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CALIFORNIA

People v. Davis, 3 Cal. App. 5th 708 (Cal. Ct. App. 2016) (holding that the State of California could not convict a criminal defendant of simple larceny for capturing flowing water from a natural stream, because the state did not hold a superior possessory interest in water).

In September 2009, Kenneth Davis's neighbor told the sheriff that Davis diverted water from a stream to irrigate medical marijuana. The neighbor showed authorities a makeshift well and a 2,500 gallon tank buried nearby on a railroad company's property. The tank captured water that Davis used to irrigate his fields. In February 2010, the California Department of Fish and Game found that Davis's irrigation system drew from a stream that was part of the state's water system. Davis did not receive approval from the landowner or the state to create the diversion. As a result, prosecutors charged Davis with illegally diverting the natural course of a stream, as well as petty theft of water.

At trial, the jury found Davis guilty of both charges and a judge placed him on informal probation conditioned upon a ninety-day jail term. Davis sought review by the Appellate Division of Butte County, which affirmed the lower court's holding but later certified the case for transfer to the Court of Appeals at the defendant's request. On appeal, the court only considered whether a court could properly convict a criminal defendant of petty theft of water.

The court first discussed whether any party held complete ownership or a superior interest in the disputed water. To bring a larceny claim, the state must show that a party stole personal property subject to ownership. Larceny claims in California require that the victim has a possessory interest in the stolen property that is superior to the defendant's. In California, the public holds a collective vested interest in the state's water. This collective ownership of water is a legal fiction, called the public trust doctrine, in which the state is the public trustee of its resources for use by its people. Consequently, ownership rights are usufructuary and incorporated with the needs of others to use the available water resources. Further, because the state holds water in public trust, it is legally inalienable. The state cannot grant property rights to water. However, water can be owned if it is lawfully captured. If the captured water is then released, it again becomes part of the state's resource trust. Therefore, in common law, water could not be the subject of larceny because it would not be anybody's personal property.

The court found that the state had not demonstrated that it, nor any other entity, had ownership of the water that was superior to the defendant's ownership interest. Therefore, the charge was insufficient to support larceny. The railroad company who owned the land that the tank was placed on did not possess a superior interest because it made no attempt to capture the water and thus had not claimed ownership of the water. The court also rejected the state's argument that its regulatory powers under the public trust doctrine created a superior possessory interest. The court found that, while Davis may have violated California's regulatory powers, the state could not bring a larceny charge against him because its regulatory responsibility did not create a possessory interest in the water. Therefore, Davis's conviction was inappropriate because the state failed to meet the ownership or superior interest requirement of a larceny charge.

The court next addressed the state's claim that it could establish Davis's ownership through severance of the water from the property. The court stated that water may be held as personal property once it is severed from the land through capture and storage. However, water that is diverted for irrigation is not considered to have been severed and does not qualify as personal property. The prosecution claimed that a larceny charge could be brought according to precedent regarding the severance of oil. Severance of oil converted it to personal property and subjected it to a valid claim of larceny. However, the court found that Davis used the water from the tank for irrigation, which did not create a severance of the water and did not convert the water into personal property. Therefore, the prosecution's alternate claim was insufficient to bring a larceny charge.

Accordingly, the court reversed Davis's conviction for petty theft, with instructions to dismiss the count. It otherwise affirmed the judgment against Davis, and ordered an amended probation order.

Ryan Hull

COLORADO

Cty of Boulder v. Boulder & Weld Cty. Ditch Co., 367 P.3d 1179 (Colo. 2016) (holding that the water court correctly denied the County of Boulder's change of use application because it failed to meet its burden of proving an accurate historical consumptive use analysis).

Beginning in the early 1990s, the County of Boulder (the "County") entered into a series of transactions to acquire the Bailey Farm, a 290-acre property historically use for irrigated agriculture and gravel mining. The County aimed to develop the Bailey Farm into an open-space park featuring two ponds made from gravel pits filled with groundwater. The ponds would expose groundwater and increase evaporation, requiring the County replace lost water through an augmentation plan under Colo. Rev. Stat. § 37-90-137. To meet this requirement, the County filed an application in the District Court for Water Division No. 1 for underground water rights, approval of a plan for augmentation, a change of water rights, and an appropriative right of substitution and exchange. Each component was interdependently linked. The application hinged on approval of the change in water rights. The County sought to change fifty inches of its Martha M. Matthews Ditch surface water right ("MM water right"), used historically to irrigate the Bailey Farm (the "Bailey Farm Inches"), into an augmentation plan. Boulder and Weld County Ditch Company ("BW Ditch") opposed the County's application, claiming injury from the proposed change.

At trial, the County submitted two historical consumptive use ("HCU") analyses examining the Bailey Farm Inches to prove BW Ditch would not suffer injury. Both analyses included a prorated estimate that assumed previous users delivered the Bailey Farm Inches entire to 101 acres of the Bailey Farm. The County's first analysis assumed full delivery of all fifty Bailey Farm Inches to Bailey Farm from 1950 to 2000; however, BW Ditch records later revealed the HCU analysis overestimated actual consumption by thirty-seven percent from 1973 to 2000. As a result, the County supplemented the original HCU analysis with BW Ditch's correct numbers from 1973 to 2000 and the same estimated numbers for 1950 to 1972. The court cited three fatal deficiencies in the