

Research on the Legal Nature and Judicial Application of The Theft and Usage of Credit Cards

-- Case Commentary on the Theft Case of Kong and Yang

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Abstract

Article 196 of the Chinese criminal Law provides for the crime of credit card fraud, in which the third paragraph stipulates: "Anyone who steals a credit card and uses it shall be convicted and punished by the provisions of Article 264 of this Law." The nature of this provision is controversial. How to apply in judicial practice is not consistent. This paper, using a specific case for entry, focuses on the analysis of the advantages and disadvantages of the application of the doctrine, to further clarify the nature of the provisions of the paragraph, and optimize the judicial application in the future.

Keywords

Theft and usage of credit cards; Theft; Credit card fraud; Amount determination.

1. Introduction: Comment on the Basic Facts of The Case

Kong and Yang conspired to steal the credit card of his friend Zhang; if any money should be divided equally between the two. Because the three often hang out together, Kong and Yang soon got Zhang's ICBC credit card password. On the night of April 23, 2017, Kong and Yang, while Zhang was drunk, took Zhang's credit card from Zhang's wallet. After two days, Kong and Yang saw that Zhang did not realize that the credit card was missing, so they decided to take the money from the card. Kong, Yang wearing hats and sunglasses camouflages to find a remote ATM. Kong was responsible for withdrawing money, and Yang was outside for the lookout. Kong found that the credit card had 75,000 yuan, but only took out 20,000 yuan, and told Yang 20,000 yuan was all there was, and shared 10,000 yuan with him. After Yang left, Kong, in different ATMs, took out all the remaining 55,000 yuan from the credit card.

2. The Legislative History of The Theft and Usage of Credit Cards

"Theft and usage of credit cards ", first appeared in the "Supreme People's Court reply on Wang Ping's theft of credit cards fraudulently ". The reply stated: "The defendant stole the credit card and then imitated the signature of the card owner to make purchases and consumption, which is the process of converting the uncertain value contained in the credit card itself into concrete property, and is a continuation of the crime of theft, so it is not a separate crime of fraud, and should be characterized as a crime of theft". Subsequently, in the Decision of the Standing Committee of the National People's Congress on the Punishment of Crimes Against the Financial Order, "stealing a credit card and using it" was stipulated at the end of the article on credit card fraud. Subsequently, the criminal law in 1997 will be directly incorporated into the criminal law article 196, so it can be considered that the provisions of the interpretation of the above.

3. The Academic Viewpoints and Commentaries

3.1. Academic views

3.1.1. The essence of the provision is the legal fiction of credit card fraud

The view that "theft and the usage of credit cards " should be recognized as a legal system, and the main reason is that the theft of credit cards and the use of behavior, essentially fraudulent use of other people's credit cards, should be recognized as credit card fraud, and the legislation stipulated it as a theft, was a legal fiction based on a specific economic and social development at the time.

3.1.2. Consider the provision as an implicated offense

The view is that the act is made of two components: theft of credit cards and the use of them; theft is the means of behavior, and the use of behavior is the purpose; the two acts are related. Therefore, it is an implicated offense.

3.1.3. The use of credit cards after the theft is not punishable aftermath

The theft of credit cards to a certain extent to obtain control of property, the subsequent use of behavior is the further extension of the theft and, therefore is not punishable after the act.

3.1.4. The conduct specified in the paragraph is considered to be larceny by its very nature.

The view is that the theft of a credit card and its use is itself a theft and that the object of the theft is a property interest. The credit card itself is of little value, but it can be used on behalf of a certain value of money, in this sense, the theft of another person's credit card and the use of it, is the same as obtaining the right to use a certain value of money.

3.2. Commentary of Opinions

The provisions of this paragraph were found to be inappropriate as legal fiction by the author. The point of view believes that the theft of credit cards only does not constitute a crime, because the use of behavior is the essence of the fraud. The theft of a credit card and its use includes two acts, the theft of a credit card and the use of a credit card, and this viewpoint does not adequately evaluate the perpetrator's act of theft. Article 264 of the Criminal Law stipulates that theft with a weapon includes two behaviors: carrying a weapon and theft. Carrying a weapon does not necessarily constitute a crime, but the act of carrying a weapon must be taken into account in the conviction. The view of legal fiction ignores the harmfulness of the act of theft itself in stealing a credit card and using it.

The argument of viewing the act as an implicated offense is also unreasonable. The implicated offender refers to the perpetrator out of a final criminal purpose to implement several criminal acts (purpose behavior, method behavior, or result behavior) and respectively commit different crimes of the crime form. First of all, in the simple theft of credit cards, the value of the credit card itself does not reach a certain amount, and does not constitute a crime; therefore does not meet the prerequisites for the formation of implicated offense. Secondly, the two behaviors do not have a typical feature. In most theft, the perpetrator generally steals money and other direct-use property. Stolen credit cards are usually deserted (because thieves do not know the password and can not use it). Fraudulent use of credit cards does not necessarily involve theft of credit cards. Therefore, the theft of credit cards and subsequent use does not have a necessary connection.

The notion of the use of credit cards after the theft is not punishable aftermath has similar problems with the implicated offenses because the simple theft of credit cards if not up to a certain amount does not constitute a crime, and the use of behavior is not appropriate to be recognized as an unpunishable after the act.

The view that the object of the offence under this paragraph is a property interest is reasonable, but needs to be further developed. This issue will be explained below.

4. Application of the Viewpoint in the Case

4.1. Application of the legal fiction viewpoint in the case

If the "theft of credit cards and use" is understood as a legal fiction, it is unreasonable to apply to this case. If the provisions are of legal fiction, then the theft of credit cards is the act of preparation for the crime, followed by two withdrawals as the implementation of the act. The first withdrawal of 20,000 yuan, the two constitute a joint crime is undisputed. The second withdrawal of 55,000 yuan is not a joint crime, but Kong alone, because at this time the two do not have a joint criminal intent. Because the behavior of the perpetrator even if the act with the common conspiracy in the constituent elements of abstract conformity, but if the factual elements do not have the same, may also be established in excess of the limit; only two not only in the constituent elements of abstract conformity, but also in the factual elements of the same specificity, belongs to the same criminal act. To recognize the amount of the crime from the point of view, the case of Yang's theft amount would be 20,000 yuan, and Kong's theft amount would be 75,000 yuan. Yang and Kong's common theft of credit card behavior of all the assets of the card with the infringing nature of legal interests, only Yang to obtain 20,000 yuan is responsible for the evaluation is obviously insufficient.

4.2. The application of the view that the object of the crime is a property interest in the case

If it is considered that the object of crime under this paragraph is property interests, then the paragraph is a provision of attention. The following section illustrates the application of this viewpoint in the cases mentioned above.

4.2.1. The time of commencement

The time of commencement of the act of stealing a credit card and using it is the time when the perpetrator poses a real and imminent danger to the property interest. Knowing the password and stealing a credit card, or having other circumstances under which a credit card can be used or borrowed at any time after stealing the credit card, can be recognized as the commencement of the crime of theft.

"Theft of a credit card and its use" can be divided into the act of theft and the act of use. The theft of a small number of credit cards does not constitute a crime if it does not meet the criteria for the filing of a case of theft. Banks provide savings services in the legal relationship, the bank is the debtor of the cardholder, and the cardholder, by the use of credit cards, realizes the process of a claim; banks provide credit lending services in the legal relationship if the parties to the overdraft use of credit cards are the lending relationship. The property interest will not change because of the transfer of credit card possession, the cardholder does not necessarily lose the claims against the bank or increase the debt to the bank. In the absence of a password, the interests for the time being face no specific real danger, and the perpetrator in fact can not readily obtain a property interest. At this point, the theft cannot be considered a commencement of the act.

If the perpetrator knows the password of the credit card or the card can be used at any time by other means, it can be considered that there is a concrete and real danger to property interests, because the bank usually does not verify the information of the other party when the user uses the credit card. And in the absence of fault on the part of the bank, the loss is borne by the cardholder. The loss of the victim in a property-based crime needs to be homogeneous with the property acquired by the perpetrator, so the ultimate victim is the cardholder. If the perpetrator did not know the password of the credit card at the time of the theft, and then committed the

act of obtaining the password, the act of obtaining the password can be recognized as proceeding. The opposite point of view may be that: the perpetrator steals the credit card, the credit card itself is of small value, does not constitute a crime, know the password is not necessarily used; and the cardholder can always lose the card, and does not necessarily cause loss to the owner of the credit card. Some articles hold a similar view, such as "real name train ticket amount should not be included in the amount of theft". The reason is that the name of the train ticket can be loss reported to avoid the loss. The same, the cardholder and the bank's debt relationship still exists, the claim has not disappeared and can be saved through the bank and other means and recover the loss. However, since the perpetrator has begun to implement the criminal law sub-article of the constitutive elements of the provisions of the act and the legal interests of the real and imminent danger, then it should be considered that the theft has begun (this part of the paper only on the beginning of the discussion, does not involve the determination of the amount of theft). Whether the perpetrator finally obtained the property is the issue of criminal attempt. Whether or not the report on credit card loss, is the cardholder's remedial behavior after the fact, legal infringement should be the behavior of the time rather than after the point of view of the investigation. Specifically in this case, the two found a way to know the victim's password on the credit card and then implemented the theft behavior, which can be considered that these two have begun to implement the crime.

4.2.2. The object and the amount determination of the crime

Kong, Yang, for the object of the crime of property interests in the credit card. The two, although have no accurate knowledge of the amount of the card balance, but there is a generalized, abstract intention. The two together intentionally proceeded to commit the crime, part of the act of full responsibility, the amount of the crime for the card balance of 75,000 yuan. Kong was found guilty of completion theft of 75,000 yuan, and Yang was found guilty of completion theft of 20,000 yuan and attempted theft of 55,000 yuan (this amount will be explained below).

The misperception of the funds on the card did not defeat Yang's intent to steal. Theft intent should be judged by the mental attitude at the time of the act, the perspective of hindsight is not objective. Assuming that Yang and Kong conspired to steal Zhang's safety and then split the cash in the box. Afterward, they agreed that Kong would destroy the evidence. Kong in the destruction of incriminating evidence found that there were other properties in the safe deposit box. Kong took the property for himself behind Yang's back. Whether Yang knew it or not, it had objectively violated the owner's possession of the safe and its contents. The object of the joint theft by Kong and Yang was the entire safe, and what was in the box and how it was divided did not affect Kong's and Yang's intent to steal the contents of the box. The case is similar. Although similar, there are differences. Theft of physical objects, the victim loses possession, the perpetrator establishes a new possession, and it should be considered that both people have accomplished the crime. However the transfer of credit card possession, as mentioned above, does not necessarily lead to the loss of property interests, only to realize the transfer of property interests can be considered as attempted theft. Yang did not participate in the subsequent use of credit cards due to reasons other than will, so the 55,000 yuan of responsibility for the attempt only. At the same time, we need to recognize the amount that should be considered when the subjective awareness of the perpetrator. Because theft is an intentional crime, not strict liability. The so-called strict liability refers to a kind of criminal liability without asking about the subjective fault, that is, the composition of certain crimes does not require the subjective elements of the general composition of the crime, as long as the behavior of the perpetrator in line with the provisions of the law, or lead to a certain result of the law, can be prosecuted or convicted and punished. The amount of determination should take into account the possibility of subjective awareness of the perpetrator, which can be combined with the theft of the object of the life situation and other objective circumstances for judgment. For example, perpetrator A knows friend B's bank card password and planned to

steal it; A heard that B had tens of thousands of dollars in deposits, but after the theft inquiries found that the card had millions of deposits in it. At this point, millions of dollars should not be recognized as the amount of attempt. From the point of view of the case, the amount of the card should be within the scope of Yang can be recognized.

4.3. The comparison between the application of two points of view

4.3.1. The advantages and disadvantages of the application of the two points of view

In the legal fiction view, as mentioned above, the problem lies in the evaluation is not sufficient, ignoring the specific circumstances of the social harm of theft. But the point of view in the amount of determination on the operation is stronger. Attention to the provision's point of view can be fully evaluated by the perpetrator of the harmful act, but the amount of subjective awareness of the perpetrator may be difficult to judge, so the application of the law brings difficulties.

4.3.2. Comparison of sentencing

According to "the Supreme People's court, the supreme people's procuratorate on the handling of criminal cases of theft of the interpretation of the law on several issues" article 12, paragraph 2 of the provisions: "theft both completed and attempted, respectively, to reach a different range of penalties, should be in accordance with the provisions of the heavier penalty; to reach the same range of penalties, to the crime of theft of the penalty for the completed. " The Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Article 12 of the Criminal Law provides a method of comparing the severity of statutory penalties.

According to the view of legal fiction, Yang is only responsible for 20,000 yuan, which is a relatively large amount. According to the point of view of the Attention Provision and the above judicial interpretation, Yang's attempted theft of 20,000 yuan and attempted theft of 55,000 yuan, Yang should be punished for attempted theft of 55,000 yuan, and the theft of 20,000 yuan should be taken into account as a sentencing circumstance. Theoretically, the latter sentence is heavier than the former.

5. Conclusion: Optimization of The Path of Legal Application

This paper believes that the point of view of the attention provision is more reasonable compared to the point of view of the legal fiction. This paper tries to give suggestions for the application of law.

The Interpretation of the Standing Committee of the National People's Congress on the Provisions of the Criminal Law Concerning Credit Cards has already defined the definition of credit cards: electronic payment cards issued by commercial banks and other financial institutions that have all or part of the functions of consumer payment, credit facilities, transfer and settlement, and cash deposit and withdrawal, etc. The owner of the credit card has stored in the card all or part of the functions of the card. There is no doubt that the money stored in the card by the owner of the credit card can be used as the object of crime. For the debit amount that has not yet been used, that portion cannot be included in the amount of the crime. This is because the object of the theft must already exist. The debit amount has not yet been used, the debt relationship has not occurred, and the property interest that is the object of the theft does not exist. In determining the amount of the crime of theft and the use of savings cards and other non-borrowable credit cards, the part that has been used for the attempt, and by the provisions of the heavier penalty, to reach completely. the same range of penalties, to be punished by the theft of the crime of attempted. The same applies to the deposit portion of a credit card with a debit or credit function. The borrowing part includes only the actual use of the amount and should include the interest generated by the borrowing part because the

perpetrator of the theft objects to property interests. In addition, it should be noted that the part of the failure to attempt needs to be combined with the subjective understanding of the perpetrator to make a comprehensive judgment.

5.1. The use of their own use and the use of other people

At present, China's laws have not been "theft of credit cards and use" in the use of a clear definition. Use can be the perpetrator of their own withdrawals, consumption, etc.; can also be stolen credit cards with passwords paid or unpaid for others to use. The behavior of their own use and handed over to a third person to use for the loss of the victim's property is not essentially different. Changes in the law on loan fraud can be a good response to this point: unit loan fraud, the specific implementation of the individual to the crime of loan fraud. The law does not pay attention to whether the proceeds of loan fraud are used by the perpetrator, the perpetrator will be the proceeds of crime to a third person (unit) use does not affect the establishment of the crime. Theft of credit cards and the use of the use of the same. At the same time should recognize the use of credit card theft proceeds of the perpetrator, if the prior conspiracy constitutes the theft of credit cards and the use of complicity; if not conspiracy constitutes the crime of credit card fraud.

5.2. The use behavior including the use of credit cards tied to mobile payment software

"Theft of credit cards and use" in today's mobile payment popularization in the context of the times easily with the "Supreme People's Court, the Supreme People's Procuratorate on the handling of obstruction of credit card management of the criminal case of specific application of the law on several issues of the Interpretation of the second paragraph of Article 5 ("stealing, bribing, fraudulent or other illegal means of obtaining the credit card information of others. The act of "stealing a credit card and using it" was mistakenly recognized as fraudulent use of a credit card.

Between July 5 and July 9, 2016, Defendant Chen Jiaying took a cruise on the Quantum of the Seas to Japan with Victim Jin Siyi. During this period, Defendant Chen Jiaying, without the victim's knowledge, stole a credit card and used the victim's verification code to bind the victim's Agricultural Bank of China (ABC) card with the victim's card number 622848038xxxxxxxxxx using her own WeChat, and transferred the funds of the card in the amount of RMB 19,800 into four different WeChat accounts and recharged her mobile phone with RMB 100, which was the same amount of money that she had used to pay for her mobile phone. The total amount of money involved was RMB 19,900 yuan. After use, the credit card was returned.

The value of the credit card itself is practically negligible, and the possession of the credit card and its password is already considered as a start. In this case, the binding behavior has gained control of the bank card. At the same time, Chen Jiaying's use of behavior appears to be the use of other people's credit card information, but the essence of the ordinary withdrawal or consumption is not materially different. The essence of the use of credit cards is not simply the use of the credit card itself, because even ordinary withdrawals or credit card consumption, also need to use the information in the credit card. WeChat pocket money is virtual currency. Chen Jiaying's WeChat transfer to other WeChat accounts is using the balance of the bank card to recharge other WeChat accounts with change. It is a direct use of the card's funds. Chen Jiaying's first theft of credit cards, after the use; later put back the credit card behavior does not affect the attempted theft, it is a cover-up of the previous theft. The essence of the entire criminal act is still the infringement of the legal interests of property and therefore should be recognized as theft.

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