

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS VANSICKLE,

Defendant-Appellant.

UNPUBLISHED

January 16, 1998

No. 191839

Livingston Circuit Court

LC No. 94-008307-FH

Before: Hoekstra, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of the common law felony offense of misconduct in office, MCL 750.505; MSA 28.773, in connection with several remodeling tasks that were performed by an inmate in defendant's home while the inmate was on a work pass to the police department where defendant was employed. For each of the three convictions, defendant was ordered to pay a fine of \$5,000. He now appeals as of right, and we reverse.

Of the issues that defendant presents on appeal, one is outcome-determinative. Defendant argues that the trial court should have granted his motions for a directed verdict because there was insufficient evidence to support his convictions for misconduct in office. A person guilty of this offense must be a public officer who, while acting in the exercise of the duties of his office or while acting under color of his office, committed any act that is wrongful in itself, i.e., malfeasance. *People v Carlin*, ___ Mich App ___, ___ NW2d ___ (Docket No. 186263, issued 9/23/97), slip op p 2. At issue here is whether there was sufficient evidence from which the jury could conclude that defendant, a lieutenant police officer for the Hamburg Township Police Department, was a public officer. If the evidence is insufficient to support a conviction, then the trial court must direct a verdict of acquittal. MCR 6.419. When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). Thus, we must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that this essential element of the charged crime was proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

On facts similar to this case, this Court recently held in *Carlin, supra* at slip op p 5, that a deputy sheriff could not be bound over on charges of misconduct in office because the deputy sheriff was not a public officer. To decide whether the position of deputy sheriff was employment considered a public office in Michigan, this Court in *Carlin, supra* at slip op pp 2-3, applied a five-part test:

(1) [I]t must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. *Meiland v Wayne Probate Judge*, 359 Mich 78, 87; 101 NW2d 336 (1960); *Kent Co Register of Deeds v Kent Co Pension Bd*, 342 Mich 548, 551-552; 70 NW2d 765 (1955).

Relying on this Court's holding in *Schultz v Oakland Co*, 187 Mich App 96, 98, 101; 466 NW2d 374 (1991), the *Carlin* Court reasoned that the deputy sheriff was not a public officer who could be charged with misconduct in office because his employment was governed by a collectively bargained labor contract and because he must answer to authorities other than the law itself.

Although this case involves a lieutenant police officer, not a deputy sheriff, the reasoning in *Carlin* is applicable here. At the trial in this case, the prosecution rested on the mere fact that defendant was a police officer to satisfy this element of the crime. Indeed, the evidence that was part of the testimony at trial supported defendant's argument that he was only a public employee. For example, the chief of police testified that defendant was responsible for the police department's building and equipment, its scheduling, as well as the inmate workers' program at the police department. These are presumably not duties that are defined, either directly or impliedly, by the Legislature or through legislative authority. It is also apparent from the police chief's testimony that defendant's duties were not performed independently, but under the control of and with instruction by the city police chief, who was the next officer in the chain of command. Even viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not find beyond a reasonable doubt that defendant was a public officer; therefore, we hold that the trial court erred in denying defendant's motions for a directed verdict, and we reverse defendant's convictions.

Because of our resolution of the public officer issue, we find it unnecessary to address defendant's remaining four issues.

Reversed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra