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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Sep 19 2011 04:38 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

THE STATE OF NEVADA,

Petitioner,

vs.

LACY THOMAS,

Respondent,

Case No. 58833

FAST TRACK RESPONSE

1. Name of Party filing this fast track response: Lacy Thomas

**2. Name, law firm, address, and telephone number of attorney submitting
this fast track statement:**

Franny Forsman, Esq.
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**3. Name, law firm, address, and telephone number of appellate counsel if
different from trial counsel:**

Same as Above

4. Proceedings raising same issues: Counsel is unaware of any cases raising
the same issues raised in this appeal pending before this court.

5. Procedural History: Appellate counsel is not dissatisfied with the history
set forth in the fast track statement.

6. Statement of Facts Material to the Issues on Appeal:

The State has set forth a lengthy rendition of its version of testimony presented
to the Grand Jury and has not referred to the evidence which was presented at the

1 lengthy trial in this matter which ended in a mistrial.¹ The facts which are relevant to
2 this appeal, however, are only those facts which formed the basis for the legal issue
3 decided by the trial court. The trial court based its decision on an examination of the
4 Indictment and broke down the Indictment in its decision in order to determine
5 whether the Indictment was sufficient both statutorily and constitutionally.

6 The trial court did not, as the State suggests, rely upon some unstated recall of
7 the testimony at trial (although the trial court frequently pressed the prosecutor to
8 explain what the crime was during the trial. See argument below). So the pertinent
9 facts are only those recitations of the allegations in the Indictment which the trial
10 court analyzed. Without repeating the trial court's meticulous recitation which can be
11 found at AA 737-740, the Indictment alleged theft (Counts 1 through 5) based on
12 allegations that:

- 13 • the vendors were managed by friends or associates of Thomas

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16 Although the issue before this court is a legal one and does not require resolution of disputed
17 facts, it must be noted that the State has chosen to illustrate its case by reference to testimony
18 before the Grand Jury rather than references to testimony at trial. The testimony at trial conflicts
19 with the State's presentation of facts in its Fast Track Statement. Moreover, the presentation of
20 facts in the Statement is not supported by the record and the record before the Grand Jury shows
21 a disturbing emphasis on race. For instance, the State emphasizes in its Statement that Thomas
22 entered into contracts with close friends and "college fraternity brothers" from Chicago. An
23 investigator makes that suggestion when he testified before the Grand Jury that "the people
24 involved with those companies were all from, fraternity members with Lacy Thomas in a
25 fraternity known as Alpha Phi Alpha. ...and all black males and all from Chicago." AA 86. (the
26 "college fraternity" is Alpha Phi Alpha, a prestigious leadership organization which lists among
27 its members Thurgood Marshall, Martin Luther King Jr., Edward Brooke and Paul Robeson).
28 The prosecutor felt it necessary to further inject race into the proceedings by eliciting from the
investigator that Lacy Thomas is a black male and that the investigator believed that the fraternity
was a black fraternity. AA 89. (It is unlikely that a prosecutor would be so eager to infer
criminality based on membership in a church). The State tells this court that the record supports
the allegation that Greg Boone was a close friend of Thomas' (p. 5, l.1) and that Martello Pollock
was a "close friend and fraternity brother." (p. 5, l. 15). The record references do not support
those contentions and there was no testimony to that effect at trial. The State tells this court that
Thomas negotiated a contract with Frasier Systems to serve as a project manager "although UMC
already had a Project Manager." (P. 5, l. 7). Yet the Grand Jury was told that UMC did not have
a Project Manager but could have gotten a county employee to serve in that capacity. AA 102.

- 1 • the terms of the contracts were grossly unfavorable to UMC
- 2 • Thomas sought to modify one contract to increase the return to the vendor²
- 3 • some services contracted for were not performed when Thomas knew or should have known that the vendor was not in compliance
- 4 • some services were not necessary as they could have been performed by salaried employees
- 5 • one company failed to provide a promised report
- 6 • one company was not qualified to provide valuable services to UMC

7 Counts 6-10 of the Indictment (Misconduct by a Public Officer) incorporated
8 by reference the facts from Counts 1-5. The trial court analyzed the sufficiency of the
9 Indictment based upon those allegations.

10 The only additional facts found by the trial court which are undisputed in the
11 State's Fast Track Statement are that "Thomas has not personally received any private
12 benefit from the contracts in question." AA 740. Additionally, the court found that
13 the State conceded that "each original contract had to go through a vetting process by
14 Thomas, various staff members of UMC, a Clark County District Attorney, and Clark
15 County staff before receiving ultimate approval by the Clark County Commissioners.
16 Also, all invoices submitted by the entities identified in Counts I-V were paid by the
17 County and not by Thomas." AA 740.

18 **7. Issues on Appeal:**

19 A. Whether the district court had authority to examine the statute to
20 determine whether it was unconstitutionally vague as applied?

21 1. Whether the State has waived any challenge to the timeliness
22 of the Motion to Dismiss based on the Sufficiency of the Indictment?

23 2. Whether a challenge to the constitutional sufficiency of an
24 indictment must be filed within 21 days of the first appearance of the defendant?

25 B. Did the District Court err in holding that allegations that Thomas
26 caused UMC to enter into ill-conceived contracts were insufficient statutorily and
27 constitutionally to charge a crime?

28 ² This is the contract that the County ultimately settled for \$595,000 in a civil suit brought by the vendor. See footnote 1 to decision at AA 741.

1 1. Whether review of the State’s constitutional argument is limited to
2 plain error review due to the failure of the State to make the argument below?

3 2. Whether the indictment is constitutionally and statutorily deficient in
4 this particular case due to the vagueness of the statutory terms and the failure to cure
5 that vagueness in the indictment itself?

6 **8. Legal Argument:**

7 The Motion to Dismiss was not Untimely and the State has Waived
8 any Challenge to the Timeliness of the Motion to Dismiss

9 The State argues that a Motion to Dismiss based upon the insufficiency of the
10 Indictment is tantamount to a Writ of Habeas Corpus challenging probable cause and
11 therefore the challenge must be brought within 21 days after the first appearance in
12 district court citing NRS 34. 710 and NRS 34.700 and cases which apply those
13 statutes to challenges to the sufficiency of the probable cause showing. This court has
14 never applied NRS 34.710 to a pretrial motion challenging the sufficiency of an
15 indictment and the trial court never had an opportunity to rule on the State’s argument
16 because it was not made below with regard to this motion. The failure to preserve this
17 error in the trial court constitutes waiver. Bower v. Harrah’s, 125 Nev. 37, 215 P.2d
18 709, 717 (2009)

19 The Trial Court Correctly Decided that the Indictment
20 was Constitutionally and Statutorily Deficient

21 The trial court determined that “the characterization of the crimes charged in
22 the Indictment does nothing more than put Thomas on notice that he/UMC may have
23 entered into an ill conceived contract and that by entering into such a contract, his
24 conduct is now deemed criminal in nature.” AA 741.

25 During the presentation to the Grand Jury, a juror asked the same question that
26 the trial court was presented with below.

27 A JUROR: — it poses a question I can’t answer regarding the law that
28 maybe you could help, and that’s really the point at which professional
 incompetency resulting in shoddy work product crosses the line into
 criminal activity.

 MR MITCHELL: Well, the law as set forth in the first five counts as I

1 emphasized a little bit when I was reading the legal instructions to you
2 or instructing you before we began has to do with the concept of taking
3 money that is entrusted to you for a particular purpose and using it for
4 other purposes outside that entrustment. And so it is much like
5 embezzlement in that embezzlement theory doesn't prove, doesn't
6 require proof that somebody was enriched, that the person doing the
7 embezzling actually put the money in their own pocket or their own
8 bank account, but that they used property in some way for purposes
9 outside the scope of what it was entrusted to them for. And so the theft
10 statute has been drafted by our legislature to cover all sorts of different
11 kinds of theft and one of the kinds of theft that is covered is an
12 embezzlement type theft and that's the legal theory behind the pleadings
13 in Counts 1 through 5 is the word entrustment, whether or not money
14 given or allowed to be disposed of by Lacy Thomas was used for the
15 purpose that he was hired to use it for. So the testimony on what the
16 money was entrusted for originally is not coming from every witness
17 because the only people that know what the money is entrusted for in the
18 first place are those that hired him and the people that were over him
19 that had oversight over him and whom he had to answer about the way
20 the money was being expended.

11 AA 313-314.

12 The answer that the prosecutor gave the Grand Jury about what conduct crosses
13 the line between professional incompetence and criminal conduct appears to be that
14 when the County enters into an ill-conceived contract, a crime has occurred.³

15 The State suggests for the first time in the Fast Track Statement that the scope
16 of Thomas' contracting authority could easily be ascertained by reference to Bylaws
17 of the hospital, administrative code provisions and statutory references. The problem
18 is that none of those references are contained in the Indictment. These allegations
19 were not made to the trial court, are not in the Indictment and there was no proof of
20 violations of any of those provisions put before the Grand Jury.

21 The thrust of the State's argument seems to be that, "[t]he Indictment identified
22 the specific contracts, counterparties, and bases on which the contracts were not
23 authorized, e.g., they were "grossly unfavorable" to the County for work Thomas
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Of course, all government entities have entered into ill-conceived contracts. It is only when the District Attorney decides to prosecute that the criminal courts become involved. The trial court wondered during the hearing on this matter whether selective prosecution had occurred in this case, AA 717; that issue is not before this court.

1 knew was completely “unnecessary” and would never be or was not being
2 performed.” Statement, p. 15. Yet the State argued to the trial court during the trial
3 that “I don’t have to prove that the purpose (of the contract) was to harm the county.”
4 RA at p. 5. At the hearing on the Motions, the State told the trial court, “Nowhere in
5 this theory of liability did we ever say that ACS was not performing under the
6 contract. ACS was performing.” AA 679.

7 The State’s Constitutional Argument Must be Reviewed for Plain Error

8 The standard of review that must be applied to the State’s argument that the
9 indictment does not violate the Sixth Amendment to the U.S. Constitution must be
10 reviewed for plain error as the State chose not to oppose the constitutional challenges
11 made Thomas in the trial court.

12 The Indictment is Insufficient

13 The State argues that the Indictment meets Nevada’s standard for notice
14 pleading and relies on Laney v. State, 86 Nev. 173, 178, 466 P.2d 666 (1970). Laney
15 is not helpful because in that case the challenge to the indictment was made for the
16 first time after conviction and the rule in that circumstance is that “every intendment
17 must be indulged in favor of the indictment.” That is not the rule here. The State also
18 relies on Sheriff v. Spagnola, 101 Nev. 508, 514 706 P.2d 840. 844 (1985). Spagnola
19 does not support the State as it involved a complaint about the lack of dates in the
20 Indictment, not the lack of specification of conduct which is sought to be
21 criminalized.

22 The analysis of the constitutional issue must begin with United States v.
23 Russell, 369 U.S. 749, 763, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962):

24 It is an elementary principle of criminal pleading, that where the
25 definition of an offence, whether it be at common law or by statute
26 “includes generic terms, it is not sufficient that the indictment shall
27 charge the offence in the same generic as in the definition; but it must
28 state the species,-it must descend to particulars. [citing United States v.
Cruikshank, 92 U.S. 542, 558, 23 L.Ed. 588].

 This court traced the history of NRS 173.075 and determined that F.R.Crim.P.

1 7(c) is the source of the statute and that federal law can be used to interpret Nevada's
2 statute. Laney v. State, Supra at 466 P.2d 669. United States v. Teh, 535 F.3d 511,
3 516 (9th Cir. 2008) sets forth the rule:

4 Where, as here, the indictment follows the language of a statute, the
5 indictment is only sufficient if the words of the statute "fully, directly
6 and expressly, without any uncertainty or ambiguity, set forth all the
7 elements necessary to constitute the offence." [citation omitted].

8 Here, just as in Teh, the indictment failed to apprise Thomas of how he acted
9 "without authority," how he "used" the property of another (the Theft counts) or how
10 he "used" money "for the private benefit or gain of himself or another" (the
11 Misconduct Counts). See also United States v. Morrison, 536 F.2d 286, 289 (9th Cir.
12 1976)(an allegation that the defendant converted property "without authorization of
13 law" was insufficient because the terms were not defined in the statute or the
14 indictment). The purpose of the constitutional and statutory requirements is two-fold.
15 First, it is to give adequate notice of the nature of the charges to permit the defendant
16 to prepare a defense. Second, it is to insure that there is adequate specificity so that
17 the defendant is protected from being placed in jeopardy a second time for the same
18 conduct. Russell, Supra. Here, not only was the indictment insufficient as to the first
19 purpose but it is inadequate as to the second test as well. If Lacy Thomas were
20 acquitted under this indictment, could he be retried for theft as a result of criminal
21 violation of administrative regulations? Could he be retried for Misconduct for failure
22 to disclose that he had worked with the vendors in his prior employment in Chicago
23 or that he is a member of a prestigious "black" leadership fraternity? Could he be
24 retried for conspiracy with the County Manager to enter into ill-advised contracts?
25 These are the reasons the district court, after thorough consideration and deliberation
26 and intense scrutiny, found that the prosecution just could not go forward.

26 The State cannot and does not allege that Lacy Thomas profited or benefitted
27 in any way from the conduct which is alleged. Mr. Thomas has been ruined by this
28 prosecution. This appeal should be summarily affirmed to prevent further financial

1 **CERTIFICATE OF SERVICE**

2 I hereby certify and affirm that this document was filed electronically with the
3 Nevada Supreme Court on September 19, 2011. Electronic Service of the foregoing
4 document shall be made in accordance with the Master Service List as follows:

5 CATHERINE CORTEZ MASTO
6 Nevada Attorney General

7 STEVEN S. OWENS
8 Chief Deputy District Attorney

9 DANIEL J. ALBREGTS, ESQ.
10 Counsel for Respondent

11 By: /s/ Kimberly LaPointe
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