STATE OF MICHIGAN

IN THE 81st JUDICIAL DISTRICT COURT, COUNTY OF IOSCO

PEOPLE OF THE STATE OF MICHIGAN,

PLAINTIFF, **FILE NO. 16-707-FY**

V **HON. ALLEN C. YENIOR**

CATHERINE ANNE ANDERSON

DEFENDANT.

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BRIEF IN OPPOSITION OF BINDOVER

INTRODUCTION

This is a case about a complaint by an employee of the Iosco County Treasurer's office claiming that her superior, the deputy treasurer, used money from the cash box. The cash box in the Iosco County Treasurer's Office is counted out every morning to $400.00. It is then used throughout the day to make change for members of the public and serve as a source of petty cash. The claim by tax specialist

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Jane Hackborn, is that the deputy treasurer, Cathy Anderson, replaced bills periodically with post-it notes reflecting the amount of money that was replaced. Then the actual currency would be replaced within 1 or 2 days.

The preliminary examination on August 23rd, 2016 produced no testimony that Cathy Anderson took any public money from the cash box let alone $50.00 or more which is the threshold amount required under the statute. Likewise, no competent testimony was adduced that Ms. Anderson made unauthorized use of the money. The testimony at the preliminary examination reflected **only** that Ms. Hackborn went to a third party co-worker named Mary Gill and asked Ms. Gill to intervene. After that conversation, the practice described above stopped. Detective/Sergeant Craig Johnson testified that there was an "understanding" among the employees in the Treasurer's office that using post-it notes as "markers" was acceptable – until Ms. Hackborn told Ms. Gill it was not acceptable -- as long as the box balanced out.

In other words, whatever was happening was by implicit or explicit agreement.

Whether money was actually taken by Ms. Anderson and whether there was authorization for her to take or use any money from the cash box was introduced only through the hearsay statements of the detective who interviewed Ms. Anderson. It was not clear if the detective's questioning of Ms. Anderson covered 2011-2012 or the period of time in 2007-2008 that was the subject of significant testimony over the objection of Ms. Anderson's counsel as to relevance and as to corpus delicti.

The bindover motion should be denied. The primary reason is that the proofs did not show that Ms. Anderson even took any money let alone took it knowingly and unlawfully and put it to an unauthorized use as is required for the prosecutor to meet the fourth element. The res gestae witness neither saw Ms. Anderson taking any

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public money nor did she have any competent testimony how Ms. Anderson used it. Even if the prosecutor hypothetically was not bound by the corpus delicti rule, the testimony that also came in through the detective reflects that the employees of the treasury department had an agreement -- until Ms. Hackborn went to Ms. Gill – at which time the conduct of which Ms. Hackborn complains stopped.

The proofs merely reflect that witness Hackborn dug a post-it out of the trash with "Cathy" and dollar bill denominations totaling $40.00 written on it. Ms. Hackborn also claimed that periodically, the cash box in the Iosco County Treasurer's office would not contain the expected $400.00 and instead, post it notes reflecting the amount "short" would be found. She provided no testimony whatsoever connecting those additional instances to Ms. Anderson. There is no testimony that an audit or an accounting revealed money missing. There is no testimony that the box ever contained insufficient amounts of cash to make change for members of the public. In other words, the Treasurer's Office never lost the intended purpose of the money to wit: make change and function as a source of petty cash.

The prosecutor's proof obligation at a preliminary exam requires that the elements of the offense must be established first before the accused citizen's confessions or extrajudicial statements may be admitted against her under *People v Meyer*, 46 Mich App 357, 360; 208 NW2d 230 (1973). The prosecutor failed to address that issue in her brief. She did not address the fact that no evidence was presented as to the use of the money. In other words, did the note reflect $40.00 was loaned to another office to make change? Not even the statements of Ms. Anderson to which the Detective testified answered whether the $40.00 went for an unauthorized use.

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Recent Michigan and federal law disfavors the strict liability view of felony charges that the prosecutor asks this court to take. The cases upon which she relies also seem to strike a chord contrary to her strict liability position. Ultimately, even the cases upon which the prosecutor relies state that if the public money is where it should be at the time at which an accounting is made, then a prosecution under this statute cannot be sustained no matter "how bad the motives" of the actor.

STATEMENT OF FACTS

Jane Hackborn, an employee at the Iosco County Treasurer's Office, testified. Ms. Hackborn works for and is running against the office-holder: elected Treasurer Elite Shellenbarger.[1] Ms. Hackborn filed to run for Iosco County Treasurer, against Mr. Shellenbarger on April 19, 2016.[2]

Eight days after she filed to run, Ms. Hackborn went to the Huron Community Bank to obtain a copy of a check from back in 2008 that the prosecutor then sought to admit at the preliminary examination as exhibit 4 because she believes it shows Ms. Anderson's criminal intent. It is not evidence of the charged conduct.[3] If intent is not an issue then the check should be stricken and the objection at the preliminary exam to its admission should be granted.

At about this same time that she filed to run, Ms. Hackborn also went to the Iosco County Prosecuting Attorney, with her tale of Ms. Anderson's conduct from 2011 and 2012.[4] Ms. Hackborn testified that she noticed money missing from the Treasurer's Office in 2011 and 2012.[5] Specifically, Ms. Hackborn testified that missing

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[1] Preliminary Examination Transcript, Page 56, Lines 11-13.
[2] *Id* at 57, Lines 1-5.
[3] *Id* at 56, Lines 18-25.
[4] *Id* at 57, Lines 1-6.
[5] *Id* at 44, Lines 8-9.

money was "the money out of the four hundred dollars that is kept in the cash box."[6] Ms. Hackborn testified that "twenty to eighty, hundred dollars"[7] would go missing "two—at least two, three times a week" during this time period.[8] Multiple employees including Melissa Beebe were responsible for balancing the cash box.[9] Ms. Hackborn never reported *any* of these instances.

Ms. Hackborn produced one post-it note consisting of numbers totaling $40.00 and the name "Cathy."[10] She testified that the post-it note annotations amounted to money missing on that date therefore the box held $360.00 plus the post-it.[11] Ms. Hackborn observed sticky notes twenty to thirty times over a period of six to eight months.[12] This behavior stopped after another employee and mutual friend of the 2 women named Mary Gill became involved at Ms. Hackborn's request.[13] After Ms. Hackborn talked to Ms. Gill, Hackborn observed no more post-it notes in the cash box corresponding to cash.

Ms. Hackborn never observed Ms. Anderson take money out of a cashbox or put a sticky note into the cashbox.[14] There also was not a sticky note in the cashbox every time cash was removed from the cashbox.[15] Further, Ms. Hackborn never once disclosed *any* concerns about fraud to investigators during annual audits of the Iosco County Prosecutor's Office in the years 2011, 2012, 2013, or 2014.[16]

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[6] *Id* at 44, Lines 11-12.
[7] *Id* at 45, Line 15.
[8] *Id* at 45, Line 10.
[9] *Id* at 46, Lines 9-13.
[10] *Id* at 47.
[11] *Id* at 47, Lines 15-17.
[12] *Id* at 48, Lines 1-5.
[13] *Id* at 48, Lines 8-10.
[14] Id at 49, Lines 24-25.
[15] *Id* at 50, Lines 15-17.
[16] *Id* at 59-60.

Detective Sergeant Johnson, of the Michigan State Police, testified that the Iosco County Prosecuting Attorney asked him to conduct an investigation based on Ms. Hackborn's allegations.[17] Sergeant Johnson interviewed Ms. Hackborn, Ms. Anderson, Mary Gill, Elite Shellenbarger, Melissa Beebe, and accountants at Stephenson & Gracik.[18] Detective Johnson testified that Ms. Anderson told him that she removed money from the cash box on occasion.[19] The testimony was objected to under the corpus delicti rule as establishing the elements of the offense. Detective Johnson testified that the auditors provided him with no documentation that any money was missing from the Iosco County Treasurer's Office.[20]

This Court took a decision on the bindover under advisement so that the parties can submit briefs on intent, strict liability, defenses and the corpus of the crime.

LAW & ANALYSIS

The Statute under which Ms. Anderson is charged covers two types of individuals:

> EMBEZZLEMENT BY PUBLIC OFFICER, HIS AGENT, ETC.--Any person holding any public office in this state, or the agent or servant of any such person, who knowingly and unlawfully appropriates to his own use, or to the use of any other person, the money or property received by him in his official capacity or employment, of the value of 50 dollars or upwards, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years or by fine of not more than 5,000 dollars.

Ms. Anderson is not a duly elected officeholder of Iosco County or an inferior pubic body such as a Township or City. Michigan law defines a public official as one

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[17] *Id* at 76, Lines 7-15.
[18] *Id* at 76, Lines 22-24.
[19] *Id* at 81, Lines 14-15.
[20] *Id* at 90.

who has substantial responsibility for control over the conduct of governmental affairs. *Rosenblatt v Baer*, 383 US 75; 86 SCt 669 (1966). The prosecutor did not provide any proofs that Ms. Anderson exercised any control over the governmental affairs of Iosco County. Therefore, the prosecutor is left to pursue the agent theory of MCL 750.175.

I. The 2007-2008 Issues are Irrelevant

The elements of MCL 750.175 are attached as **Appendix I**. The res gestae witness for the prosecution was Ms. Hackborn. She testified from pages 2 through pages 75 of the preliminary examination transcript. Substantial time was spent on stale observations from either 2007 or 2008, based on Ms. Hackborn's claim that the cash box was "light" although she never actually counted the money.[21] This observation by her led to a conversation with Mr. Shellenbarger, during which she accused her colleague of stealing. This discussion was followed by a three person meeting with Ms. Hackborn, Ms. Anderson and Mr. Shellenbarger present. Auditors later reviewed Ms. Hackborn's claim specifically at Mr. Shellenbarger's request. The audit resulted in no finding that money was missing.

When Ms. Hackborn was impeached with a document that she claims she read by downloading it from a public website, she was forced to concede that the audit revealed no money was missing and no "material deficiencies existed," but suggestions for changes in the accounting practices in the office were presented for consideration by the end-user.[22]

There are two problems with this whole line of inquiry by the prosecutor from 2008:

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[21] *Id* at 25-26.
[22] *Id* at 69-70.

1. There is no theory under which any observations from 2008 bear any relevance to the charging document and;

2. There is no rule of evidence that allows counting by osmosis, so when Ms. Hackborn testified that she looked at the cash box and it "seemed light" – she has not satisfied the foundation needed for MRE 401 or MRE 602 that money is or was actually "missing."

The prosecutor's theory on one hand seems to be that Ms. Anderson intentionally and deliberately used public money for an unauthorized purpose. Then the prosecutor argues that she does not have to show intent. The testimony does not connect-up to what Ms. Anderson's intent was during the relevant time of 2011-2014 in any event.

Especially when the audit found that no money was missing and there were no material deficiencies in the procedures of the Treasurer's office, the testimony related to 2007-2008 is irrelevant and should be stricken.

I. Failure to Satisfy the Corpus Delicti

It is a long-established principle of Michigan law that proof of corpus delicti is required before the prosecution is allowed to introduce inculpatory statements of the accused. *People v McMahan*, 451 Mich 543; 548 NW2d 199 (1996). The *McMahan* Court held that, in the context of a homicide charge, the underlying purposes of the corpus delicti requirement are:

> The underlying purposes of the corpus delicti requirement are (1) 'to guard against, indeed to preclude, conviction for a criminal homicide when none was committed,' and (2) 'to minimize the weight of a confession and require collateral evidence to support a conviction.' *Id* at 548-549 (internal citations omitted).

Under *Meyer*, the testimony of Ms. Hackborn does not satisfy the corpus delicti for probable cause purposes on the element of unauthorized use and the prosecutor is

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barred from seeking to close the loop with the hearsay statement that Ms. Anderson told Detective Johnson what she was previously told by Mr. Shellenbarger.

The fourth element of MCL 750.175 is:

> "...that the defendant used the money for an unauthorized purpose. It is charged in this case that the defendant used the money for [state purpose]. Such use of public money is unauthorized". CJI 2ND 27.3, attached as **Appendix I.**

Really the 4th element is two elements within one:

1. "unauthorized purpose" and
2. "what that specific purpose was."

Ms. Hackborn conceded that she never saw Ms. Anderson take any money.[23] Multiple people were in charge of the cash box.[24] She did not testify to having any knowledge as to what Ms. Anderson did with any public money.

The prosecutor conceded that the testimony about instructions by Mr. Shellenbarger to his agent Ms. Anderson regarding the cash box were necessary to show "unauthorized" purpose.[25] Mr. Shellenbarger did not testify. No one testified to what use Ms. Anderson put any public money – only that the public money was never "unaccounted for" in anyone else's mind except for Ms. Hackborn.[26]

It is only through the hearsay statement of Detective Johnson, who testified to his interview with Ms. Anderson, that the prosecutor can try to establish the element. He testified that during the interview she acknowledged that in 2008, Mr. Shellenbarger told her that he would loan her money if she needed money and not to use the county treasury cash box money.

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[23] *Id* at 71, Lines 17-25; 72 Lines 1-2.
[24] *Id* at 44, Lines 22-24.
[25] *Id* at 117, Lines 1-7.
[26] *Id* at 90, Lines 20-24.

Circular proofs frustrate the corpus delicti rule and circumvent the prosecutor's obligation to present competent testimony on each element of the crime with a proper foundation before admitting the statement of the accused.

III. Failure to Establish the Element of Unauthorized Use and The Testimony Establishes Permissive Use by Catherine Anderson

The glaring issue in the record is that Ms. Hackborn failed or could not testify to who took money or what they used it for, only that the cash box would be short periodically and would be replaced later.[27] It may be that Ms. Hackborn did not want to describe any agreement or understanding among the employees so as not to implicate herself - but the only observation established by the record at the examination is that:

> 1. A post-it note was found with numbers totaling $40.00 and the name "Cathy" on it and;
>
> 2. That periodically money was short in the cash box and replaced later.

The fourth element is not satisfied.

Further, ***permission*** to use the money or property at issue is always a defense. Embezzlement does not exist if the accused had permission to take the funds which are claimed to have been embezzled. *People v Hoefle*, 276 Mich 428; 267 NW 244 (1936)(attached as **Appendix II)**. Consent involves "agreement, approval, or permission for an act." *People v Buie*, 285 Mich App 401, 417; 775 NW2d 817 (2009). Accordingly, Michigan Model Criminal Jury Instruction 22.11 defines conversion as "using or keeping someone else's property without that person's permission." Michigan Criminal Jury Instruction 22.11(attached as **Appendix III)**. None of the published or unpublished cases cited by the prosecutor hold to the contrary.

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[27] *Id* at 40.

Ms. Hackborn was not able to give any testimony with a sufficient foundation regarding the lack of authorization for the placement of the post-it note. The witness who the prosecutor needed to satisfy the element of "unauthorized use" was Ms. Anderson's principal: Mr. Shellenbarger. The reason why the prosecutor failed to call Mr. Shellenbarger is speculative but, there was testimony from Detective Johnson that he interviewed everyone in the office and that it seemed there was an "agreement" or "understanding" that post-it notes were an acceptable practice to track public funds in the cash box.[28] In fact, the practice was rife throughout the county building as Detective Johnson is investigating other offices for the same practice.[29]

Any conduct that was established was not shown to be lacking consent. Ms. Hackborn said "we became so uncomfortable with it," (ostensibly referring to her non-testifying colleague Melissa Beebe and her) that she went to a woman named Mary Gill.[30] According to Ms. Hackborn, no further incidents of using post-it notes or markers for cash occurred after she asked Ms. Gill to talk to Ms. Hackborn.[31]

This moment in the transcript is telling because the witness uses the simple past tense form of the intransitive verb "become." The dictionary definition for this verb:

1. **1a** : *to come into existence*
   b : *to come to be* <become sick>
2. **2**: *to undergo change or development*[32]

In other words, there was a time when Ms. Hackborn was "comfortable" with "it" - ostensibly the practice of which she now is the complaining witness for a major felony charge. During that period of time, it is a simple inference that her comfort level is why

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[28] *Id* at 91, Lines 2-9; *Id* at 94, Lines 10-13.
[29] *Id* at 98.
[30] *Id* at 48.
[31] *Id.* This testimony was also corroborated through Detective Johnson's hearsay testimony.
[32] http://www.merriam-webster.com/dictionary/become

she **never once** complained of the practice despite it happening dozens of times and 2-3 times a week with $20-$80 going missing from the cash box. However, when "consent" by Ms. Hackborn was indirectly removed by her discussion with Ms. Gill, Ms. Anderson simply stops whatever she was doing that was offensive to Ms. Hackborn.

To turn around 5-6 years later and say "gotcha" is akin to entrapment. Simple fairness militates toward dismissing this charge based on this record.

Ms. Hackborn testified that she never saw Ms. Anderson actually remove money from the cash box. Ms. Hackborn never gave testimony that she knew or saw Ms. Anderson *use* any treasury department money between the years 2011-2014. She only provided nebulous testimony about Ms. Anderson acting "funny" when she received a phone call about her mother being ill in 2008.[33] Ms. Hackborn's own testimony creates a very gray picture about whether many of the employees, including Ms. Hackborn, had knowledge and an "understanding" for removing cash for a brief period of time to be replaced by a sticky note until it could be replaced. The unauthorized use requirement is not established.

The prosecutor never elicited testimony about whether the cash box is secure or locked with a key or combination required for entry. The inference from the record is that at least four to five people including Ms. Hackborn and Ms. Anderson work in the treasury department and may have access to the cash box. The corpus delicti of who may have used the funds let alone the unauthorized nature of that use is not satisfied.

IV. Credibility of the Res Gestae Witness and *People v King*

The court sitting as a magistrate to determine probable cause may assess the credibility of witness and defenses under *People v King*, 412 Mich 145; 312 NW2d 629

[33] *Id* at 10, Lines 21-25.

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(1981). In *King*, the Supreme Court held that even if the prosecutor presents testimony and evidence on each of the elements, the Court is to refuse to bindover the accused if the Court examines the whole matter and remains unconvinced that the crime charged was committed and that there is probable cause to believe the accused committed it, *King* at 154. The Court's duty at a preliminary exam is to give weight to the substance and competency of the evidence but further, to judge the credibility of the witnesses, *King* at 153.

Two things are most important about the testimony of Jane Hackborn:

1. Her answer in the negative when she was examined by the auditors for the relevant years (2011-2014) about the existence of fraud or improper conduct.[34]

2. The timing of her meeting with prosecutor Palumbo and filing to run for the elected treasurer's position against Mr. Shellenbarger, which was a matter of *days*.[35]

The lack of credibility in Ms. Hackborn's testimony is manifest. Ms. Hackborn testified that she was also passed over for a promotion in 2008 by Mr. Shellenbarger in favor of Ms. Anderson.[36]

The Court is also asked to reflect on the manner in which Hackborn testified. Examples include stating first that she did not know what the audit report said about 2008, but then saying she downloaded it from the internet and read it.[37] She also testified inconsistently as to whether there was money missing from the Iosco County Treasurer's Office. When she was under cross examination – there was no money missing.[38] On direct: there was money missing.[39]

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[34] *Id* at 4.
[35] *Id* at 56.
[36] *Id* at 62, Lines 13-14.
[37] *Id* at 68, Lines 5-8.
[38] *Id* at 71, Lines 2-3.

V. The Prosecutor's Strict Liability Theory- It is contrary to the clearly-established legal principles and would render the statute unconstitutional as vague and overbroad.

The prosecutor argues that MCL 750.175 is a strict liability offense. Strict liability offenses have long been disfavored in both state and federal jurisprudence. Generally, four main reasons are given for the imposition of strict liability: (1) a shift of the risk to those best able to handle it; (2) assurance to the legislature that like cases will receive uniform treatment; (3) easing the burden for the prosecutor in proving intent; and (4) that the risk of injustice to individuals is outweighed by the need to protect society and proclaim a strong policy statement that some behavior is unacceptable.[40]

In *Morrissette v United States*, 342 US 246; 72 SCt 240 (1952)(attached as **Appendix IV**), the United States Supreme Court overruled a federal appellate court interpretation to eliminate the intent element from a statute that prohibited the taking or conversion of government property. *Id* at 249-250. The Court held even if the statute's language did not contain an expressly-stated intent element, that does not mean criminal intent is not required to be proven:

> Crime, as a compound concept generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. *Id* at 251-252.

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[39] *Id* at 44, Line 25; 45, Lines 1-2.

[40] Laurie L. Levenson, Good Faith Defenses: Reshaping Strict Liability Crimes, 78 Cornell L. Rev. 401, 419-22 (1993).

In *People v Kalbfleisch*, 46 Mich App 25; 207 NW2d 428 (1973)(attached as **Appendix V**), the Court of Appeals reversed the conviction of a township treasurer in Lapeer County, who was prosecuted after a discrepancy was discovered between the cash shown on original deposit slips retained by the bank and the copies retained by Ms. Kalbfleisch. *Id* at 26.

The record developed during trial established that:

1. Ms. Kalbfleisch was the township treasurer and as such she and two others received and receipted tax monies
2. The accused and one other person deposited township tax funds into the township bank account,
3. A substantial discrepancy was established between the cash shown on the deposit slips at the bank and the slips retained by the accused and the deposit entries in the township passbook;
4. What became of the money is not known. *Id* at 27.

Ms. Kalbfleisch moved for directed verdict at the close of the prosecutor's proofs and the trial court denied the motion. In reversing, the Court of Appeals interpreted a prior holding of the Supreme Court in *People v Glazier*, 159 Mich 528; 124 NW 582 (1910) as requiring the prosecutor to show:

> The defendant knowingly and unlawfully appropriated tax moneys for her own use, or the use of another, and that she failed, neglected or refused to account for them on demand or to pay over and deliver them to her successor. *Id* at 28.

The prosecutor's case against Ms. Anderson is not even as strong as *Kalbfleisch* in that there is no money missing and it was accounted for according to the testimony. Further, when the complaining witness complained to Ms. Anderson

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indirectly through Mary Gill, it appears that whatever conduct it was that Ms. Hackborn did not like *ceased* to occur.

As the Supreme Court in *Glazier* put it:

> "If [s]he is able to account for them at the proper time, he incurs no criminal responsibility under this statute, however bad his motives, but can only be prosecuted for the offense described in section 1201, or under the general embezzlement statute," *Id* at 529-530.

The holding of the Court of Appeals is also in accord with the federal doctrine set forth by the Supreme Court of the United States.

To say that this statute requires no intent to be shown would render it overbroad. The Court must also consider the public policy implications of allowing the prosecution's argument to prevail. A court should read into a statute the mens rea necessary to separate wrongful conduct from innocent conduct, *Carter v United States*, 530 US 255, 269; 120 SCt 2159 (2000).

As the Court contemplated during its colloquy with the lawyers, the prosecution's interpretation of MCL 750.175 renders many workplace behaviors felonious. If a Treasurer's Office employee wants to collect a particular bill received from the public for a particular year and replaces it with another bill of equal value, she is guilty of a felony according to the prosecutor. If the employee makes change for lunch using bills from the office cashbox and replaces those bills with different bills of equal value, that too is a felony per the prosecutor's theory of MCL 750.175.

There is no money missing from the Iosco County Treasurer's Office. There was no money missing from the Iosco County Treasurer's Office. As *Glazier* puts it, if the public official (in this case his agent) accounts for the public funds when asked, he has not violated MCL 750.175. Under the later case of *Kalbfleisch,* if he accounts and there

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is a discrepancy, the prosecutor must still show that the agent appropriated the funds for her own use or the use of another. This conduct coupled with the required mental state is not supported by the testimony and exhibits on the record presented to the court.

VI. The Prosecutor's Unpublished Authority

The prosecutor cited the unpublished case of *People v Fick* (2008 WL 2746003) in her brief. An unpublished opinion is disfavored and not binding. MCR 7.215(C). A party citing an unpublished opinion must provide a copy of the case *and* explain why the case is being cited. MCR 7.215(C). The prosecutor failed to give such an explanation in her brief.

Moreover, *Fick* does not support the prosecutor's argument. In fact, the *Fick* Court held that MCL 750.175 is not a strict liability offense. The rest of the *Fick* case is a rehash of the issues discussed in the above brief. Fick does not change the outcome of this Court's decision.

VII. *People v Jones*

The prosecutor's position in her brief is different than her argument in moving for a bindover as she cites to *People v Jones* for the proposition that an alleged embezzler does not escape prosecution by paying restitution (Prosecutor's Brief pp. 6-7). The problem with her reliance on the case is three-fold.

1. It does not overrule the legal principles in *Glazier* and in *Kalbfleisch*, to wit that if the money at issue is present at the time of the accounting then a prosecution cannot be had and, even if the money is subject of a discrepancy, the prosecutor must show an intentional unauthorized appropriation by the accused;

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2. In *Jones*, the sole issue was whether the prosecutor was required to show that there was a demand made for the money and the demand was not met by the accused;

3. The proofs at the preliminary examination, as recited in the opinion were that:

a. Mr. Jones was a city council member;

b. He was given a check for expenses for a conference *and*;

c. "According to the evidence presented at the preliminary examination *on June 13, 1988, defendant cashed the check, used the money to cover a medical emergency and did not attend the conference*" (*Jones* at 263, *emphasis supplied*).

The prosecutor in *Jones* presented testimony that Mr. Jones cashed a check and used the money for a specific purpose specifically, an unauthorized purpose. No such testimony was presented through the statements of any witness except for the somewhat unclear statement of Ms. Anderson to the Detective that violated the corpus delicti rule.

It also appears the prosecutor's argument puts the cart before the horse. Ms. Anderson is not claiming that she made restitution and therefore should not be prosecuted. The point is that no money is missing: period. If no money is missing, no restitution is required and no prosecution can be had under *Glazier*. The argument conflates restitution as a concept with the office practices testified to during the preliminary examination in this case, specifically: leave a marker and return the cash and it is acceptable among the employees balancing the cash box.

The prosecutor elected to bring a charge under MCL 750.175, arguing that there is no intent. Then she argued there is a little intent but not much (*Fick*). However, the statute under which the prosecutor proceeds also is interpreted very clearly by the

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Michigan Supreme Court in *Glazier* as stating that if no money is missing when the accounting occurs, no prosecution can be sustained *regardless* of intent. This point is completely different than what *Jones* stands for, which is that the prosecutor does not have to show an "unmet demand" for public funds. No such demand was made. No such demand is required because no money is or ever was, missing in this case. Therefore, no prosecution can be sustained.

CONCLUSION

For these reasons, Ms. Anderson respectfully requests this Honorable Court to deny the prosecution's bindover motion and dismiss the charge.

Respectfully submitted,

THE NICHOLS LAW FIRM, PLLC

Dated: Sept 20, 2016 BY: _____

MICHAEL J. NICHOLS (P59391)
Co-Counsel for the Accused

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APPENDIX I

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M Crim JI 27.3 Embezzlement by a Public Official

(1) The defendant is charged with the crime of embezzlement by a public official. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant either held public office or was the agent or servant of a public official.*

(3) Second, that the defendant received [money / property] in [his / her] official position.

(4) Third, that the defendant knew that the [money / property] was public property.

(5) Fourth, that the defendant used the [money / property] for an unauthorized purpose. It is charged in this case that the defendant used the [money / property] for [state purpose]. Such use of public [money / property] is unauthorized.

(6) Fifth, that [the property was worth $50 or more / more than $50 was involved].

Use Note

*Define terms used. See the table of contents to chapter 22 on page 22-1 for a list of definitions.

History

M Crim JI 27.3 was CJI 27:2:01.

APPENDIX II

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276 Mich. 428
Supreme Court of Michigan.

PEOPLE
v.
HOEFLE.

No. 141.
|
June 16, 1936.

John J. Hoefle was convicted of embezzlement and conversion, and he appeals.

Conviction set aside and new trial ordered.

West Headnotes (4)

[1] **Criminal Law**
⚖Defenses in General

It is trial court's duty, on proper request, to cover in charge to jury theory on which defense was founded, if supported by competent testimony.

9 Cases that cite this headnote

[2] **Criminal Law**
⚖Necessity of Instructions

Party is entitled to specific charges on law applicable to each of various hypotheses or combinations of facts which jury might legitimately find from evidence, if not covered by other instructions.

6 Cases that cite this headnote

[3] **Criminal Law**
⚖Erroneous Requests

Trial court's failure to outline and submit to jury by instructions in embezzlement trial theory of defense that defendant took and used money with his employer's consent or approval held prejudicial error, though his request for such charge was technically incorrect in asking instruction that defendant's testimony showed that he drew and cashed checks for amount taken under employer's authority.

4 Cases that cite this headnote

[4] **Witnesses**
⚖Cross-Examination to Discredit Witness or Disparage Testimony in General

Scope of cross-examination on collateral and irrelevant issues for purpose of testing witness' credibility rests in trial court's discretion.

Cases that cite this headnote

***429 **644** Appeal from Recorder's Court of Detroit; W. McKay Skillman, judge.

Argued before the Entire Bench.

Attorneys and Law Firms

Wm. Henry Gallagher, of Detroit, for appellant.

David H. Crowley, Atty. Gen., and Edmund E. Shepherd and Chester P. O'Hara, Asst. Atty. Gen., for the People.

Opinion

NORTH, Chief Justice.

Appellant was convicted by a jury of embezzling and converting to his own use $10,000 of the funds of Rands, Inc., a Michigan corporation, located in Detroit. This corporation was practically owned and wholly under the control of William C. Rands. The defense urged was that

the accused took and used the $10,000 under the express authority of his employer, and that later defendant decided to keep the amount so taken in the belief that he was justly entitled thereto as part payment for money due him from his employer under a specific agreement, the details of which are unimportant for decision herein.

***430** Appellant asserts as error that the trial judge failed to fully cover in his charge to the jury the defendant's theory of defense, notwithstanding an appropriate request to so charge was preferred. It was a part of defendant's claim and theory of defense that, prior to the time he countersigned and cashed the check for $10,000 and used the proceeds for his own stock transactions, Mr. Rands gave him permission to do so. Mr. Rands, the complaining witness, denied there was any such arrangement or permission. Clearly, if defendant had Rands' permission to use the funds alleged to have been embezzled, no crime was committed. A controlling issue of fact was thus presented. On this phase of the case defendant testified:

'He (Mr. Rands) said, 'You better go in and buy yourself some Hiram Walker stock if you need anything here help yourself out for your own account. Go ahead and use it.' * * *

'* * * he said to me, 'If you need anything, go ahead and use it,' and I said, 'I have used a few hundred shares of stock,' and he said, 'All right, go ahead but don't carry the place away, * * *' * * *

'I proceeded to take the property of Rands, Inc., without telling anybody about it. I did it with Mr. Rands' advice.'

In the court's opinion, filed at the time he denied defendant's motion for a new trial, the following statement is made: 'Rands took the witness stand first and testified very largely as to formal matters. He testified in general terms that he did not authorize use by defendant of the $10,000 which the defendant was charged with embezzling at any time or for any purpose. Afterwards Hoefle, the defendant, took the stand and with great detail narrated the time, place and substance of the agreement he claimed to have ***431** had with ****645** Rands, which authorized him to use the money as he did.'

The following request to charge was presented by defendant: 'The testimony of Mr. Hoefle shows that at the time he drew and cashed this $10,000.00 check he did so under authority of William C. Rands, that he had no intention at that time to keep and not return the money, but did intend to return it; and if you find that to be the fact then you must find that the defendant is not guilty of the charge of embezzling and converting this money to his own use feloniously and fraudulently as charged.'

[1] A careful reading of the court's charge discloses that this request was not given nor was it covered by any portion of the charge to the jury. Instead the charge, in so far as it outlined the theory of defense, was wholly confined to another issue of fact presented by the testimony, to wit, that defendant, subsequent to taking and using the money, believing he had a right to do so, decided to retain it and apply it in payment on an indebtedness which he claimed was due him from Mr. Rands. This we think deprived defendant of a fair trial. It is the duty of a trial court, if proper request is made, to cover in the charge to the jury the theory upon which the defense is founded, if it is supported by competent testimony.

[2] 'A party is entitled to have specific charges upon the law applicable to each of the various hypotheses or combinations of facts which the jury, from the evidence, might legitimately find, and which have not been covered by other instructions.' Syllabus. People v. Parsons, 105 Mich. 177, 63 N.W. 69. See, also, People v. Cummins, 47 Mich. 334, 11 N.W. 184, 186.

[3] Surely it was of greatest importance to the defendant that the jury should be charged that the burden ***432** was on the people to show beyond a reasonable doubt that the $10,000 was taken and used by defendant without the consent or approval of Mr. Rands or Rands, Inc. Failure to outline and submit to the jury this theory of the defense was prejudicial error.

While it has not been urged in the people's brief, it may be noted in passing that the above-quoted request to charge, as presented by defendant, was not in technically correct language. It would have been unfair and prejudicial to the people's case for the court to have said to the jury: 'The testimony of Mr. Hoefle shows that at the time he drew and cashed this $10,000 check he did so under authority of William C. Rands. * * *'

Such statement by the court would in all probability have led the jury to understand the charge as meaning that by Mr. Hoefle's testimony the fact was established that the money was used under the authority of Mr. Rands. Notwithstanding the imperfection in the request as presented, this theory of the defense was specifically called to the attention of the court, and it thereupon became the duty of the court in the trial of a criminal case to fairly cover this theory of the defense in the charge to the jury.

[4] It is also urged in support of this appeal that the trial court committed error by unduly restricting defendant's cross-examination of the complaining witness. The

cross-examination which defendant's counsel sought to pursue had to do wholly with collateral matters, and its only bearing was upon the credibility of the complaining witness. The scope of cross-examination upon collateral and irrelevant issues for the purpose of testing the credibility of a witness rests in the discretion of the trial court. People v. Marcus, 253 Mich. 410, 235 N.W. 202.

***433** For the reason hereinbefore indicated, the defendant's conviction must be set aside and a new trial ordered.

FEAD, WIEST, BUTZEL, BUSHNELL, SHARPE, and TOY, JJ., concur.

POTTER, J., took no part in this decision.

All Citations

276 Mich. 428, 267 N.W. 644

End of Document

APPENDIX III

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M Crim JI 22.11 Definition of Conversion

Conversion means using or keeping someone else's property without that person's permission.

History

M Crim JI 22.11 was CJI 22:2:07.

APPENDIX IV

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72 S.Ct. 240
Supreme Court of the United States

MORISSETTE
v.
UNITED STATES.

No. 12.
|
Argued Oct. 9—10, 1951.
|
Decided Jan. 7, 1952.

Joseph Edward Morissette was convicted in the United States District Court for the Eastern District of Michigan, Frank A. Picard, J., of knowingly converting to his own use property of the United States, and he appealed. The United States Court of Appeals for the Sixth Circuit, Martin, Circuit Judge, 187 F.2d 427, affirmed the judgment, and Joseph Edward Morissette brought certiorari. The Supreme Court, Mr. Justice Jackson, held that criminal intent is an essential element of the crime of knowing conversion of Government property.

Judgment reversed.

West Headnotes (12)

[1] **Constitutional Law**
⇦Criminal Law

The federal judiciary does not have power to create crimes.

5 Cases that cite this headnote

[2] **Constitutional Law**
⇦Criminal Law

The federal judiciary should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.

36 Cases that cite this headnote

[3] **Statutes**
⇦Technical terms, terms of art, and legal terms

Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed, and in such case absence of contrary direction may be taken as satisfaction with widely accepted definitions and not as a departure from them.

262 Cases that cite this headnote

[4] **Embezzlement**
⇦Intent
Larceny
⇦Intent

The mere omission of any mention of intent from statute providing that whoever embezzles, steals, purloins or knowingly converts government property is punishable by fine and imprisonment will not be construed as eliminating the element of intent from the crimes denounced. 18 U.S.C.A. § 641.

146 Cases that cite this headnote

[5] **Embezzlement**
⇦Statutory provisions

The 1948 re-enactment, as a consolidation of former sections of the code, of statute providing,

inter alia, that whoever embezzles, steals, purloins or knowingly converts government property in punishable by fine and imprisonment had no other purpose than to collect from scattered sources crimes so kindred as to belong in one category. 18 U.S.C.A. § 641.

19 Cases that cite this headnote

[6] **Conversion and Civil Theft**
⊶Intent
Conversion and Civil Theft
⊶Exemplary damages

At common law, there are unwitting acts which constitute conversions, and in the civil tort, except for recovery of exemplary damages, the defendant's knowledge, intent, motive, mistake and good faith are generally irrelevant, and if one takes property which turns out to belong to another, his innocent intent will not shield him from making restitution or indemnity, for his well meaning may not be allowed to deprive another of his own.

65 Cases that cite this headnote

[7] **Embezzlement**
⊶Intent
Larceny
⊶Intent

Under statute providing that whoever embezzles, steals, purloins or knowingly converts government property is punishable by fine and imprisonment, "knowing conversion" requires more than knowledge that defendant was taking the property into his possession, and he must have had knowledge of the facts, though not necessarily the law that made the taking a conversion. 18 U.S.C.A. § 641.

327 Cases that cite this headnote

[8] **Embezzlement**
⊶Conversion or Appropriation of Property

Conversion may be consummated without any intent to keep and without any wrongful taking where the initial possession by the converter was entirely lawful, and may include misuse or abuse of property, and may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use, and money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact.

79 Cases that cite this headnote

[9] **Embezzlement**
⊶Intent
Larceny
⊶Intent

In enacting statute providing that whoever embezzles, steals, purloins or knowingly converts government property is punishable by fine and imprisonment, Congress did not intend to eliminate intent from the offense. 18 U.S.C.A. § 641.

105 Cases that cite this headnote

[10] **Criminal Law**
⊶Elements of offenses
Criminal Law
⊶Intent or malice

Where intent of accused is ingredient of crime charged, its existence is a question of fact which must be submitted to jury, and the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.

335 Cases that cite this headnote

The Court of Appeals affirmed, one judge dissenting.[3]

On his trial, Morissette, as he had at all times told investigating officers, testified that from appearances he believed the casings were cast-off and abandoned, that he did not intend to steal the property, and took it with no ***249** wrongful or criminal intent. The trial court, however, was unimpressed, and ruled: '(H)e took it because he thought it was abandoned and he knew he was on government property. * * * That is no defense. * * * I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property.' The court stated: 'I will not permit you to show this man thought it was abandoned. * * * I hold in this case that there is no question of abandoned property.' The court refused to submit or to allow counsel to argue to the jury whether Morissette acted with innocent intention. It charged: 'And I instruct you that if you believe the testimony of the government in this case, he ****243** intended to take it. * * * He had no right to take this property. * * * (A)nd it is no defense to claim that it was abandoned, because it was on private property. * * * And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. * * * The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty.' Petitioner's counsel contended, 'But the taking must have been with a felonious intent.' The court ruled, however: 'That is presumed by his own act.'

The Court of Appeals suggested that 'greater restraint in expression should have been exercised', but affirmed the conviction because, 'As we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions.' Its construction of the statute is that it creates several separate and distinct offenses, one being knowing ***250** conversion of government property. The court ruled that this particular offense requires no element of criminal intent. This conclusion was thought to be required by the failure of Congress to express such a requisite and this Court's decisions in United States v. Behrman, 258 U.S. 280, 42 S.Ct. 303, 66 L.Ed. 619, and United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604.

I.

In those cases this Court did construe mere omission from a criminal enactment of any mention of criminal intent as dispensing with it. If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more—it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind. We think a re sume of their historical background is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[4] A relation between some mental element and punishment for a ***251** harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[5] Unqualified acceptance of this doctrine by English common ****244** law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'[6] Common-law commentators of the Nineteenth Century early pronounced the same principle,[7] although a few exceptions not relevant to our present problem came to be recognized.[8]

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism ***252** and took deep and early root in American soil.[9] As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.[10] The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty

knowledge,' 'fraudulent intent,' 'wilfulness,' 'scienter,' to denote guilty knowledge, or 'mens rea,' to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.

However, the Balint and Behrman offenses belong to a category of another character, with very different antecedents and origins. The crimes there involved depend ***253** on no mental element but consist only of forbidden acts or omissions. This, while not expressed by the Court, is made clear from examination of a century-old but accelerating tendency, discernible both here[11] and in England,[12] to call into existence ****245** new duties and crimes which disregard any ingredient of intent. The industrial revolution ***254** multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

While many of these duties are sanctioned by a more strict civil liability,[13] lawmakers, whether wisely or not,[14] ***255** have ****246** sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions. This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called 'public welfare offenses.' These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many ***256** violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does not grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. This has not, however, been without expressions of misgiving.

The pilot of the movement in this country appears to be a holding that a tavernkeeper could be convicted for selling liquor to an habitual drunkard even if he did not know the buyer to be such. Barnes v. State, 1849, 19 Conn. 398. Later came Massachusetts holdings that convictions for selling adulterated milk in violation of statutes forbidding such sales require no allegation or proof that defendant knew of the adulteration. Commonwealth v. Farren, 1864, 9 Allen 489; Commonwealth v. Nichols, 1865, 10 Allen 199; Commonwealth v. Waite, 1865, 11 Allen 264. Departures from the common-law tradition, ***257** mainly of these general classes, were reviewed and their rationale appraised by Chief Justice Cooley, as follows: 'I agree that as a rule there can be no crime without a criminal intent, but this is not by any means a universal rule. * * * Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them, the purpose being ****247** to require a degree of diligence for the protection of the public which shall render violation impossible.' People v. Roby, 1884, 52 Mich. 577, 579, 18 N.W. 365, 366.

After the turn of the Century, a new use for crimes without intent appeared when New York enacted numerous and novel regulations of tenement houses, sanctioned by money penalties. Landlords contended that a guilty intent was essential to establish a violation. Judge Cardozo wrote the answer: 'The defendant asks us to test the meaning of this statute by standards applicable to statutes that govern infamous crimes. The analogy, however, is deceptive. The element of conscious wrongdoing, the guilty mind accompanying the guilty act, is associated with the concept of crimes that are punished

as infamous. * * * Even there it is not an invariable element. * * * But in the prosecution of minor offenses there is a wider range of practice and of power. Prosecutions for petty penalties have always constituted in our law a class by themselves. * * * That is true, though the prosecution is criminal in form.' Tenement House Department of City of New York v. McDevitt, 1915, 215 N.Y. 160, 168, 109 N.E. 88, 90.

Soon, employers advanced the same contention as to violations of regulations prescribed by a new labor law. Judge Cardozo, again for the court, pointed out, as a basis ***258** for penalizing violations whether intentional or not, that they were punishable only by fine 'moderate in amount', but cautiously added that in sustaining the power so to fine unintended violations 'we are not to be understood as sustaining to a like length the power to imprison. We leave that question open.' People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 1918, 225 N.Y. 25, 32—33, 121 N.E. 474, 476, 477.

Thus, for diverse but reconcilable reasons, state courts converged on the same result, discontinuing inquiry into intent in a limited class of offenses against such statutory regulations.

Before long, similar questions growing out of federal legislation reached this Court. Its judgments were in harmony with this consensus of state judicial opinion, the existence of which may have led the Court to overlook the need for full exposition of their rationale in the context of federal law. In overruling a contention that there can be no conviction on an indictment which makes no charge of criminal intent but alleges only making of a sale of a narcotic forbidden by law, Chief Justice Taft, wrote: 'While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it * * *, there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court. * * *' United States v. Balint, supra, 258 U.S. 251—252, 42 S.Ct. 302.

He referred, however, to 'regulatory measures in the exercise of what is called the police power where the emphasis ***259** of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se,' and drew his citation of supporting authority chiefly from state court cases dealing with regulatory offenses. Id., 258 U.S. at page 252, 42 S.Ct. at page 302.

On the same day, the Court determined that an offense under the Narcotic Drug Act does not require intent, saying, 'If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.' United States v. Behrman, supra, 258 U.S. at page 288, 42 S.Ct. at page 304.

Of course, the purpose of every statute would be 'obstructed' by requiring a finding of intent, if we assume that it had a purpose to convict without it. Therefore, the obstruction rationale does not help us ****248** to learn the purpose of the omission by Congress. And since no federal crime can exist except by force of statute, the reasoning of the Behrman opinion, if read literally, would work far-reaching changes in the composition of all federal crimes. Had such a result been contemplated, it could hardly have escaped mention by a Court which numbered among its members one especially interested and informed concerning the importance of intent in common-law crimes.[15] This might be the more expected since the Behrman holding did call forth his dissent, in which Mr. Justice McReynolds and Mr. Justice Brandeis joined, omitting any such mention.

It was not until recently that the Court took occasion more explicitly to relate abandonment of the ingredient of intent, not merely with considerations of expediency in obtaining convictions, nor with the malum prohibitum classification of the crime, but with the peculiar nature and quality of the offense. We referred to '* * * a now familiar type of legislation whereby penalties serve as ***260** effective means of regulation', and continued, 'such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.' But we warned: 'Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting.' United States v. Dotter-weich, 320 U.S. 277, 280—281, 284, 64 S.Ct. 134, 136, 88 L.Ed. 48.[16]

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static. The conclusion reached in the Balint and Behrman cases has our approval and adherence for the circumstances to which it was there applied. A quite different question here is whether we will expand the doctrine of crimes without intent to include those charged here.

Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation;[17] they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is '* * * as bad a word as you can give to man or thing.'[18] State courts of last resort, on whom fall the heaviest burden ***261** of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses.[19] If any state ****249** has deviated, the exception has neither been called to our attention nor disclosed by our research.

Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all ***262** constituent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute. Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act. Because the offenses before this Court in the Balint and Behrman cases were of this latter class, we cannot accept them as authority for eliminating intent from offenses incorporated from the common law. Nor do exhaustive studies of state court cases disclose any well-considered decisions applying the doctrine of crime without intent to such enacted common-law offenses,[20] although a few deviations are notable as illustrative of the danger inherent in the Government's contentions here.[21]

***263** The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

[1] [2] [3] [4] The spirit of the doctrine which denies to the federal judiciary power to ****250** create crimes forthrightly[22] admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

We hold that mere omission from s 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.

II.

It is suggested, however, that the history and purposes of s 641 imply something more affirmative as to elimination of intent from at least one of the offenses charged under it in this case. The argument does not contest ***264** that criminal intent is retained in the offenses of embezzlement, stealing and purloining, as incorporated into this section. But it is urged that Congress joined with those, as a new, separate and distinct offense, knowingly to convert government property, under circumstances which imply that it is an offense in which the mental element of intent is not necessary.

Congress has been alert to what often is a decisive function of some mental element in crime. It has seen fit to prescribe that an evil state of mind, described variously in one or more such terms as 'intentional,' 'wilful,' 'knowing,' 'fraudulent' or 'malicious,' will make criminal an otherwise indifferent act,[23] or increase the degree of the offense or its punishment.[24] Also, it has ***265** at times required a specific intent or purpose which will require some specialized knowledge or design for some evil beyond the common-law intent to do injury.[25] The law under some circumstances recognizes good faith or blameless intent as a defense, partial defense, or as an element to be considered in mitigation of punishment. ****251** [26] And treason—the one crime deemed grave enough for definition in our Constitution itself—requires not only the duly witnessed overt act of aid and comfort to the enemy but also the mental element of disloyalty or adherence to the enemy.[27] In view of the care that has been bestowed upon the subject, it is significant that we have not found, nor has our attention been directed to, any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law.

[5] The section with which we are here concerned was enacted in 1948, as a consolidation of four former sections of Title 18, as adopted in 1940, which in turn

were derived from two sections of the Revised Statutes. The pertinent legislative and judicial history of these antecedents, *266 as well as of s 641, is footnoted.[28] We find no **252 other purpose in the 1948 re-enactment than to collect from scattered sources crimes so kindred as to belong in *267 one category. Not one of these had been interpreted to be a crime without intention and no purpose to differentiate between them in the matter of intent is disclosed. *268 No inference that some were and some were not crimes of intention can be drawn from any difference in classification or punishment. Not one fits the **253 congressional classification of the petty offense; each is, at its least, a misdemeanor, and if the amount involved is one hundred *269 or more dollars each is a felony.[29] If one crime without intent has been smuggled into a section whose dominant offenses do require intent, it was put in ill-fitting and compromising company. The Government apparently did not believe that conversion stood so alone when it *270 drew this one-count indictmemt to charge that Morissette 'did unlawfully, wilfully and knowingly steal and convert to his own use.'[30]

[6] Congress, by the language of this section, has been at pains to incriminate only 'knowing' conversions. But, at common law, there are unwitting acts which constitute conversions. In the civil tort, except for recovery of exemplary damages, the defendant's knowledge, intent, motive, mistake, and good faith are generally irrelevant.[31] If one takes property which turns out to belong to another, his innocent intent will not shield him from making restitution **254 or indemnity, for his well-meaning may not be allowed to deprive another of his own.

[7] Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions. Knowledge, of course, is not identical with intent and may not have been the most apt words of limitation. But knowing conversion *271 requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. In the case before us, whether the mental element that Congress required be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt. for it is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property.

[8] It is said, and at first blush the claim has plausibility, that, if we construe the statute to require a mental element as part of criminal conversion, it becomes a meaningless duplication of the offense of stealing, and that conversion can be given meaning only by interpreting it to disregard itention. But here again a broader view of the evolution of these crimes throws a different light on the legislation.

It is not surprising if there is considerable overlapping in the embezzlement, stealing, purloining and knowing conversion grouped in this statute. What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances. Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. 'To steal means to take away from one in lawful possession without right with the intention to keep wrongfully.' (Italics added.) Irving Trust Co. v. Leff, 253 N.Y. 359, 364, 171 N.E. 569, 571. Conversion, however, may be consummated without *272 any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions.

The purpose which we here attribute to Congress parallels that of codifiers of common law in England[32] and in the States[33] and demonstrates that the serious problem *273 **255 in drafting such a statute is to avoid gaps and loopholes between offenses. It is significant that the English and State codifiers have tried to cover the same type of conduct that we are suggesting as the purpose of Congress here, without, however, departing from the common-law tradition that these are crimes of intendment.

[9] We find no grounds for inferring any affirmative instruction from Congress to eliminate intent from any offense with which this defendant was charged.

III.

As we read the record, this case was tried on the theory that even if criminal intent were essential its presence (a) should be decided by the court (b) as a presumption ***274** of law, apparently conclusive, (c) predicated upon the isolated act of taking rather than upon all of the circumstances. In each of these respects we believe the trial court was in error.

[10] Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. State court authorities cited to the effect that intent is relevant in larcenous crimes are equally emphatic and uniform that it is a jury issue. The settled practice and its reason are well stated by Judge Andrews in People v. Flack, 125 N.Y. 324, 334, 26 N.E. 267, 270, 11 L.R.A. 807: 'It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system, (unless in exceptional cases,) both must be found by the jury to justify a conviction for crime. However clear the proof may be, or however inconstrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury. * * *'

It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. The Supreme Court of Florida, for example, in a larceny case, from selected circumstances which are present in this case, has ***275** declared a presumption of exactly opposite effect from the one announced by the trial court here: '* * * But where the taking is open and there is no subsequent attempt to conceal the property, ****256** and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized. * * *' Kemp v. State, 146 Fla. 101, 104, 200 So. 368, 369.

[11] [12] We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect.[34] In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519.

Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, 'Did he intend ***276** to take the property?' That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, wrongfully to deprive another of possession of property. Whether that intent existed, the jury must determine, nor only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances.

Of course, the jury, considering Morissette's awareness that these casings were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an afterthought. Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges. They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was indicated by Morissette's good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.

Reversed.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice MINTON took no part in the consideration or decision of this case.

All Citations

342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288

Footnotes

1 341 U.S. 925, 71 S.Ct. 796, 95 L.Ed. 1356.

2 18 U.S.C. s 641, 18 U.S.C.A. s 641, so far as pertinent, reads:
'Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof;
'Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.'

3 Morissette v. United States, 6 Cir., 187 F.2d 427, 431.

4 For a brief history and philosophy of this concept in Biblical, Greek, Roman, Continental and Anglo-American law see Radin, Intent, Criminal, 8 Encyc.Soc.Sci. 126. For more extensive treatment of the development in English Law, see 2 Pollock and Maitland, History of English Law, 448—511. 'Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.' Pound, Introduction to Sayre, Cases on Criminal Law (1927).

5 In Williams v. People of State of New York, 337 U.S. 241, 248, 69 S.Ct. 1079, 1084, 93 L.Ed. 1337, we observed that 'Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.' We also there referred to '* * * a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.' Id., 337 U.S. at page 247, 69 S.Ct. at page 1083. Such ends would seem illusory if there were no mental element in crime.

6 4 Bl.Comm. 21.

7 Examples of these texts and their alterations in successive editions in consequence of evolution in the law of 'public welfare offenses,' as hereinafter recited, are traced in Sayre, Public Welfare Offenses, 33 Col.L.Rev. 55, 66.

8 Exceptions came to include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent. Absence of intent also involves such considerations as lack of understanding because of insanity, subnormal mentality, or infancy, lack of volition due to some actual compulsion, or that inferred from doctrines of coverture. Most extensive inroads upon the requirement of intention, however, are offenses of negligence, such as involuntary manslaughter or criminal negligence and the whole range of crimes arising from omission of duty. Cf. Commonwealth v. Welansky, 1944, 316 Mass. 383, 55 N.E.2d 902.

9 Holmes, The Common Law, considers intent in the chapter on The Criminal Law, and earlier makes the pithy observation: 'Even a dog distinguishes between being stumbled over and being kicked.' P. 3. Radin, Intent, Criminal, 8 Encyc.Soc.Sci. 126, 127, points out that in American law 'mens rea is not so readily constituted from any wrongful act' as elsewhere.

10 In the Balint case, Chief Justice Taft recognized this but rather overstated it by making no allowance for exceptions such as those mentioned in n. 8.

11 This trend and its causes, advantages and dangers have been considered by Sayre, Public Welfare Offenses, 33 Col.L.Rev. 55; Hall, Prolegomena to a Science of Criminal Law, 89 U. of Pa.L.Rev. 549; Hall, Interrelations of Criminal Law and Torts, 43 Col.L.Rev. 753, 967.

12 The changes in English law are illustrated by Nineteenth Century English cases. In 1814, it was held that one could not be convicted of selling impure foods unless he was aware of the impurities. Rex v. Dixon, 3 M. & S. 11 (K.B.1814). However, thirty-two years later, in an action to enforce a statutory forfeiture for possession of adulterated tobacco, the respondent was held liable even though he had no knowledge of, or cause to suspect, the adulteration. Countering respondent's arguments, Baron Parke said, 'It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care

in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so.' Regina v. Woodrow, 15 M. & W. 404, 417 (Exch. 1846). Convenience of the prosecution thus emerged as a rationale. In 1866, a quarry owner was held liable for the nuisance caused by his workmen dumping refuse into a river, in spite of his plea that he played no active part in the management of the business and knew nothing about the dumping involved. His knowledge or lack of it was deemed irrelevant. Regina v. Stephens, L.R. 1 Q.B. 702 (1866). Bishop, referring to this decision, says, 'The doctrine of this English case may almost be deemed new in the criminal law. * * * And, properly limited, the doctrine is eminently worthy to be followed hereafter.' 1 Bishop, New Criminal Law (8th ed. 1892) s 1076. After these decisions, statutes prohibiting the sale of impure or adulterated food were enacted. Adulteration of Food Act (35 & 36 Vict. c. 74, s 2 (1872)); Sale of Food and Drugs Act of 1875 (38 & 39 Vict. c. 63). A conviction under the former was sustained in a holding that no guilty knowledge or intent need be proved in a prosecution for the sale of adulterated butter, Fizpatrick v. Kelly, L.R. 8 Q.B. 337 (1873), and in Betts v. Armstead, L.R. 20 Q.B.D. 771 (1888), involving the latter statute, it was held that there was no need for a showing that the accused had knowledge that his product did not measure up to the statutory specifications.

13 The development of strict criminal liability regardless of intent has been roughly paralleled by an evolution of a strict civil liability for consequences regardless of fault in certain relationships, as shown by Workmen's Compensation Acts, and by vicarious liability for fault of others as evidenced by various Motor Vehicle Acts.

14 Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology. Of course, they would not justify judicial disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that Congress, without clear expression, intends in any instance to do so. Radin, Intent, Criminal, 8 Encye.Soc.Sci. 126, 130, says, '* * * as long as in popular belief intention and the freedom of the will are taken as axiomatic, no penal system that negates the mental element can find general acceptance. It is vital to retain public support of methods of dealing with crime.' Again, 'The question of criminal intent will probably always have something of an academic taint. Nevertheless, the fact remains that the determination of the boundary between intent and negligence spells freedom or condemnation for thousands of individuals. The watchfulness of the jurist justifies itself at present in its insistence upon the examination of the mind of each individual offender.'
Sayre, Public Welfare Offenses, 33 Col.L.Rev. 55, 56, says: 'To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.'
Hall, Prolegomena to a Science of Criminal Law, 89 U. of Pa.L.Rev. 549, 569, appears somewhat less disturbed by the trend, if properly limited, but, as to so-called public welfare crimes, suggests that 'There is no reason to continue to believe that the present mode of dealing with these offenses is the best solution obtainable, or that we must be content with this sacrifice of established principles. The raising of a presumption of knowledge might be an improvement.' (Italics added.)
In Felton v. United States, 96 U.S. 699, 703, 24 L.Ed. 875, the Court said, 'But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions * * *.'

15 Holmes, The Common Law.

16 For the place of the mental element in offenses against the revenues, see Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418; United States v. Scharton, 285 U.S. 518, 52 S.Ct. 416, 76 L.Ed. 917.

17 2 Russell on Crime (10th ed., Turner, 1950) 1037.

18 2 Pollock & Maitland, History of English Law, 465.

19 Examples of decision in diverse jurisdictions may be culled from any digest. Most nearly in point are Johnson v. State, 36 Tex. 375, holding that to take a horse running at large on the range is not larceny in the absence of an intent to deprive an owner of his property; Jordan v. State, 107 Tex.Cr.R. 414, 296 S.W. 585, that, if at the time of taking parts from an automobile the accused believed that the car had been abandoned by its owner, he should be acquitted; Fetkenhauer v. State, 112 Wis. 491, 88 N.W. 294, that an honest, although mistaken, belief by defendant that he had permission to take property should be considered by the jury; and Devine v. People, 20 Hun, N.Y., 98, holding that a claim that an act was only a practical joke must be weighed against an admitted taking of property.
Others of like purport are Farzley v. State, 231 Ala. 60, 163 So. 394; Nickerson v. State, 22 Ala.App. 640, 119 So. 243; People v. Williams, 73 Cal.App.2d 154, 166 P.2d 63; Schiff v. People, 111 Colo. 333, 141 P.2d 892; Kemp v. State, 146 Fla. 101, 200 So. 368; Perdew v. Commonwealth, 260 Ky. 638, 86 S.W.2d 534, holding that appropriation by a finder of lost property cannot constitute larceny in the absence of intent; People v. Shaunding, 268 Mich. 218, 255 N.W. 770; People v. Will, 289 N.Y. 413, 46 N.E.2d 498; Van Vechten v. American Eagle Fire Ins. Co., 239 N.Y. 303, 146 N.E. 432, 38 A.L.R. 1115; Thomas v. Kessler, 334 Pa. 7, 5 A.2d 187; Barnes v. State, 145 Tex.Cr.R. 131, 166 S.W.2d 708; Sandel v. State, 131 Tex.Cr.R. 132, 97 S.W.2d 225;

Weeks v. State, 114 Tex.Cr.R. 406, 25 S.W.2d 855; Heskew v. State, 18 Tex.App. 275; Page v. Commonwealth, 148 Va. 733, 138 S.E. 510, holding reversible error to exclude evidence having a tendency to throw light on the question of the bona fides of one accused of larceny; Butts v. Commonwealth, 145 Va. 800, 133 S.E. 764; State v. Levy, 113 Vt. 459, 35 A.2d 853, holding that the taking of another's property in good faith by inadvertence or mistake does not constitute larceny.

20 Sayre, Public Welfare Offenses, 33 Col.L.Rev. 55, 73, 84, cites and classifies a large number of cases and concludes that they fall roughly into subdivisions of (1) illegal sales of intoxicating liquor, (2) sales of impure or adulterated food or drugs, (3) sales of misbranded articles, (4) violations of antinarcotic Acts, (5) criminal nuisances, (6) violations of traffic regulations, (7) violations of motor-vehicle laws, and (8) violations of general police regulations, passed for the safety, health or well-being of the community.

21 Sayre points out that in criminal syndicalism or sedition cases, where the pressure to convict is strong, it has been accomplished by dispensing with the element of intent, in some instances by analogy with the public welfare offense. Examples are State v. Hennessy, 114 Wash. 351, 195 P. 211; People v. Ruthenberg, 229 Mich. 315, 201 N.W. 358; State v. Kahn, 56 Mont. 108, 182 P. 107; State v. Smith, 57 Mont. 563, 190 P. 107. Compare People v. McClennegen, 195 Cal. 445, 234 P. 91. This although intent is of the very essence of offenses based on disloyalty. Cf. Cramer v. United States, 325 U.S. 1, 65 S.Ct. 918, 89 L.Ed. 1441; Haupt v. United States, 330 U.S. 631, 67 S.Ct. 874, 91 L.Ed. 1145, where innocence of intention will defeat a charge even of treason.

22 United States v. Hudson and Goodwin, 7 Cranch 32, 3 L.Ed. 259; United States v. Gooding, 12 Wheat. 460, 6 L.Ed. 693.

23 18 U.S.C. s 81, 18 U.S.C.A. s 81, Arson: '* * * willfully and maliciously * * *'; 18 U.S.C. s 113, 18 U.S.C.A. s 113, Assault: '(a) * * * with intent to commit murder or rape * * *. (b) * * * with intent to commit any felony, except murder or rape * * *'; 18 U.S.C. s 152, 18 U.S.C.A. s 152, Bank-ruptcy—concealment of assets, false oaths and claims, bribery: '* * * knowingly and fraudulently * * *'; 18 U.S.C. s 201, 18 U.S.C.A. s 201, Bribery and Graft: '* * * with intent to influence * * *'; 18 U.S.C. s 471, 18 U.S.C.A. s 471, Counterfeiting and Forgery: '* * * with intent to defraud * * *'; 18 U.S.C. s 594, 18 U.S.C.A. s 594, Intimidation of voters: '* * * for the purpose of * * *'; 18 U.S.C. s 1072, 18 U.S.C.A. s 1072, Concealing escaped prisoner: '* * * willfully * * *'; 61 Stat. 151, 29 U.S.C. s 162, 29 U.S.C.A. s 162, Interference with a member of the National Labor Relations Board or an agent of the Board in his performance of his duties: '* * * willfully * * *'; 52 Stat. 1069, 29 U.S.C. s 216(a), 29 U.S.C.A. s 216(a), Violations of provisions of Fair Labor Standards Act: '* * * willfully * * *'; 37 Stat. 251, 21 U.S.C. s 23, 21 U.S.C.A. s 23, Packing or selling misbranded barrels of apples: '* * * knowingly * * *.'

24 18 U.S.C. s 1112, 18 U.S.C.A. s 1112, Manslaughter, '* * * the unlawful killing of a human being without malice', if voluntary, carries a maximum penalty of imprisonment not to exceed ten years. If the killing is 'with malice aforethought', the crime is murder, 18 U.S.C. s 1111, 18 U.S.C.A. s 1111, and, if of the first degree, punishable by death or life imprisonment, or, if of the second degree, punishable by imprisonment for any term of years or life.

25 18 U.S.C. s 242, 18 U.S.C.A. s 242; Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495.

26 I.R.C. ss 145(a), 145(b), 53 Stat. 62, as amended, 26 U.S.C. ss 145(a), 145(b), 26 U.S.C.A. s 145(a, b), as construed in Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418; 52 Stat. 1069, 29 U.S.C. s 216(a), 29 U.S.C.A. s 216(a), stating the criminal sanctions for violations of the Fair Labor Standards Act, provides that: 'No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.' N.Y. Penal Law, McK.Consol.Laws, c. 40, s 1306, provides that, 'Upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable.'

27 U.S.Const. Art. III, s 3, cl. 1.
This provision was to prevent incrimination of mere mental operations such as 'compassing' the death of the King. See Cramer v. United States, 325 U.S. 1, 65 S.Ct. 918, 89 L.Ed. 1441. To hold that a mental element is necessary to a crime is, of course, not to say that it is all that is necessary.

28 The Reviser's Note to 18 U.S.C. s 641 states that it is derived from 18 U.S.C. (1940 ed.) ss 82, 87, 100, and 101 which, in turn, are from Rev.Stat. ss 5438 and 5439. We shall consider only the 1940 code sections and their interpretations.
18 U.S.C. (1940 ed.) s 82 reads: 'Whoever shall take and carry away or take for his use, or for the use of another, with intent to steal or purloin * * * any property of the United States * * * shall be punished as follows * * *.'
In United States v. Anderson, D.C., 45 F.Supp. 943, a prosecution for conspiracy to violate that section, District Judge Yankwich said:
'It has been before the courts in very few cases. But such courts as have had cases under it, including our own Ninth Circuit Court of Appeals, have held that the object of the section is to introduce the crime of larceny into the Federal Criminal Code.
'In Frach v. Mass, 9 Cir., 1939, 106 F.2d 820, 821, we find these words: 'Larceny of property of the United States is made a crime

by 18 U.S.C.A. s 82.'

'This means of course, that in interpreting the statute, we may apply the principles governing the common law crime of larceny, as interpreted by the courts of various states.' 45 F.Supp. at page 945.

United States v. Trinder, D.C., 1 F.Supp. 659, was a prosecution of a group of boys, under s 82, for 'stealing' a government automobile. They had taken it for a joy ride without permission, fully intending to return it when they were through. Their plans went awry when the auto came to grief against a telephone pole. In dismissing the complaint, the District Judge said: 'Upon principle and authority there was no stealing but merely trespass; secret borrowing. At common law and likewise by the federal statute (18 U.S.C.A. s 82) adopting common-law terms, stealing in general imports larceny; that is, felonious taking and intent to permanently deprive the owner of his property.' 1 F.Supp. at page 660.

18 U.S.C. (1940 ed.) s 87, entitled 'Embezzling arms and stores', provides: 'Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in sections 80 and 82 to 86 of this title.'

No cases appear to have been decided relating to the element of intent in the acts proscribed in that section.

18 U.S.C. (1940 ed.) s 100, 'Embezzling public moneys or other property', states that: 'Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than $5,000, or imprisoned not more than five years, or both.'

The only noted case of consequence is Crabb v. Zerbst, 5 Cir., 99 F.2d 562, to which the dissent below referred at some length. The appellant there was convicted of feloniously taking and carrying away certain personal property of the United States in violation of s 46 of the Criminal Code, 18 U.S.C. (1940 ed.) s 99, and had been sentenced to seven years' imprisonment. He argued that the five-year limitation of sentence in 18 U.S.C. (1940 ed.) s 100 for stealing property of the United States reduced the ten-year limitation in s 99 for feloniously taking and carrying away property of the United States to five years also.

The Court of Appeals rejected his argument, holding that the crime of 'stealing' in s 100 was separate and distinct from the offense specified in s 99, on the ground that s 100 was a broadening of the common-law crime of larceny to foreclose any avenue by which one might, in the process of pleading, escape conviction for one offense by proving that he had committed another only a hair's breadth different.

In the course of its opinion, it advanced the following pertinent observations:

'That felonious taking and carrying away of property which may be the subject of the offense constitutes the common law offense of larceny cannot be disputed. * * * However, it is doubtful if at common law any fixed definition or formula (as to the meaning of 'larceny') was not strained in its application to some of the cases clearly constituting the offense. Modern criminal codes treat the offense in various ways. Some define the offense by following the old cases and are merely declaratory of the common law, while others have broadened the offense to include offenses previously known as embezzlement, false pretenses, and even felonious breaches of trust.

'As pointed out above, the modern tendency is to broaden the offense of larceny, by whatever name it may be called, to include such related offenses as would tend to complicate prosecutions under strict pleading and practice. In some of these statutes the offense is denominated 'theft' or 'stealing.' No statute offers a clearer example of compromise between the common law and the modern code than the two sections here involved. Section 46 (18 U.S.C. s 99 (1940 ed.)) deals with robbery and larceny, the description of the latter being taken from the common law. Section 47 (18 U.S.C. s 100 (1940 ed.)) denounces the related offenses which might be included with those described in section 46 under a code practice seeking to avoid the pitfalls of technical pleading. In it the offense of embezzlement is included by name, without definition. Then to cover such cases as may shade into larceny, as well as any new situation which may arise under changing modern conditions and not envisioned under the common law, it adds the words steal or purloin. * * * Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word purloin. * * * Thus, in any case involving larceny as defined by the common law, section 46 (18 U.S.C. s 99 (1940 ed.)) would apply. Where the offense is embezzlement, or its nature so doubtful as to fall between larceny and embezzlement, it may be prosecuted under section 47 (18 U.S.C. s 100 (1940 ed.))' 99 F.2d at 564—565.

The reference in Crabb v. Zerbst to 18 U.S.C. (1940 ed.) s 99, the robbery and larceny statute then operative, suggests examination of its successor in today's code. For purpose of clarification, that section states that: 'Whoever shall rob another of any kind or description of personal property belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than $5,000, or imprisoned not more than ten years, or both.'

The Reviser's Note to 18 U.S.C. s 641, 18 U.S.C.A. s 641, makes no mention of it as a successor to that section. The present robbery statute is 18 U.S.C. s 2112, 18 U.S.C.A. s 2112, 'Personal property of United States', providing that:

'Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years.'

The Reviser's Note to that section recites that it is derived from s 99 of the 1940 Code, and 'That portion of said section 99 relating to felonious taking was omitted as covered by section 641 of this title', which makes it clear that, notwithstanding the absence of any reference to 18 U.S.C. (1940 ed.) s 99 in the Note to 18 U.S.C. s 641, 18 U.S.C.A. s 641, the crime of larceny by a felonious taking and carrying away has been transported directly from the former into the latter.

18 U.S.C. (1940 ed.) s 101 is the forerunner of that part of present s 641 dealing with receiving stolen property, and has no application to the problem at hand.

The history of s 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions. It is also pertinent to note that it renders one subject to its penalty who 'knowingly converts to his use' property of the United States. The word 'converts' does not appear in any of its predecessors. 18 U.S.C. (1940 ed.) s 82 is applicable to 'Whoever shall take and carry away or take for his use, or for the use of another, with intent to steal or purloin * * * any property of the United States * * * shall be punished as follows * * *.' 18 U.S.C. (1940 ed.) s 87 uses the words 'knowingly apply to his own use'. Neither 18 U.S.C. (1940 ed.) ss 99, 100, nor 101 has any words resembling 'knowingly converts to his own use.' The 1948 Revision was not intended to create new crimes but to recodify those then in existence. We find no suggestion that a guilty intent was not a part of each crime now embodied in s 641.

29 18 U.S.C. ss 1, 641, 18 U.S.C.A. ss 1, 641.

30 Had the indictment been limited to a charge in the words of the statute, it would have been defective if, in the light of the common law, the statute itself failed to set forth expressly, fully, and clearly all elements necessary to constitute the offense. United States v. Carll, 105 U.S. 611, 26 L.Ed. 1135.

31 Harker v. Dement, 1850, 9 Gill, Md., 7, 52 Am.Dec. 670; Baltimore & O.R. Co. v. O'Donnell, 1892, 49 Ohio St. 489, 32 N.E. 476, 21 L.R.A. 117. The rationale underlying such cases is that when one clearly assumes the rights of ownership over property of another no proof of intent to convert is necessary. It has even been held that one may be held liable in conversion even though he reasonably supposed that he had a legal right to the property in question. Row v. Home Sav. Bank, 1940, 306 Mass. 522, 29 N.E.2d 552, 131 A.L.R. 160. For other cases in the same vein, see those collected in 53 Am.Jur. 852—854. These authorities leave no doubt that Morissette could be held liable for a civil conversion for his taking of the property here involved, and the instructions to the jury might have been appropriate in such a civil action. This assumes of course that actual abandonment was not proven, a matter which petitioner should be allowed to prove if he can.

32 The Larceny Act of 1916, 6 & 7 Geo. V, c. 50, an Act 'to consolidate and simplify the Law relating to Larceny triable on Indictment and Kindred Offences' provides:
'1. For the purposes of this Act—
'(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:
'Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner. * * *'
For the growth and development of the crime of larceny in England, see 2 Russell on Crime (10th ed., Turner, 1950), 1037—1222, from which the material above was taken.

33 N.Y.Penal Code, s 1290, defines larceny as follows: 'A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.'
The same section provides further that it shall be no defense to a prosecution that: '2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property * * *.'
The Historical Note to that section discloses that it represents an attempt to abolish the distinctions between kinds of larcenies. Laws 1942, c. 732, s 1, provided: 'It is hereby declared as the public policy of the state that the best interests of the people of the state will be served, and confusion and injustice avoided, by eliminating and abolishing the distinctions which have hitherto differentiated one sort of theft from another, each of which, under section twelve hundred and ninety of the penal law, was denominated a larceny, to wit: common law larceny by asportation, common law larceny by trick and device, obtaining property by false pretenses, and embezzlement.'

34 Cf. Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv.L.Rev. 59; Morgan, Some Observations Concerning Presumption, 44 Harv.L.Rev. 906.

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APPENDIX V

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46 Mich.App. 25
Court of Appeals of Michigan, Division No. 2.

PEOPLE of the State of Michigan,
Plaintiff-Appellee,
v.
Ina KALBFLEISCH, Defendant-Appellant.

Docket No. 13892.
|
March 28, 1973.
|
Released for Publication May 30, 1973.

Defendant was convicted before the Lapeer County Circuit Court, Norman A. Baguley, J., of embezzlement, and she appealed. The Court of Appeals, Quinn, P.J., held that township treasurer, who along with two other received and receipted for township tax monies, with treasurer and one other depositing tax monies in township bank account, could not be found guilty of embezzling tax funds on showing of substantial discrepancy between cash shown on original deposit slips retained by bank and copies thereof retained by treasurer and deposit entries in bank passbook, in absence of showing who made alterations on deposit slips or what became of tax money shortage.

Reversed.

West Headnotes (2)

[1] **Embezzlement**
⇦Weight and Sufficiency of Evidence

Township treasurer, who along with two others received and receipted for township tax monies, with treasurer and one other depositing tax monies in township bank account, could not be found guilty of embezzling tax funds on showing of substantial discrepancy between cash shown on original deposit slips retained by bank and copies thereof retained by treasurer and deposit entries in bank passbook, in absence of showing who made alterations on deposit slips or what became of tax money shortage. M.C.L.A. § 750.175.

1 Cases that cite this headnote

[2] **Embezzlement**
⇦Presumptions and Burden of Proof

Burden was on the state, in prosecution of township treasurer for embezzlement of township tax funds, to prove that there was no innocent theory possible which would, without violation of reason, accord with the facts. M.C.L.A. § 750.175.

Cases that cite this headnote

Attorneys and Law Firms

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***25** Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., Martin E. Clements, Pros. Atty., for plaintiff-appellee.

Before QUINN, P.J., and BRONSON and VanVALKENBURG,* JJ.

Opinion

QUINN, Presiding Judge.

A jury found defendant guilty of embezzlement, M.C.L.A. s 750.175; M.S.A. s 28.372. She was sentenced and she appeals.

Defendant first claims that it was reversible error for the trial court to deny her motion for a directed verdict of not guilty made at the close of the people's case.

The statute reads:
'Any person holding any public office in this state, or the agent or servant of any such person, who knowingly and

unlawfully appropriates to his own use, or to the use of any other person, the money or property received by him in his official capacity or employment, of the value of $50 or upwards, shall be guilty of a felony * * *.

In any prosecution under this section the failure, neglect or refusal of any public officer to pay over and deliver to his successor all moneys and property which should be in his hands as such officer, shall be prima facie evidence of an offense against the provisions of this section.'

In People v. Glazier, 159 Mich. 528, 546, 124 N.W. 582, 589 (1910), the Supreme Court set forth the elements of the offense:
'(1) The receipt of public moneys by a public official entitled to receive them.

(2) The appropriation of the moneys, knowing them to ***27** be public moneys, to a use which, as a matter of law, is unauthorized.

(3) The failure or refusal to pay over the money, which he ought to have on hand.'

Thereafter the Supreme Court said:

> 'In our opinion it was the intention of the Legislature to provide that any public officer, who devoted the public funds in his custody and control to any other purposes than those to which the law authorized their appropriation, must account for them to his successor, or be guilty of a felony, no matter how good his intentions may have been. (Citing a case) Under this statute the public officer uses the public funds for an unauthorized purpose at his peril. If he is able to account for them at the proper time, he incurs no criminal responsibility ****430** under this statute, however bad his motives, but can only be prosecuted for the offense described in section 1201, or under the general embezzlement statute. If he is unable to account, he is criminally responsible, however good his motives.'

The record at the close of the people's case established the following:

1. Defendant was a township treasurer. As such, she and two others received and receipted for township tax moneys.

2. Defendant and one other deposited tax moneys in the township bank account.

3. A substantial discrepancy was established between the cash shown on original deposit slips retained by the bank and the copies thereof retained by defendant and the deposit entries in the township bank passbook. Alteration of the amount of cash deposits shown on the copies of deposit slips retained by defendant were shown, but by whom the alterations were made was not shown.

4. What became of the tax money shortage is not shown.
***28** [1] We read the statute to require a showing that defendant knowingly and unlawfully appropriated tax moneys for her own use, or the use of another, and that she failed, neglected or refused to account for them on demand or to pay over and deliver them to her successor. One of these elements are established on the record at the close of the people's case. It was reversible error to deny defendant's motion for directed verdict.

[2] In addition, the evidence against defendant was circumstantial. The burden of the prosecution was to prove that there is no innocent theory possible which will, without violation of reason, accord with the facts, People v. Davenport, 39 Mich.App. 252, 256, 197 N.W.2d 521 (1972). We have grave doubts that this burden was met on a record which shows two other people handling tax money and one of those also banking it.

The result reached obviates discussion of the other issues raised.

Reversed.

All Citations

46 Mich.App. 25, 207 N.W.2d 428

Footnotes

* WADE VanVALKENBURG, former Circuit Court Judge, sitting on the Court of Appeals by assignment pursuant to Const.1963, art. 6, s 23 as amended in 1968.

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