IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 091945

MIHAI GHEORGHIU,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

This is an appeal of the judgment of the Court of Appeals of Virginia affirming and reversing, in part, the March 9, 2007 judgment of the Circuit Court of Arlington County. Mihai Gheorghiu was convicted in a five-day jury trial of 36 counts of credit card theft in violation of Virginia Code § 18.2-192 (case numbers CR05-1231 through CR05-1240, CR06-453 through

CR06-469, and CR06-752 through CR06-760); eight counts of credit card forgery, in violation of Code § 18.2-193 (case numbers CR06-441 through CR06-448); five counts of identity theft, in violation of Code § 18.2-186.3 (case numbers CR05-1241 through CR05-1243, CR05-1247, and CR05-1248); three counts of credit card fraud, in violation of Code § 18.2-195 (case numbers CR06-449, CR06-451, and CR06-452); and one count of possession of burglarious tools, in violation of Code § 18.2-94 (case number CR06-440). (App. 101-206). All told, Gheorghiu was convicted on 53 counts. The jury sentenced him to a total term in prison of 117 years and 6 months, but the trial court suspended all but 20 years. (App. 1988).

Gheorghiu appealed his convictions to the Court of Appeals of Virginia. In the notice of appeal, Gheorghiu referenced CR05-1230 through CR05-1249.[1] On April 13, 2007, more than 30 days following judgment, Gheorghiu filed an amended notice of appeal listing case numbers CR06-440 through CR06-449, CR06-451 through CR06-469, and CR06-752 through CR06-760. After briefing and argument, the Court of Appeals dismissed the appeal with respect to the convictions in the amended notice

[1] Gheorghiu's reference to case numbers CR05-1230 and CR05-1249 was erroneous, as was his inclusion of case numbers CR05-1244 though CR05-1246, since he was not convicted in these cases.

of appeal and otherwise affirmed the trial court in a published decision on January 20, 2009. Gheorghiu v. Commonwealth, 53 Va. App. 288, 671 S.E.2d 407 (2009). See Rule 5A:6 and 5A: 3.

On January 30, 2009, however, Gheorghiu filed a petition for a rehearing and a motion for a delayed appeal. The Court of Appeals withdrew the opinion rendered on January 20, 2009 and granted Gheorghiu's appeal in its entirety on March 4, 2009.

After additional briefing and argument, the Court of Appeals issued a published decision on August 25, 2009, reversing and dismissing Gheorghiu's conviction for possession of burglarious tools (CR06-440), but otherwise affirming the trial court. One judge concurred, in part, and dissented. Gheorghiu v. Commonwealth, 54 Va. App. 645, 682 S.E.2d 50 (2009). (App. 206A-206LL).

On February 24, 2010, this Court awarded Gheorghiu an appeal on the two assignments of error quoted below:

ASSIGNMENTS OF ERROR

I. THE COURT OF APPEALS ERRED IN HOLDING THAT VENUE WAS PROVED FOR SEVERAL IDENTITY THEFT AND CREDIT CARD FRAUD INDICTMENTS.

II. THE COURT OF APPEALS ERRED IN REJECTING A CLAIM, NOT RAISED IN THE TRIAL COURT, THAT VENUE WAS NOT PROVEN FOR VARIOUS CREDIT CARD THEFT INDICTMENTS GIVEN THAT DIRECTLY CONTROLLING AUTHORITY IN EFFECT AT THE TIME HAS NOW BEEN OVERRULED.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT VENUE HAD BEEN PROVED FOR INDICTMENT 05-1243 ALLEGING IDENTITY THEFT AND FOR INDICTMENT 06-449 ALLEGING CREDIT CARD FRAUD?

II. DID THE COURT OF APPEALS ERR IN REJECTING A CLAIM THAT VENUE WAS NOT PROVEN FOR VARIOUS CREDIT CARD THEFT INDICTMENTS, BASED ON COUNSEL'S FAILURE TO OBJECT, WHEN DIRECTLY CONTROLLING AUTHORITY IN EFFECT AT THE TIME HAS NOW BEEN OVERRULED?

STATEMENT OF FACTS

Mihai Gheorghiu, the defendant, and a passenger, identified as Christenel Mihai Gheorghiu, left New York in a Chevrolet Trailblazer on September 20, 2005. (App. 1058). Even though the truck was registered to Costel Onofrei, the defendant opened the account for an E-Z Pass transponder, affixed to the dash, and paid for it with a debit card from

Maspeth Federal Savings Bank in July, 2005. (App. 1055-1056, 1994-1996).

The transponder established that the truck passed through the Holland Tunnel on the New Jersey Turnpike at 1:30 p.m. on September 20, 2005, crossed the Delaware Memorial Bridge at 3:00 p.m., and the Baltimore Harbor Tunnel at 4:30 p.m. (App. 1059-1060).

Once in Virginia, Gheorghiu and his passenger went first to Arlington County and charged a meal at a restaurant with the defendant's valid credit card. (App. 1380). Later, around 9:00 p.m., using the same credit card, Gheorghiu paid for a room at the Red Roof Inn in Alexandria, about six miles south of Arlington County. (App. 852-853, 1380, 1387). Ellen Azu, the manager, testified the two men called late and were "really desperate for a room," but she was sold out. (App. 853). When she realized that some of her customers had checked out that night, Azu told the men she could clean a room and have it ready by the time they arrived. (App. 853).

Unsure of the time she had seen them in the lobby checking out the following morning, Azu testified it was no later than noon because the staff checks rooms at noon and the men were gone. (App. 855).

Around 8:00 a.m. that same morning, September 21, 2005, a program file that "interface[s] the computer with the remagger" was accessed from Gheorghiu's laptop. (App. 1411-1412). This software program was necessary to operate the remagger. (App. 1412). A remagger is a "device that allows you to read and write data to the magnetic strip on the back of a plastic card." (App. 1392). In Citi Group cards, there are three lines of data on the "magstrip" of the credit card. (App. 1499). Other files were also accessed on the laptop "around 9:00 [a.m.], just before 10:00 [a.m.], "but there was "little or no activity until about 2:20, 2:30 in the afternoon." (App. 1416).

About 11:30 a.m., Gheorghiu stopped at an office supply store in Alexandra and charged a global positioning device and 30 compact discs with a stolen credit card number belonging to cardholder Rick Antonoff. (5362-1889-5774-6591). (App. 880; 1594-1595; 2005).

Next, about 11:45 a.m., Gheorghiu and his passenger went to a discount store, also located in Alexandria, and presented the same stolen credit card number used at the office supply store a few minutes earlier in an unsuccessful attempt to buy a $300 gift card (along with a pack of gum and drink). (App. 906-907). They tried a second card with a stolen number

belonging to Iris Keltz, but that attempt failed as well. (5490-3513-2093-9088). (App. 905-907; 2146). Gheorghiu's passenger was video-taped at the counter during the transaction. (App. 910).

Very soon after, around noon, Gheorghiu was back in Arlington County at a computer store. He charged a laptop computer for about $2,000 with a second stolen credit card number belonging to Iris Keltz. (3725-412357-11010). (App. 1043). Gheorghiu's name was embossed on the front of the plastic card, but the number in the magnetic tape belonged to Keltz. (App. 1039; 1472-1473; 2146).

Testifying at trial on September 13, 2006, Iris Keltz said she lived in New York and was never in Virginia. (App. 1473). She also testified she did not know Gheorghiu or that he was using her credit card numbers until an Arlington County detective called her. (App. 1473). On talking to the detective at the time, she was "a little bit shocked" because both cards were in her wallet, a Master Card and an American Express. (App. 1474-1475). She kept the cards in her wallet, did not "generally leave [her] wallet around," and did not "give them out to anyone." (App. 1476).

Similarly, Gerald Kent, a resident of Bucks County, Pennsylvania, had possession of his credit cards on September 21, 2005 and was

unaware Gheorghiu was using them until the credit card issuer called. (App. 1464; 1466; 1469).

After charging the first laptop in a computer store in Arlington County with Keltz's stolen credit card number, Gheorghiu and his passenger returned to the same restaurant in Arlington County where they had charged their supper the night before with Gheorghiu's valid card. (App. 931). Using the same stolen credit card number from Keltz, the men, about 1:00 p.m., consumed two bottled waters, two chopped salads, and two omelets for lunch. (App. 934). The truck, parked nearby, was ticketed for a parking violation about 1:30 p.m. (App. 980).

After lunch in Arlington County, Gheorghiu drove to Fairfax County and, after failing twice with Keltz's credit card number, was able to charge a camera on cardholder Joseph Martina's stolen credit card number about 2:30 p.m. (3785-112915-61009). (App. 1168; 1257-1258). Next, the two men went to a computer store in Fairfax County and charged a second laptop, this time with cardholder Gerald Kent's stolen credit card number. (5121-0701-6055-5690). (App. 940; 1041-1042; 2147).

Then, around 4:00 p.m., Gheorghiu and his passenger returned to Arlington County and charged a third laptop at a different computer store in

Arlington County for $2,256.45. (App. 1040). Once again, Gheorghiu used Gerald Kent's stolen credit card number, the same number he used to charge the second laptop at the computer store in Fairfax County around 3:00 p.m. (5121-0701-6055-5690). (App. 1040-141; 2147).

Less than an hour later, about 4:40 p.m., Arlington County Police Officer, Mohamed Tabibi, stopped Gheorghiu for speeding near an Arlington County shopping center. (App. 1066-1068). On running Gheorghiu's information, the officer discovered an outstanding arrest warrant for Gheorghiu on felony fraud charges in New Jersey. (App. 229). Gheorghiu was arrested and taken into police custody. (App. 229, 244).

Because both Gheorghiu and his passenger denied owning the truck, Arlington police impounded and inventoried the contents inside. The passenger, identified by Gheorghiu as his cousin, had a valid Michigan identification card. (App. 227; 233). The passenger claimed a suitcase in the truck and left with it on foot. (App. 242). Before allowing the passenger to walk away with the suitcase, police opened it and saw clothing and a laptop. (App. 1078). As he was leaving, Gheorghiu gave the passenger $300. (App. 242).

Gheorghiu told police the briefcase behind the driver's seat was his. (App. 241). Inside Gheorghiu's briefcase was a laptop computer, a thumb drive, two credit cards, and five compact discs. (App. 1082; 1084-1086). A thumb drive has a "solid state chip in it that you can write data to. . . [by plugging] it in and out of computers, so you can read and write that data." (App. 1391-1392). A power adaptor that "converts the power from your car battery into a 110-volt current" was in the backseat. (App. 1390).

Arlington County Detective Gillenwater, a computer forensics investigator, testified there were pictures on the first compact disc from the briefcase.[2] (App. 1401). On the second compact disc from the briefcase, Detective Gillenwater discovered two program files. One program file allowed Gheorghiu's laptop to interface with the credit card remagger found in the truck's back seat, while the other allowed Gheorghiu to "generate numbers to unlock the software . . . to use the program. . . without paying for it." (App. 236, 1404).

On the third compact disc, Detective Gillenwater found a file containing names and stolen credit card numbers. (App. 1404-1405; 2008). On the fourth compact disc was the "same type of information" as in

[2] The pictures, together with email responses to a "SAF looking for a relationship" were defense exhibits 1, 2, 3, and 5.

the third disc. (App. 1406; 2009-2010). And, on the fifth disc, the detective discovered additional credit card names and numbers. (App. 1407; 2012). Including the names and numbers on the thumb drive, Gheorghiu possessed about one hundred credit card names and numbers, all stolen. (App. 2008-2012; 2080-2082; 2145-2147).

Six more credit cards were found in the driver's side visor, along with four more in Gheorghiu's wallet. A total of twelve credit cards were found in the truck by Arlington police. Eleven had Gheorghiu's name on the front (App. 1225), but only three cards had numbers on the front that matched the number in the magnetic strip on the back. (App. 1998; 2000; 2007). As to those cards, the first few number at the start and end of the sequence were the same. (App. 1997; 1999; 2001-2006).

Catherine Oelkers, a Vice President from Maspeth Federal Bank in New York, testified Gheorghiu opened his debit card account in August, 2004. Two cards were active on the account, but Oelkers testified that the bank had replaced four because Gheorghiu reported them lost or stolen. (App. 1005; 2140-2144).

Similarly, John Golbreski, an American Express Card security employee from New Jersey, testified Gheorghiu was issued a credit card in

February 2005. (App. 1520). He also testified that the card was replaced four times when Gheorghiu reported it lost or stolen in February and March, 2005. (App. 1520-1521). A supplemental card for a secondary holder on the same account was replaced three times during the same time period. (App. 1521-1526).

Gheorghiu's New York electric bill, a negotiated check, and a leasing agreement for a Mercedes-Benz were in the truck. (App. 1994-1996). His 5920 61st Street, Apartment 3A address was "all over everything." (App. 1715).

In addition to a global positioning device in the back of the truck, police recovered a digital camera and a "store locator sheet" for the two computer stores in Arlington County where Gheorghiu had charged laptops with stolen numbers. The computer store in Fairfax was also listed on the sheet. (App. 912-914; 1107; 1110; 1187-1191). The three new laptops, still in their boxes, were in the truck. (App. 1094).

While housed in the Arlington County Jail, Gheorghiu repeated to police that the truck did not belong to him. He said his address was 787 Seneca Avenue, Ridgeway, New York and not 5920 61st Street, Apartment 3A, New York. (App. 1715). He said that he had borrowed the truck from a

friend in New York about 4:00 a.m. on September 21, 2005, arriving in Arlington County about 10:30 a.m., so he could meet a person he had met online in an Arlington County shopping center and sell a laptap computer for $1700. (App. 1242).

Gheorghiu also told police the three new laptops were already in the back of the truck when he left New York for Arlington County on September 21, 2005. (App. 1242). When police showed Gheorghiu six credit cards, Gheorghiu admitted they were his, but said it was "impossible" and that there was "no way" any of the laptops in the back of the truck had been charged on his cards. (App. 1244).

While Gheorghiu's story "changed a couple of different times," Gheorghiu also said he had arrived in Arlington County about 10:30 a.m. on September 21, 2005 and had waited all day in his car for his customer. (App. 1242). While waiting, he said he had slept until selling the laptop for $1700 about 3:30 p.m. He said he was on the way back to New York when Officer Tabibi pulled him for speeding. (App. 1043-1044; 1245; 1250). Other than the shopping mall in Arlington County, Gheorghiu told police "he hadn't gone anywhere" and "didn't buy anything." (App. 1245). Later, Gheorghiu admitted eating at a restaurant "near one of the stores" in

Arlington County and receiving a parking ticket, but denied ever being at the Red Roof Inn in Alexandria on September 20, 2005. (App. 1246; 1300).

Other than the pictures and email responses, the defendant presented no evidence.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE EVIDENCE PRESENTED AT TRIAL ESTABLISHED A STRONG PRESUMPTION THAT ARLINGTON WAS THE LOCALITY WHERE PART OF THE CRIME OF IDENTITY THEFT TOOK PLACE AND WHERE AN ACT IN FURTHERANCE OF CREDIT CARD FRAUD OCCURRED.

IDENTITY THEFT OF IRIS KELTZ

Gheorghiu contends the Court of Appeals wrongly held the Commonwealth proved venue in Arlington County for identity theft under Code § 18.2-186.3 (case number CR05-1243) for one of two attempts to buy a gift card at a discount store in Alexandria with New Yorker Iris Keltz's stolen credit card number.

According to Gheorghiu, the proof failed in respect to the Keltz transaction for identity theft because the Commonwealth's evidence

showed that Gheorghiu's laptop was turned on about 8:00 a.m. on September 21, 2005 and he had spent the night before at a hotel in Alexandria. Further, the attempt to buy a gift card with one of Keltz's stolen credit car numbers occurred in Alexandria. (5490-3513-2093-9088) (Def. Br. 10). Thus, according to Gheorghiu, "no evidence showed that the defendant obtained, recorded, or accessed Keltz's identifying information in Arlington, or that he obtained goods or services there." (Def. Br. 10).

In reality, Gheorghiu's argument conflates the Commonwealth's burden of proving a completed offense of identity theft with the burden to prove venue by establishing a "strong presumption" that any part of the offense took place in Arlington.

For identity theft under Code § 18.2-186.3, the venue provision, § 18.2-186.3(D), provides:

> In any case brought pursuant to this section, the crime shall be considered to have been committed in any locality where the person whose identifying information was appropriated resides or in which any part of the offense took place, regardless of whether the defendant was ever actually in such locality.

Importantly, when venue is challenged on appeal, the reviewing court determines "whether the evidence when viewed in the light most favorable to the Commonwealth, is sufficient to support the jury's venue findings."

Cheng v. Commonwealth, 240 Va. 26, 36, 393 S.E.2d 599, 604 (1990). And, venue can be proved "by either direct or circumstantial evidence." Id.

Gheorghiu's argument gives short shrift to the intent of the legislature to expand the general venue provision of Code § 19.2-244 and its "authority, within the confines of the constitution, to enact special venue statutes. . . when special needs relating to venue have arisen." Ex parte Egbuonu, 911 So. 2d 748, 753 (Ala. Crim. App. 2004). See e.g., § 18.2-517, § 19.2-245, § 19.2-247, and § 19.2-279.2.

Additionally, as the Court of Appeals noted, "except for his recognition of a clause in Code § 18.2-186.3(D) that the defendant need not ever have been physically present in a locality for venue to be proper," Gheorghiu contends that the "general venue standard of Code § 19.2-244 is essentially unchanged for identity theft offenses." Gheorghiu v. Commonwealth, 54 Va. App. 645, 663, 682 S.E.2d 50, 59 (2009).

Further, the Court of Appeals rightly rejected Gheorghiu's argument, relying on a credit card theft case, Meeks v. Commonwealth, 274 Va. 798, 651 S.E.2d 637 (2007), that Gheorghiu merely possessed Keltz's stolen information when he was arrested in Arlington County. (Def. Br. 20).

Pointing out that "identity theft is not credit card theft," the Court of Appeals observed that

> [d]espite its name, the completion of the crime of identity theft is not limited to a discrete moment in time marked by the unlawful taking or receiving of an individual's identifying information. Rather, identity theft can be committed by recording or accessing an individual's identifying information, actions that continue after the initial obtaining of the information, or by obtaining goods through the use of the illegally obtained identifying information.

Gheorghiu, 54 Va. App. at 658-659, 682 S.E.2d at 56. Thus, while credit card theft, at least under Meeks,[3] is "completed when the card is taken, identity theft continues after the identity is illegally taken from its lawful owner." Id.

Moreover, Gheorghiu does not do justice to the facts by characterizing his possession of the stolen credit card number he tried to use in Alexandria as "mere possession" or "incidental" in Arlington County. While it is true Gheorghiu was arrested in Arlington County with the stolen

[3] Effective July 1, 2008, Code § 18.2-198.1, the venue statute for offenses relating to credit cards, including credit card theft pursuant to § 18.2-192, includes one additional sentence: "A prosecution of a violation of § 18.2-192 [credit card theft] may be had in any county or city where a credit card number is used, is attempted to be used, or is possessed with intent to violate § 18.2-193 [credit card forgery], § 18.2-195 [credit card fraud], or § 18.2-197 [criminally receiving goods and services fraudulently obtained]."

Keltz number, the record also established that he came to Arlington first from New York, eating in a restaurant and then traveling south to Alexandria, "really desperate" for a hotel room. (App. 853). The next morning, September 21, 2005, Gheorghiu went north again, stopping briefly to buy a GPS and 30 compact discs from an office supply store in Alexandria. It was on the way to Arlington County that he stopped at the discount store and attempted to use one of Keltz's stolen numbers to buy a gift card.

After that, about fifteen minutes later, he was back in Arlington and charged the first of three fraudulently obtained laptops at a computer store, two of them in Arlington County, using another stolen credit card number that belonged to Keltz. (3725-412357-11010). He then ate lunch in Arlington County using that stolen credit card number. Gheorghiu's name was embossed on the front of the plastic card, but the number in the magnetic tape was Keltz's. (App. 1039, 1472-1473).

Not only did Gheorghiu and his cousin possess Keltz's credit card number in Arlington after the charge was declined in Alexandria, but the duo had everything they needed in the truck to set-up a traveling "re-encoding shop" in Arlington County. (App. 831). Noteworthy is

Gheorghiu's explicit statement to police that his destination from New York was Arlington County and that he "hadn't gone anywhere" except the mall in Arlington while waiting for his customer. (App. 1245).

After leaving the restaurant in Arlington about 1:40 p.m. on September 21, 2005, the two men left Arlington for a couple of hours, where they failed to successfully charge a camera on cardholder Joseph Martina's stolen credit card number in Fairfax. (App. 1257-1258; 1168). After that, the two men went to a computer store in Fairfax and successfully charged a second laptop with Gerald Kent's stolen credit card number. (5121-0701-6055-5690).[4]

Gheorghiu then returned to Arlington about 4:00 p.m. and charged the third laptop at a second computer store in Arlington using the same credit card number used in Fairfax about 45 minutes earlier. (App. 1040, 2147). And, less than an hour after that, Gheorghiu and his passenger were stopped by police in Arlington for speeding. (App. 1068).

In the instant case, as the Court of Appeals properly found, the crime of stealing Keltz's identity continued over the locality of Arlington County on September 20, 2005 through September 21, 2005. The Commonwealth

[4] This is the transaction that Gheorghiu says the Commonwealth did not prove venue under the former version of § 18.2-198.1

easily proved "any part" of the offense of stealing Keltz's identity took place in Arlington.

CREDIT CARD FRAUD

Likewise, Gheorghiu challenges venue concerning the Gerald Kent transaction in Fairfax County. Using the same credit card number he used to charge a third laptop in Arlington County not more than an hour later, Gheorghiu charged a laptop in Fairfax County. According to Gheorghiu, he "did nothing more than possess" Kent's credit card number in Arlington. (Def. Br. 24). As mentioned above, Code § 18.2-198.1, the venue statute for offenses related to credit cards was amended in 2008. On September 21, 2005, however, venue was established for credit card fraud pursuant to Code § 18.2-195 by the following version of § 18.2-198.1:

> Notwithstanding the provisions of § 19.2-244, a prosecution for a violation of this article (Article 6, credit card offenses) may be had in any county or city in which (i) any act in furtherance of the crime was committed or (ii) an issuer or acquirer, or an agent of either, sustained a financial loss as a result of the offense.

As was true of venue for Keltz's identity theft, Gheorghiu's argument ignores the expansive venue provision for credit card offenses, its purpose, and the context in which he possessed Kent's stolen credit card number. In rejecting Gheorghiu's argument that venue was improper in Arlington

because the transaction was completed in Fairfax and his contention that no act in furtherance of the crime took place in Arlington, the Court of Appeals ruled:

> [A]ppellant's possession of many stolen credit card numbers (including Mr. Kent's) must be viewed in the full context of his activities while he was in Virginia. Not only did appellant possess these credit card numbers, but, as the prosecutor argued in the trial court, he had also assembled a "re-encoding shop" inside his truck. Appellant held these stolen credit card numbers on his laptop, and he readily possessed the means to encode these credit card numbers on fabricated credit cards in order to make fraudulent purchases. It was through these sophisticated means that appellant—already in possession of Mr. Kent's credit card number—fraudulently used the credit card number in violation of Code § 18.2-195. Appellant's possession of the stolen credit card number while in Arlington was clearly an act in furtherance of the crime [of credit card fraud].

Gheorghiu, 54 Va. App. at 670, 682 S.E.2d at 62.

Significantly, as mentioned above, Gheorghiu used the same credit card number and successfully charged a third laptop in Arlington County. (App. 1040). The defendant's possession of Kent's stolen credit card number in Arlington, under these facts, was a direct act "toward his subsequent commission of the credit card offense in case number CR06-449." Id. at 669, 682 S.E.2d at 62. Thus, the Court of Appeals rightly agreed with the trial court that "appellant's possession of Mr. Kent's credit

card number in Arlington created the requisite strong presumption that an act in furtherance of this particular credit card fraud offense occurred in Arlington. . . ." Id. at 670, 682 S.E.2d at 62.

As was true of the Keltz encounter, Arlington was a place where a "part of the offense took place" as well as a locality where any act in furtherance of the crime was committed. Stated another way, venue was appropriate in Arlington because the evidence established Gheorghiu's presence there with a laptop, equipped with software to swindle and steal, a car power adaptor, stolen credit card numbers, a remagger, multiple invalid credit cards, ready for encoding, and a "store locater" sheet of the three computer stores he intended to attack.

In formulating a plan of attack, he came first to Arlington from New York on September 20, 2005. He returned the next day and used Kent's stolen number, first in Fairfax and then in Arlington, before being stopped for speeding in Arlington. Thus, when considered in the light most favorable to the Commonwealth, the evidence proved that there was a strong presumption that Arlington, at the very least, was a place where "any act in furtherance of the crime was committed." See Code § 18.2-198.1(i).

II. THE COURT OF APPEALS CORRECTLY RULED THAT THE DEFENDANT WAIVED HIS CLAIM THAT VENUE WAS IMPROPER IN ARLINGTON FOR CREDIT CARD THEFT.

On brief, Gheorghiu admits he raised the argument the Commonwealth did not prove venue in Arlington County for credit card theft for the first time in the Court of Appeals. (Def. Br. 26). Under Meeks and the venue provision of § 18.2-198.1, in effect at the time, Gheorghiu says prosecution of credit card theft is limited to the venue where the Commonwealth can prove the numbers were taken with the intent to use them. In the instant case, he contends the credit card numbers "only proved retention" in Arlington. (Def. Br. 27).

Gheorghiu also says his failure to object at trial is excusable for good cause as Meeks was not decided by this Court until November 2, 2007 and the trial court entered final judgment in his case on March 9, 2007.

While the Commonwealth acknowledges that Meeks was decided after Gheorghiu was tried, convicted, and sentenced, as the Court of Appeals observed, Gheorghiu never mentioned Meeks or the claim that his credit card theft counts were not properly prosecuted in Arlington in his demand for review by a three-judge panel or motion for a delayed appeal on December 12, 2007 (granted by the Court of Appeals on March 27,

2008). Gheorghiu raised the issue for the first time in his opening brief in the Court of Appeals on May 6, 2008. According to the Court of Appeals, "no exception" applies to the requirement of Code § 19.2-244 (requiring that questions of venue be raised prior to jury verdict) and Rule 5A:12(c) ("Only questions presented in the petition for appeal will be noticed by the Court of Appeals"). Gheorghiu, 54 Va. App. at 670, 682 S.E.2d at 62-63.

Because Gheorghiu was silent about the issue of venue in Arlington for credit card theft in general and the applicability of Meeks in particular, his argument is not reviewable in this Court under Rule 5:25. See Porter v. Commonwealth, 276 Va. 203, 227-228, 661 S.E.2d 415, 426 (2008) ("[A]ny irregularities as to the circuit court's authority raised is at most an issue of territorial jurisdiction, which was waived by Porter's failure to timely object to any such defect").

And, the fact that Meeks had not been decided at the time of Gheorghiu's trial does not excuse him from objecting at trial. Obviously, the defendant in Meeks objected and preserved the issue for appellate review at trial. No good cause applies because Gheorghiu believed the law was settled under Cheatham v. Commonwealth, 215 Va. 286, 208 S.E.2d 760 (1974). See Snurkowski v. Commonwealth, 2 Va. App. 532, 536, 341

S.E.2d 667, 669 (1986) (holding that futility of an objection is not good cause for failing to object). See also Epperly v. Warden, 235 Va. 35, 44, 366 S.E.2d 62, 67 (1988). Cf. Jones v. Commonwealth, 194 Va. 273, 280, 72 S.E.2d 693, 697 (1952) (good cause preserved the issue of court's erroneous reply to jury on appeal when jury asked court if defendant would "get out" if they sentenced him to life imprisonment in a death penalty case and counsel was surprised).

Moreover, in view of Gheorghiu's concession that there was "ample evidence" he retained the stolen numbers in Arlington County, not to mention his statement to police he stayed in Arlington all day, his argument challenging venue in Arlington does not warrant relief under the ends of justice exception to Rule 5:25. See Rowe v. Commonwealth, 277 Va. 495, 503, 675 S.E.2d 161, 165 (2009). (ends of justice exception applicable if necessary to avoid a grave injustice or denial of essential rights).

Even on the merits, however, Meeks is inapplicable. In Meeks, the defendant stole a credit card from a staff member at a group home in Fairfax. Later, she used the stolen card to buy a hotel room in Alexandria. At trial, pursuant to the first prong of the credit card venue statute, § 18.2-198.1(i), Meeks argued that venue was proper only in Fairfax, not

Alexandria, since her conduct in Alexandria could not be "in furtherance" of the theft "as a matter of law." 274 Va. at 801, 651 S.E.2d at 637-638. The theft of the card was complete in Fairfax, making it impossible that any act in "furtherance" of theft could take place in Alexandria.

Importantly, the second prong of the venue statute under Code § 18.2-198.1(ii) was not at issue in Meeks (venue is where issuer, acquirer, or agent sustains financial loss as a result of crime). In reversing Meek's conviction for credit card theft, this Court relied exclusively upon the first prong of § 18.2-198.1 and held no act in furtherance of credit card theft took place in Alexandria.

In this case, in contrast, venue for credit card number theft for Gheorghiu was submitted to the jury in instruction #15, which tracked both prongs of the venue statute under Code § 18.2-198.1. (App. 1707). Instruction #15, to which counsel said there was "no objection" (App. 1659-1660) stated:

> The offense of credit card number theft is grand larceny. A prosecution for credit card number theft, credit card forgery, or credit card fraud may be in any county or city in which, one, any act in furtherance of the crime was committed or two, an issuer or agent sustained a financial loss as a result of the offense.

(App. 1707).

Notwithstanding the holding of Meeks, venue in this case for credit card number theft was proper in Arlington. The jury found that the Commonwealth established a strong presumption that Gheorghiu's conduct inside his "re-encoding shop" while in Arlington was "any act" in furtherance of credit card number theft. The jury could have also found, unlike the situation in Meeks, that there was a financial loss sustained for issuers of the credit card numbers in Arlington. And, unlike Meeks, none of the cardholders were aware of when, much less where, their numbers were stolen.[5] Gheorghiu did much more than "merely retain" stolen credit card numbers. See Cheatham, 215 Va. at 290, 208 S.E.2d at 763 (to withhold a credit card under § 18.2-192 means more than mere retention).

CONCLUSION

For the foregoing reasons, the judgment of the trial court and the Court of Appeals upholding its judgment (except the conviction for

[5] At trial, the Commonwealth conceded having no "earthly idea" when the numbers were stolen, but offered a theory that they were stolen while the cardholders were exercising in a gym. Iris Keltz, however, testified she did not go to a gym. (App. 1789, 1791).

burglarious tools, Case No. CR06-440) should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On April 30, 2010, the required number of copies of this brief, paper and electronic, were hand-delivered to the Clerk of this Court and three copies were mailed to Jonathan Shapiro, Law Office of Jonathan Shapiro, P.C., 3955 Chain Bridge Road, 2nd Floor, Fairfax, VA 22030 and J. Frederick Sinclair, J. Frederick Sinclair, P.C., 100 North Pitt Street, Suite 200, Alexandria, VA 22314, counsel for the appellant. A copy was sent electronically to this Court at scvbriefs@courts.state.va.us.

The Commonwealth desires to present oral argument in this case.

_____

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