STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 6, 2009
v	No. 282028 Wayne Circuit Court
LARRY EDWIN SCHWARTZ, JR., Defendant-Appellee.	LC No. 07-011155-FH

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Following a preliminary examination, defendant was bound over to circuit court on a charge of misconduct in office, MCL 750.505, but four additional counts of perjury in a citation, MCL 257.744a, were dismissed. The circuit court subsequently denied the prosecutor's motion to reinstate the perjury charges, and granted defendant's motion to quash the information relative to the misconduct charge. The prosecutor appeals as of right. We reverse the circuit court's order and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant, a police officer, issued four undated speeding tickets to truck drivers while working overtime. The prosecution introduced testimony to show that defendant's overtime eligibility would be jeopardized if he received two warnings for failing to issue a certain number of tickets during an overtime shift. In a daily traffic detail log, defendant listed the requisite number of tickets for the dates on which the subject tickets were actually issued. He then dated the subject tickets for the following day, and listed them in a daily log for the following day.

The district court concluded that, "[a]mendments regarding dates of alleged offenses are freely given," and that the failure to initially include the dates was therefore not material, as required by the perjury statute at issue, MCL 257.744a. The circuit court concluded that the dates were not material because MCL 257.743, which outlined the requirements for citations, did not require that the date of an offense be included.

In *People v Lively*, 470 Mich 248; 680 NW2d 878 (2004), our Supreme Court held that materiality was not an element of the perjury statute at issue, MCL 750.422 (perjury in a court proceeding). However, it referenced a number of perjury statutes that did have a materiality requirement. *Id*. at 254. It also referenced a number of cases that did not differentiate between a

common law and statutory materiality requirement; it stated that "these cases are overruled *to the extent that they are inconsistent* with our opinion today." *Id*. at 256. Thus, when materiality is an element of a perjury statute, the meaning assigned to the term in these cases applies.

One such case was *People v Kert*, 304 Mich 148, 153-154; 7 NW2d 251 (1943), in which a tavern owner (Kert) testified untruthfully that he did not know a police inspector, that the inspector had never frequented his tavern, and that patrons did not use his tavern to enter an adjoining gambling establishment. The *Kert* Court held:

> There would be nothing criminal or extraordinary in police officers or other officials going to a tavern for food and drink, but when it is considered that the building was laid out with a connection between the tavern and the adjoining part of the building used for a gambling house, through a back door from one to the back door of the other, or through the tunnel or aisle at the rear of the building on the basement level, that the frequenters of the gambling house visited the tavern, and that officers of the law, defendants in the case, frequented the place, the inference is irresistible that these officers countenanced gambling and that Kert's cafe was a place where officers met and must have known that gambling was going on next door. This would become very competent and material, though not at all conclusive, in a case where police and officers of the law were also charged with complicity in a conspiracy to permit gambling. It thus became material to show in the chain of evidence whether Inspector Watkins was a frequenter of Kert's tavern. In view of the testimony in the case, the jury were [sic] fully justified in finding that the questions asked Kert were material and that Kert had committed perjury.

See also *People v Fox*, 25 Mich 492, 497 (1872) (materiality was "an issue or cause to which facts were material, and a false statement regarding such facts upon such issue, or in such cause"); *People v Hoag*, 113 Mich App 789, 798-799; 318 NW2d 579 (1982) (statement may be material where it discredits other testimony or has bearing on credibility issues); *Anno: Materiality of testimony forming basis of perjury charge as question for court or jury in state trial*, 37 ALR4th 948, § 2[a](footnotes omitted) (false statement is material "if it directly or circumstantially had a reasonable and natural tendency to influence a pertinent determination").

In *Kert*, the inspector's patronage of the tavern was not wrongful, just as the failure to date a ticket might not be wrongful. However, together with other evidence, the patronage provided circumstantial proof of a conspiracy and was therefore material. Similarly, omitting and then misrepresenting the date on a ticket, together with other evidence, was circumstantial proof of misconduct and therefore material. Accordingly, the perjury charges should have been reinstated.

The prosecutor next argues that the circuit erred in quashing the misconduct in office charge. This was a common law offense charged pursuant to MCL 750.505. In *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003), quoting *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999) (*Coutu I*), quoting Perkins & Boyce, Criminal Law (3d ed), p 543, our Supreme Court stated that this offense requires "corrupt behavior by an officer in the

exercise of the duties of his office or while acting under color of his office." An offender acts with a corrupt intent if the act is with a "sense of depravity, perversion or taint." See Perkins, p 542. Although defendant's failure to insert the dates on the citations and properly record them might not have been a sign of depravity or perversion, if it was done for the purpose of improperly securing overtime it could not be regarded as a legitimate act. At a minimum, probable cause existed to find that it had a "sense of taint" and was therefore corrupt.[1] Accordingly, it was error to grant the defendant's motion to quash.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood

[1] We find it irrelevant that MCL 257.750 precluded a quota system. There is no indication that defendant manipulated the quota system out of regard for the statutory prohibition on quotas. The circumstantial evidence suggests that he did so impermissibly to secure his entitlement to overtime when he might not otherwise have been given overtime.