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**STATE OF VERMONT
OFFICE OF THE CHITTENDEN COUNTY STATE'S ATTORNEY**

MEMO

TO: Chittenden County Chiefs of Police
FROM: Sally Adams, Chief Deputy State's Attorney
DATE: June 27, 2022
RE: Operation without Owner's Consent and Possession of Stolen Property cases

Chittenden County has seen an increase in motor vehicle thefts in recent months. As a result, your respective agencies have been submitting a larger number of cases to our office for prosecution. We have noticed a pattern when reviewing these cases which make it difficult, if not impossible, to establish probable cause for the offenses let alone sustain a conviction at trial by proving the offense beyond a reasonable doubt. To assist officers in their investigation and the drafting probable cause affidavits, we are providing this memo as guidance on the essential elements and applicable case law of Operation without Owner's Consent and Possession of Stolen Property cases.

Operation without Owner's Consent

The essential elements of this offense are:

- (1) the Defendant;
- (2) took, obtained, operated, used, or continued to operate a motor vehicle that belonged to someone else;
- (3) the Defendant did not have the owner's consent; and
- (4) they acted knowingly.

The essential element that a person must have acted knowingly requires the State to prove that they did not act inadvertently, or because of mistake, or by accident. A jury may find a person acted knowingly if they were **aware** that they were taking, obtaining, operating, using, or continuing to use the vehicle without the owner's consent.

Possession of Stolen Property

The essential elements of this offense are:

- (1) the Defendant;
- (2) the property was stolen property;
- (3) the Defendant possessed the property without an intent to restore it to its owner;
- (4) the Defendant knew that the property was stolen at the time they possessed it; and
- (5) at that time the property had some value.*

The essential element that a person must have known that the property was stolen at the time they possessed it requires the State to prove that they **actually knew** that the property was stolen.

The Vermont Supreme Court has held that a conviction that requires a "knowing" element cannot be sustained when "the only evidence of guilt is [an] inference of knowledgeable possession." *State v. Scales*, 2019 VT 7, 209

Vt. 425, 206 A.3d 1263. In the context of Operation without Owner's Consent and Possession of Stolen Property, the State needs to show more than proximity to the stolen vehicle to establish this essential element. We need to show that the person **actually knew** they did not have the actual owner's consent to take, obtain, operate, use, or continue to use a vehicle or the person **actually knew** that the vehicle was stolen. It is not enough to that someone was in possession of a stolen vehicle. There must be some evidence the suspect had actual knowledge that it was stolen. It is not enough to show that a person "should have known" they didn't have consent to use the vehicle or "should have known" that the vehicle was stolen; we must prove actual knowledge. See *State v. Sargent*, 156 Vt. 463, 594 A.2d 401 (1991).

In a lot of these cases, the affidavit of probable cause outlines the following facts: a person realizes their vehicle is stolen and report it to police. Weeks later the vehicle is located, and a suspect is in the vehicle either operating it or using it as a home. Without more information, State is unable to prove either Operation without Owner's Consent or Possession of Stolen Property. The fact that they are operating or using the car and it is stolen is not a crime. The fact that they are in possession of a piece of property that was reported stolen is not a crime. The fact that DNA evidence confirms that they operated the car or were in the car is not enough to prove these two offenses.

The State must prove that they knew they did not have consent to operate the car to charge Operation without Owner's Consent. An example of how we can prove that is by showing that the suspect was the person who actually stole the car. Another way we can prove that is by obtaining a statement from the suspect about how they came into possession of the car, with follow up interviews that show that their story is false or contrived. "Although [a] defendant is not required to explain his possession of stolen goods, an explanation 'shown to be contrived and false' can be taken as evidence of guilty knowledge." *State v. VanDusen*, 166 Vt. 240, 243 (1997). A probable cause affidavit that is silent on how the person obtained the vehicle is insufficient. Further, a probable cause affidavit that outlines the suspect's statement that they purportedly obtained permission from someone who they thought was the owner of the vehicle is insufficient without further investigation into their version of events to show the falsehood.

Similarly, the State must prove that they had knowledge that the car was stolen when they were in possession of it to charge Possession of Stolen Property. An example of how we can prove that is by showing that the suspect was the person who actually stole the car. Or, again, statements from the suspect that are conflicting or false coupled with follow up interviews that show the falsehood, is circumstantial evidence of actual knowledge. A person who provides conflicting statements about where they obtained the stolen property or how long they had it allows a fact finder to infer that the suspect knew or believed the property was stolen. *VanDusen*, 166 Vt. At 243.

Please disseminate this memo to officers in the field who are conducting these investigations. Our office does not want to decline these cases or return cases to your officers for more work months after the initial investigation. That does nothing to address the offender's behavior and does nothing to address the direct harm and major inconvenience caused to members of our community who are victimized. Our hope in providing this information is that it assists our law enforcement partners in conducting thorough and complete investigations that establish the required elements of these crimes in order to meet our mutual goals.

I'm happy to discuss in further detail if necessary. As always, please don't hesitate to reach out with questions.

Thank you.

* Please remember to include a monetary value of the property that was stolen. While we all assume that most cars are worth more than \$900, without an estimated value included in the affidavit, we must charge the offense as a misdemeanor.