STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 1

Case No. 2018AP001293-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL W. MORSE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
in the Milwaukee County Circuit Court
the Honorable Joseph P. Wall Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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A Personal Representative's Guide to Informal Estate Administration in Wisconsin, Wisconsin Register in Probate Association, Revised September 2013

ISSUE PRESENTED

Mr. Morse was the duly appointed and acting personal representative of the Estate of Mary Gass, who died intestate, single and without issue as a resident of Dodge County. Acting as the personal representative, Mr. Morse commingled, transferred, and for convenience used funds of the Estate during his administration.

The state charged Mr. Morse with five felonies and three misdemeanors related to the eight times he moved money from the originally opened estate account to other accounts of Mr. Morse as the personal representative.

The circuit court erred in denying the motion to dismiss, which argued that the information erroneously identifies Mr. Morse in each count "as trustee." (6:3) and fails to identify the owner (6:3-4).

The question presented is whether the transfers made by a personal representative constitute the crime of theft under Wis. Stat. § 943.20(1)(b).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted to provide circuit courts with guidance in similar cases. Briefing should adequately address the issue presented; however, Mr. Morse would welcome oral argument should the Court deem it desirable.

STATEMENT OF THE CASE AND FACTS

Mary Gass died 11 October 2013. (Dodge County Case 2013PR000268, available at wicourts.gov.) Mr. Morse met with the sibling heirs of the decedent to discuss the

necessity of a probate administration. Mr. Morse consented to act as personal representative. In order to save the small estate the premium for a bond, Mr. Morse voluntarily submitted his personal financial statement showing assets well in excess of a million dollars and asked the probate court to accept his personal guarantee. The Dodge County Probate Court did so, and Mr. Morse personally executed a signature bond for $50,000. (Dodge County Case 2013PR000268, of record 5 December 2013, available at wicourts.gov.)

Soon after being appointed, Mr. Morse closed a couple of the decedent's bank accounts and opened an account for the Estate in his name as Personal Representative.

The state charged Mr. Morse with eight counts of theft. (1:2-3.) This included five felony theft charges and three misdemeanor theft charges each "as trustee." (1:2-3.)

Mr. Morse filed a motion to dismiss asserting Mr. Morse was not a trustee but rather a personal representative, and that as such the personal representative is treated as the "owner" of the property during administration. The state filed a response which was totally nonresponsive and made no attempt to argue that a personal representative is a trustee. The state argued that the personal representative is not the owner but didn't assert who is the owner. The circuit court denied the motion. (39:15; App. 105.)

As a result of the denial of the motion to dismiss, Mr. Morse entered into a bargained plea agreement and was convicted of the three misdemeanor charges for the three transfers that were less than $2,500.00. (28:1.)

At sentencing, the court recognized that Mr. Morse's motion to dismiss presented a question of the interaction and potential conflict between the criminal code and the probate code. (41:24; App. 113.) The court remarked: "But it's still an open question, and I understand that." (41:14-15.) The circuit court further referred to Mr. Morse's motion to dismiss stating, "We did have a very involved legal motion here which certainly remains of record and Mr. Morse has certain rights as to that." (41:18-19; App. 106-107.)

The circuit court then reviewed the three considerations in determining an appropriate sentence and addressed the gravity of the offense, the background and character of Mr. Morse, and the need to protect the public. (41:18; App. 106.) The court found Mr. Morse to be of excellent character. (41:19-22; App. 107-111.) It further indicated that there appeared to be no need to protect the public. (41:22; App. 111.) The court stated, "I think Mr. Morse has suffered greatly as a result of these charges. I can't imagine him doing anything wrong. I just can't imagine that." (41:22; App 111.) The court then sentenced Mr. Morse to six months in the House of Correction, which was stayed, and Mr. Morse was placed on probation for one year with no conditions and to perform forty hours of community service.

In closing, the court remarked, "Okay. Mr. Morse, you have the right to appeal my decision in this case. First of all, my decision in the motion hearing, as well as the sentence that I'm handing down here, if you think I made a legal error." (41:24; App. 113.)

Mr. Morse filed a timely notice of appeal and this appeal follows. (36:1.)

ARGUMENT

Wisconsin Statute § 943.20(1)(b) governs misdemeanor theft and reads as follows:

"By virtue of his or her office, business or employment, or as *trustee* or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing *of another*, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing *without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own* use or to the use of any other person except the owner. A refusal to deliver any money or a negotiable security, instrument, paper or other negotiable writing, which is in his or her possession or custody by virtue of his or her office, business or employment, or as trustee or bailee, upon demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to his or her own use within the meaning of this paragraph."

Wis. Stat. § 943.20(1)(b) (emphasis added).

As Mr. Morse argued in the motion to dismiss, when interpreting statutes, a court must begin by examining the language of the relevant statute. If the meaning of the statute is plain the inquiry stops. *State ex rel Kalal v. Circuit Court*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W. 2d 110. Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation. (*Id.*, ¶46.) The court held that both the context and the structure of the statute in which the operative language appears are important to its meaning. Therefore, statutory language is interpreted in the context in which it is used; not in isolation, but as part of a whole; in relation to the language of surrounding or closely related

statutes; and reasonably, to avoid absurd, unreasonable results. *Id.* "Furthermore, when there is doubt as to the meaning of a criminal statute, a court should apply the rule of lenity and interpret the statute in favor of the accused." *State v. Cole*, 2003 WI 59, ¶13, 262 Wis. 2d 167, 663 N.W. 2d 700. If this Court has any question regarding the interplay of the plain language of Wis. Stats. § 857.01, governing ownership in personal representative, management, and control, and 943.20(1)(b), it must be resolved in favor of the defendant, Mr. Morse.

There are at least five elements required to occur to be guilty of the crimes of which Mr. Morse was convicted and the lack of any one of such elements is sufficient to find Mr. Morse not guilty.

NOT A TRUSTEE

Mr. Morse was the duly appointed and acting personal representative of the intestate estate of Mary Gass pursuant to Wis. Stat. § 857.01. To be clear, Ms. Gass had not executed a will, nor had she created a trust prior to her death. As such, Mr. Morse was never appointed as a trustee.

It is obvious and unambiguous from the plain language of the statute that the charges should never have been issued. A personal representative is simply not a trustee. The terms have meaning and are not interchangeable. The powers, duties, and responsibilities are distinctly different and come from totally different statutes: Wis. Stat. Chapter 857 for personal representatives and Wis. Stat. Chapter 701 for trustees.

When it was a capital offense for stealing a horse and someone stole a cow, calling the cow a horse didn't make it so. And charging a personal representative with a perceived offense for a trustee doesn't make the personal representative a trustee.

Sure, some attributes of personal representatives and trustees may be similar, like an electrician and a plumber are both tradesmen and place their work within the walls, but those terms certainly aren't interchangeable. A personal representative and a trustee are both fiduciaries. Wis. Stat. § 66.1309(1)(c). So, if the legislature had wanted to include personal representatives within the purview of § 943.20(1)(b), it could have easily done so by actually using the term "fiduciary." The legislature did not and for good reason. A personal representative simply cannot do the job of administering an estate without *using* the assets of the estate so nearly every personal representative would regularly be committing an offense under this statute.

There is a case where another personal representative was charged under this statute. *State v. Doss*, 2008 WI 93, 312 Wis. 2d 570, 754 N.W. 2d 150. Neither the circuit court, nor the court of appeals nor the Supreme Court made any attempt to explain how the state got from Doss being a personal representative to being accused as a trustee (and sometimes, oddly, including bailee).

OF ANOTHER

So then, just who's money is it? Who is the legal owner of such assets during the period of administration?

Well, Mary Gass, like all other decedents before her, was dead. The moment before she died, she owned her assets. Then she was dead, so then what?

What about the beneficiaries or the estate? Thomas E. Atkinson, in his treatise on the Law of Wills, concludes:

"The purposes of administration are to collect the personal assets of the decedent, pay the lawful claims against the estate, and distribute the balance to the legatees or distributees. For these reasons the title to the personalty passes to the Personal Representative rather than the beneficiaries."

The office of Personal Representative, that is, executor or administrator, is of extreme importance in Anglo-American law. This is not only because he has important rights and duties in connection with the settlement of his decedent's affairs, but also ***for the reason that the estate is not recognized as a legal entity."***

The representative is not regarded as an agent for the estate for, in legal contemplation, there is no such principal. He is regarded rather as the owner of the decedent's personal property though his ownership is not beneficial and will be terminated upon completion of the administration."

The personal representative and not the estate is the one with whom the courts and third persons are concerned."

Law of Wills, 2nd Edition, 1953, by Thomas E. Atkinson, Chapter 12, Section 103, pages 561, 576

The circuit court concluded that the estate is the "owner." (39:14; App. 104.) But if that is the case, you can't stop there. Who, then, speaks for the estate? Who can consent or withhold consent for the estate? The only person authorized to do so is the personal representative.

So then, this is certainly not to argue that the assets belong to the personal representative personally, or not in a fiduciary capacity, but rather that there is no "other" during the period of administration for whom the personal representative is withholding control or use. The criminal statute necessarily requires that the actor is doing something with property of another and there simply isn't another.

WITHOUT THE OWNER'S CONSENT

Another necessary element of the offense is that such action be done without the owner's consent. Who else, other than the personal representative, is the owner? The original owner is dead and no longer owns any property and there must be someone who has the authority to consent in order to have acted without such consent. The only person authorized to speak for the estate is the personal representative.

The only case in Wisconsin that addressed this element of owner is the case of *State v. Doss*, 2008 WI 93, 312 Wis. 2d 570, 754 N.W. 2d 150. The court made no attempt to explain how it got from Doss being a personal representative to being accused as a trustee (and sometimes, oddly, including bailee). Nevertheless, the court did not conclude that Doss was guilty of theft or conversation *during her period of administration,* but rather when she ultimately refused to comply with a court order to turn over the funds: "We agree with the State that even if Doss held title to the estate assets as a personal representative, nothing justified her refusal to return those funds to the clerk when ordered to do so by the probate court." (*Id.,* ¶89.) It is understandable that the Supreme Court cannot have someone choosing to ignore a

court order. However, in the instant case, Mr. Morse immediately complied with the probate court's order and promptly turned over every penny of the funds of the Estate.

As fundamental principles of probate law establish, Mr. Morse was the "owner." *Peters v. Kell,* 12 Wis. 2d 32, 41, 106 N.W. 2d 407,413(1960); *In re Krause's Will,* 240 Wis. 72, 75-76, 2 N.W. 2d 733, 735 (1942); *Schoenwetter v. Schoenwetter,* 164 Wis. 131, 134, 159 N.W. 737 (1916); *see* Wis. Stat. § 857.01 ("Upon his or her letters being issued by the court, the personal representative succeeds to the interest of the decedent in all property of the decedent."). That being the case, then there was no violation. *See Peters,* 106 N.W. 2d at 413 (any action for conversion of estate property may be maintained only by the administratrix (now, personal representative)).

It is also clear that the heirs have no ownership interest in the estate during administration:

"The administrator is the legal owner for the time being of the personal property of which the decedent died possessed, and his title and authority extend so completely to all such property as to exclude for the time being creditors, legatees, and all others beneficially interested in the estate."

In re Krause's Will, 240 Wis. at 75-76 (citations omitted).

Apparently being unfamiliar with the broad impact of the 1986 Marital Property Law of Wisconsin, the state assumed in its Response to the Motion to Dismiss that replacing "title" with "interest" *diminished* the property included in an estate (7:3.) when it is actually quite the opposite. The reason for the change was not to shrink away from title, but rather to expand the decedent's ownership to

assets that are titled in the name of a surviving spouse to which the decedent had a marital property interest. The term "interest" subsumes the titled assets of the decedent and also includes ownership of other assets not so titled. The circuit court in its denial of the Motion to Dismiss was admittedly confused and consequently got the entire concept of the "interests of the estate" as changed by the Marital Property Law totally wrong (39:3-4; App. 101-102).

CONTRARY TO AUTHORITY

The statute further requires that such acts are done contrary to the authority of the personal representative. How can this be? The personal representative has total authority to transfer the assets in payment of claims, to change banks and accounts, to make investments and sell investments, etc. Wis. Stat. § 857.03. Since the cash from the accounts of the decedent that were closed could legally have been placed in any account, including a personal account of the personal representative, then how could moving such cash into such an account later suddenly be a crime. In this case, the conviction is for transferring funds less than $2,500 three times from an account created by the personal representative for the estate to different accounts also controlled by Mr. Morse. Whose authority was required for those transfers? Such transfers or payments made to anyone for anything by a personal representative do not require permission of the probate court or the beneficiaries. Certainly, obtaining such approval might bode well in the event of a mistake or poor judgment and might provide some protection from liability. But here Mr. Morse had already assumed total liability for such assets by pledging his own personal assets as bond.

Assume Andy gives $20 to Bill and asks him to give it to Carl. On his way to do so, Bill sees David and David reminds Bill that he owes him $20. Bill gives the $20 from Andy to David at a time when Bill has $60 of his own money. Bill then goes to an ATM and takes out $20 from his own account and delivers it to Carl. Is Bill guilty of theft of Andy's money?

INTENT

As is evident from the record, Mr. Morse certainly "used" the money of the Estate in the sense that if you are tracing what otherwise is typically viewed as a fungible asset, the dollars originally of the Estate were used by Mr. Morse personally. However, at every single moment of such transfer and use, Mr. Morse was personally liable for the funds and was in possession of assets of far greater value such that Mr. Morse always had possession of the full amount of cash that belonged to the Estate, just not always the exact same dollars. Mr. Morse never had any intent to convert a single dollar and literally could not, because he was always personally liable for such funds, having given his personal guarantee.

PERSONAL REPRESENTATIVES and COMMINGLING

The position of personal representative is unique. Because at death there is no one to stand in the shoes of the decedent to have a legal basis for dealing with the property of the decedent, the legislature has created a position by statute and has, of necessity, given the personal representative the ownership and control of such assets under Section 857.01.

While it may come as a shock to the ill-informed, there is absolutely no law, no statute, no rule or regulation that requires a personal representative to open a separate account for the liquid assets of the estate to be administered or to keep such assets isolated or partitioned. It is widely known, understood, and accepted among probate attorneys that the vast majority of personal representatives appointed in Wisconsin simply deposit the cash assets of the decedent into their own accounts. Of course, arguably it might be better practice or easier to account for such funds if a separate account were used, but the only requirement is that at the end of the period of administration there is an accounting and the remaining assets are distributed to the legally determined beneficiaries. Even the handbook created by the Association of Probate Registers of Wisconsin as a guide for personal representatives indicates that not setting up a separate account is acceptable:

"You may need to open a checking account. We cannot order that a checking account be opened, nor is it always needed. However, with a checking account you can keep accurate records of income and expenses."

Wisconsin Register in Probate Association, A Personal Representative's Guide to Informal Estate Administration in Wisconsin, p. 8, Revised September 2013, page 8.

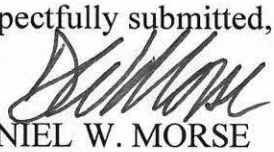
It would be categorically impossible to carry out one's duties as a personal representative and not be guilty of "using" the assets of the estate. Moving, repairing, and selling the decedent's vehicle, or dealing with a boat or summer home, or any of a myriad of assets in various stages of condition and location, necessarily requires "use."

CONCLUSION

For any one or more of the reasons stated above, this Court should remand to the circuit court with instructions to vacate Mr. Morse's convictions and dismiss with prejudice.

Dated this 10th day of September 2018.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,979 words.

Dated this 10th day of September 2018.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of September 2018.

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