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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2468-12T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

GARY S. DEMARZO,

Defendant-Respondent.

Submitted November 6, 2013 – Decided May 2, 2014

Before Judges Fisher, Koblitz, and O'Connor.

On appeal from the Superior Court of New
Jersey, Law Division, Cape May County,
Indictment No. 12-06-00349.

Robert L. Taylor, Cape May County
Prosecutor, attorney for appellant (Robert
W. Johnson, First Assistant Prosecutor, of
counsel and on the brief).

Jacobs & Barbone, P.A., attorneys for
respondent (Louis M. Barbone and Yoonieh
Ahn, on the brief).

PER CURIAM

On June 12, 2012, defendant Gary S. DeMarzo was indicted
for the third time, for second-degree official misconduct by
obtaining a benefit for himself or his attorney of more than
\$200, N.J.S.A. 2C:30-2 (count one); third-degree official

misconduct by obtaining a benefit for himself or his attorney of less than \$200, N.J.S.A. 2C:30-2 (count two); fourth-degree criminal contempt, N.J.S.A. 2C:29-9(a)(count three); and fourth-degree unauthorized disposition of public resources, N.J.S.A. 2C:27-12(a)(2)(count four).¹ On January 22, 2013, the trial court dismissed the indictment, finding the charges unsustainable as a matter of law and that the State failed to introduce clearly exculpatory evidence before the grand jury. The State appealed. We affirm.

I.

To put the indictment in perspective, some background is necessary. The City of Wildwood (City) has a commission form of government, created pursuant to the Walsh Act, N.J.S.A. 40:70-1

¹On March 8, 2011, DeMarzo was indicted on two counts of second-degree official misconduct, N.J.S.A. 2C:30-2; second-degree conspiracy to commit official misconduct, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:30-2; two counts of fourth-degree misappropriation of public funds, N.J.S.A. 2C:30-4(a); and fourth-degree unauthorized disposition of public resources, N.J.S.A. 2C:27-12(a)(2). DeMarzo filed a motion to dismiss the indictment, but before the return date, a superseding indictment was returned by the grand jury.

The second indictment charged DeMarzo with two counts of second-degree official misconduct, N.J.S.A. 2C:30-2; second-degree conspiracy to commit official misconduct, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:30-2; and fourth-degree unauthorized disposition of public resources, N.J.S.A. 2C:27-12(a)(2). DeMarzo filed a motion to dismiss the indictment, which was granted on the grounds the presentation was fundamentally unfair.

to 76-27. In May 2007, DeMarzo was elected to serve as one of the City's three commissioners.² At the time, DeMarzo was employed as a police officer for the City. Before taking the oath of office, he took an unpaid leave of absence from the police force.

Concerned holding both positions created a conflict of interest, the City filed a declaratory judgment action seeking to compel DeMarzo to resign from one of the two positions. DeMarzo argued the positions were not incompatible, as he was on an unpaid leave from his position as a police officer. In July 2007, the trial court held DeMarzo could hold both positions simultaneously, as long as, among other things, he did not participate in any matter related to the Wildwood Police Department.³

After the trial court rendered its decision, DeMarzo sought to recover the counsel fees he incurred in the declaratory judgment action. On November 16, 2009, DeMarzo filed a verified complaint in lieu of prerogative writs against the two other

²As the City has a population of less than twelve thousand, the board of commissioners consists of only three members.

³On February 22, 2010, we reversed the trial court's decision, in part, and ordered DeMarzo to resign from either one of the two positions. City of Wildwood v. DeMarzo, 412 N.J. Super. 105, 118, 125 (App. Div. 2010), app. dis., 205 N.J. 270 (2011).

commissioners and the City solicitor. (DeMarzo did not name the City as a defendant, but the City sought and was granted leave to intervene). The parties refer to this lawsuit as the "second lawsuit" and for consistency we do as well.

Specifically, DeMarzo sought, on an emergent basis, an order compelling the other commissioners to authorize the City to pay his counsel fees in the declaratory judgment action. He contended the other commissioners and the solicitor wrongfully refused to provide him legal counsel in such action, forcing him to pay for his own defense even though the declaratory judgment action related to his official duties. He also sought counsel fees for the second lawsuit and any future actions relating to his official duties.

In addition, DeMarzo sought damages against the two other commissioners and the City solicitor under 42 U.S.C.A. § 1983, claiming they had violated his rights to "equal treatment under the law as well as the Doctrine of Fundamental Fairness" by depriving him of legal representation. Finally, he sought to have one of the other commissioners and the solicitor removed from office for various alleged improprieties, the details of which are not relevant.

On December 8, 2009, the trial court dismissed the verified complaint, with prejudice, and entered a final judgment. In its

oral decision the court found DeMarzo failed to meet the four-prong test⁴ in Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982) to justify granting emergent relief, but also commented that there was "absolutely no merit to the issues raised in the complaint." By way of the final judgment, the judge permitted the City to intervene, denied DeMarzo's requests for emergent relief, dismissed the complaint with prejudice, and declared the order to be a final judgment for appellate purposes. The final judgment was not appealed.

In March 2010, an attorney who briefly represented DeMarzo in the declaratory judgment action submitted a voucher to the City seeking reimbursement of \$104.50 for expenses incurred to travel to court. The same attorney also represented DeMarzo in the second lawsuit, and submitted a voucher to the City seeking reimbursement of \$244.25 for the filing fees and photocopying costs incurred in that matter. The attorney, who happened to be an employee of the City serving as DeMarzo's confidential aide at the time he represented him, did not submit a bill for

⁴ The four prongs a court is to consider when determining whether to grant a preliminary injunction are: (1) whether an injunction is necessary to prevent irreparable harm; (2) whether the legal right underlying the applicant's claim is unsettled; (3) whether the applicant has made a preliminary showing of a reasonable probability of ultimate success on the merits; and (4) the relative hardship to the parties in granting or denying injunctive relief. Crowe, supra, 90 N.J. at 132-34.

counsel fees. In his capacity as director of the Department of Revenue and Finance⁵, DeMarzo authorized payment of all of the costs in the total amount of \$348.75.

The predominant theme throughout the grand jury presentation was that DeMarzo had sought but the court refused to order the City to pay his legal expenses in both the declaratory judgment action and second lawsuit; nevertheless, thereafter DeMarzo used his position and authorized the payment of his costs in both lawsuits from City funds. The clear implication from the evidence was that the court had ruled the City could not reimburse DeMarzo, when in fact the court had merely ruled it could not compel the City to pay for such expenses, a crucial distinction. The court's ruling did not prohibit the City from paying for these expenses. The evidence unquestionably depicted DeMarzo as one who had not only violated the final judgment, but did so flagrantly, brazenly abusing his

⁵Consistent with the commissioner form of government, each commissioner is the director of one department in a municipality, see N.J.S.A. 40:72-6, and is a legislator, executive and quasi-judicial officer over the department. Wildwood, supra, 412 N.J. Super. at 109-12. Soon after DeMarzo was elected, he became the director of the Department of Revenue and Finance.

powers as a City official by authorizing the payment of these costs in derogation of the final judgment.

II.

The indictment contends DeMarzo committed acts of official misconduct in violation of N.J.S.A. 2C:30-2 because he filed the second lawsuit "without proper authorization" and authorized the City to pay \$348.75 in violation of the final judgment. The indictment also alleges DeMarzo committed an act of criminal contempt, N.J.S.A. 2C:29-9(a), because he authorized the City to pay his legal expenses in violation of the final judgment. Finally, the indictment alleges DeMarzo made an unauthorized disposition of public resources, N.J.S.A. 2C:27-12(a)(2).

The trial court dismissed all charges. The trial court concluded, among other things, that the final judgment did not bar the municipality from reimbursing DeMarzo for legal costs.

On appeal, the State raises the following points:

POINT I - THE LAW DIVISION SHOULD HAVE LIMITED ITS REVIEW TO THE INDICTMENT AT ISSUE HEREIN.

POINT II - THE LAW DIVISION APPLIED AN INCORRECT STANDARD OF REVIEW.

POINT III - THIS COURT SHOULD REVERSE THE LAW DIVISION'S DECISION THAT THE GRAND JURY WAS ILL-ADVISED.

POINT IV - THE LAW DIVISION FAILED TO ADDRESS AN ALTERNATE THEORY OF CRIMINAL

CULPABILITY THAT FORMED THE BASIS FOR COUNT ONE OF THE INDICTMENT.

POINT V - THE STATE DID NOT FAIL TO PROVIDE CLEARLY EXCULPATORY EVIDENCE TO THE GRAND JURY.

POINT VI- THE DECEMBER 8, 2009 FINAL JUDGMENT ENTERED BY THE [COURT] WAS NOT APPEALED BY THEN COMMISSIONER GARY DEMARZO AND THEREFORE BECAME BINDING PRECEDENT PROHIBITING HIM FROM USING CITY (TAXPAYER) FUNDS TO PAY [HIS ATTORNEY] ANY FEES, EXPENSES OR COSTS.

POINT VII - FORMER COMMISSIONER DEMARZO'S NOVEMBER 16, 2009 SUIT WAS NOT IN THE PUBLIC'S INTEREST, BUT IN HIS PRIVATE INTEREST, SINCE HE WAS SUING FOR COMPENSATORY AND PUNITIVE DAMAGES.

III.

We recognize a court should not dismiss an indictment except on "the clearest and plainest ground" and only if the indictment is "palpably defective." State v. Lyons, 417 N.J. Super. 251, 258 (App. Div. 2010) (quoting State v. N.J. Trade Waste Ass'n, 96 N.J. 8, 18-19 (1984)). Further, in reviewing the grand jury record on a motion to dismiss an indictment, the trial court "should evaluate whether, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it." State v. Morrison, 188 N.J. 2, 13 (2006).

Nevertheless, an indictment is subject to dismissal if a prosecutor's error was clearly capable of producing an unjust result, a standard that "can be satisfied by showing that the grand jury would have reached a different result but for the prosecutor's error." State v. Triestman, 416 N.J. Super. 195, 202 (App. Div. 2010) (quoting State v. Hoqan, 336 N.J. Super. 319, 344 (App.Div.), certif. denied, 167 N.J. 635 (2001)). "An indictment will fail where a prosecutor's instructions to the grand jury were misleading or an incorrect statement of law." Triestman, supra, 416 N.J. Super. at 205 (citing State v. Ball, 268 N.J. Super. 72, 119-20 (App. Div. 1993), aff'd, 141 N.J. 142 (1995), cert. denied, 516 U.S. 1075, 116 S. Ct. 779, 133 L. Ed. 2d 731 (1996)).

N.J.S.A. 2C:30-2 states that a public servant is guilty of official misconduct when, with a purpose to obtain a benefit for himself or another, he commits an act relating to his office that constitutes an unauthorized exercise of his official functions, knowing such act is unauthorized or he is committing such act in an unauthorized manner. The indictment contends DeMarzo committed official misconduct because he filed the second lawsuit without first obtaining the City's permission. In its brief the State did not articulate how DeMarzo committed this offense simply because he failed to get permission to file

what the State itself contends was a personal, private lawsuit. DeMarzo did not require the City's approval before filing his complaint in lieu of prerogative writs.

The indictment further contends defendant engaged in official misconduct because, in "disregard" and "in violation of" the judgment he approved the payment of his legal expenses from City funds. Underlying this charge is the supposition defendant violated the final judgment.

While DeMarzo's request to compel the City to pay his costs was rejected, the court did not prohibit the City from paying such expenses. The fact the City was not ordered to pay DeMarzo's expenses did not in turn restrict it from paying such costs. See McCurrie ex rel. Town of Kearny v. Town of Kearny, 174 N.J. 523, 530-31 (2002) (that municipality was not compelled by law to defend municipal employee did not include the corollary the municipality was without the discretion to pay legal expenses incurred by employee). The City was free to reimburse DeMarzo for these costs, if it so chose. Further, there was nothing in the final judgment that barred DeMarzo from approving the payment of these costs on behalf of the City. We agree with the trial court that DeMarzo did not violate the final judgment. As the charges of official misconduct are

grounded upon a violation of the final judgment, we affirm the trial court's dismissal of the first and second counts.

The charge DeMarzo committed an act of criminal contempt in violation of N.J.S.A. 2C:29-9(a) by authorizing the City to pay his costs is also premised upon defendant's disobedience of the judgment. For the reasons we affirm the dismissal of the first and second counts, we affirm the dismissal of the third count, as well.

The fourth count of the indictment alleges defendant knowingly used or made disposition of public resources belonging to the City for an unauthorized purpose, N.J.S.A. 2C:27-12(a)(2). Unlike the other counts in the indictment, the fourth count does not explicitly posit this charge upon a violation of the judgment. However, the evidence before the grand jury in support of the indictment was that it was defendant's act of authorizing the payment of his costs from City funds in violation of the final judgment that formed the basis of the criminal acts with which he was charged. We therefore affirm the dismissal of the fourth count.

The State unmistakably led the grand jury to believe defendant had violated the final judgment, an error clearly capable of producing and did produce an unjust result. See Triestman, supra, 416 N.J. Super. at 202. We are satisfied the

grand jury would have reached a different result but for the introduction of this misleading evidence.

With respect to other arguments the State raises in its brief, we find that they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION