STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ALAN KOHL,

Defendant-Appellant.

UNPUBLISHED
May 14, 1996

No. 172639
LC No. 92-001537

Before: O'Connell, P.J., and Hood and C.L. Horn*, JJ

PER CURIAM.

Following a jury trial, defendant was convicted of acceptance of a bribe by a public official, MCL 750.118; MSA 28.313. He was sentenced to five years' probation, with the first ninety days to be served in jail. Defendant was also ordered to perform one hundred hours of community service and was disqualified from holding public office. Defendant appeals as of right. He was released from jail on appeal bond pursuant to a March 4, 1994 order of this Court. We affirm.

This action arose in May of 1992, when defendant and Steven Gabriel were running for the office of Clinton Township Supervisor. Defendant was seeking re-election. On May 12, 1992, Vito Granata was approached by defendant at a fund-raiser. Defendant requested that Granata speak to Gabriel about withdrawing from the race, and instructed him to offer Gabriel anything necessary for his withdrawal. Defendant mentioned that Gabriel was having problems obtaining a privacy fence permit.

On May 13, 1992, Granata contacted Gabriel. During this conversation, Granata suggested that if Gabriel withdrew from the race, he could resolve the berm and fence matters which were causing Gabriel concern. Gabriel refused to withdraw. On that same day, Gabriel attempted to make an appointment for a berm inspection. However, he received no response at that time. Granata also spoke with Gabriel on May 14 and 15, 1992, but to no avail. The last day a candidate could voluntarily withdraw from the election was May 15, 1992.

* Circuit judge, sitting on the Court of Appeals by assignment.

On May 18, 1992, Gabriel contacted the Michigan State Police Detective Sergeant Curtis Schram to report what had transpired with Granata. Gabriel agreed to assist the police by calling Granata and allowing the police to record the conversations. On May 18 or 19, 1992, Gabriel submitted an application for a privacy fence permit to the township.

On May 20, 1992, Gabriel called Granata in the presence of Schram. Pursuant to Schram's instructions, Gabriel informed Granata that he had decided to withdraw. Granata called defendant and informed him that Gabriel had decided to withdraw. Defendant instructed Granata to offer Gabriel whatever necessary for him to withdraw.

On May 21, 1992, Gabriel told Granata that, in addition to the berm matter, he needed help obtaining a fence permit. Granata also offered Gabriel $5,000 as part of their deal. Granata then met with defendant and informed him that Gabriel was willing to take $5,000 plus two favors regarding the berm and fence matters. Defendant agreed.

On May 22, 1992, the township clerk informed Gabriel that he could withdraw if he signed an affidavit that he had moved out of the township, even if that move was for one day. Gabriel subsequently withdrew by signing the false affidavit. On May 25, 1992, Granata informed defendant that Gabriel had fulfilled his part of the agreement and that he wanted the money and both permits immediately.

On May 26, 1992, defendant called Steven Cassin, the township's director of planning and community events. Cassin contacted an engineer and John Codron, who was either the township's building inspector or assistant superintendent. Codron ultimately reviewed the fence permit, approved the setback, and gave the paperwork to the inspector assigned to the permit. Shortly thereafter, defendant met Granata, gave him $5,000 and informed him that the fence and berm matters were resolved. Granata then informed Gabriel that the berm matter had been resolved, that he could obtain his fence permit, and gave him the $5,000.[1] Later that day, Gabriel obtained his fence permit from Codron, who issued the fence permit after having a conversation with defendant. It was unusual for Codron, rather than the building inspector assigned to review the application, to approve a fence permit. However, Codron denied that he issued the fence permit for any reason related to defendant. When Gabriel returned home, a township engineering consultant, Gordon Randall, inspected and approved the berm. Randall testified that no one had asked him to inspect the berm.

On May 28, 1992, Schram served Granata with an arrest warrant. Granata advised Schram of defendant's involvement in the case. He also agreed to cooperate with the state police by calling defendant on May 28 and June 1, 1992. Following the phone calls, Schram interviewed defendant. Defendant admitted that he gave $5,000 to Granata to give to Gabriel so that he would withdraw. Defendant also admitted that he had agreed to attempt to take care of the fence and berm matters.

Defendant testified that it was Granata's idea to approach Gabriel. After Granata made a deal with Gabriel, Granata threatened defendant by suggesting that he should be concerned for his own

safety and his family's safety if he did not produce $12,000 to complete the deal. Defendant subsequently gave $12,000. He stated that this payment was to protect his family.

I.

Defendant first argues that the trial court erred in denying his motion for dismissal because he was entrapped under both prongs of the entrapment test. We disagree. A trial court's findings following an entrapment hearing will be upheld on appeal unless clearly erroneous. *People v Williams*, 196 Mich App 656, 661; 493 NW2d 507 (1992).

Entrapment occurs when (1) the police engage in impermissible conduct that would induce a law-abiding person to commit the crime in similar circumstances, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. *People v Butler*, 199 Mich App 474, 479; 502 NW2d 333 (1993).

To determine whether the police engaged in impermissible conduct which would induce a law-abiding person similarly situated to the defendant to commit the crime, an analysis of the following factors must be conducted: (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted. *Id*.

In this case, several of these factors are not present. There was no evidence that appeals were made to Granata or defendant's sympathy as a friend. The police investigation was brief and there were no long delays between the investigation and the arrests. There was no evidence of any inducement to make the commission of the crime unusually attractive. There was no evidence of a guarantee that the acts were not illegal. Likewise, there was no evidence of sexual favors or threats of arrest. Further, there was no excessive consideration or enticement. Rather, Gabriel merely offered to do what he was asked to do when first approached by Granata. Therefore, these factors weigh against finding entrapment.

Defendant claims that the police investigation escalated his criminal culpability. Defendant was not known to commit the crime for which he was charged. However, prior to any police involvement, defendant initiated the contact with Granata regarding Gabriel withdrawing. Further, the police did not know who Granata was representing. Moreover, there was no evidence that the police used Gabriel to change the character of his discussions with Granata to focus on the fence permit, berm and the

payment of money. The focus of the discussions always revolved around Gabriel withdrawing from the election. In fact, Granata testified that the matters mentioned by Gabriel after he contacted the police were of the same sort contemplated by defendant before Gabriel contacted the police. The trial court found, and we agree, that the police did nothing more than "reignite embers which had been smoldering; they did not build that fire."[2] Even though, the police were involved in some deceit, the mere act of deceit will not bar prosecution. *Williams, supra*, 662.

Furthermore, there is no evidence that Gabriel pressured Granata to do anything. Rather, Gabriel simply informed Granata that he decided to withdraw from the election. Then the two proceeded to negotiate the consideration Gabriel wanted for withdrawing..

Defendant also claims that the investigation was not targeted, but was a "fishing expedition with no focus or control." However, the evidence established that the investigation was targeted at the individual [Granata] whom Gabriel claimed had tried to persuade him to withdraw from the election. Additionally, the police exercised reasonable control over Gabriel in his dealings with Granata. Schram gave Gabriel guidelines, and monitored his conversations with Granata. We therefore conclude that the trial court did not clearly err in finding that the police would not have induced a law-abiding person similarly situated to defendant, a public official, to commit the crime of accepting a bribe.

Defendant also failed to establish that police engaged in conduct so reprehensible that it cannot be tolerated by a civilized society. The purpose of the entrapment defense is to deter the corruptive use of governmental authority by invalidating convictions which result from law enforcement efforts which have as their effect the instigation or manufacture of a new crime by one who would not otherwise have been so disposed. *People v Juillet*, 439 Mich 34, 56; 475 NW2d 786 (1991).

In this case, we find that the purpose of the challenged activity was the detection of crime, not its manufacture. There was no impropriety in the police investigating the complaint made by Gabriel. Nor was it reprehensible conduct that Gabriel actually benefited from the investigation by obtaining his fence permit or his berm approval. There was no evidence that the police prohibited the township from taking further action on these matters after it learned about the police investigation.

Furthermore, contrary to defendant's argument, this case is not analogous to a "reverse- buy" drug transaction. In this case, defendant initially approached Granata. He had already decided to offer Gabriel something in return for his decision to withdraw. Gabriel did not approach defendant and request that he offer him something to withdraw. In any event, even "reverse-buy" drug operations are not entrapment per se, and will not rise to the level of entrapment where the police do nothing more than present a defendant with an opportunity to commit the crime for which he was convicted. *People v Butler*, 444 Mich 965 (1994).

We conclude that, under either test, defendant failed to establish that he was entrapped to commit the crime of accepting a bribe by a public official. Therefore, the trial court properly denied defendant's motion to dismiss.

II.

Defendant next argues that the trial court erred in denying his motions for acquittal and new trial because there was insufficient evidence that a corrupt agreement existed by which he would give his vote, opinion or judgment in a particular manner or on a particular side of a question, cause or proceeding which was before him or would be brought before him in his official capacity pursuant to MCL 750.118; MSA 28.313. We review sufficiency of the evidence claims by considering the evidence in the light most favorable to the prosecution. We determine whether a rational trier of fact could have found that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995).

MCL 750.118; MSA 28.313 states that:

> Any executive, legislative or judicial officer *who shall corruptly accept* any gift or gratuity, or any promise to make any gift, or to do any act beneficial to such officer, *under an agreement, or with an understanding that his vote, opinion or judgment shall be given in any particular manner, or upon a particular side of any question, cause or proceeding, which is or may be by law brought before him in his official capacity,* or that in such capacity, he shall make any particular nomination or appointment . . . [Emphasis added.]

There must be a corrupt intent in a bribery case. A corrupt intent is gathered from the acts done and the circumstances under which they are done. *People v Ritholz*, 359 Mich 539, 554-555; 103 NW2d 481 (1960). The following instruction describing a corrupt intent has been upheld as fully protecting a defendant's rights with respect to the intent element:

> I charge you that there can be no conviction for acceptance of a bribe unless the same be accepted with a corrupt intent, and even though you should find from the evidence that the defendant received some money, nevertheless, you cannot find him guilty unless you believe beyond a reasonable doubt that he received money with an intent at the time of receiving same to allow the receipt of money to influence his vote on the question of masonry and concrete or steel construction, and unless you do find beyond a reasonable doubt that he had such corrupt intent and intended to be influenced in his vote or decision by the receipt of money, then your verdict must be not guilty. * * *
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> A corrupt act means an act characterized by an intent to gain advantage not consistent with one's official duty and the rights of others. It is also defined to be dishonest, without integrity, or guilty of dishonesty involving liberty, as when one accepts money with the intent and purpose of being influenced into doing something inconsistent with his official duty as a public officer. [*People v Ewald*, 302 Mich 31, 45-46; 4 NW2d 456 (1942).]

The mere use of influence is not criminal under the statute; there must be a vote, opinion, or judgment. *People v Leve*, 309 Mich 557, 563; 16 NW2d 72 (1944).

There are two matters that the prosecution claimed came within the ambit of the statute as a particular matter upon which defendant could have exercised a vote, opinion or judgment in his official capacity. The first matter was the application for a fence permit, which was filed by Gabriel on May 18 or 19, 1992, and was still pending in the township's building department on May 26, 1992. In this case, there was evidence that defendant's acceptance of Gabriel's withdrawal was corrupt because he accepted it under an agreement or understanding that he was to remain supportive of approving the fence permit (and the berm). Further, defendant could use and in fact had used his position as supervisor on May 26, 1992, to insure that defendant's application for a fence permit would be acted upon by the building department. Because this would properly be characterized as "mere influence," and, it is insufficient to establish the charged offense. *Id*.

However, the statute looks to the time of "acceptance" of the bribe to determine criminal responsibility. We find that a trier of fact could have concluded that had the township denied the fence permit and Gabriel appealed the township's decision permit, defendant, as supervisor, could have voted on an appeal as a member of the township board on the application for a fence permit. We therefore conclude that the evidence was sufficient to support a finding that defendant had corruptly accepted Gabriel's beneficial act under an agreement, or with an understanding that his "vote, opinion or judgment shall be given in any particular manner, or upon a particular side of any question, cause or proceeding, which is or may be brought before him in his official capacity." MCL 750.118; MSA 28.313.

The second matter is the berm approval. Unlike the fence matter, Gabriel already obtained a landfill permit to install a berm. However, he had not received approval of the permit. Cassin indicated that some issues regarding the berm could be brought before the zoning board of appeals (e.g. a request for a variance), while other issues could be brought before the township board (e.g. an interpretive issue on ordinance compliance). Cassin testified that if a person appealed the rejection of a berm approval to the township board, defendant would vote on it as a member of the township board. Based on the evidence, we find that a trier of fact could have concluded that the berm approval was a matter that could have been brought before the township board at the time that defendant corruptly accepted Gabriel's beneficial act of withdrawing from the election for supervisor.

We therefore conclude that, viewed most favorably to the prosecution, there was sufficient evidence that to find the charged offense of accepting a bribe by a public official. Therefore, the trial court properly denied defendant's motions for acquittal and a new trial.

III.

Defendant finally argues that the trial court erred in its April 13, 1993 opinion and order denying his motion to quash the information because it misapplied the corpus delicti rule. We disagree.

Initially, we note that this Court previously denied defendant's application for interlocutory appeal regarding the district court's bindover decision. In the present appeal, we have concluded that the trial evidence was sufficient. Therefore, any error was harmless. *People v Hall*, 435 Mich 599, 615; 460 NW2d 520 (1990); *People v Staffney*, 187 Mich App 660, 663; 468 NW2d 238 (1991).

Even if we were to consider the issue, we would conclude that the trial court properly denied defendant's motion to quash. The district court considered the Charter Township Act and township ordinances in its decision. In its findings, the trial court stated:

> Also, that based upon the testimony that was presented in this Court uncontradicted Mr. Gabriel indicated that he offered to do a beneficial act, to wit: withdraw from the political race with an agreement or understanding that he would use, that Kohl would use his vote, his opinion or his judgment on a particular matter or matters . . . [P]ursuant to M.C.L.A. 42.5(1)(2) and Charter Township of Clinton ordinances . . . and Clinton Township Zoning ordinance . . . which allow that any person aggrieved by the decision of the Building Department or Township engineer may appeal to the Township Board of Trustees for a ruling. Therefore as a member of that Board such issues could be given favorable votes by Mr. Kohl regarding Mr. Gabriel's issues, that being the berm and the fence in return for the beneficial withdraw from the Supervisor's race.

The purpose of the corpus delicti rule is to prevent a defendant's confession from being used to convict a defendant of a crime that never occurred. *People v Cotton*, 191 Mich App 377, 386; 478 NW2d 681 (1991). The corpus delicti rule is satisfied in a criminal case if the prosecution shows that the specific injury of loss has occurred and that some person's criminality was the source or cause of the injury. *Id.*, p 391.

In this case, the prosecution had to show that an "executive, legislative or judicial officer' was behind the bribery. MCL 750.118; MSA 28.313. Evidence considered by the court established that defendant was an officer who came within the ambit of the statute. Further, the specific injury in this case arises from the fact that a public official has acted corruptly. This injury was established by the introduction of Granata's in-court testimony of his dealings and conversations with defendant. The prosecution may use an accomplice's in-court testimony to establish the corpus delicti of the charged offense. *People v Conte,* 104 Mich App 73, 77; 304 NW2d 485 (1981).

Contrary to defendant's argument, his statements to Schram were not needed to establish probable cause, and there is no evidence that the court relied on his statements. Even if the court had misapplied the corpus delicti rule in its analysis of the motions to quash and for reconsideration of that motion, reversal would not be required because it reached the right result. *In re Powers*, 208 Mich App 582, 591; 528 NW2d 799 (1995).

Affirmed.

/s/ Peter D. O'Connell
/s/ Harold Hood
/s/ Carl L. Horn

[1] The jury was instructed that the $5,000 cash payment of money to a candidate for office was not a criminal offense and that it should not be considered.

[2] Defendant inappropriately relies on lower court records from the case filed against Granata to support this argument. This Court's review is limited to the record presented in the trial court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). [2] The jury was instructed that the $5,000 cash payment of money to a candidate for office was not a criminal offense and that it should not be considered.

[2] Defendant inappropriately relies on lower court records from the case filed against Granata to support this argument. This Court's review is limited to the record presented in the trial court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).