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20070247

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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CLERK OF SUPREME COURT

DEC 18 2007

STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff - Appellant,

v.

Supreme Court No. 20070247

Charles Blunt,

Defendant - Appellee.

BRIEF OF APPELLEE

Burleigh County District Court
South Central Judicial District
Criminal Case No. 08 07 K 0789

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STATEMENT OF THE CASE

This is a criminal case wherein the State of North Dakota charged Charles Blunt with two counts of Misapplication of Entrusted Property under N.D.C.C. 12.1-23-07(1). Count I charged an offense committed on May 10, 2004, through March 31, 2007; and Count II charged an offense committed on July 1, 2005, through November 30, 2005. (App. 304). The State appeals from a district court order discharging Blunt following a preliminary examination held under Rule 5.1, N.D.R.Crim.P. (App. 1).

At all times relevant to this case, Blunt was the Executive Director and CEO of Workforce Safety and Insurance (WSI). WSI is an organization created by statute. N.D.C.C. Chapter 65-02. The organization is maintained by a board of directors. N.D.C.C. §§ 65-02-01 and 65-02-03.1. The board appoints the director, who “is subject to the supervision and direction of the board and serves at the pleasure of the board.” N.D.C.C. § 65-02-01. Blunt was hired by the board on April 7, 2004, and began the position on May 3, 2004 (App. 313).

N.D.C.C. 12.1-23-07(1) provides for the crime of Misapplication of Entrusted Property as follows:

A person is guilty of misapplication of entrusted property if the person disposes of, uses, or transfers any interest in property that has been

entrusted to the person as a fiduciary, or in the person's capacity as a public servant or an officer, director, agent, employee of, or a person controlling a financial institution, in a manner that the person knows is not authorized and that the person knows to involve a risk of loss or detriment to the owner of the property or to the government or other person for whose benefit the property was entrusted.

The two charges against Blunt were for disposing, using, or transferring an interest in WSI property in his capacity as the director and CEO of WSI, in a manner he knew was not authorized, and which he knew to involve a risk of loss or detriment to WSI or the State of North Dakota or to other persons for whose benefit the property was entrusted. Blunt was not accused of failing to account for money, of a shortage in his accounts, or of falsification of accounts. See N.D.C.C. § 12.1-23-09(3)(a). Blunt was not accused of personally pocketing money or spending money for personal items. Blunt was personally accused of criminal wrongdoing in this case in regard to gift certificates to employees, certain staff meeting expenses, and certain bonuses paid to employees (see Brief of Plaintiff-Appellant, pp. 11-12; Tr. 7-8). Given that Blunt began his position on May 3, 2004, and Count I charges an offense beginning on May 10, 2004, Blunt is accused of beginning his criminal wrongdoing one week after beginning his position.

In addition to the fact that Blunt was “subject to the supervision and direction of the board”, N.D.C.C. § 65-02-01, there are other statutes which are relevant in this case. The first is N.D.C.C. § 65-02-01.2, which provides:

The organization shall establish a system of personnel administration for its employees based upon principles and methods to be determined by the organization and governing position classification, pay administration, transfer of employees, discipline of employees, and removal of employees.

(Emphasis added).

N.D.C.C. § 65-02-03.3 provides for the powers and duties of the board:

The board may authorize the organization to transfer moneys between line items within the organization’s budget. The board shall:

1. Appoint a director on a nonpartisan, merit basis.
2. Set the compensation of the director.
3. Ensure a proper response to any audit recommendations.
4. Present an annual report to the legislative audit and fiscal

review committee. The report must be presented by the chairman of the board and the director.

5. Prepare, with the assistance of the organization, an organization budget The organization shall present the budget to the governor for inclusion in the governor's budget. If the governor makes adjustments to the budget, the board may concur in the adjustments or may present testimony to the appropriations committees of the legislative assembly, requesting amendments to the budget to remove adjustments made by the governor. The deadline for submission of the budget is the same as the deadline for all executive agencies.

6. Assist the organization in formulating policies and discussing problems related to the administration of the organization, while ensuring impartiality and freedom from political influence.

7. Incorporate principles of continuous improvement goalsetting, a procedure for implementing a team-oriented continuous improvement program throughout all operations of the organization. The program must include a number of challenging, measurable goals to ensure the organization maintains focus on improving those areas most important to its primary mission.

8. Adopt internal management rules creating bylaws for the board and relating to the election of a board chairman, formation of

committees, replacement of departing members, voting procedures, and other procedural matters.

(Emphasis added).

N.D.C.C. § 65-02-05 provides, in part, for expenditures from WSI's fund for employees and supplies:

. . . . The organization, at the expense of the fund, shall provide all necessary equipment, supplies, stationary, and furniture, and all clerical and other help necessary to carry out the provisions of this title. . . . Expenditures made under this section, however, must be within the limitations designated by the legislative assembly in appropriation measures adopted from time to time.

(Emphasis added).

Title 65 does not specifically provide for powers and duties of the director of WSI. N.D.C.C. § 65-02-01 provides, "The director may appoint the director of any division established by the director." N.D.C.C. § 65-02-09 provides, "The director shall submit a biennial report to the governor and the secretary of state in accordance with section 54-06-04." Such report is to cover WSI's operations, § 54-06-04, and § 65-02-09 lists the statements and matters the report must include.

Title 65 speaks more toward the organization of WSI, rather than to the director of WSI. N.D.C.C. § 65-02-12 states, “Any investigation, inquiry, hearing, or decision, and every order of the director is deemed to be the order or decision of the organization.”

Finally, in regard to Title 65, N.D.C.C. § 65-02-30 provides in relevant part as follows:

Biennially, the director shall request the state auditor to select a firm with extensive expertise in workforce safety and insurance practices and standards to complete a performance evaluation of the functions and operations of the organization during that biennium. . . . As determined necessary by the state auditor, but at least once every other biennium, the biennial independent performance evaluation must evaluate departments of the organization to determine whether the organization is providing quality service in an efficient and cost-effective manner; evaluate the effectiveness of safety and loss prevention programs under section 65-03-04; and evaluate the board to determine whether the board is operating within section 65-02-03.3 and within the board’s bylaws. The firm’s report must contain recommendations for departmental improvement or an explanation of why no recommendations are being made. The director, the chairman

of the board, and a representative of the firm shall present the evaluation report and any action taken to the legislative council's legislative audit and fiscal review committee and to the house and senate industry, business and labor standing committees during the next regular session of the legislative session following the performance evaluation. The director shall provide a copy of the performance evaluation report to the state auditor. The organization shall develop and maintain comprehensive, objective performance measurements. These measurements must be evaluated as part of the independent performance evaluation performed under this section. . . .

(Emphasis added).

A performance audit was conducted by the State Auditor of North Dakota in 2006, with an audit report in October, 2006 (Tr. 5-6, 28). In regard to conduct which was ultimately charged in Count I, the report identified expenditures for gift certificates and meeting expenses "appearing to result in noncompliance with constitutional provisions, state law, and OMB policy." (App. 309). (See Tr. 9-12, 13-16). The report continued:

Public funds should be spent efficiently and only expended to pay for expenditures that are directly related to the purpose of the agency and with the agency's statutory responsibilities. As required by the

Constitution of North Dakota and in accordance with a 1993 Attorney General's Opinion, an agency may expend public funds only for public purposes.

(App. 310). The report recommended that WSI "make improvements with how public funds are used." (App. 310).

WSI's response to the State Auditor is labeled as "Management's Response". It states:

CONCUR: However, WSI does not concur that it has been noncompliant. WSI is focused on assuring the agency follows the law and conducts itself appropriately and believes it has predominantly obeyed all applicable laws and OMB guidance under NDCC 65-02-01.2 and OMB Policy 207.

(App. 310). See App. 32, OMB Policy 207.

WSI also responded in part as follows:

In January of 2005, WSI worked with the legislature to establish specific appropriation authority to assure WSI was making prudent and discretionary payments for the promotion/support of the agency. Just prior to the additional appropriation authority being amended into WSI's budget bill, OMB noted that WSI was already a "promotional agency" and thus already had this authority. As a result, the

amendment for additional appropriation authority was withdrawn. In February of 2005, in order to ensure WSI strictly followed the promotional agency rules, the Executive Director wrote OMB to ask for compliance guidance:

“I was seeking some guidance from you on the actual guidelines and allowances of the program (meals, alcohol, travel, etc.). We want to assure that we are meeting and exceeding every guideline established for the program.”

OMB responded:

“You are referring to OMB fiscal policy 207 related to promotional expenses when you say WSI already has the ability to purchase meals, etc. with detailed receipts and justification . . . The policy does not state what is allowed and what is not allowed. The only guideline given is that ‘agencies are expected to use restraint and common sense in authorizing these types of expenses.’”

(App. 311). The State Auditor concluded that “WSI has not appropriately expended public funds.” (App. 310).

The gift certificates at issue are reflected in State’s Exhibit 3 (App. 196-271) and State’s Exhibit 6 (App. 272-303). Blunt is accused in Count I

with \$4,331.00 in gift certificates dated from December 12, 2004, through July 6, 2005 (App. 197; Tr. 11-12). A review of State's Exhibit 3 (App. 198-271) reflects that the Human Resources division of WSI made requests to the Finance Department of WSI for the gift certificates, and the checks were then written directly to the local businesses by the State Auditor and the State Treasurer (see also Tr. 9-10).

State's Exhibit 6 reflects the practice of gift certificates began at least by January 15, 2002, more than two years before Blunt began his position (App. 272; Tr. 47). The testimony was that a WSI internal auditor gave approval for the practice before Blunt was hired (Tr. 48). The testimony was also that Blunt expanded on the practice, considering the gift certificates to be morale boosters and incentives for employees (Tr. 9, 47-48). If Blunt would have looked at the Gift Certificate Log (State's Exhibit 6) the day after he began his position, he would have seen three employees being awarded gift certificates as "winners of 7,000,000 document contest" (App. 280). Other gift certificates awarded that month included gift certificates given for "building an excel spreadsheet – saving me a bunch of time", "suggestions related to saving loss costs", and "helped set up for sexual harassment prevention on short notice" (App. 280). The practice of the gift certificates involved primarily an employee recognizing another employee

or employees for certain work. A review of the log does not show Blunt giving or receiving any gift certificate.

Count I also included \$7,053.29 in expenses related to employee meetings (Tr. 13-16) (See State's Exhibit 4, App. 34-195). The first item accused against Blunt, the \$103.96 paid to Miracle Mart on May 11, 2004 (App. 35), is the cake WSI purchased for Blunt's first day at WSI (App. 37-40; Tr. 50-52).

The next item is \$135.00 for "Rental of Grill for Superior Starts with Me Summit" (App. 35, 41-43). The next is \$320.00 for 60 lunches for the Summit (App. 35, 44-46). The next is \$64.20 reimbursed to Blunt for coffee he purchased for the Summit (App. 35, 47-49), although that item does not appear in the audit report (see Defendant's Exhibits 9, 10 and 12; R. 28, 29, 30). In fact, the report appears to show that item as \$0.00 because it had been "Moved to Mr. Blunt's expense account." (Defendant's Exhibit 10; R. 29). A similar alleged expense against Blunt for \$115.06 on October 10, 2005, for the Superior II Summit (App. 36, 128-129) is not even listed in the audit report.

The next item is \$204.00 to the Ft. Lincoln Trolley Company for the use of the trolley for the Summit (App. 35, 50-52). It appears the Summit took place at Ft. Lincoln, and someone at WSI did a cost analysis which

showed that the use of the trolley actually saved travel expenses (App. 53-54).

The next item is \$282.89 for “Puzzle Pieces for Superior Starts with You program” (App. 35, 55-58). There was no testimony at the preliminary hearing specific to this item to show the purpose of the item or who made the decision to purchase the item.

The list continues with a legislative meeting with lunch for \$211.86 (App. 59-62), crackers and gummy worms for a quarterly meeting for \$43.92, \$75.80 and \$9.78 (App. 64-70), and \$17.30 to Party America for candy, balls, erasers, balloons and pencils for “Bring Kids to Work Day” (App. 71-73). Perhaps it can be assumed Blunt knew of the quarterly meeting expenses, but as to the latter dollar amount there was no evidence to show Blunt had any knowledge of the items or the expenditures. At the preliminary hearing, the State’s position was that Blunt, as CEO of WSI, is “ultimately responsible for all expenditures made by WSI” (Tr. 5, lines 16-18), and “[t]he board has no direct authority over the day-to-day expenditures of WSI” (Tr. 62, see lines 11-24).

The next item is \$44.25 paid to the Dakota Zoo for “Hedgehogs” on May 4, 2005 (App. 35, 75-77). The Supply Requisition shows it was made by Employee Jim Long for promotional items and it states, “CEO approval

needed” (App. 78). It appears Blunt signed off on the requisition (App. 78). This item is followed by \$65.89 paid to Tropical Island Restaurant for “Jungle Animals” on May 11, 2005 (App. 80-81). There was no evidence showing the purpose of these items. There was no evidence showing the items were not for WSI business.

The next item for \$200.00 (App. 83-84) and the item for \$1,401.00 (App. 88-94) were for a “Medora Retreat”. The purpose of \$63.90 paid to Dan’s Supermarket on May 26, 2005, for “4 cases” of “York Peppermint Patties” (App. 85-87) is not explained by the documents or the testimony. There is no evidence whether the item relates to the Medora Retreat or not, or if Blunt knew of the expenditure. The item was purchased by a WSI employee with a purchasing card (App. 85).

The next item is \$109.00 paid to “Long Life Food Depot” on June 30, 2005, for “MRE Full Meals – 12” (App. 95-97). There was no evidence explaining this expenditure. However, there was a notation which states in part, “This was shipped 2day . . . (per Jim’s request)” (App. 97).

The next item is \$23.46 for “Patriotic & 4th of July Items” purchased from Osco Drug on June 30, 2005 (App. 35, 99-100). Blunt, as CEO, signed off on this expenditure (App. 99). There was no evidence explaining the

purchase of these items, other than they were additional promotional items (App. 99).

The next item is for \$113.55 paid to Peacock Alley on July 20, 2005, for a “working lunch” which involved a “TEC meeting” (App. 101-102). Blunt approved the expenditure (App. 102), and the meeting was explained to the State Auditor (App. 103). The item was not included in the audit report (see Defendant’s Exhibits 9, 10 and 12; R. 28, 29, 30). A similar expenditure on February 23, 2006, for \$55.98 (see App. 36, 162-165) is also not included in the audit report.

A continuation of the items shows expenses of \$356.15 for “the July All-Employee Meeting” in 2005(App. 35, 104-108); \$435.00 for “a 4 day training at the Kelly Inn in Bismarck to discuss the future of employer service” in July, 2005 (App. 35, 110-114); \$37.09 and \$266.95 for a second “All Employee Meeting” (App. 35-36, 115-122) (which may be the Superior II Summit in October, 2005); \$37.88, \$126.00, \$249.00, \$52.00, \$197.82 and \$125.92 for the Superior II Summit in October, 2005(App. 36, 132-141, 160-161); and \$53.49 for trophies for the “All emp[loyee] meeting in January 2006” (App. 36, 143-152).

The remaining items of \$73.75, and \$300.00 through \$610.13, in December 2005, through February, 2007, appear to be for various WSI meetings and a supervisor workshop (App. 36, 153-159, 166-195).

On April 24, 2007, the auditors recorded an interview with Blunt (Defendant's Exhibit 4; R. 25), wherein they asked him about items like Goldfish crackers, glass pickle ornaments, and the Saturday Night Live video. Blunt responded in part:

. . . [L]ast session we had a law to allow us to do certain things like that. It was pulled because we were told we could. It documented that we had that right. . . . (inaudible) does benefit the public to keep people happy, you do things different

. . . [W]e sought guidance on them, we made a decision, . . . we haven't done it since we were told it's not right.

(R. 25, pp. 3-4).

Finally, Count II charges Blunt with paying bonuses to three employees in violation of N.D.C.C. § 54-06-30 (Tr. 17-18). At the preliminary hearing, the State defined a bonus as "additional payment above and beyond normal compensation (Tr. 17, lines 8-11).

During the audit, WSI disagreed it paid bonuses. WSI's "Management's Response", in part, was as follows:

. . . WSI disagrees with the conclusion that the retroactive pay increases are bonuses. Each identified employee in this category was either denied their right to an annual salary review or promoted to a new position with additional responsibilities but not immediately financially adjusted to reflect such responsibilities. . . . These salary adjustments were then made retroactive to the appropriate date or to the extent possible. Consequently, these payments were for base compensation and not bonus pay.

(Defendant's Exhibit 13; R. 31).

At the preliminary hearing, the State introduced State's Exhibit 5 prepared by the auditor's office (App. 307-308; Tr. 18). It showed the first employee being paid an additional \$613.00 per month. This was paid retroactively for 4 months, for an alleged bonus of \$2,452.00. (App. 307; Tr. 18-19, 52-53).

The second employee was paid an additional \$347.00 per month. This was paid retroactively for 4 months, for an alleged bonus of \$1,388.00. (App. 307; Tr. 18, 20, 53).

The third employee was paid an additional \$480.00 per month. This was paid retroactively for 7 months, for an alleged bonus of \$3,360.00. (App. 308; Tr. 18, 20, 53-54).

Each of these three employees continued to receive the additional money per month after the 4 months and 7 months respectively. It was an increase in their pay per month. It was only the retroactive payments which were charged as bonuses. (Tr. 53-54). Indeed, the Court questioned the testifying agent:

THE COURT: - - that 613 in the case of the first employee, is that employee still receiving that every month, I mean, the last time you investigated?

THE WITNESS: To my knowledge, yes.

THE COURT: All right. So it was basically an increase in salary?

THE WITNESS: Yes, sir.

(Tr. 61, lines 17-23).

Blunt never had referred to these monies as bonuses (Tr. 52, lines 14-18). To the auditors, Blunt consistently referred to these monies as increases in salary paid retroactively (App. 317, 320, 322). Blunt also told the auditors that he acted upon advice (App. 323-324).

Following the preliminary hearing or examination, the district court dismissed both counts charged against Blunt and ordered him discharged (App. 1-5). The court found the monies in Count I to be a benefit to WSI

employees and WSI. The court found the money in Count II to be increases in monthly salaries and not bonuses. (App. 3). The court further explained:

Without any evidence of self dealing in these public funds, there is no evidence that Blunt knew these meeting expenses and “bonuses” involve a risk of loss or detriment . . . to the government.”

Neither is there any evidence that the WSI board of directors did not authorize these expenses.

(App. 3-4).

The court specifically relied on N.D.C.C. Title 65, and N.D.C.C. §§ 65-02-01.2 and 65-02-03.3 in particular (App. 4). Without evidence of action by the board, “there is no evidence Blunt knew he was not authorized to do what he did.” (App. 4).

The court also found “there is no evidence the government lost anything as all of these expenditures appear to benefit the government since arguably such expenditures would make employees happy and thus better state workers, and would also benefit the government by assisting in the retention of good employees.” The court also found there was no evidence the expenditures were in excess of WSI’s budget. (App. 4-5).

Finally, the court found no hint of gain to Blunt himself, and the prosecution to be unwarranted (App. 5).

STATEMENT OF THE STANDARD OF REVIEW

Rule 5.1, N.D.R.Crim.P, Preliminary examination, provides in relevant part as follows:

(a) **Probable cause finding.** If the magistrate finds probable cause to believe an offense has been committed and the defendant committed the offense, an arraignment must be scheduled. The finding of probable cause may be based on hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. The magistrate may receive evidence that would be inadmissible at the trial.

(b) **Discharge of the defendant.** If the magistrate hears evidence on behalf of the respective parties, in a preliminary examination, and finds either a public offense has not been committed or there is not sufficient cause to believe the defendant guilty of the offense, the magistrate must discharge the defendant.

In State v. Foley, 2000 ND 91, ¶ 8, 610 N.W.2d 49, the Court explained:

Under N.D.R.Crim.P. 5.1(b), a defendant must be discharged “if it appears either a public offense has not been committed, or there is not sufficient cause to believe the defendant guilty of the offense”

State v. Serr, 1998 ND 66, ¶ 10, 575 N.W.2d 896. The probable cause standard does not require the State to establish that a crime occurred with absolute certainty or beyond a reasonable doubt, rather it is only necessary for the State to produce sufficient evidence “to satisfy the examining magistrate that a crime has been committed and that the accused is probably guilty.” Id. On appeal, we will not reverse a trial court’s finding of fact in preliminary proceedings in a criminal case if, after resolving conflicts in the testimony in favor of affirmance, sufficient competent evidence exists which is fairly capable of supporting the trial court’s findings and the decision is not contrary to the manifest weight of the evidence. State v. Erbele, 554 N.W.2d 448, 450 (N.D. 1996). Whether the facts found by the trial court reach the level of probable cause is a question of law, fully reviewable on appeal. Serr, at ¶ 9.

ARGUMENT

Here, the district court found that no crime was committed. The court found that Blunt did not act in a manner that he knew was not authorized. The court also found that Blunt did not act in a manner that he knew to involve a risk of loss or detriment to WSI or the government (or to any other person for whose benefit the money was entrusted).

The district court's findings should be upheld. Sufficient competent evidence exists which is fairly capable of supporting the district court's findings. The district court's decision to discharge Blunt for a lack of probable cause is not contrary to the manifest weight of the evidence.

From Title 65, to the cake, to the given practice of gift certificates, to the organization acting as an organization, to a failure to prove Hedgehogs a detriment, to the board not saying any of this was not authorized, to Blunt not self dealing, to the testifying agent telling the district court the "bonuses" were actually salary, there is no crime here.

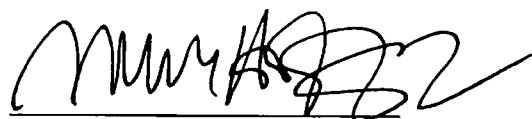
It is time for this case to end.

CONCLUSION

WHEREFORE, Blunt requests the Supreme Court of North Dakota to affirm the order of the district court finding no probable cause and dismissing the complaint.

Respectfully submitted this 17 day of December 2007.

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A handwritten signature in black ink, appearing to read 'Michael R. Hoffman', written over a horizontal line.

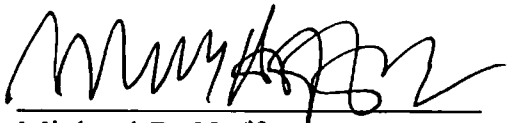
Michael R. Hoffman

CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing document by mail, on this 17 day of December 2007, on:

Cynthia Feland
Assistant Burleigh County State's Attorney
Burleigh County Courthouse
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