Circuit Court for Somerset County

Case No. 19-K-16-010712

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2350

September Term, 2016

LIONEL FREDERICK

v.

STATE OF MARYLAND

Wright,
Kehoe,
Berger,

JJ.

Opinion by Wright, J.

Filed: October 17, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

By indictment filed on June 17, 2016, in the Circuit Court for Somerset County, the State of Maryland charged appellant, Lionel Frederick, II, with:

Count 1: Theft of U.S. currency having a value of at least $1,000 but less than $10,000, in violation of Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 7-104;

Count 2: Extortion of U.S. currency having a value of at least $1,000 but less than $10,000, in violation of CL § 3-701(b)(1-2);

Count 3: Extortion by a government employee of U.S. currency having a value of at least $1,000 but less than $10,000, in violation of CL § 3-702;

Count 4: Extortion between government officials, in violation of CL § 3-703;

Count 5: Misconduct in office (malfeasance), in violation of the common law; and

Count 6: Misconduct in office (misfeasance), in violation of the common law.

A hearing was held on November 15, 2016, at which time the parties proceeded by way of a not guilty agreed statement of facts. Thereafter, the circuit court found Frederick guilty of Counts 3 and 5, and acquitted him of the remaining charges. On January 9, 2017, the court merged Count 5 into Count 3, sentenced Frederick to serve six months in the local detention center, and ordered him to pay restitution. The circuit court, however, stayed the sentence, including restitution, pending this appeal.

Questions Presented

Frederick asks:

1. Was the evidence insufficient to convict appellant of extortion by a government employee under [CL] § 3-702?

2. Was the evidence insufficient to convict appellant of common-law misconduct in office?

For the reasons that follow, we answer both questions in the affirmative. As such, we vacate Frederick's convictions and reverse the circuit court's judgments.

Facts

On November 15, 2016, Frederick was tried on the following agreed statement of facts, as read by the prosecutor:

> All material that's occurred in Somerset County, Maryland, and all material ties Dennis R. Williams and Lionel D. Frederick, II, who is the Defendant, were elected Commissioners of the governing body of the Town of Princess Anne, Maryland, which is a municipality.
>
> On or about May 3rd, 2016, Mr. Frederick approached Mr. Williams in person after a meeting and informed Williams he knew someone who wanted to run against Williams in the upcoming election for Town Commissioner in which Williams was running for re-election.
>
> Frederick told Williams that his potential opponent would probably win the election with Frederick's help unless Williams paid Frederick five thousand dollars to convince the opponent not to run. Williams told Frederick this was unethical and Frederick responded, quote, no, it's just politics.
>
> Williams then complained to law enforcement officials to include the Somerset County State's Attorney Dan Powell. Later Mr.Williams also called 911 to express his concerns regarding the conversations.
>
> On May 9th, 2016, Frederick again spoke with Williams and indicated that he wished to discuss his, quote, proposal. Williams told law enforcement that Frederick had seen him walking and stopped him in person to again discuss the proposal. Frederick again discussed the matter of Williams paying him five thousand dollars to stop the other person from running. Frederick then indicated he was going to Pocomoke and would be back at 3:00 o'clock p.m.

> Williams cooperated at that point with law enforcement officials in a sting operation against Frederick including multiple surreptitious recording conversation.
>
> On May 9th, 2016, Williams called Frederick at approximately 1630 hours, at the direction of law enforcement. That phone call was recorded. The phone call stated the following:
>
> > Williams: Hey, it's Dennis here.
> >
> > Frederick: Yes, sir. I'd be to my house in about another ten minutes.
> >
> > Williams: Okay.
> >
> > Frederick: Could you put the letter in the mailbox for me and call me when you're on your way.
> >
> > Williams: I'm home.
> >
> > Frederick: Okay. Is there any way you can meet me at my house?
> >
> > Williams: Sure.
> >
> > Frederick: I'll be there in about five to ten minutes.
> >
> > Williams: Sounds good.
>
> On or about May 9th, 2016, with law enforcement surveillance in place, Williams and Frederick met and Williams paid two thousand five hundred dollars in cash to Frederick. At the time of the money transfer Williams was wearing a recording device (inaudible) law enforcement and recorded conversation at the time of payment. Williams and Frederick agreed that Williams would pay the remaining two thousand five hundred dollar balance to Frederick.
>
> As soon as the day for the opponent to file for election occurred without the opponent filing.
>
> The recorded conversation is the State's 1, which is entered.

State's exhibit No. 1, a transcript of the phone call between Williams and Frederick, read in pertinent part as follows:

MR. WILLIAMS: Okay.

MR. FREDERICK: I trust you.

MR. WILLIAMS: Huh?

MR. FREDERICK: I trust you.

MR. WILLIAMS: Just so we confirm. When do you - - okay. This is the 25. When do you want the balance? I mean, as far as I'm concerned, the deal we made is that after the election, but in reality after the close of registration.

MR. FREDERICK: Just send it off before then.

MR. WILLIAMS: I mean, do you want to do it the day after the - - the election and registration is over?

MR. FREDERICK: I'd rather have it all done before.

MR. WILLIAMS: Yeah. Before the election?

MR. FREDERICK: Yeah.

MR. WILLIAMS: Okay. So it's - -

MR. FREDERICK: Before registration is done, the last day of registration.

MR. WILLIAMS: Okay. That's good. So I mean, he's not going to - - he's not - - he's not signing up. It's guaranteed, yes?

MR. FREDERICK: Guaranteed.

MR. WILLIAMS: Okay. So -- so here is 25 in hundreds, and then you get the other the day - - the day of the registration; is that good?

MR. FREDERICK: Sure.

MR. WILLIAMS: For a total of five. Okay.

MR. FREDERICK: Any help you need for the campaign, let me know.

MR. WILLIAMS: Okay. Thank you so much.

The transcript ended with some discussion between Williams and an officer, apparently after Frederick hung up the phone.

The remainder of the statement of facts presented at trial read:

> Mr. Williams returned with law enforcement to their Barrack to listen to the recording. At that time, surveillance was still active on Frederick's residence. As the conversation was being reviewed, law enforcement observed Frederick to back out of his driveway in a silver 2000 Mercedes. At that point a traffic stop was conducted on Mr. Frederick. Almost immediately after Frederick was arrested.
>
> Mr. Frederick was subsequently indicted on June 17th, 2016, on the charges that bring us here today. Lionel Frederick II would be identified as the Defendant before the Court this morning and is the individual who had previous inactions with Dennis Williams regarding the payment of the five thousand dollars.

After hearing argument from the parties, the circuit court ruled, in pertinent part, as follows:

> Count three, extortion [by] a government employee value one thousand to less than ten thousand dollars the Court finds him guilty.
>
> The Court in that case was convinced that it was under the color of his office. I believe that the color of his office is what gave him the authority or at least the appearance of the authority to Mr. Williams to pay for - - to pay the money. I think it's distinguishable from *Rendelman* [*v. State*, 175 Md. App. 422, *aff'd*, 404 Md. 500 (2007)] in that these are public officials. I think it's close, but I think it's distinguishable and therefore in that count I find him guilty.
>
> * * *
>
> The Court under count five misconduct in office count five is malfeasance the Court finds him guilty at that point. The definition of malfeasance is the doing of an act which is wrongful in itself. I think once I found him guilty under count three it then leads to malfeasance.
>
> * * *
>
> For count five I would again go back to the *Leopold* [*v. State*, 216 Md. App. 586 (2014)] case and the quote in *Leopold* it talks about quoting *Smith* [*v. Goguen*, 415 U.S. 566 (1974)] from the U.S. Supreme Court that

> it is self evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know his contemptuous conduct and these instances there would be ample notice to the actor such as the case here being the *Leopold* case. And likewise I find the case here further even in the stipulation, the transcript that was provided, the conduct, the sort of secretive nature of it, the comments about put the mail or the exact quote was to put the letter in the mailbox for me along with some of the commentary in the transcript that was admitted as State's 1 in the case that the Defendant was in effect operating in a secretive nature about it which would lead me - - leads me to that this falls into the range of conduct that while maybe not adequately statutorily defined falls within the behavior that a semblance of common sense would lead you to believe is misconduct in office.

Following sentencing on January 9, 2017, Frederick timely appealed.

Standard of Review

The standard of review for a sufficiency challenge is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Suddith*, 379 Md. 425, 429 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 313 (1979)). We review "not only the evidence in a light most favorable to the State, but also all reasonable inferences deducible from the evidence in a light most favorable to the State." *Smith v. State*, 415 Md. 174, 185-86 (2010) (citation omitted).

The plea of not guilty, accompanied by an agreed statement of facts, however, is "a peculiar animal." *Covington v. State*, 34 Md. App. 454, 455 (1977), *aff'd*, 282 Md. 540 (1978). We have previously explained:

> Under an agreed statement of facts both State and the defense agree as to the ultimate facts. Then the facts are not in dispute, and there can be, by definition, no factual conflict. The trier of fact is not called upon to determine the facts as the agreement is to the truth of the ultimate facts

> themselves. There is no fact-finding function left to perform. To render judgment, the court simply applies the law to the facts agreed upon.

Barnes v. State, 31 Md. App. 25, 35 (1976). Therefore, our task in this case is to make a legal determination from the facts, as agreed upon by the parties, whether such facts are sufficient to sustain Frederick's convictions. *See Harrison v. State*, 151 Md. App. 648, 657 (2003), *rev'd on other grounds*, 382 Md. 477 (2004).

Discussion

I. Extortion by a Government Employee

Frederick was charged with, and found guilty of, "[e]xtortion by a government employee of U.S. currency having a value of at least $1,000 but less than $10,000, in violation of CL § 3-702." In pertinent part, that section provides:

> An officer or employee of the State or of a political subdivision may not wrongfully obtain or attempt to obtain money, property, or anything of value from a person with the person's consent, if the consent is obtained under color or pretense of office, under color of official right, or by wrongful use of actual or threatened force or violence.

CL § 3-702(b). Frederick argues that the evidence was insufficient to convict him of extortion by a government employee under this statute. Moreover, he avers that the evidence did not establish that he acted "wrongfully," as the action he offered to carry out in exchange for money was not, in and of itself, unlawful.

In response, the State argues that the evidence, and reasonable inferences from the evidence, were sufficient to sustain Frederick's conviction for extortion by a government employee. According to the State, Williams could have reasonably inferred that Frederick was implicitly threatening to use his powers as Town Commissioner to

persuade someone else to run or not to run for office. The State also contends that the wrongful nature of Frederick's actions is shown by "the surreptitious, clandestine nature" of his encounters with Williams.

As the parties do not dispute that there was no allegation of "actual or threatened force or violence," the question before us is whether there was sufficient evidence to establish that Frederick's actions were "under color or pretense of office" or "under color of official right." We conclude that, unless we engage in speculation, there was not.

The General Assembly has not defined the phrases "under color or pretense of office" or "under color of official right." However, because the form of extortion set forth in CL § 3-702 closely resembles common law extortion and appears to have been based on federal statutes that, in turn, were based on common law extortion, the common law sheds some light upon the meaning of "under color or pretense of office" and "under color of official right." *See Rendelman*, *supra*, 175 Md. App. 422; 1978 Md. Laws, ch. 448 (enacting Md. Code. Ann., Art. 27 § 562B); S.B. 257 (1978). *See also* Bill File, S.B. 256 (1978) (referencing 18. U.S.C. §§ 872, 874 & 1951).

Treatises have defined common law extortion as "the corrupt collection of an unlawful fee by an officer under color of office," Rollin M. Perkins, *Criminal Law* 367 (2d ed. 1969). "In order to constitute extortion, the taking must take place under color of office – that is, under the pretense that the officer is entitled to the fee *by virtue of his or her office*." 31A Am. Jur. 2d Extortion, Blackmail, etc. § 9 (emphasis added; footnote omitted). "This requires that the service rendered must be apparently, or pretended to be, *within official power or authority, and the money must be taken in such apparent or*

claimed authority." *Id.* (emphasis added; footnote omitted). In other words, "[t]he money or thing received must usually have been claimed or accepted in right of office and the person paying must have yielded to official authority." 70 A.L.R.3d 1153 §2[a] (footnote omitted).

Stating the inverse, an officer who wrongfully obtains property from another without using the authority (real or pretended) of his or her office is not guilty of extortion because it was not done "under color of office." *See* Perkins, *supra*, at 369 ("The offense consists in the oppressive misuse of the exceptional power with which the law invests the incumbent of an office and hence is not committed unless the fee was collected under color of office." (Footnotes omitted)); 31A Am. Jur. 2d Extortion, Blackmail, etc. § 9 ("If a person, who happens to be a public officer, renders a service for another and demands payment in a private capacity, such person cannot be guilty of extortion since the demand was not made under color of office." (Footnote omitted)). As one treatise explains:

> To constitute extortion, the officer must obtain the fee under color of office, *i.e.*, under the pretense that he is entitled to the fee by virtue of his office . . . . Thus, the officer must misuse the power of his office to obtain the fee, and the person paying must yield to the show of official authority . . . . *If a person, who happens to be a public officer, renders a service for another in his private capacity and demands payment therefor in his private capacity, he cannot be guilty of extortion since the demand was not made under color of office.*

4 Wharton's Criminal Law § 655 (15th ed.) (emphasis added; internal footnotes omitted).

Although United States Supreme Court justices have disagreed about the meaning of the common law "under color of office" requirement, both approaches require, at a

minimum, that the conduct for which payment is sought or received must actually or apparently relate to the defendant's official duties. *Compare Evans v. United States*, 504 U.S. 255, 268 (1992) (holding "that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts" (footnote omitted)), *with id.* at 282 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) (endorsing view "that an official obtained a payment 'under color of his office' only – as the phrase suggests – when he used the office to assert a false pretense of official right to the payment" (footnote omitted)).

In this case, nothing in the agreed statement of facts indicated that Frederick acted "under color or pretense of office" or "under color of official right" in attempting to obtain money from Williams to convince a prospective opponent not to run for office. Although it was established that, at the time of the incident, both Frederick and Williams "were elected Commissioners of the governing body of the Town of Princess Anne," there was no evidence that Frederick used his position or offered to do so, either to convince the potential opponent not to run or to facilitate his arrangement with Williams. There was also no indication that his position as Town Commissioner made the arrangement possible.

We have previously made clear as follows:

> To be sure, when we review a criminal conviction for sufficiency of the evidence, we draw all rational inferences that arise from the evidence in favor of the State. But this precept does not license an appellate court to indulge in rank speculation. "If upon all of the evidence, the defendant's guilt is left to conjecture or surmise, and has no solid factual foundation, there can be no conviction." *Taylor v. State*, 346 Md. 452, 458, 697 A.2d

462 (1997). As we observed in *Dukes v. State*, 178 Md. App. 38, 47-48, 940 A.2d 211, *cert. denied*, 405 Md. 64, 949 A.2d 652 (2008):

> Maryland courts have long drawn a distinction between rational inference from evidence, which is legitimate, and mere speculation, which is not. *See, e.g., Benedick v. Potts*, 88 Md. 52, 55, 40 A. 1067 (1898) ("[A]ny . . . fact . . . may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them."). In *Bell v. Heitkamp*, 126 Md. App. 211, 728 A.2d 743 (1999), we endorsed the following test to distinguish between inference and speculation: "'where from the facts most favorable to the [party with the burden of proof] the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence), the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be permitted to draw it.'" *Id.* at 224, 728 A.2d 743 (quoting *Chesapeake & Potomac Tel. Co. v. Hicks*, 25 Md. App. 503, 524, 337 A.2d 744, *cert. denied*, 275 Md. 750 (1975)).

Brown v. State, 182 Md. App. 138, 173 (2008).

Here, the evidence was that Frederick told Williams he knew someone who wanted to run against Williams in the upcoming election, and that the prospective opponent "would probably win the election with Frederick's help unless Williams paid Frederick five thousand dollars to convince the opponent not to run." Without more, we cannot speculate that the "help" Frederick indicated he would give the potential candidate was connected to his official role as Town Commissioner.[1] As Frederick correctly notes,

[1] At the time of the incident, both Frederick and Williams "were elected Commissioners of the governing body of the Town of Princess Anne." "The position of Town Commissioner" is "a municipal office chosen by municipal election." *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 49-50 (2013) (footnote omitted). In

"help" could come in the form of "advice about strategy, or a political donation, or posting flyers, or voter outreach, or any of a myriad of things that he could do as a private citizen." Likewise, we also cannot speculate, from the agreed statement of facts, that Frederick's offer to convince Williams's potential opponent not to run would be made by virtue of his official power or authority as a Town Commissioner. As Frederick suggests, the actions could have been carried out through personal influence, charm, or persuasion. Although Frederick happened to be a public officer, he could have provided "help" in ways that any private citizen might. Nothing in the agreed statement of facts presented at trial indicated that Frederick would carry out the actions by using his office as opposed to acting in his private capacity.

In sum, after reviewing the evidence, as well as all reasonable inferences deducible from the agreed statement of facts – even in a light most favorable to the State – we conclude that the evidence was not sufficient to permit the circuit court to conclude that Frederick acted "under color or pretense of office" or "under color of official right." Accordingly, we need not determine whether Frederick "wrongfully" obtained or attempted to obtain money.

II. Misconduct in Office

Princess Anne, the five Town Commissioners are vested with all of the Town's "legislative powers." *Charter of the Town of Princess Anne* § 401(A). In that capacity, "[t]he Commissioners . . . have the power to pass all such ordinances, resolutions, rules and regulations not contrary to the Constitution and laws of the State of Maryland or of the United States of America or the Town Charter as they may deem necessary." *Id.* at § 501(A). The five Town Commissioners are also vested with the power to appoint and enter into a contract of employment with a Town Manager and prescribe the duties for the position. *Id.* at § 601.

Next, Frederick argues that the evidence was insufficient to convict him of common-law misconduct in office. Specifically, Frederick avers that the circuit court "seemed to base its misconduct in office verdict on the fact that it had found [him] guilty of extortion by a government employee." Alternatively, Frederick contends that "there was no evidence whatsoever that [he] was acting 'under color of office,' an element of misconduct in office," or that the behavior satisfies the "corruption or wrongfulness elements of misconduct in office."

This Court has previously defined misconduct in office as follows:

> "In Maryland, misconduct in office is a common law misdemeanor." *Duncan v. State*, 282 Md. 385, 387, 384 A.2d 456 (1978) (footnote omitted). It has been defined as "corrupt behavior by a public officer *in the exercise of the duties of his office or while acting under color of his office*." *Id.* (citing Perkins on Criminal Law 485 (2d ed.1969); *Hitzelberger v. State*, 174 Md. 152, 197 A. 605 (1938)). The corrupt behavior may be: (1) the doing of an act which is wrongful in itself, or "malfeasance;" (2) the doing of an act otherwise lawful in a wrongful manner, or "misfeasance;" or (3) the omitting to do an act which is required by the duties of the office, or "nonfeasance." *Id.* (citations omitted).

Leopold, *supra*, 216 Md. App. at 604-05 (emphasis added). As we explained above, the evidence was not sufficient to permit the circuit court to conclude that Frederick acted "in the exercise of the duties of his office or while action under color of his office." As such, Frederick's conviction for common-law misconduct in office, likewise, cannot stand.

"In the instant case, there were myriad, outstanding factual issues, the resolution of which required traditional trial mechanisms." *See Morris v. State*, 418 Md. 194, 217 n.16 (2011) (citation omitted). Thus, we deem it worth repeating the Court of Appeals's admonition in *Harrison v. State*, 382 Md. 477, 497-98 (2004):

> This Court and the Court of Special Appeals have heretofore made clear that prosecutors risk acquittal when a not-guilty agreed statement of facts fails to support the legal theory upon which the State relies. *See Bruno v. State*, 332 Md. 673, 684, 632 A.2d 1192, 1197 (1993) (noting that the State "risk[s] an acquittal" by proceeding on a not-guilty agreed statement of facts that does not present sufficient evidence to support the crimes charged); *Barnes v. State*, 31 Md. App. 25, 28, 354 A.2d 499, 501 (1976) (stating that, even in a case based on an agreed statement of facts, "an accused must be acquitted if the evidence is not legally sufficient to sustain his conviction"). We renew that admonition today. If a prosecutor proceeds on a not-guilty agreed statement of facts, he or she should take care to assure that the statement contains evidence to support each element of the crime or crimes charged, or else acquittal necessarily will follow.

See also Smallwood v. State, 106 Md. App. 1, 17-20 (1995) (Bloom, J., dissenting) ("I daresay that no agreed statement of facts is ever complete; the trial judge has to flesh out the agreed facts by drawing inferences as to other material facts that the parties have not stipulated . . . . [Where] [t]here was an agreed statement of facts from which conflicting inferences can be drawn . . . I do not believe that a reasonable trier of fact can reasonably draw the weaker inference and thus be persuaded of appellant's guilt beyond a reasonable doubt."), *rev'd*, 343 Md. 97 (1996).

JUDGMENTS OF THE CIRCUIT COURT FOR SOMERSET COUNTY REVERSED. COSTS TO BE PAID BY SOMERSET COUNTY.