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

STATE OF FLORIDA,

vs.

JAMES ROBERT RICHBURG,
RAYMOND E. SAMSON and
JAY ALAN ODOM,
Defendants.
_____/

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

FILED
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BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

ORDER ON MOTIONS TO DISMISS

Defendants, Sansom, Richburg and Odom are charged with Official Misconduct. Sansom and Richburg are also charged with Perjury. All three defendants seek dismissal of the charges against them. For the reasons set forth below, I grant in part, and deny in part, the motions. Specifically, the charges of Official Misconduct for falsifying the Appropriations Act, and the perjury charge against Defendant Richburg are dismissed by this order. Otherwise the motions are denied.

OFFICIAL MISCONDUCT

The Appropriations Act

The findings of the Grand Jury 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, then lease the building to him to use as a hangar, with an agreement that the city could use the

facility as a 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. Because of his position as Chair of the Appropriations Committee and Speaker Designate, Sansom was able to by-pass the normal screening procedure and increase the total appropriation to the college from $6,000,000 over three years, to over $25,000,000 in a single year.

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. 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.

Based on these findings, the Grand Jury returned indictments for all three defendants for official misconduct in violation of section 839.25(1)(b), Fla. Statutes. The Statute proscribes the knowing falsification by a public servant of an official record or document with corrupt intent to obtain a benefit for himself or another or cause unlawful harm to another.

The State's theory is that defendant Sansom caused a portion of the 2007-2008 General Appropriations Act, and a related Joint Use Note, to be falsified when he

represented that the particular line item appropriation of $6,000,000 to the college was for "Okaloosa Jt Use Emergency Response Workforce Center". The omission of the "true" purpose of these funds, i.e., to build an aircraft hangar for his friend and political supporter, Odom, made the appropriation act misleading and thus false, and made Defendant Sansom criminally liable under the above quoted statute. The State further contends that Odom and Richburg aided and abetted Sansom in the commission of this offense and thus are also criminally liable.

The Issue

A fair reading of the Grand Jury's Presentment should give pause to members of the Legislature, and anyone else who cares about public trust and confidence in our government institutions. The Grand Jurors were extremely critical of the conduct of Mr. Sansom, concluding that he had "violated the trust that the citizens of Florida should expect from its elected representatives." But they were also critical of a process and a culture in the Legislature that not only tolerates such conduct, but seems to think little of it. As stated in the Presentment:

"This Sate should be guided in openness and transparency. The procedure currently in place requires that our elected legislators vote on a final budget that they have no knowledge about because it is finalized in a meeting between only two legislators. This process allows taxpayer money to be budgeted for special purposes by those few legislators who happened to be in a position of power.....

Your grand jurors heard testimony that appropriations such as the subject of this Presentment are common and routine. We even heard that this $6 million dollars was likened to a gnat hitting a windshield. It is small wonder, with this attitude, that Florida is

broke financially. The Legislature needs to remember that they do not print money, and that whether it is general revenue dollars, federal grants, matching funds or PECO dollars, it is all taxpayer money, and it needs to be spent wisely."

The question before me, however, is not whether the conduct of the defendants may be wrongful, unethical, or a breach of the public's trust, but rather whether it constitutes a violation of the specific criminal statute under which they are charged. Based upon their findings, one can understand the frustration and indignation apparent in the Presentment of the Grand Jury.[1] It is also natural to want to punish those involved. But not every wrongful conduct is a crime. Sometimes the remedy for such conduct must be political rather than judicial. This is one of those situations.

The Application of Law to the Facts

Contrary to the argument advanced by the defendants, I can not agree that, in order to falsify a document, one must alter, add to, or in some way tamper with the document itself. A document or record can be "falsified" within the meaning of this statute by the omission of material information, by misleading wording, or other misrepresentation.

In *State v. Russ*, 778 So.2d 414 (Fla. 1st DCA 2001), the Court held that, when the defendant used, for his own purposes, a check given to him to purchase toys for needy children, he caused the check to misrepresent the purpose for which it was issued, and was properly found guilty of official misconduct. Although the conviction was vacated in federal court, the DCA opinion interpreting the statute remains the law in Florida and is

[1] I understand that the defendants may take issue with the findings of the Grand Jury and the State's theory of the case. For purposes of a motion to dismiss, however, I must assume that the State can prove the facts necessary to support its theory of the case.

binding on me. And, for that reason, I also reject the argument that the defendants did not have fair warning that the falsifying of a record or document by misrepresentation could violate the statute.

In *Brown v State*, 689 So.2d 1165 (Fla. 4th DCA 1997) rev denied 698 So.2d 839 (Fla. 1997), the issue on appeal was whether a time card was an official document or record. The defendant did not argue that the record could not be falsified by misrepresentation. The case is, therefore, not directly on point. It is, however, a good example of how a document, which is accurate on its face, can still be false. The time card accurately reflected the time it was inserted in the clock. The implication of this information, however, by custom and usage, is that the employee began work and ended work at the times indicated on the card – which was false.

Other examples are easy to imagine. A voucher submitted seeking reimbursement of expenses incurred to attend an educational conference might accurately reflect the expenses incurred, but might none-the-less be false if the person did not attend any educational sessions. Similarly, the information in a financial disclosure form could be accurate on its face, but be misleading and false if it omitted certain material information.

There are two problems, however, in applying this concept of falsification by misrepresentation to the facts of this case. The first has to do with the nature of the document or record falsified, i.e., an act of legislation. The second stems from the nature of the misrepresentation, i.e., the concealed "true" purpose of the legislation.

A law, including an appropriations act, is the result of the collective vote of the legislative body. Its "true" purpose can thus not be determined by the motives or intent of any single legislator, whether hidden or out in the open. A law, by its nature, is what it

says it is. It can not be made false by the fraud, misrepresentation or other trickery of one or more of its members which may have misled other members into voting for it.

In the *Russ* case, by analogy, the check that was "falsified" was presumably issued pursuant to a vote of the city commission, a collective body, which authorized the expenditure of funds. If that authorization was memorialized in the official minutes of the commission meeting or other formal document, neither the defendant's intent at the time nor his subsequent action could make the minutes or other official record of the vote false.

Similarly, the fact that Mr. Sansom may have misled other members of the Legislature by hiding from them his 'true" intent, does not make the appropriations act itself false. The act authorizes funds for "Okaloosa Jt Use Emergency Response Workforce Center". Either the act, as worded, authorizes construction of an aircraft hangar, or it doesn't. If it does authorize it, under applicable rules and regulations, then it is not false. If it doesn't authorize such an expenditure, then the construction of a hangar is not lawful. Either way, the act itself is not false.[2]

A related problem with application of the statute to the facts of this case is the nature of the alleged misrepresentation. In effect, the defendants are being charged because of the impure motive of defendant Sansom in seeking passage of this particular appropriation. If the statute can be said to apply in such a situation, it would create the same due process concerns that led the Florida Supreme Court to strike down other

[2] Whether official records or documents created pursuant to this line item of the appropriations act, like the check issued in *Russ*, could be "falsified" by some form of misrepresentation on the part of a public official, is not before me.

portions of the statute. Specifically it would be overbroad and susceptible to arbitrary application.

In the case of *State v De Leo*, 356 So.2d 306 (Fla. 1978), the Florida Supreme Court struck down that part of the Official Misconduct statute that prohibited "knowing violations of any statute, rule or regulation for an improper motive," because it was "...simply too open-ended to limit prosecutorial discretion in any reasonable way." Id at 308.

In *State v. Jenkins*, 469 So.2d 733 (Fla. 1985), the Court held that subsection (1)(a) of the statute, which made it a crime to refrain from performing a duty imposed by law, was unconstitutional because it suffered "the same vulnerability to arbitrary application and ...it impermissibly allow[ed] the imposition of criminal sanctions for the failure to perform duties imposed by statutes, rules, regulations that may themselves impose either a lesser penalty or no penalty at all." Id at 734.

Subsection (1)(b) of the statute, does not, on its face, suffer these same constitutional infirmities. See *State v. Riley*, 381 So.2d 1359 (Fla. 1980). If applied, however, to instances in which a legislator misrepresents to his colleagues his "true" purpose in supporting and helping to pass a certain law, it would simply be too broad, too open-ended to limit prosecutorial discretion in any meaningful way, and thus subject to arbitrary application.

I thus find the statute unconstitutional as applied to the undisputed material facts of this case. Specifically, acts of legislation can not, as a matter of law, be falsified, within the meaning of section 839.25(1)(b), Fla. Statutes, by the misrepresentations of a single member as to the act's purpose.

Jt. Use Note

The record before me is simply inadequate for me to make a determination as to whether a falsification of this document may constitute a violation of the statute. The facts relative to this document are not set forth in the motions to any degree, nor is there any argument related to it. I can not tell from the record what exactly it is and how it relates to the Appropriations Act.

PERJURY

General

Nobody likes to be lied to. When someone raises his hand and swears to tell the truth, the whole truth and nothing but the truth, that's what we expect. The Grand Jurors felt that defendants Richburg and Sansom did not tell them the truth and returned indictments against them for perjury.

Most people, including many lawyers and judges, believe that if you say something under oath which is later determined to be false, you have committed the crime of perjury. Maybe that's the way it should be. The appellate courts, however, have held that, in order to subject a person to perjury charges, the witness must be asked a specific, unambiguous question, so as to solicit a specific statement of fact - not of opinion, belief or perception.

For example, in *Doyle v. Dep't of Bus. and Prof. Reg.*, 713 So. 2d 1040 (Fla. 1st DCA 1998), the court held that the defendant did not commit perjury when she stated that she had not used "Vulgar or sexually explicit" language. The court held that, because this was a matter of interpretation or opinion, rather than fact, it could not form the basis for a

perjury charge. Similarly, in Vargus v. State, 795 So. 2d 270(Fla. 3d DCA 2001), the court held that the defendant did not commit perjury when, asked whether meetings with another person were work-related or personal, she stated they were work-related. The court said this was a statement of opinion, not fact.

From a philosophical perspective, however, it can be argued that every "fact" is really a matter of perception, belief or opinion. Saying something is a fact does not make it so, nor can you avoid a perjury charge by saying that you are simply expressing an opinion. What does it mean, then, to say that a statement must be one of empirical fact, rather than opinion, perception or belief? How do you tell the difference?

As best I can determine, from reading the cases that speak to this issue, the appellate courts mean that a "statement of fact" is a statement in response to a specific question, that relates information about which there can be no reasonable dispute, something that can be determined by direct resort to the senses of sight, hearing, smell or touch, rather than a conclusion or opinion drawn from consideration of the surrounding circumstances. As a general rule, if the question requires the person to interpret information and draw a conclusion, his answer will most likely be a statement of opinion, belief or perception rather than a statement of fact. The thought processes of a person can rarely be established as an empirical fact.

Using the example of the two cases cited above, *Doyle* and *Vargus*, if you say that a person said particular words, at a specific place, at a specific time, you are making statements of fact. If you say the words were vulgar or sexually explicit, you are making a statement of opinion, belief or perception. If you say that you went to a person's house on particular dates and at particular times, if you state who was there, what was said or

done at the meetings, you are making statements of fact. If you say the meetings were work-related, you are making a statement of opinion, belief or perception. You are drawing a conclusion based upon the surrounding circumstances.

What is important to understand here is that it is not simply a question of asking a jury to determine, based on all the evidence, whether what was said was false. The jury in *Vargus* in fact determined that the visits were personal, not work-related, and the Hearing Officer in *Doyle* determined she used vulgar or sexually explicit language. But the appellate court said they couldn't be prosecuted for perjury because the statements were not ones of fact.

Indeed, a jury verdict is a good example to point up the distinction. Whether someone has been found guilty of a certain crime is a fact which can be established beyond any reasonable dispute, by production of the jury verdict, witnesses who can identify the defendant as the person who was tried, etc. But whether or not the person actually committed the crime is not an empirical, concrete fact that is beyond dispute. It is a conclusion or opinion, reached by a group of people (the jury) based on evidence of other facts that support that conclusion or opinion. It requires interpretation of circumstances and the exercise of judgment.

If the defendant later declares under oath that he had not been found guilty of the offense by a jury, he would be subject to perjury for a false statement of fact. If he said he did not commit the crime, however, he would be stating an opinion, not a fact. One might not believe the defendant, but he could not be properly convicted of perjury based on the statement as it is one of opinion.

It is not always easy to draw this distinction, and whether someone is stating an opinion or a fact often depends on the context of the question. This is why the appellate courts require a specific, unambiguous question so we can better tell if the answer is a statement of fact, or one of opinion, belief or perception. It is from this view that I must analyze the alleged false statements of the defendants to determine if, as a matter of law, they may form the basis for charges of perjury.

Richburg

The specific act of perjury alleged against defendant Richburg is that he told the Grand Jury that the building that was the subject of their investigation was not designed as a hanger and/or there was never intention or discussion after the appropriation was made, that Jay Odom or Destin Jet would use the building.

As to the first part of the two-pronged allegation – that the building was not designed as a hangar - the defendant has set forth all portions of the Grand Jury testimony that he says contains any question or statement regarding the design of the building. The State has not traversed the defendant's assertions in this regard. Thus, there are no disputed material facts, but rather a disagreement as to the legal effect of those facts.

The State argues that the question of whether a building is designed to be a hangar is akin to the question of whether a woman is pregnant; a woman is either pregnant or not pregnant and a building is either designed as a hangar or is not. The problem with this argument is that it can be said about almost anything. Either a visit is work-related or it is not; Either certain words are vulgar or sexually explicit, or they are not; Either a person is angry or he is not; Either he intended to do harm or he did not; Either the light was red or

it was not. These statements beg the question. Is one's statement about the subject essentially one of empirical fact, or one of opinion, perception or belief.

Indeed, the State's analogy can be used to point up the distinction. There seems to me to be a critical difference between a question of whether a woman is pregnant and whether a building is designed for use as a hangar. The answer given in each instance might be one of opinion or of fact, depending on the question asked and the context, but the existence of a pregnancy can be established without getting inside the mind of the witness. The same can not be said for a question about the design of a building.

It is possible, given the scientific tools and the information available, to establish as an empirical fact that a woman is pregnant. After being told by the woman that she is pregnant, observing her physical features, reading the results of a pregnancy test, seeing the images from a sonogram, and watching the birth itself, it would be ludicrous to suggest that her pregnancy is a matter of opinion.

Suppose, however, that the question was whether the pregnancy was planned or accidental? The answer will be in the nature of an opinion because it will require the witness to interpret information, exercise judgment and reach a conclusion based on the surrounding circumstances. Just as in *Doyle* and *Vargus*, supra, the fact that a jury may find, beyond a reasonable doubt, that the statement is untrue, does not make the statement one of empirical fact so as to subject the person to perjury charges.

It makes more sense, then, to say that the question of whether a building is designed as a hangar is more akin to this question of whether a pregnancy was planned. When you ask about the "design" of a building, it is commonly understood that you are asking about the architectural drawings for the building which show its planned use, or in

a broader sense, to what the owner has in mind for its use. In either case, the answer to the question is in the nature of perception or opinion, not fact.

There are two references to "designed" in the transcript, three references to "design" and the word "designing" is used once. When the witness disagrees with State Attorney Megg's description of the building as a hangar, Meggs challenges him, saying, "Well, that's what you designed. You paid for it, sir."

Richburg's responds that they are building an educational facility in cooperation with emergency operation agencies. Meggs again challenges him in the following exchange.

Q ...it's an aircraft hangar with aircraft doors.

A Mr. Meggs, sir, I look at that drawing right there before you. I see classrooms. I see conference facilities –

Q "I didn't say there wasn't room in it. It's an aircraft hanger.

A I see a – sir, I see a training area for static training for law enforcement and first responder, just like we have been asked to do. I don't see an aircraft hangar.

Later, when asked why he needs hangar doors, Richburg explains that it is so they can get fire trucks and utility trucks inside. This is challenged as follows:

Q So what you are saying is that you hired – you paid PECO dollars to hire an architect to design you a fire station with hangar doors on it?

A No, sir. We hired Mr. Dowling to design an EOC that would [sic] could use for year-round training, contains seven or eight – we can count them off – instructional spaces for classroom. Contains a very large area where we're going to set up training spaces, where over I would guesstimate between three or four hundred students

per year will go through that training program. And at times of natural disaster, the training materials will be pushed aside and it will the be used as an EOC facility.

On page 40 of the transcript, the following exchange takes place.

Q Well, listen to the question. And the marching orders from you were to build it at that site using the development order, and build the facility that had already been designed, but hire an architect to do it, make changes, change it from staging area – from hangar area to staging area, which they did in some parts, but the building is identical except what you call the stuff inside.

A Mr. Meggs. I just can't accept that it's identical. I really can't. You've got classroom training facility, you've got storage facilities for various agencies to use during a time that it's an EOC. I can accept that there are similarities. But that it's identical? I just simply can't accept that."

When asked by a grand juror if the building could be used as a hangar, Richburg said, "It could be used as a hangar. There are no plans for it to be used as a hangar." When another grand juror suggests that the design of the building as classroom space seems inefficient because of high ceilings, Richburg explains that the space will be functional as a two story simulated apartment building for first responder training.

The questions to the defendant about the design of the building, just as those in *Vargus* and *Doyle*, supra, inherently require the witness to express his opinion or perception. The defendant has not be charged with lying about any of the surrounding "facts" on which the State might have relied upon in concluding that the building was designed to be a hangar, e.g., statements made in e-mails and other communications,

meetings attended, its location at the Destin Airport, directions given to college staff, construction bids or memos that suggest airplanes will be stored in the building, etc.

What he was asked to do is confirm the conclusion the State had reached based on the surrounding circumstances. When the witness looks at these plans and says he sees an emergency operations center that has classrooms and a conference center, and not a hangar, that the large doors are in order to get in fire trucks and large utility vehicles, one does not have to believe him, but it is not a statement of "fact" which subjects him to perjury charges.

As to the second prong of the charge – that the defendant falsely testified that there was never any intention or discussion after the appropriation was made, that Jay Odom or Destin Jet would use the building - the defendant has cited and quoted portions of the Grand Jury testimony in which Richburg acknowledges discussions with defendant Odom about the project, and that Odom indicated his desire to use the building as an aircraft hangar.[3] The State has not specifically traversed this recitation of the testimony, nor contradicted it with other portions of the transcript. In fact, the State's response does not speak to this point at all. Therefore, the undisputed facts show that the defendant can not be found guilty of perjury on this prong.

Sansom

The perjury charge against this defendant is also two-pronged. The Indictment alleges that Mr. Sansom falsely testified "that the building that was the subject of the Grand Jury investigation was not intended for private use and/or the increased funding in 2008 to Northwest Florida State College was at the request of the College..."

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[3]If the theory is that the defendant lied about his own intent, it is an opinion or perception, not a fact. See the discussion of this issue as to defendant Sansom for more details.

There are a couple of problems with the first prong. First, it is not clear whose intent is in question. Is it Sansom's, one or both of the co-defendants, the Legislature, the college, or any of the above? If it is anyone other than the defendant, Sansom, it is clearly a statement of opinion, perception or belief, and thus not subject to a perjury charge. If it refers to the defendant himself, it is a closer question. But, guided by the cases of *Vargus* and *Doyle,* cited and discussed above, I conclude that a statement of intent is not a statement of "fact" within the meaning of the perjury statute.

In *Vargus,* supra, the defendant was asked whether her meetings with a particular person were work-related or personal. Inherent in her answer was her intent regarding the meetings. She knew whether the purpose of the meetings was for work or personal in nature. The defendant in *Doyle* certainly knew, in her own mind, whether the words she used were vulgar or sexually explicit. But in both cases, their statements were considered ones of perception or opinion, not fact.

Similarly, in this case, the defendant presumably knew in his mind what he intended regarding the building's use. And others, looking at the surrounding circumstances, might later conclude that his statements about his intent were untrue. But that can not change the subjective nature of the subject. His intent is not an empirical fact that can be established beyond dispute by resort to the five senses, but rather an inference drawn from consideration of the surrounding circumstances. Again, the defendant is not charged with lying about the many surrounding circumstances that led the State and the Grand Jury to conclude that he intended that the building be used for private purposes. He is charged, in effect, because he would not agree with that conclusion. This can not form the basis for the perjury charge.

The same can not be said, however, as to the second prong. The statement that the increased funding was requested by the college is a statement of fact. It is not necessary to reach conclusions about someone's state of mind. It is not a matter of perception, opinion or belief. Either it happened or it did not.

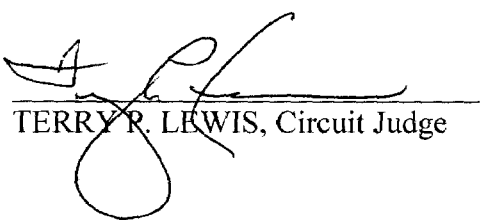
This was a material fact. It is one of those surrounding circumstances to which the State would point to prove the intent of the defendant relative to the charge of official misconduct, something the Grand Jury had authority to investigate, even if no charges had ever been brought. It also has nothing to do with separation of powers or meddling with the legislative process, as the defendant asserts. It's about testifying truthfully before the Grand Jury.

The defendant argues that the traverse should be stricken because it is legally insufficient. It does not, he says, deny with specificity his assertion that the college requested the increased funding. I disagree. It does. The defendant, in his motion says the college requested the increase in funding. The State specifically denies this in its traverse.

He also argues that the traverse should be stricken because the denial is not supported by the record evidence, but has given me no authority for such action, and I have found none. Rather, a traverse need only apprise the court of the material allegations in the motion to dismiss which the State denies. It is not necessary that the traverse set forth evidence that supports its denial, or negates the factual assertions of the defendant It is under no obligation to present additional facts consistent with guilt. *State v Wall*, 4459 So.2d 646 (Fla. 2nd DCA 1984); *State v. Lindsey*, 501 So.2d 174 (Fla. 4th DCA 1987); *State v. Oberholtzer*, 411 So.2d 376 (Fla. 4th DCA 1982).

For the reasons set forth above, it is ORERED AND ADJUDGED that the motions as to the charges of Official Misconduct for falsifying the Appropriations Act, and the perjury charge against Defendant Richburg are hereby granted. In all other respects, the motions are denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 5th day of October, 2009.



TERRY R. LEWIS, Circuit Judge

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