

OPINION NO. 84-040**Syllabus:**

The act of knowingly inserting a stolen bank card into an automatic teller device and obtaining money therefrom without the authority of the cardholder does not constitute a violation of R.C. 2911.31, which prohibits safecracking.

To: Lee C. Falke, Montgomery County Prosecuting Attorney, Dayton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 31, 1984

I have before me your request for an opinion concerning whether an individual, who knowingly possesses a stolen bank card, inserts that card into an automatic teller device and obtains money therefrom without the authority of the cardholder has violated R.C. 2911.31.

R.C. 2911.31, defining the offense of safecracking, provides: "(A) No person, with purpose to commit an offense, shall knowingly enter, force an entrance into, or tamper with any vault, safe, or strongbox. (B) Whoever violates this section is guilty of safecracking, a felony of the third degree." See generally State v. Snowden, 49 Ohio App. 2d 7, 359 N.E.2d 87 (Clermont County 1976).

I note that R.C. 2911.31 is a criminal statute, and I cannot, as an executive officer, pass on the guilt or innocence of a particular individual. That authority is vested solely within the judiciary. I can only express my opinion as to whether a given set of facts, if proven in court, could constitute a violation of a criminal statute. See 1983 Op. Att'y Gen. No. 83-001. The following discussion of R.C. 2911.31 under the circumstances presented in your letter is rendered for informational purposes, and represents my analysis of R.C. 2911.31.

In interpreting R.C. 2911.31, I am aware of the well established rule of statutory construction that, "[s]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." R.C. 2901.04(A). All doubts in the interpretation of a penal statute are to be resolved in favor of the accused. State v. Conley, 147 Ohio St. 351, 71 N.E.2d 275 (1947).

I turn now to a consideration of whether the terms "vault," "safe," or "strongbox," as used in R.C. 2911.31, include an automatic teller device. Because of the rule of statutory construction set forth in R.C. 2901.04(A), these terms must be narrowly construed. In State v. Aspell, 10 Ohio St. 2d 1, 3-4, 225 N.E.2d 226, 228 (1967), the court, in interpreting the predecessor of R.C. 2911.31, stated:

[The words "safe" and "vault"], considered together, strongly suggest iron or steel containers ordinarily found in banking institutions or in business establishments, which are used for the storage of money, jewelry, other valuables and important papers and documents. One pictures a safe as an iron or steel depository for the safekeeping of assorted valuables and a vault as a large arched or square structure located in a protected area such as an underground basement and built of stone, bricks, concrete or steel, where a variety of valuables are usually stored. One dictionary definition of a vault is "a chamber used as a safe."

The court went on to discuss the term "depository box" which was subsequently replaced by the word "strongbox" in R.C. 2911.31. See 1971-1972 Ohio Laws, Part II, 1866, 1924 (Am. Sub. H.B. 511, eff. Jan. 1, 1974). The court noted:

Where the words, "safe," "vault," and "depository box" are conjoined, one must interpret "depository box" as related to the words which precede it.

A well-known legal maxim is "ejusdem generis," which literally translated means "of the same kind or species." So, where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterwards a term is conjoined having perhaps a broader signification, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms. . . .

. . . Of course, under the concept of criminal law obtaining in this state any substantial doubt as to the meaning of "depository box" must be resolved in favor of the [defendants].

And there may be merit to the argument. . . that a "depository box" as that term is commonly understood is a receptacle wherein valuables are placed for safekeeping by the owner to be reclaimed by him in kind. . . .

10 Ohio St. 2d at 4, 225 N.E.2d at 228. The court concluded that a cigarette vending machine and an open receptacle therein containing coins which had been deposited in the machine for the purchase of cigarettes were not encompassed within the terms "safe," "vault," or "depository box."

It is instructive to note that the Committee Comment to Am. Sub. H.B. 511 states in part:

The term "strongbox" replaces the term "depository box" since the former [earlier] term is broader on its face, and it was considered that the crime of safecracking as such ought to be restricted to containers designed primarily for the safekeeping of valuables, such as safes. . . .

Safecracking is viewed as a moderately serious offense, first because it usually involves a burglary or breaking and entering which is difficult to prove, and second because it requires some skill and

practice, which suggests that cracksmen can be considered "professional" criminals.

Thus, the term "strongbox" has been deemed to be narrower than the term "depository box" which was interpreted in Aspell.

In State v. Stotridge, No. 916 (Ct. App. Ross County Nov. 22, 1982), the court considered whether a cash register is a "strongbox" for purposes of R.C. 2911.31. Citing the Committee Comment to Am. Sub. H.B. 511, as well as Aspell, the court stated:

The State admits a cash register is not a "vault or safe," yet contends it is a "strongbox." Applying the rule of ejusdem generis and relevant case law and statutes, we disagree. Webster's Third International Dictionary defines "strongbox" as "a chest or case for money or valuable items made very strongly: a small safe." (Emphasis added.) Webster's, defines a cash register as, "a business machine that records the amount of money received that usually has a money drawer, that exhibits the amount of each sale, and that often performs related operations." The Synonym Finder (1965), Rodale Books Inc., lists "strongbox" as a synonym for "safe" or "vault" (pgs. 1082 and 1206), yet nowhere is the word "cash register" listed as synonymous with any of the three terms in the statute.

Appellant also presented expert testimony at trial that a cash register is not considered a vault, safe or strongbox. The expert testified that a cash register may be opened without damage due to a hidden button. The expert testified that cash registers are not made as strong as safes or vaults, or for the same purpose.

Although automatic teller devices may be constructed in a manner similar to the construction of safes and vaults, see 12 C.F.R. Part 21, Appendix A (minimum standards for security devices for national banks), the use of an automatic teller device is not similar to the use of a vault, safe, or strongbox. While safes, vaults, and strongboxes are used for the storage or safekeeping of money, jewelry, valuables, and important documents, an automatic teller device is an electronic bank facility which provides for the electronic deposit, withdrawal, and transfer of funds in bank customers' accounts, see 15 U.S.C. §1693a(7), 1984 Op. Att'y Gen. No. 84-039. See also 12 C.F.R. Part 21, Appendix A (distinguishing among vaults, safes, safe deposit boxes, and automated paying or receiving machines). Although someone who possesses a stolen bank card may insert the card into an automatic teller device and, if he follows the appropriate steps, obtain money therefrom, such action is different from gaining access to a safe, vault or strongbox and obtaining access to the money or valuables stored therein.

Although federal law is not determinative as to what constitutes an offense under state law, it is instructive to examine federal law concerning those actions which constitute an unauthorized electronic fund transfer. In the technical vernacular of modern banking, the insertion of a card into an automatic teller device, the transmission of the access code, and any subsequent withdrawal of funds is termed an "electronic fund transfer." 15 U.S.C. §1603a(6) provides in part:

the term "electronic fund transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone.

Any such transfer without authorization is termed an "unauthorized electronic fund transfer." 15 U.S.C. §1693a(11) provides:

the term "unauthorized electronic fund transfer" means an electronic

fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit, but the term does not include any electronic fund transfer (A) initiated by a person other than the consumer who was furnished with the card, code, or other means of access to such consumer's account by such consumer, unless the consumer has notified the financial institution involved that transfers by such other person are no longer authorized, (B) initiated with fraudulent intent by the consumer or any person acting in concert with the consumer, or (C) which constitutes an error committed by a financial institution.

See 15 U.S.C. §1693g (setting forth the respective liabilities of consumers and financial institutions for unauthorized electronic fund transfers); 15 U.S.C. §1693n (setting forth criminal liability for certain fraudulent actions); 15 U.S.C. §1693q (setting forth the relation between state and federal law as to electronic fund transfers). By comparing R.C. 2911.31 and 15 U.S.C. §1693a(11), it is apparent that two different types of conduct are addressed.

In sum, because the terms "safe," "vault," and "strongbox" must be strictly construed against the state, and in light of judicial interpretations of these terms, I conclude that insertion of a stolen bank card into an automatic teller device and the obtainment of money therefrom without the authority of the cardholder is not an entrance into a vault, safe, or strongbox for purposes of R.C. 2911.31.¹

It is, therefore, my opinion, and you are advised, that the act of knowingly inserting a stolen bank card into an automatic teller device and obtaining money therefrom without the authority of the cardholder does not constitute a violation of R.C. 2911.31, which prohibits safecracking.

¹ This opinion does not, however, address whether the specific acts about which you ask may constitute a violation of other sections of the Revised Code. See, e.g., R.C. 2913.02 (theft).