beyond a reasonable doubt that the Defendant took possession of water, and it belonged to someone else. Well, who owns the water? We all own the water. But we don't get to do whatever we want with it. As people who live in the State of California, we have entrusted the water to the Department of Fish and Game. They control it on our behalf. They're the ones who give us permission to use it. And so, in terms of the Defendant not having consent, he would have to get permission from Fish and Game. They ultimately have the control over how our water is [used]. And we know he did not have the consent of the Department of Fish and Game to use this water.

The Defendant's counsel argued that this was discarded water seeping into the ground without forming a natural waterway.

The Court provided the following instruction to the jury in regards to the alleged theft:

The fish and wildlife resources of this state are owned by the people of the State of California and held in trust for the people of the state, by and through the Department of Fish and Game.

The Appellate Court noted that an essential element of larceny is the presence of personal property that is subject to ownership.

The Court agreed that the State of California does not have any possessory interest in the waters of the state (other than such riparian or appropriative rights it acquires under law). The Court rejected the prosecution's argument that while the State does not "own" the water, its authority over waterways is

sufficient to establish this element because this demonstrates Defendant's absence of a possessory interest.

The Court also noted that:

While the People may prosecute defendant for transgressing the state's regulatory police power. . . , they do not provide any authority to counter the above stated principle that their ability to regulate his behavior does not create any possessory interest in the water that constitutes larceny.

It also stated in regards to the railroad that it:

. . . had not itself captured any of the flowing water, and the creation of an irrigation system would not have effected a severance from realty had the railroad accomplished it . . . , a possessory interest superior to defendant did not exist when he diverted the water from the railroad's realty, and section 495 accordingly cannot apply as an alternative basis for this count.

The Court reversed the Defendant's conviction for petty theft.

[A copy of the opinion can be downloaded here.](#)