Court of Appeals, State of Michigan

ORDER

PEOPLE OF MI v JOSEPH P. GIACALONE & DANIEL ROBIN

Docket No. 277600

LC No. 2006-018001-FC; 2006-018002-FC

Peter D. O' Connell
Presiding Judge

William B. Murphy

E. Thomas Fitzgerald
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued September 18, 2007, is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

NOV 0 1 2007
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED September 18, 2007
v	No. 277600 Genesee Circuit Court
JOSEPH P. GIACALONE and DANIEL ROBIN, Defendants-Appellees.	LC Nos. 2006-018001-FC 2006-018002-FC

Before: O'Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendants were bound over to the circuit court on two counts each of larceny by conversion, MCL 750.362, for conversion of a $225,000 Flint Area Investment Fund (FAIF) loan and conversion of a $877,600 city of Flint Section 108 loan. Defendants moved to quash the information, arguing that title to the funds passed to them along with possession, and therefore, they could not have violated MCL 750.362. The circuit court granted defendants' motion and dismissed the larceny by conversion charges, but also granted the prosecution's motion to add charges of embezzlement. This Court denied the prosecution's application for leave to appeal; however, our Supreme Court remanded the case for consideration as on leave granted. *People v Giacalone*, 477 Mich 1110; 729 NW2d 861 (2007). We affirm in part and reverse in part.

The prosecution argues that the circuit court erred by dismissing the two counts of larceny by conversion against each defendant. We agree that the circuit court erred by dismissing the count regarding the Section 108 loan, but hold that dismissal of the count regarding the FAIF loan was proper. This court reviews "'a circuit court's decision to grant or deny a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering bindover.'" *People v Mason*, 247 Mich App 64, 70-71; 634 NW2d 382 (2001), quoting *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998).

A district court must bind a defendant over for trial if, after a preliminary examination, there exists probable cause to believe the defendant committed a felony. MCL 766.13; *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003). Probable cause requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. *Id.* at 126. The circuit court must consider the entire record of the preliminary examination when reviewing the magistrate's bindover

decision. *People v Crippen*, 242 Mich App 278, 281; 617 NW2d 760 (2000). The circuit court, however, may not substitute its judgment for that of the magistrate. *Id.* at 281-282.

Larceny by conversion occurs "where a person obtains possession of another's property with lawful intent, but subsequently converts the other's property to his own use." *Mason*, *supra* at 72, quoting *People v Christenson*, 412 Mich 81, 86; 312 NW2d 618 (1981); MCL 750.362. "[L]arceny by conversion is a crime against possession and not against title; one cannot convert his own funds. Thus, if an owner intends to part with title as well as possession, there can be no crime of larceny." *Christenson*, *supra* at 87. Therefore, when loaning Section 108 and FAIF funds to OK Industries (defendants' company), if the evidence shows that the city of Flint did not intend to pass title along with possession of the funds, and that defendants subsequently converted the funds to their own use with the intent to permanently deprive the city of the funds, probable cause would exist to bind defendants over on the charge of larceny by conversion. See *Mason*, *supra* at 72.

To find whether title passed, it is not necessary for the complainants to require the recipient of the funds "to keep the money separate from . . . personal accounts in order to infer that they intended to retain title to the money until and unless they received" their bargained-for consideration. *Id.* at 79. Additionally, the title owner of the funds need not require that the identical funds be returned; rather, "the money's original owner need only entrust the defendant with the money expecting that the same amount be returned . . . ." *Id.* at 77. The following passage from *Mason, id.* at 76-77, is instructive for our purposes:

> The Supreme Court in *Christenson*, adopting language from *People v Bayer*[, 352 Mich 564; 90 NW2d 656 (1958),] to describe the circumstances under which a court may infer that a money transfer included a transfer of legal title, explained that it was reversing the defendant's conviction because the homeowners and the defendant did not have an agreement concerning "*specific* funds." In other words, had the defendant agreed to take the money the homeowners gave him only to pay the debts at issue, then he would have been guilty of larceny by conversion because he would have had possession of the money only for the purpose of giving it to these creditors, but used it for other purposes. The defendant, though in actual possession of the money, never would have obtained legal title to the money under those facts because he could not do with it as he wished, a limitation that generally does not exist for title owners of property. [Citations omitted; emphasis in original.]

In *Mason*, the complainants had given the defendant money as down payments for mobile homes, and defendant permanently retained the payments, placing them in his personal bank account, without ever delivering the mobile homes to the complainants. This Court found that a prosecution for larceny by conversion could proceed, stating "each complainant intended to retain legal title to the down payment money, though not possession of it, until each complainant received the home each sought to purchase." *Id.* at 75.

In the instant case, defendants initially argue that title to the funds passed because the prosecutor admitted at the preliminary examination that title passed.[1] However, read in context, the prosecutor's statement at issue was not made with the intent to dispose of the formal proof of whether title passed. See *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969). Rather, the prosecutor merely misspoke.

Next, with respect to the central focus of this appeal, there is a dispute concerning whether the facts showed that title to the funds passed when the loans were dispersed. Regarding the city of Flint's Section 108 loan, testimony indicates that there was an agreement that the loan was earmarked for the specific purpose of operating OK Industries in the city of Flint. Glenda Dunlap, the city's project manager relative to the loan, Marguerite Sykes, a community planning and development representative for HUD, Tamar Lewis, a grant administrator for the city, and Captain Chris Swanson of the Genesee County Sheriff's Department, all testified that the Section 108 loan was made with the specific purpose of providing economic development within the city of Flint and to provide jobs to city residents. The loan proceeds were to be used as working capital and to purchase machinery and equipment relative to the operation of the business within the city. Furthermore, Dunlap, Sykes, and Swanson testified that the city was to monitor the Section 108 loan and that the loan disbursements were to be made based on specific documentation of how OK Industries was going to spend the loan proceeds. Thus, defendants were not free to spend the Section 108 loan funds in any way they chose or wished. Defendants were limited in how the funds could be utilized, and, as noted in *Mason, supra* at 77, limits on use do not generally exist for title owners of property. Moreover, consistent with *Mason*, the loan was primarily provided to defendants in exchange for the city receiving the benefits of economic growth and employment opportunities for its residents via the operation of OK Industries, and unless and until defendants used the funds in compliance with the loan agreement that would hopefully further the city's goals and objectives, it would make little sense for the city to have intended to give title of the funds to defendants irrespective of how the funds would be used.[2] We hold that, based on the testimony, there is probable cause to believe that the city of Flint retained title to the Section 108 funds.

On the other hand, there was no evidence presented that the $225,000 loan from FAIF was earmarked for a specific purpose, and therefore, there is not probable cause to believe that FAIF retained title to the $225,000. If title passed to defendants, larceny by conversion is impossible since one cannot convert his own property. *Christenson, supra* at 87. Consequently, the circuit court did not err by dismissing the charge of larceny by conversion with respect to the FAIF funds.

Defendants also argue that there was no evidence of larcenous intent. Intent can be proved by inferences that arise from any facts in evidence, and because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v*

[1] On appeal, defendants do not distinguish between the two counts of larceny by conversion.

[2] As stated in *Mason, supra* at 75, "[i]t would make little sense for each of these complainants to intend to give their hard-earned money to Mason to keep irrespective of whether they ever received the home for which they bargained[.]"

McRunels, 237 Mich App 168, 181; 603 NW2d 95 (1999). The prosecution presented substantial testimony that defendants used Section 108 funds for their own personal purposes and benefits. The evidence also showed that the purpose of the Section 108 loan was for defendants to operate a business in the city of Flint and hire city residents, and although defendants spent the proceeds, they did not operate their business in the city or hire city residents. Further, defendants failed to make any repayments on the outstanding loan. Hence, we hold that there is probable cause to believe that defendants converted the Section 108 funds with larcenous intent. Therefore, we reverse the order dismissing the charge of larceny by conversion in regard to the city of Flint's Section 108 funds and affirm the dismissal of the charge of larceny by conversion with respect to the FAIF funds.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O' Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald