[Cite as *State v. Morrison*, 2010-Ohio-6309.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. JACK MORRISON, JR. Appellant	C.A. No. 24965 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2008-12-4019

DECISION AND JOURNAL ENTRY

Dated: December 22, 2010

MCMONAGLE, P. J.

{¶1} Defendant-appellant, Jack Morrison, Jr. ("Trustee Morrison"), appeals his convictions, rendered after a bench trial, for filing a false statement and falsification. He also challenges the denial of his motion to dismiss. We reverse and remand, with orders to vacate his convictions.

I.

{¶2} Trustee Morrison was charged in a seven-count indictment as follows: Count 1, having an unlawful interest in a public contract; Counts 2 and 3, filing a false statement relative to the calendar year 2006; Counts 4 and 5, filing a false statement relative to the calendar year 2007; Count 6, falsification relative to the calendar year 2006; and Count 7, falsification relative to the calendar year 2007.

{¶3} Trustee Morrison filed a motion to dismiss and a hearing was held on same. The motion was denied and the case was tried to the court. The defense made a Crim.R. 29 motion

for acquittal at the conclusion of the state's case and the conclusion of its case; the motion was denied. Trustee Morrison was found guilty only of Counts 4 and 7, sentenced to a six-month suspended sentence and one year of probation with conditions, and fined $1,000.

II.

{¶4} Trustee Morrison is an attorney at law and began serving as a trustee for the University of Akron in 2005. He has a son, also named Jack Morrison, Jr. ("son Morrison"), who, while a law clerk studying for the bar examination, worked with his father and began investing in real estate. Son Morrison purchased several houses in Akron, some of which were near the University, and which he used as investment properties.

A. The Spicer Road Property — $75,000 Loan

{¶5} One of the properties the son purchased, located at 334 Spicer Road, was purchased by him in September 2006. According to the son, he tried to obtain financing, but was unable to do so because of the condition of the property. Consequently he asked his father for a short-term loan of $75,000, telling him it was "urgent" because the deal with the seller was about to fall through.

{¶6} Appellant testified that he did not have $75,000 in liquid assets at the time, so he took the money out of the Morrison Family Foundation, a 501(C)(3) charitable trust, over which he and his wife were the sole trustees. Appellant told his son that as the loan was coming from the Foundation, he had to pay 1% monthly interest.

{¶7} The son began making monthly $750 interest payments in October 2006. In February 2007, the son made a $70,000 principal payment, leaving a balance of $5,000, later

liquidated. All payments were made to appellant, not the Foundation. Trustee Morrison, however, deposited the payments in the Foundation's account (one payment was accidentally deposited in his personal account, but later refunded to the Foundation).

{¶8} The University of Akron had been working on a plan for a new football stadium, and in accordance with its plan, had been "land banking" properties around its campus. Son Morrison's Spicer Road house was one of the properties that the University sought to acquire under its plan and he and the University had been in negotiation for the sale of the property. In order to acquire the remaining parcels it needed for the stadium, including the son's Spicer Road house, the University's Board of Trustees had to pass a resolution — the resolution was scheduled to be voted on during the Board's June 13, 2007 meeting.

{¶9} Ted Mallo, the University's Vice President, General Counsel, and Board Secretary, testified that he became aware from a third party prior to the June 13 meeting that one of the parcels was owned by son Morrison. Accordingly, immediately prior to the meeting, Mallo spoke to Trustee Morrison, told him that the resolution was set for vote, and asked him to abstain from discussion about and voting on the matter; Trustee Morrison agreed, disclosed that his son owned the Spicer Road property to the full Board, and abstained from voting on the resolution. The remaining Trustees passed the resolution.

{¶10} The son accepted the University's offer to purchase the property on August 21, 2007, and the University signed the purchase agreement on October 8, 2007. The University's Controlling Board still had to approve the sale, and a meeting was held on October 20, 2007 for that vote. Mallo informed the Controlling Board that Trustee Morrison had disclosed that his son

owned the Spicer Road property to the Board of Trustees and had abstained from voting. The sale was approved by a 5-2 vote.

{¶11} Negative press coverage followed the sale, and the University's administrators suggested that the matter be referred to the Ohio Ethics Commission for review. Morrison agreed, and the request was jointly submitted by the University and Morrison in November 2007. Investigator Molly Burns of the Ohio Ethics Commission was assigned to the case. Trustee Morrison participated in the investigation by providing the Commission with requested documents and making himself available to be interviewed by Burns.

B. The Rankin Street Property — $52,000 Loan

{¶12} Another property owned by son Morrison was located at 355 Rankin Street. The son borrowed $52,000 from his father in January 2007 for the purchase of that property. In this instance, the funds for the loan came from Trustee Morrison's personal account. The property is located in the area of the University, but had nothing to do with the University's stadium plan, nor was it to be purchased by the University. After the loan was made, the son began making $520 monthly payments to his father, which the son categorized in testimony as "interest payments." Trustee Morrison testified, however, that he accepted the monthly $520 as repayment of principal for his and his wife's advancement of monies to their son for improvements to his personal residence in Cuyahoga Falls. (The son purchased his home in 2004, and his parents assisted him with repairs and appliances, loaning him approximately $25,000.)

C. The Financial Disclosure Form

{¶13} On April 14, 2008, Trustee Morrison filed his financial disclosure form for the year 2007. This form required, in pertinent part, that a Trustee of a state university list income received by him and outstanding debts due him, during the calendar year 2007. Appellant listed his son as a debtor on the form, because of the loan. The approximate $3,150 in payments that the son testified were for interest on the loan were not listed as income.[1]

D. The Result of Investigation

{¶14} After its investigation, the Ohio Ethics Commission docketed the matter as a "charge" and issued "preliminary findings," which concluded that Trustee Morrison's actions were in violation of R.C. 2921.42(a) and 102.02. The Commission forwarded its findings to the Summit County Prosecutor's Office.

III.

{¶15} In his third assignment of error, Trustee Morrison contends that the trial court erred by not granting his motion to dismiss.

{¶16} Crim.R. 12(C) provides that "[p]rior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial

[1]The son was not listed as either a debtor or source of income on Trustee Morrison's financial disclosure form for the year 2006 (i.e., relative to the $75,000 loan), but was listed as a debtor on the Foundation's 990-PF Return.

of the general issue. The following must be raised before trial: (1) Defenses and objections based on defects in the institution of the prosecution[.]"

{¶17} We review a trial court's denial of a motion to dismiss de novo. *Whitehall v. Khoury*, Franklin App. No. 07AP-711, 2008-Ohio-1376, at ¶7, citing *Akron v. Molyneaux* (2001), 144 Ohio App.3d 421, 426, 760 N.E.2d 461. A de novo standard of review affords no deference to the trial court's decision and we independently review the record. *Gilchrist v. Gonsor*, Cuyahoga App. No. 88609, 2007-Ohio-3903, at ¶16. A motion to dismiss tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced at trial. *State v. Patterson* (1989), 63 Ohio App.3d 91, 95, 577 N.E.2d 1165. A pretrial motion must not involve a determination of the sufficiency of the evidence to support the indictment. Id. If the indictment is valid on its face, a motion to dismiss should not be granted. See *State v. Eppinger*, 162 Ohio App.3d 795, 2005-Ohio-4155, 835 N.E.2d 746, ¶37, citing *State v. Varner* (1991), 81 Ohio App.3d 85, 610 N.E.2d 476.

{¶18} Trustee Morrison contended in his motion to dismiss that the state's prosecution of him was commenced in violation of his due process rights.[2] It was Trustee Morrison's contention that R.C. 102.06 required the Ethics Commission to file an administrative complaint and conduct an administrative hearing prior to forwarding the findings of its investigation to the prosecutor's office.

[2]The motion also alleged other grounds for dismissal, but Trustee Morrison abandoned those grounds at the hearing and only pursued his violation of due process contention.

{¶19} R.C. 102.06(A) provides in relevant part as follows: "The appropriate ethics commission shall receive and *may* initiate complaints against persons subject to this chapter concerning conduct alleged to be in violation of this chapter or section 2921.42 or 2921.43 of the Revised Code." (Emphasis added.) R.C. 102.06(B) provides that in the course of its investigation, "the commission, in its discretion, may share information * * * with, or disclose the information to * * * any appropriate prosecuting authority * * *." The remainder of R.C. 102.06(B) details the notice and hearing requirements if the Commission takes "formal action against a person" by filing a "complaint."

{¶20} Under R.C. 102.06, therefore, the Commission "*may*" take formal action against a person alleged to have violated R.C. Chapter 102, R.C. 2921.42, or 2921.43. If the Commission opts to take formal action, then the person against whom the action is taken is entitled to due process during the administrative proceeding. The Commission did not take formal action against Trustee Morrison. Rather, it "shared" information it gathered during its investigation with the "appropriate prosecuting authority," which is permitted under the statute.

{¶21} In light of the above, the prosecution against Trustee Morrison was not commenced in violation of his due process rights and his third assignment of error is overruled.

IV.

{¶22} In his first assigned error, Trustee Morrison contends that the state failed to produce sufficient evidence to sustain his convictions. We agree.

{¶23} An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether

such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶24} Appellant was convicted of violating R.C. 102.02(D) and 2921.13(A)(7) relative to his 2007 financial disclosure form only. R.C. 102.02(D) states that "[n]o person shall knowingly file a false statement that is required to be filed under this section." R.C. 2921.13(A)(7) provides that "[n]o person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when * * * [t]he statement is in writing or in connection with a report or return that is required or authorized by law."

{¶25} David Freel, Executive Director of the Ohio Ethics Commission, testified that interest paid on a loan would constitute income required to be disclosed on the financial disclosure forms. The issue here is whether the state proved that these payments were, in fact, interest, and whether Trustee Morrison "knowingly" failed to disclose that fact.

A. Whether the state produced sufficient evidence to prove that the $3,150 paid by son Morrison to Trustee Morrison was interest required to be included in gross income for federal tax purposes.

{¶26} Section 11 of the Financial Disclosure Form requires the provider to "[l]ist every source of income from which you received more than five hundred dollars ($500) during 2007, exclusive of reasonable expenses. Following each source of income, briefly describe the

services for which the income was received. Remember to list your employment as a source of income. 'Income' includes *gross income for federal income tax purposes*, and dividends on all governmental securities. Income also includes sources of income received by another person for your use or benefit." (Emphasis added.) Nine examples of income were listed as coming from: (1) a public employer, (2) a private law practice, (3) a mutual fund, (4) stockholding, (5) a retirement account, (6) stock dividends, (7) interest on a savings account, (8) a trust, and (9) investment dividends paid to a trust.

{¶27} The state contends that Trustee Morrison "knew that the Financial Disclosure Statement he filed on April 15, 2008 for calendar year 2007 was false because it failed to disclose interest income payments [he] received from his son in calendar year 2007 * * * and instead represented that no such payments were received by [him]." This contention is inaccurate; appellant did not represent that no payments were made to him — his silence on the issue of interest on the loan is evidence that he did not receive *interest* payments.

{¶28} Although son Morrison categorized the $520 monthly payments he was making to his father as interest payments on the $52,000 loan, Trustee Morrison testified that he did not list the payments because he did not consider them to be income. Rather, he considered them as repayment for expenses he and his wife advanced to their son for repairs to and appliances for his personal residence. Thus, while there was evidence that the son regarded his payments to his father as interest payments, there was no evidence that Trustee Morrison treated the payments as anything other than principal payments for the $25,000 that he and his wife gave their son in 2004 to make improvements to his personal residence. Criminal liability is based upon the state of mind of the appellant, not the understanding of his son.

{¶29} The evidence presented by the state on this issue is as follows: (1) the amount of the monthly payment tendered by the son is the same 1% of principal that the son was paying in interest on another loan; (2) one of the checks bears the word "interest 358" in the memorandum space on the check (state's exhibit 25); however, none of the other checks allegedly involved in this loan bear any writings in the memorandum space (of note is the fact that 358 is *not* the address of the property claimed by the state involved in this loan transaction; the address at issue is 355 Rankin); and (3) the son testified that he believed that the monthly payment he was making to his father represented interest on the $52,000 loan.

{¶30} On the other hand, the father contended that he was treating his son's payment as payment toward principal remaining on a loan of approximately $25,000 that Trustee Morrison and his wife had made to their son for rehabilitation of the son's personal residence. We note that none of these transactions — the $25,000 loan for rehabilitation of the son's personal residence, the $75,000 loan for purchase of the property ultimately bought by the University of Akron, or the $52,000 loan to purchase the rental property at issue here — involved any documentation whatsoever. There was no letter or memorandum of understanding, no contract, no note, no security interest, and/or no ownership interest taken by Trustee Morrison in any property or business of his son's. Trustee Morrison did not declare the $3,150 received in 2007 from his son on either his federal or state returns, nor is there is any evidence that the son filed a 1099 with the Federal Government declaring that the payment at issue was interest.

{¶31} In sum, in order for the state to prevail on this issue, this court must find that the son's accounting practices which treated these payments as interest, were binding upon the father who was treating the payments as repayment of principal. Absent some document of agreement to the contrary, we discern no law in support of this proposition.

B. Whether the State proved that Trustee Morrison knowingly falsified information on his Financial Disclosure Form.

{¶32} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶33} Knowledge, like all kinds of intent, can be inferred from circumstantial evidence. See *State v. Seiber* (1990), 56 Ohio St.3d 4, 13-14, 564 N.E.2d 408. And often knowledge can be established only by circumstantial evidence. This is because the fact-finder is incapable of peering into the mind of the criminal defendant. *State v. Adams* (June 8, 1995), Ross App. No. 94CA2041, citing *State v. Flowers* (1984), 16 Ohio App.3d 313, 475 N.E.2d 790, citing *State v. Huffman* (1936), 131 Ohio St. 27, 1 N.E.2d 313. "Circumstantial evidence and direct evidence inherently possess the same probative value * * *." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph one of the syllabus.

{¶34} Much of the state's argument in this appeal relates to the $75,000 loan. However, the trial court **acquitted** appellant of the charges relative to that loan, finding that the "evidence shows that the debt was with the Family Trust, [sic] Family Foundation. It was repaid to the Family Foundation." The only issue on appeal therefore relates to the $52,000 loan, not the $75,000 loan. In regard to those convictions, the trial court stated, "I find the defendant guilty of failing to disclose Jack, Jr. as a source of income of more than $500 during 2007. Those payments were made as interest. They were tied to the loan of $52,000." The court did not comment on the "knowingly" aspect of the crimes.

{¶35} Section 9 of the Financial Disclosure Form requires the provider to "[l]ist the names of all persons residing or transacting business in Ohio who owe you, or owed you at any time during the calendar year 2007, more than one thousand dollars ($1,000) in your own name or in the name of any other person for your use or benefit." Son Morrison was listed.[3]

{¶36} We next consider whether there is any evidence that the filing submitted by Trustee Morrison in 2008 concerning his income in 2007 constituted a "knowing falsification." The Ohio Supreme Court has already clarified that R.C. Section 102.02 only criminalizes a **knowing** false statement; this statute is not one imposing strict liability. *Ohio State Bar Assn. v. Reid* (1999), 85 Ohio St. 3d 327, 332, 708 N.E.2d 193. In *Reid,* a judge neglected to list an investment he had made in his son's restaurant. (Of note here is the fact that the money loaned by Trustee Morrison to his son was not an investment, as was Reid's, but rather a personal and unsecured loan.) The Supreme Court noted that the omission was "at worst, negligent" and noted that the evidence did not disclose any "intent or reason to conceal" his involvement in his son's enterprise.[4]

{¶37} This case is even more compelling. Unlike the judge in *Reid,* Trustee Morrison had no security or ownership interest or involvement in any these properties or in his son's business. This disclosure form was filed *after* negative press coverage concerning his son's purchase of properties, and *during* an investigation by the Ohio Ethics Commission; an

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[3]Trustee Morrison also noted in his "statement of interest," "the current pending issue involving my son Jack W. Morrison in the sale of his property to the University of Akron to avoid eminent domain proceedings — I abstained on the discussion and vote on the purchase."

[4]We note that *Reid* involved a disciplinary complaint, not a criminal charge, and that the burden of proof in a disciplinary case is "clear and convincing evidence" (see Government of the Bar Rule V, Section 6(J)), whereas the criminal charge at issue must be proved "beyond a reasonable doubt."

investigation that he, in part, requested and participated in. Most significantly, the existence of the debt that the Commission claims gave rise to the disputed interest was included on the very same disclosure form at issue here.

{¶38} The purpose of the Financial Disclosure Form under Ohio Ethics law is to assist the press and the public in identifying conflicts of interest. When Trustee Morrison was informed that the University of Akron was negotiating to buy a property owned by his son, he did not participate in the discussion or vote that authorized the University to acquire the property. We discern nothing in this record that would constitute an "intent to conceal or falsify" any matter relevant to the public interest in detecting conflicts of interest.

V.

Conclusion

{¶39} We conclude that the state failed to produce sufficient evidence that the sum of $3,150 at issue here was, beyond a reasonable doubt, required to be included as interest on Trustee Morrison's federal income tax return. We further find that even if this sum were required to be included on Trustee Morrison's tax return, there is no evidence whatsoever that its absence from the income portion of the Financial Disclosure Form was the result of a knowing falsification, rather than simple misunderstanding or negligence.

{¶40} Accordingly, the first assignment of error is sustained. The second assignment of error is moot and we do not consider it. See App.R. 12(A)(1)(c).

Judgment reversed;
case remanded with instructions to vacate the convictions.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CHRISTINE T. MCMONAGLE
FOR THE COURT

EUGENE DONOFRIO
CONCURS

MARY DEGENARO
DISSENTS, SAYING:

{¶41} I agree with my colleagues' resolution of Trustee Morrison's third assignment of error. But because I conclude that there is sufficient evidence to support Trustee Morrison's conviction and that the conviction was not against the manifest weight of the evidence, I respectfully dissent.

{¶42} Regarding the sufficiency of the evidence, my review of the record leads me to the conclusion that, construing the evidence most strongly in favor of the prosecution, there is sufficient evidence to support Trustee Morrison's convictions.

{¶43} With regard to Trustee Morrison's manifest weight argument, our standard of review is as follows:

{¶44} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony. *Tibbs*, 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661. See, also, *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 219, 485 N.E.2d 717, 720-721 ('The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.')." *State v. Thompkins* (1997) 78 Ohio St.3d 380, 546-7, 678 N.E.2d 541.

{¶45} My review of the record is that Trustee Morrison's convictions were not against the manifest weight of the evidence. Trustee Morrison disclosed his son as a debtor on the financial disclosure form for 2007 for the $52,000 Rankin Street loan made in 2007, not the $25,000 2004 personal residence loan. The son was not listed as a debtor at all in 2006. The son testified that the $750 and $520 monthly payments represented a one percent interest payment on the two investment loans, which was the parties' practice. The trial court, as the trier of fact, was in the best position to assess the credibility of all the witnesses. Thus, the trial court deemed the son's rather than Trustee Morrison's testimony to be more credible regarding the purpose of the monthly $520 payments. Considering this and the rest of the record, Trustee Morrison's convictions are not against the manifest weight of the evidence.

{¶46} For the foregoing reasons, I would affirm the decision of the trial court.

(McMonagle, J., of the Eight District Court of Appeals, sitting by assignment. Donofrio, J., of the Seventh District Court of Appeals, sitting by assignment. DeGenaro, J., of the Seventh District Court of Appeals, sitting by assignment.)

APPEARANCES:

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