

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

CC NO. 200108691

v.

SHERIF S. ABDELHAK

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
ORDER OF COURT

NOVAK, J.

August 16, 2002

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4. The Commonwealth established a prima facie case that the defendant failed to make the required disposition of the property.

In its brief opposing Habeas Corpus, the Commonwealth relies on the case of Commonwealth v. Fritz, 470 A.2d. 1364 (1983). In that case the superior court held that evidence that the defendants placed proceeds from the sale of bus tickets from various bus companies into the operating account of their partnership, and then failed to remit the proceeds to the bus companies, was sufficient to prove that they dealt with the proceeds as their own. The defendants, however, were partners in the business and had a proprietary interest therein. In the case at bar, the defendant was the Chief Executive Officer of Allegheny Health, Education and Research Foundation. When AHERF fell upon bad financial times in 1997 and 1998 the defendant authorized various “borrowings” from trust funds to make up losses in operational funds. The funds transferred from the trust funds were used to pay operational expenses of the hospital: supposedly everything from executive salaries to salaries for dietary workers, from sophisticated surgical equipment to enemas. The defendant was not a shareholder in the business, thus the only way he benefited from the transaction was that he continued to draw his salary and other benefits as long as the Foundation remained viable. In that regard he was not unlike thousands of other employees, despite the fact that he was perhaps the most highly paid and powerful employee in the organization.

In holding this case for court, the preliminary hearing judge, the Hon. Robert E. Dauer, relied on the case of Commonwealth v. Wood, 637 A.2d 1335 (1994). Wood was an investor, together with four co-investors, in a corporation known as “Life of Leisure”. Moreover, he served as secretary and treasurer of the corporation, and general manager of

the business. Throughout 1989 and 1990 "Life of Leisure" sold 23 recreational vehicles. Wood collected Pennsylvania sales taxes in the amount of \$11,046, which were deposited into the general operation fund for the corporation. By the summer of 1990 the corporation's financial position deteriorated to the extent that Wood left the corporation to take a new job in Philadelphia. He never remitted the collected sales tax to the Commonwealth. He was convicted of Theft By Failure to Make Required Disposition and the conviction was upheld by the superior court.

In this Court's opinion the case at bar is clearly distinguishable from Wood in that the defendant in Wood had a proprietary interest in the corporation, whereas Abdelhak had no such interest in the Foundation which he directed. He may have been the most powerful and highly compensated employee of AHERF, but the record is devoid of any evidence that he had a proprietary interest in the Foundation. He received a salary, benefits, and had pensions rights, but in that regard he was not unlike any other of the thousands of employees of the Foundation. His salary, benefits, and pension rights may have been significant, even obscene, but he had no proprietary interest in the Foundation.

The Commonwealth also cites the case of Commonwealth v. Edwards, 582 A.2d 1078 (1990). Edwards was one of two principals in a construction company which received public funds for a specific construction project in the city of Philadelphia. He used the money to pay off old debts of his company, and did not perform the construction work. His conviction for theft by deception was affirmed. Once again Edwards owned the construction company. In the case at bar, Abdelhak owned nothing, he was pure and simply an employee of AHERF.

In striking contrast to the decisions reviewed above, is the case of Commonwealth v. Stein, 585 A2d 1048 (1991), cited by the defense. Stein was a salesperson for a construction company owned by his brother, who became addicted to drugs and began to neglect the company. Despite his brother's problems Stein continued to solicit and secure construction contracts. The work was not done, and Stein and his brother were charged with Theft by Failure to Make Required Disposition of the funds received, the identical crime with which Abdelhak is charged. His brother pled guilty, Stein went to trial and was convicted. The superior court reversed, holding that the evidence did not establish that Stein, who was an employee of the company, dealt with the property as his own.

The only evidence we find that may be interpreted to show [Stein] dealt with the property as his own, was that [he] was paid a salary by [his brother]. We hold that without more, the mere fact that [Stein] was paid a salary by the company he worked for does not establish proof beyond a reasonable doubt that [Stein] was intentionally dealing with the homeowners' property as his own. (Id. at 1052.)

In this court's opinion, the Stein case is controlling in the case at bar. Abdelhak may have been the CEO of an enormous health foundation, but in the last analysis he was an employee and not an owner. In this court's opinion the word "own" in the statute means own. By authorizing transfers from the trust accounts to the operating accounts of the Foundation, the defendant did not deal with the property as his own. He, therefore, did not steal the funds and his motion for habeas relief must be granted as to all but one of the theft counts.

This member of the court is painfully aware that the decision here is at variance with the decision of the preliminary hearing judge, the late Hon. Robert E. Dauer, a

thoughtful, even brilliant colleague. However, Judge Dauer had the daunting task of making literally hundreds of decisions after a tedious hearing, lasting several weeks. The transcript of the preliminary is literally eight inches thick.

If the case had remained with Judge Dauer he would have had the same opportunity as this member, to more thoroughly study the record and the law, and revisit his preliminary decisions. Preliminary hearing decisions are exactly that: preliminary. Although I did not consider this factor in reaching my decision, I know that something about this case deeply troubled Judge Dauer. One day during the many weeks of preliminary hearing testimony, I offered a word of encouragement to him. I can see him in his dapper suit, no doubt from Brooks Brothers, leaning on his carved cane, shaking his head and complaining: "it's the damn statute." Perhaps the source of his consternation was the fact that an unlawful transfer of funds to keep medical operations afloat was charged as a felony theft. Because of his untimely death we will never know. Regardless, the defendant is clearly entitled to habeas review at this time.

B. MISAPPLICATION OF ENTRUSTED PROPERTY. 18Pa. C.S.A. §4113(a). (even numbered counts 2-598)

1. The Commonwealth has made out a prima facia case that the defenciant was a fiduciary.
2. The Commonwealth has made out a prima facia case that the defendant disposed of the entrusted property in a manner which was unlawful and involved a substantial risk of loss.

C. THEFT BY UNLAWFUL TAKING. 18 Pa.C.S.A. 3921(a) (count 715)

The Commonwealth has made out a prima facie case that the defendant exercised unlawful control over the property of another with the intent to deprive the owner of the property, by making a \$50,000 donation of A.H.E.R.F. funds to Quaker Valley School District.

In contrast to the theft counts alleged in odd numbered counts 1 through 597, the evidence of record is clearly sufficient to make out a prima facie case of theft as alleged in count 715. Here the defendant made an “anonymous” donation of \$50,000 of AHERF funds to the Quaker Valley School District for the purpose of refurbishing the locker room facility at a high school where his son played football.

D. MOTION IN LIMINE.

1. The Commonwealth’s Motion in Limine regarding the testimony of Chief Deputy Attorney General, Mark A. Pasella is denied. The deposition was entered into the record without objection. The Court notes, however, that the consideration of Mr. Pasella’s deposition did not figure into the Court’s decision either to grant Habeas Corpus relief on the theft counts or deny relief on the remaining counts.

E. MOTION FOR DISCOVERY.

The Court finds that the Commonwealth has met its obligations under Rule 305 with the possible exception of the hand written notes covered in part F below.

F. MOTION TO DISMISS.

Defense counsel wrote to the Attorney General requesting that the investigators’ hand written notes of interviews with prospective witnesses be provided to the defense. The notes were subsequently destroyed. A review of the record leads the court to the conclusion that an evidentiary hearing is necessary to determine whether the defendant’s

right to a fair trial was thereby violated. A hearing on this matter is hereby scheduled for August 29, 2002.

G. MOTION TO DISMISS.

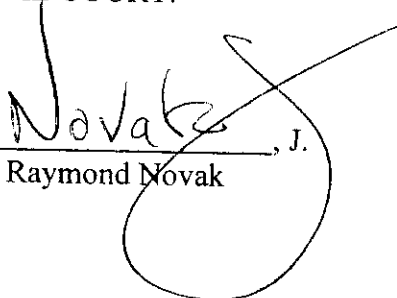
The defendant's Motion to Dismiss counts alleging violations of 18 Pa.C.S.A. §3927(a) as violating Pennsylvania's prohibition against prosecutions pursuant to general statutes is moot in view of the court's decision on his Habeas Corpus Motion.

ORDER OF COURT

Counts 599 through 715 having been nolle prossed on April 11, 2002 upon Motion of the Commonwealth, the Defendant's Motion for Habeas Corpus relief is granted as to odd numbered counts 1 through 597 (Theft by Failure to Make Required Disposition); and denied as to even numbered counts 2 through 598 (Misapplication of Entrusted Property) and count 715 (Theft by Unlawful Taking).

A hearing on the defendant's Motion to Dismiss, and trial of one Felony Theft count and 299 Misdemeanor counts, are set for Thursday, August 29, 2002, at 1:30 p.m., in Courtroom 10.

BY THE COURT:


_____, J.
Hon. Raymond Novak