

Why Can't You Take a Dead Woman's Phone?

Most of us will agree that stealing from the dead is morally reprehensible. But is it actually against the law? How can a dead person possess anything? What if the item isn't physically on the dead person, but is, let's just say, lying on a train platform at, for example, Downtown Crossing?

The fate of Josue Gonzalez, the 26-year-old Brockton resident who was [arraigned](#) on Monday in Boston Municipal Court on a charge of larceny over \$250, may help us answer those very questions. Gonzalez became infamous last week after photos [released by the MBTA Transit Police](#) appeared to show him taking the phone of a woman who had just been [struck and killed](#) by a Red Line train at Downtown Crossing station.

The police said that the phone became "dislodged" when the train hit the woman, while the [District Attorney says](#) the victim placed it on the ground before being struck. In photos and video from the scene, Gonzalez appears to place his foot on top of the phone to conceal it before picking it up and walking away. Gonzalez pleaded not guilty and was released on his own recognizance.

Forget for a minute this particular case, however, and consider this: Is picking up a dead woman's phone just an issue of finders keepers? Once someone is dead, is it no longer stealing?

The answer to both questions is no, according to Herald Fahringer, a New York-based lawyer who once defended Larry Flynt.

For starters, the dead—or really, their heirs—are entitled to the things they possessed while alive.

"If she was married, [the phone] could go to her spouse," said Fahringer. "If she wasn't, it could go to her loved ones. The notion of taking things from dead people condones what is essentially grave-robbing."

There is also the possibility that the phone could contain evidence or otherwise pertinent information that authorities investigating the death want access to.

"It could have been filming, or had a note," Fahringer said. "We don't know."

Beyond that, whether this was a crime comes down to one thing: criminal intent. Did Gonzalez intend to take another person's possessions?

If the answer is yes, he would be guilty, according to Boston-based defense attorney Philip A. Tracy.

"It seems like intent to make off with someone else's property," he said.

For the record, his lawyer [claims](#) Gonzalez had "no criminal intent." Still, Tracy and Fahringer said, Gonzalez's defense will have to spin quite a yarn to help him avoid a conviction.

While “any creative defense attorney can come up with some ideas,” Tracy said the video footage might be too much to overcome.

“Whether she was deceased or not, if he’s there and sees that it’s her property and intentionally seems to try to make away with it, there was a camera that put him out there like the wanted posters in the Old West,” Tracey said.

That’s not to say that Gonzalez has no possible way to win his case. Tracy believes the only way he can show he’s not guilty of the larceny charge is if his defense makes a believable case that he just happened upon the phone, totally ignorant of the circumstances.

That option may not be enough, either.

“There are different laws that state when you find something that isn’t yours you have to turn it in,” Fahringer said.

So why doesn’t everyone who finds a wallet full of cash on the sidewalk get charged with larceny? It depends on your ability to identify the owner.

“If you are walking and see a wallet with no identification, I don’t know of any law that says what you are obligated to do,” said Everett-based attorney Arnold Abelow. “If, however, you are walking and see me drop my wallet ... or pick up my wallet after I drop it with my ID in it, and do not return it to me or turn it in to police, you have committed the crime of larceny.”

This raises another question: a driver’s license and a social security card are universally recognized forms of ID. If you find a wallet with a license, debit, and credit card that all belong to the same person, chances are the wallet belongs to that person. If you don’t return it, that’s larceny. Phones too often contain data that identifies their owners. Does that hold the same weight?

To Fahringer, “part of it would have to do with a password.”

“Often, you find a phone, and it requires a password, and you can’t readily access information,” he said. “Whereas on my phone, if it’s locked, you can still see my name and number and tell who owns that phone.” Part of the issue with larceny of a phone is “that requiring an individual to go into it and find that info is another step.”

Still, Fahringer said, “I think that it’s clear no one leaves their phone somewhere on purpose. If someone drops a wad of cash, maybe they meant to donate it to the world, there is some gray area.” If there is no password, or if the owner is somehow readily identified on the phone, Fahringer believes “it adds to the arguments likening it to a wallet.”

Basically, if the phone has a password and you can’t discern its owner, give it to the police. If you can, give it to the owner.

If Gonzalez’s lawyer is going to argue his client had no criminal intent, he’s going to have to prove he intended to hand it over to authorities or the woman’s loved ones. That might be difficult considering that he gave the phone to police only after his image was widely circulated.

And, of course, just because you *can* legally show that you didn't mean to steal from a dead person doesn't mean you *should*.

"If you find something and don't know how it got there, the intent to steal is not there," Tracy said. "Whether or not you turn it in or keep it, that's an ethical decision."

By Jordan Lebeau