



**Second Judicial Circuit of Florida Press Release
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FOR IMMEDIATE RELEASE

**STATE OF FLORIDA VS. JAMES ROBERT RICHBURG, RAYMOND E. SANSOM AND JAY
ALAN ODOM**

CASE NOS: 2009-CF-1229, 09-CF-1774

Enclosed is the Order Denying Motions to Dismiss in the above case. (13 page order)

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

STATE OF FLORIDA,

CASE NOS: 2009-CF-1229,
2009-CF-1744

vs.

JAMES ROBERT RICHBURG,
RAYMOND E. SANSOM and
JAY ALAN ODOM,
Defendants.

ORDER DENYING MOTIONS TO DISMISS

This case is before me on the Defendants' Motions to Dismiss arguing that, as a matter of law, they cannot be found guilty of grand theft and conspiracy to commit grand theft as alleged by the State. In response to the motions, the State has filed a detailed and extensive traverse with numerous attachments. Accordingly, for purposes of the motions, I must accept as true the facts set forth in the traverse and give the State the benefit of every reasonable inference that can be drawn from those facts. Based thereon, and for the reasons set forth below, I deny the motions.

FACTS

The essential theory of the State's prosecution and the facts and inferences it avers in the traverse in support of that theory may be summarized as follows:

Defendant, Jay Odom approached City of Destin officials about the construction of a fixed-based operation (FBO) at the Destin Airport for his business, Destin Jet. He wanted the city to construct, with public funds, a building on land he had leased, and then lease the building to him to use as a hangar, for the storage, maintenance and servicing of aircraft, with an agreement that the city could use the facility as an emergency staging

area during hurricanes. The city agreed and sought, unsuccessfully, to get state funding for the project. Odom then turned to his friend, Ray Sansom, a member of the House of Representatives, for help.

Sansom arranged, with Defendant James Richburg, president of Okaloosa-Walton Community College, (nka Northwest Florida State College) to obtain \$6,000,000 to fund the project as part of an appropriation to the college for capital improvements, what is called Public Education Capital Outlay (PECO) funds. The plan was to have the college construct the building, include some classrooms in the space so it could be called an educational facility, then lease the bulk of the space to Odom for his private use. This plan was to be held close between the three of them and not disclosed to others.

Because of his position as Chair of the Appropriations Committee and Speaker Designate, Sansom was able to by-pass the normal screening procedure to obtain the funding for the project. The matter was not discussed in any committee nor considered by any other member of the House. The Department of Education had no knowledge of the request until it was placed in the appropriation budget, nor were the trustees of the college. Mr. Sansom's Senate counterpart, former Senator Lisa Carlton, who signed off on the project in a joint conference, was not told of and had no knowledge of this intention to use the building as a hanger. If she had, she would not have agreed to sign off on it.

Once the appropriation was made, the college moved forward with plans to build a building with the funds. Of the several possible sites, Mr. Odom's property was selected for the location. When the college thereafter had an architect draw up plans for the building, the only change from Odom's original plans for a hangar was that the area previously designated for offices became classrooms and the hangar area became a

staging area. Negotiations for a lease with Mr. Odom's company were initiated which would have entitled him to use 24,000 square feet of the 30,000 square foot building.

Before the building could be built, however, investigative reporting by the St. Pete Times and other newspapers alerted officials with oversight responsibilities and the project was halted, monies spent on an architect were returned, and the three defendants were indicted for official misconduct and perjury (Richburg and Sansom).

I dismissed the official misconduct and a portion of the perjury charges. While that order was on appeal, the State filed a superceding information, adding these new charges.

ISSUES

The defendants advance several legal challenges to the prosecution of these new charges:

1. The alleged theft was a factual and legal impossibility because the money appropriated for the project was accomplished by an act of the Legislature which, as a matter of law, cannot be the subject of a criminal prosecution for theft.
2. The alleged theft was a factual and legal impossibility because the money appropriated for the project was under the control of the Department of Education, not the defendants.
3. As applied to the facts of this case, the theft statute is unconstitutionally vague. It places no reasonable limit on prosecutorial discretion and encourages arbitrary enforcement.
4. Any alleged theft would not have been of U.S. Currency as alleged, but rather, if at all, would have involved the use of the building.

5. Because there would have been no legal prohibition against the college leasing the building, or a part thereof, to Defendant Odom, there could have been no theft.

DISCUSSION

The theft statute with which the defendants are charged provides as follows:

- 1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
 - (a) Deprive the other person of a right to the property or a benefit from the property.
 - (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

"Obtains or uses" means any manner of:

- (a) Taking or exercising control over property.
- (b) Making any unauthorized use, disposition, or transfer of property.
- (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
- (d)
 1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, deception; or
 2. Other conduct similar in nature.

"Endeavor" means to attempt or try.

"Property" means anything of value."

It is important to note the very broad scope of the statute and specifically that one does not have to be successful in stealing something to be guilty of theft. It is enough if one tries. It is also important, however, to note, as I did in my previous order dismissing charges of official misconduct, that the issue is not whether certain conduct is unethical,

corrupt or perhaps a breach of public trust, but rather whether the conduct violates a specific law – here the law against theft.

The essential elements of theft, as set out in the above statute are that one obtains or endeavors to obtain property of another with intent to: a) deprive the other person of a right to or a benefit from the property; or (b) appropriate the property to his or her own use or to the use of any person not entitled to the use of the property. Applying this law to the facts and inferences urged by the State, I see only one theory by which the defendants could be lawfully prosecuted and convicted of theft.

The object of the theft

One of the Defendants' arguments is that, under the undisputed material facts, the State can not prove that there was ever a plan to obtain U.S. currency, as the State has alleged. This argument seems reasonable on its face. There has never been advanced a scenario in which any of the defendants were to receive cash or any funds. The State's theory is that the defendants did what they did so that Mr. Odom could use the building as a hangar. Upon closer examination, however, I find that the State has properly charged that the object of the attempted theft was money.

This is a good starting place because the answer to the questions of what were the defendants trying to steal, and how, is essential to an analysis of the other arguments raised by the defendants. By eliminating the other possible theories, i.e., what could not factually or legally be the object of the theft, I conclude that money had to have been the object of the attempted theft.

The object of the theft could not be the appropriation itself. That was an act of the legislature, a collective body, authorized under the constitution to do so. As a matter of law, such an appropriation can not be theft. Moreover, its passage can not be the basis

for a theft charge against one of its members, regardless of what disclosed or undisclosed reasons motivated a member to support or vote for the Act.

To apply the law of theft in such situations would violate the separation of powers concept in our constitution. It would also make the statute unconstitutionally vague and overbroad, providing no reasonable limit on prosecutorial discretion and encouraging arbitrary enforcement. This is the same constitutional impediment that I found foreclosed prosecution for official misconduct in my previous order in this case.

The building itself can not be the object of the theft. There is no suggestion that any of the defendants were trying to obtain ownership of the building. Nor can the use of the building by Mr. Odom under the facts asserted by the State be the object of the theft. There is no suggestion that Mr. Odom was going to get free use of the building. Rather, the facts asserted show that the plan was for him to lease the space from the college at fair market value – something the State concedes would be authorized under the law. If Mr. Odom is to obtain possession and use of the building pursuant to a lawful lease, that can not be theft. You can not steal what you have a legal right to possess.

The only theory of theft supported by the facts and inferences urged by the State in its traverse is that the defendants endeavored to exercise control over the expenditure of the appropriated funds so that the money was spent to construct a building at a specific location, of a certain size, with specific dimensions and features, all of which would make it suitable for Mr. Odom to store, service and maintain aircraft. The State's theory would have to be that they did so with the intent to deprive the public of the benefit of having a building reasonably capable of meeting the purpose mandated in the appropriation, i.e., a joint educational and emergency management facility.

The State says this theft was to be accomplished through fraud and misrepresentation. Mr. Sansom was to work with Mr. Richburg to get the funds appropriated by calling it an educational facility that would, in emergencies be made available to EMS vehicles. Mr. Richburg would then use his position, authority and influence to cause the building to be constructed in such a way and in such a location so as to make it compatible with the intended use as a hangar. The State says the stated purpose of the project, as represented by the defendants, was a sham, a cover for their intended use of the funds to build a hangar, which would be of limited use for education.

So, not only is U.S. currency properly alleged as the object of the theft, it is the only theory I see as viable under the facts asserted in the traverse. Thus, I find that the charges are not defective for this reason.

The appropriations act

As noted above, the defendants can not be lawfully prosecuted or convicted for theft based upon the alleged improper motives of Mr. Sansom, or his alleged misrepresentation in getting this project inserted into the State budget legislation. That does not mean, however, that his intent and his actions in this regard are not relevant as to the charges against the defendants. Getting this project into the appropriations act was a necessary step toward reaching the ultimate goal of the theft, by fraud and misrepresentation, of the funds appropriated. If the funds are not appropriated, the hangar can not be built.

Department of Education Control of Funds/Legality of the Lease

Two somewhat related arguments are: 1) it was a factual and legal impossibility for the defendants to steal the appropriated funds because they were under the authority and control of the Department of Education; 2) The college had the legal right to enter

into a sublease with Mr. Odom for the use of the building, so a plan to achieve such a goal could not be theft. In some respects, the second argument undermines the first, but regardless, I find neither persuasive.

While the statutory and administrative scheme may call for the expenditures to be made under the auspices of DOE, that doesn't mean that the plan of the defendants was not possible. People can be fooled. They can make mistakes, overlook things. Indeed, the evidence suggests that the defendants were well on their way toward their goal until the investigative reporting brought it to the attention of such people in oversight positions. The fact that there were obstacles to overcome in order to accomplish the theft, doesn't make its attempt less a crime.

Moreover, the fact that the college had the legal right to lease its property is beside the point. The college would not be in a position to lease the building to Mr. Odom if the Defendants had not managed to get the project funded and have the building constructed at a specific location, of a particular size and dimensions and with specific features that would make it suitable for such use. That was the whole point of trying to control the expenditure of those funds.

Constitutionality of the Statute as Applied

The defendants' argument that, as applied to the facts of this case, the theft statute is too vague and encourages arbitrary enforcements raises a legitimate concern. The prosecution of this case navigates us into uncharted waters – allegations that a legislator and another government official conspired to divert public monies for the use of a private individual by misrepresenting how those funds were to be spent. The attorneys have not cited a case, nor have I found one that is factually or legally on point.

What makes the issue difficult here is that, even under the State's theory, the building that was built with public funds so that Mr. Odom could have his hangar, was going to serve at least some public purpose. Almost every piece of legislation will have the effect of benefiting private individuals. Indeed, it is inevitable. If that were not the case, there would not be so many individuals, businesses, organizations, and other interested groups seeking to influence legislation. I am not so naïve as to presume, either, that all of these efforts are motivated by altruism. But, public good and private benefit are not mutually exclusive.

It is also natural that legislators will feel it not only appropriate but obligatory that they do everything they can to obtain their "fair share" or more of the budgeted funds for state government directed towards people and businesses in their respective districts. That is what many constituents want and expect.

In fact, that is exactly what Defendant Sansom asserts he was doing here, doing his best to bring home the bacon, so to speak, to his district. If because of his skills and his leadership position, he could get items in the budget that would be spent in his district, then he was doing his job. The fact that one or more of those expenditures might also benefit a friend or campaign contributor was a good thing, entirely proper and certainly not criminal.

Our public officials do not have *carte blanche*, however, to use our money to benefit themselves or their friends, with no regard to the required public purpose of that money. The question then is, how can the statute be applied in these types of situations so that it does not encourage unbridled, unchecked discretion and arbitrary enforcement on the part of prosecutors? How does one know where to draw the line between the legitimate exercise of political influence or power that benefits a private individual while

also serving a public purpose, and actions that might subject one to criminal prosecution for theft of public funds?

I think the answer to those questions starts with the re-iteration that, as noted above, a theft prosecution can not be based on the fact that an appropriation was the result of impure or even corrupt motives on the part of a legislator. It may be evidence of a plan to steal the money once appropriated, but regardless of what may have happened to obtain the funding in the legislature, that can not be a theft, as a matter of law.

Once the funds have been appropriated, however, they can be the object of theft, by diverting them from the intended and stated public purpose, to the benefit of someone not entitled to them. Whether that has happened will depend on the specific facts in each case. Where funds have purportedly been used for both a public purpose and to obtain a private benefit, one must look at the direct and circumstantial evidence of intent and the nature and extent of both to determine if the purported public use is a sham or not.

This is a necessary inquiry into almost any case of alleged theft by fraud. Take the example of a person who obtains money from a homeowner with promises to put a roof on his house. When the man spends the money and doesn't do the work, how do we know if we have a breach of contract action or criminal theft? The answer lies in the evidence of the man's intent. Did he obtain the money with no intention to do the work? Or did he just get in over his head and was incompetent in his business affairs? We would have to depend on the direct and circumstantial evidence to make that determination.

Similarly, whether a private citizen, state employee, even a legislator, knowingly and willfully conspires to fraudulently obtain public monies for private purposes will depend on the particular facts of each case. Certainly, many cases may be close calls. That does not, however, make the theft statute unconstitutionally vague and subject to

arbitrary enforcement as applied in such cases. The State will have to prove that the purported public purpose in this case was de minimus, a sham intended to hide or camouflage the intended private benefit.

An imperfect but perhaps useful analogy to consider, relative to this and the other challenges to the prosecution, is the case of a person soliciting funds for a private, non-profit charitable organization. He tells you that they are raising money to build and operate a school for disabled children whose needs are not being met in the public schools. It sounds good. You give him some money, as do many other people.

A year later, you go to see the finished product and discover that the "school" looks a lot like a barn. There are stalls with horses throughout the structure, equipment and other accessories. Workers are tending to the horses, feeding, watering and grooming them, exercising them in the large pastures adjoining the building. You learn that the man who solicited the funds from you has leased the building from the organization. He apparently owns numerous horses, which he keeps there. He also rents space and provides services to other horse owners at the facility.

You ask him, what about the school? Where are the classrooms? He leads you to the end of the building and shows you an area, a small percentage of the total square footage of the building, which contains a few classrooms. You ask, where are the disabled students? You are told that the children only come on Saturdays.

When you complain that he has defrauded you out of your money, that you would not have given it to him had he not misrepresented the purpose for which it was intended, he says he did not misrepresent anything. He said the funds were for a school. The organization in fact has built a school with the money raised. The fact that he leases out a part of the building doesn't change that.

Besides, he says, it wasn't his decision. He had no control over the expenditure of the funds. That was up to the board of trustees of the organization and the building committee. He never saw a dime of any of the money that was collected. He is paying fair market value to lease a portion of the building, and there is nothing either in state law or in the by-laws of the organization that prohibits the organization from leasing its properties to whomever it chooses.

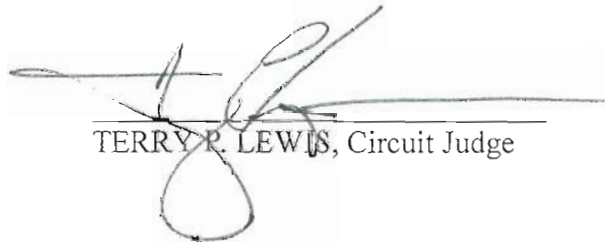
Assuming the man planned all along to use the money to build stables and intentionally misled you as to this plan, and that, because of his influence and position within the organization, he was able to maneuver the trustees and the building committee to approve of the plan, also misleading them as to his true purpose, has a theft been committed?

I would suggest that it presents a question of fact to be decided by a jury. I also suggest that it should not be any different if the alleged theft is from the public at large instead of an individual. Nor does it appear that to apply the theft statute in such situations would make it unconstitutionally vague and subject to arbitrary enforcement.

Accordingly, for the reasons set forth above, the motions are denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this

17th day of May, 2010.


TERRY R. LEWIS, Circuit Judge

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