

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

---

**RECEIVED**

**11-09-2018**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

Appeal Case No. 2018AP001293-CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DANIEL W. MORSE,

Defendant-Appellant.

---

ON APPEAL FROM A JUDGMENT OF CONVICTION  
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT  
COURT, THE HONORABLE JOSEPH R. WALL,  
PRESIDING

---

BRIEF OF PLAINTIFF-RESPONDENT

---

John Chisholm  
District Attorney  
Milwaukee County

Matthew R. Westphal  
Assistant District Attorney  
State Bar No. 1071292  
Attorneys for Plaintiff-Respondent

District Attorney's Office  
821 West State Street, Room 405  
Milwaukee, WI 53233-1485  
(414) 278-4646

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	iii
ISSUES PRESENTED .....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION .....	2
STATEMENT OF THE CASE .....	2
STANDARDS OF REVIEW .....	4
ARGUMENT .....	4
I.    By pleading guilty, Morse is judicially estopped from challenging whether his actions constituted the crime of Theft (Embezzlement). ....	5
a.    Morse’s later position is clearly inconsistent. ....	5
b.    The facts at issue are the same. ....	6
c.    Morse convinced the circuit court to adopt his position. ....	6
II.   Morse waived the ability to challenge his convictions by entering guilty pleas. ....	7
III.  The evidence was sufficient to establish the elements of Theft (Embezzlement). ....	8
a.    By pleading guilty to Theft, Morse admitted to each of the elements and agreed that a factual basis existed to support a finding of guilt. ....	9
b.    Morse had possession of funds of another due to his employment. ....	10
c.    Morse used the estate funds without consent and contrary to his authority. ....	12
d.    Morse knew the use of the money was without consent and contrary to his authority. ....	13

e. Morse intended to convert the estate funds to his own use.....	14
CONCLUSION .....	15
CERTIFICATION.....	16
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) .....	16

## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Armstrong v. State</i> , 55 Wis. 2d 282, 198 N.W.2d 357 (1972).....	7
<i>Belcher v. State</i> , 42 Wis. 2d 299, 166 N.W.2d 211 (1969).....	7
<i>Boyd v. State</i> , 217 Wis. 149, 258 N.W. 330 (1935).....	13
<i>Champlain v. State</i> , 53 Wis. 2d 751, 193 N.W.2d 868 (1972).....	7
<i>Day v. State</i> , 52 Wis. 2d 122, 187 N.W.2d 790 (1971).....	7
<i>Kelley v. State</i> , 54 Wis. 2d 475, 195 N.W.2d 457 (1972).....	7
<i>Krause v. Krause</i> , 240 Wis. 2d 72, 2 N.W.2d 733 (1942).....	12
<i>McGeever v. State</i> , 239 Wis. 97, 300 N.W. 486 (1941).....	13
<i>McKeigue v. Chicago &amp; N.W.R. Co.</i> , 130 Wis. 543, 110 N.W. 384 (1907).....	10
<i>Nelson v. State</i> , 54 Wis. 2d 489, 195 N.W.2d 629 (1972).....	8
<i>Peters v. Kell</i> , 12 Wis. 2d 32, 106 N.W.2d 407 (1960).....	12
<i>Schoenwetter v. Schoenwetter</i> , 164 Wis. 131, 159 N.W.2d 737 (1916).....	12
<i>State v. Arias</i> , 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748 .....	4, 10
<i>State v. Armstrong</i> , 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98 .....	11

<i>State v. Asmus</i> , 2010 WI App 48, 324 Wis. 2d 427, 782 N.W.2d 435 .....	7, 8
<i>State v. Bangert</i> , 131 Wis. 2d 246, 389 N.W.2d 12 (1986).....	8
<i>State v. Beamon</i> , 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681 .....	4
<i>State v. Bentley</i> , 201 Wis. 2d 303, 548 N.W.2d 50 (1996).....	8
<i>State v. Blaisdell</i> , 85 Wis. 2d 172, 270 N.W.2d 69 (1978).....	9
<i>State v. Doss</i> , 2008 WI 93, 312 Wis. 2d 570, 754 N.W.2d 150 .....	11, 12, 14
<i>State v. Fonte</i> , 2005 WI 77, 281 Wis. 2d 654, 698 N.W.2d 594 .....	14
<i>State v. Halverson</i> , 32 Wis. 2d 503, 145 N.W.2d 739 (1966).....	9
<i>State v. Hanson</i> , 2012 WI 4, 338 Wis. 2d 243, 808 N.W.2d 390 .....	4
<i>State v. Kelty</i> , 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886 .....	7
<i>State v. Kraemer</i> , 156 Wis. 2d 761, 457 N.W.2d 562 (Ct. App. 1990).....	7
<i>State v. Lechner</i> , 217 Wis. 2d 392, 576 N.W.2d 912 (1998).....	4
<i>State v. Mack</i> , 93 Wis. 2d 287, 286 N.W.2d 563 (1980).....	7
<i>State v. Maloney</i> , 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436 .....	11
<i>State v. Oakley</i> , 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200 .....	4

<i>State v. Petrone</i> , 161 Wis. 2d 530, 468 N.W.2d 676 (1991).....	7
<i>State v. Petty</i> , 201 Wis. 2d 337, 548 N.W.2d 817 (1996).....	5
<i>State v. Poellinger</i> , 153 Wis. 2d 493, 451 N.W.2d 752 (1990).....	9
<i>State v. Riekkoff</i> , 112 Wis. 2d 119, 332 N.W.2d 744 (1983).....	4
<i>State v. Ryan</i> , 2012 WI 16, 338 Wis. 2d 695, 809 N.W.2d 37 .....	4, 5
<i>State v. Skamfer</i> , 176 Wis. 2d 304, 500 N.W.2d 369 (Ct. App. 1993).....	7
<i>State v. White</i> , 2008 WI App 96, 312 Wis. 2d 799, 754 N.W.2d 214 .....	4

#### **STATUTES:**

Wis. Stat. § 751.06 .....	11
Wis. Stat. § 805.17(2).....	4
Wis. Stat. § 808.03(2).....	3
Wis. Stat. § 809.50 .....	3
Wis. Stat. § 857.01 .....	10, 11, 12
Wis. Stat. § 857.03 .....	13
Wis. Stat. § 943.20(1)(b) .....	3, 8, 11, 12, 13, 14
Wis. Stat. § 971.08 .....	8

#### **OTHER AUTHORITIES**

WIS JI-CRIM 1444.....	9
-----------------------	---

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

---

Appeal Case No. 2018AP001293-CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DANIEL W. MORSE,

Defendant-Appellant.

---

ON APPEAL FROM A JUDGMENT OF CONVICTION  
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT  
COURT, THE HONORABLE JOSEPH R. WALL,  
PRESIDING

---

BRIEF OF PLAINTIFF-RESPONDENT

---

**ISSUES PRESENTED**

- I. Whether Morse is judicially estopped from challenging his convictions with the entry of his guilty pleas?

Circuit Court Answered: Circuit Court did not address

- II. Whether Morse waived any challenges to his convictions with the entry of his guilty pleas?

Circuit Court Answered: Circuit Court did not address

III. Whether the evidence was sufficient to support the convictions?

Circuit Court Answered: Yes

**STATEMENT ON ORAL ARGUMENT AND  
PUBLICATION**

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

**STATEMENT OF THE CASE**

Defendant-Appellant Daniel Morse was charged in a criminal complaint, dated May 10, 2017, with eight counts of Theft (Embezzlement), which included five felony counts and three misdemeanor counts. (R. 1:2).

In late 2013, Morse, an attorney licensed to practice in the State of Wisconsin, was employed to serve as both the attorney and personal representative to handle the probate of the M.G. Estate. (R. 1:4). In early 2014, Morse opened a PrivateBank account in the name of the “[M.G.] Estate” and initially deposited \$26,199.43 into the estate account. (R. 1:4).

Morse then proceeded to withdraw amounts from the estate account and deposit them into his business and personal accounts. (R. 1:4). A review of Morse’s banking records showed that the transfers were being done to allow Morse to pay business and personal expenses using the estate account funds. (R. 1:4). At different times, Morse transferred to his business or personal accounts estate funds worth several thousand dollars. (R. 1:5-8). Morse would use the estate funds in his personal account to cover personal expenses and overdrafts. (R. 1:9).

In September of 2014, a brother of the decedent M.G. contacted Morse to request an accounting of the estate, as well as an explanation for why mortgage payments and bills for the



estate were not being paid in a timely fashion. (R. 1:19). About three weeks after receiving no response from Morse, the heirs of M.G. contacted a new attorney, Allen Larson, to take over as personal representative due to concerns about Morse's handling of the estate. (R. 1:19). Attorney Larson was substituted as personal representative on November 18, 2014, and made several attempts to receive an accounting of the estate's activity and the estate's funds. (R. 1:18). Ultimately, due to Morse failing to turn over the estate funds, Larson applied to the Dodge County Court for an Order compelling Morse to turn over estate funds to Larson and to provide an accounting of the estate's finances. (R. 1:19). Morse only repaid the estate funds after Larson applied for an Order to Show Cause and the probate court ordered Morse to pay, approximately 5 months after Larson first took over as personal representative and requested an accounting of the funds and the funds. (R. 1:19).

Morse was ultimately charged with multiple counts of theft from the estate in 2017. (R. 1). During litigation, Morse filed a Motion to Dismiss, alleging the Information was deficient. (R. 6). He alleged that the State failed to allege ownership of the Estate funds that were converted. (R. 6). Following briefing, the circuit court denied the motion, holding that the Information appropriately alleged ownership. (R. 39:14-15). Morse did not seek a permissive appeal under Wisconsin Statutes §§ 808.03(2) and 809.50.

Subsequent to the denial of his motion, Morse entered guilty pleas to three counts of Theft (Embezzlement)(Value Not Exceeding \$2,500), in violation of Wisconsin Statutes Section 943.20(1)(b). (R. 28). In entering his pleas, he agreed that he would write checks to his personal or business accounts for personal reasons and that, once replaced as the personal representative for the estate, did not return the money to the new personal representative, Allen Larson, until Larson was forced to bring an order to show cause in probate court. (R. 40:14-15). Further, Morse's attorney agreed to using the facts from the criminal complaint, as well as the State's proffer, to support the factual basis for Morse's plea. (R. 40:15). The circuit court accepted Morse's pleas, finding his guilty of the offenses plead to and ultimately sentencing him to a probationary sentence. (R. 40:15-16, 41:23). Morse filed a Notice of Appeal and this appeal follows. (R. 36).

## **STANDARDS OF REVIEW**

- I. “Whether the elements of the doctrine of judicial estoppel are met is a question of law that [the Court] reviews independently of the determinations rendered by the circuit court and the court of appeals.” *State v. Ryan*, 2012 WI 16, ¶ 30, 338 Wis. 2d 695, 809 N.W.2d 37 (citing *State v. White*, 2008 WI App 96, ¶ 15, 312 Wis. 2d 799, 754 N.W.2d 214).
- II. “Whether a defendant has waived his or her claim of error by entering a plea is a question of law which this court reviews de novo.” *State v. Oakley*, 2001 WI 103, ¶ 22, 245 Wis. 2d 447, 476, 629 N.W.2d 200, 213 (citing *State v. Lechner*, 217 Wis. 2d 392, 404 n. 8, 576 N.W.2d 912 (1998) and also *State v. Riekkoff*, 112 Wis. 2d 119, 122-25, 332 N.W.2d 744 (1983)).
- III. A court’s findings of fact will not be set aside unless they are clearly erroneous. Wis. Stat. § 805.17(2). A finding of fact is clearly erroneous when “it is against the great weight and clear preponderance of the evidence.” *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (internal citation omitted). In evaluating the sufficiency of the evidence, this Court will not overturn a verdict “unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. . . .” *State v. Beamon*, 2013 WI 47, ¶ 20, 347 Wis. 2d 559, 571, 830 N.W.2d 681, 687-88 (internal citations omitted). The defendant bears a “heavy burden to show the evidence could not reasonably have supported a finding of guilt.” *Id.* (citing *State v. Hanson*, 2012 WI 4, ¶ 31, 338 Wis. 2d 243, 808 N.W.2d 390).

## **ARGUMENT**

Morse asserts that the evidence was insufficient to establish the State met the elements of Theft (Embezzlement). As an initial matter, Morse is judicially estopped from challenging whether his actions constituted the crime of Theft

(Embezzlement). Secondly, by entering a guilty plea to the offenses alleged, Morse has waived the ability to challenge those convictions. Finally, if this Court were to find Morse was not judicially estopped from challenging his conviction and he did not waive the claimed error, this Court should affirm the circuit court, as the evidence was sufficient to establish each of the elements of Theft (Embezzlement).

**I. By pleading guilty, Morse is judicially estopped from challenging whether his actions constituted the crime of Theft (Embezzlement).**

The purpose of judicial estoppel is “to protect against a litigant playing ‘fast and loose with the courts’ by asserting inconsistent positions” in legal proceedings. *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). “The doctrine precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position.” *Id.* The intent is to “protect the judiciary as an institution from the perversion of judicial machinery.” *Id.* at 346, 548 N.W.2d 817. “For judicial estoppel to be available, three elements must be satisfied: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position.” *State v. Ryan*, 2012 WI 16, ¶ 33, 338 Wis. 2d 695, 809 N.W.2d 37 (citing *Petty*, 201 Wis. 2d at 348, 548 N.W.2d 817).

**a. Morse’s later position is clearly inconsistent.**

At the time of his plea, Morse agreed that he was giving up his right to challenge the criminal complaint. (R. 40:12). He admitted that he was guilty of the offenses charged because he did in fact commit those offenses. (R. 40:12). He acknowledged as accurate the State’s proffer that he took money from the estate and did not return that money upon demand. (R. 40:14-15). In the Plea Questionnaire/Waiver of Rights he signed, Morse further acknowledged that he would be found guilty based upon the facts in the criminal complaint and the facts stated in court. (R. 21:2). He acknowledged the different elements that the State would have to prove beyond a reasonable doubt. (R. 21:1). As such, Morse’s position was

clearly that he admitted to committing the offenses charged in the amended information.

Now, Morse is arguing that the evidence was not sufficient to convict him and is denying the elements of Theft (Embezzlement) were satisfied. Denying the evidence satisfied the elements of Theft after previously having accepted that same proposition by pleading guilty is clearly inconsistent.

**b. The facts at issue are the same.**

The facts at issue when Morse plead guilty and the facts raised in his appeal are the exact same. Nothing has changed that would change the facts. The only different is that, instead of acknowledging and agreeing with the facts as he did at his plea hearing, Morse is now contesting those same facts. As such, the facts are the same in both instances.

**c. Morse convinced the circuit court to adopt his position.**

At the earlier plea hearing, Morse convinced the circuit court to adopt his position. At the plea hearing, Morse's position was that there was sufficient evidence to meet each of the elements of Theft (Embezzlement) and to find him guilty of such. The circuit court specifically made a finding that there was a factual basis to support the charges of Theft and that Morse was knowingly and voluntarily entering his plea and waiving his rights. (R. 40:15). As such, the circuit court was convinced by Morse's assertions to adopt his position that he was guilty of the offenses charged in the amended information.

Morse knowingly and intelligently plead guilty to three counts of Theft (Embezzlement), acknowledging the sufficiency of the facts to convict him of such crimes and leading the circuit court to rely upon those pleas. Now, he takes the contrary position that he cannot be convicted of the crimes to which he admitted guilt. This Court should hold that Morse is judicially estopped from arguing this inconsistent position and affirm the circuit court ruling.

## **II. Morse waived the ability to challenge his convictions by entering guilty pleas.**

Morse does not address why his entry of guilty pleas should not be considered a waiver of all defenses. A knowingly and voluntarily entered guilty plea waives all non-jurisdictional defects and defenses in a criminal prosecution, including claims of violations of constitutional rights. *See State v. Kelty*, 2006 WI 101, ¶ 18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; *State v. Mack*, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980); *State v. Kraemer*, 156 Wis. 2d 761, 765, 457 N.W.2d 562 (Ct. App. 1990). Such a plea constitutes a waiver of defects and defenses even if the “defendant attempts to preserve an issue by raising it in the circuit court.” *State v. Asmus*, 2010 WI App 48, ¶ 3, 324 Wis. 2d 427, 430, 782 N.W.2d 435, 436 (citing *State v. Skamfer*, 176 Wis. 2d 304, 312 n. 2, 500 N.W.2d 369 (Ct. App. 1993)). In Wisconsin, the circuit courts are courts of general jurisdiction that “have original subject matter jurisdiction of all matters, civil and criminal, not excepted in the constitution or prohibited by law.” *Id.* at 294. In contrast, “[p]ersonal jurisdiction in a criminal case attaches by an accused’s physical presence before the court pursuant to a properly issued warrant, lawful arrest or a voluntary appearance, and continues through the final disposition of the case.” *Kelley v. State*, 54 Wis. 2d 475, 479, 195 N.W.2d 457 (1972).

Morse has not claimed the circuit court lacked either personal or subject matter jurisdiction. As to personal jurisdiction, Morse was properly before the court on a Summons and thus voluntarily acceded to the court’s jurisdiction. Since Morse never made any objections to the court’s personal jurisdiction, any objection has been waived.<sup>1</sup> *See Day v. State*, 52 Wis. 2d 122, 125, 187 N.W.2d 790 (1971); *Belcher v. State*, 42 Wis. 2d 299, 166 N.W.2d 211 (1969). As to subject matter jurisdiction, a complaint or information is jurisdictionally defect if it fails to charge a criminal offense. *See Champlain v. State*, 53 Wis. 2d 751, 754, 193 N.W.2d 868 (1972) (*abrogated on other grounds by State v. Petrone*, 161 Wis. 2d 530, 468 N.W.2d 676 (1991)). There is no dispute that

---

<sup>1</sup> In addition, by pleading to the information, Morse waived any defense of lack of personal jurisdiction. *See Armstrong v. State*, 55 Wis. 2d 282, 285, 198 N.W.2d 357 (1972).

Theft (Embezzlement) under § 943.20(1)(b) is a crime; the only dispute revolves around whether the evidence was sufficient to establish each of the elements. Thus, the circuit court had subject matter jurisdiction over the proceedings.

Morse has not moved to withdraw his plea or alleged that his attorney was ineffective in representing him in regards to the plea. He has not claimed the circuit court violated its mandatory procedures under Wis. Stat. § 971.08, nor that his plea was not knowingly and voluntarily entered. *See State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986); *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). In this instance, Morse entered a voluntary and knowing guilty plea. He filled out a plea questionnaire, in which he acknowledged his constitutional rights, and filed with the court a copy of the jury instructions explaining the elements of the offense to which he was pleading. (R. 21, 22). Included in his plea questionnaire was an addendum in which Morse explicitly acknowledged he was giving up the right to challenge the sufficiency of the complaint, his right to raise any defenses, and his right to make the state prove its case beyond a reasonable doubt. (R. 21:3). The trial court conducted a thorough plea colloquy with Morse, a licensed attorney himself, and went over Morse's rights again before finding him guilty. (R. 40:6-16). As such, there can be no meritorious claim that Morse's plea was not voluntarily and knowingly entered.

Because Morse's guilty plea was voluntarily entered and he was subject to the jurisdiction of the circuit court, any defects or defenses in the criminal prosecution are deemed waived. Even though Morse raised the defense that a personal representative cannot be guilty of Theft (Embezzlement), a valid guilty plea constitutes a waiver of that defense. *See Asmus*, 2010 WI App 48, ¶ 3. Based on that waiver, Morse cannot now attempt to challenge his conviction due to his valid guilty pleas. This Court should affirm the circuit court.

### **III. The evidence was sufficient to establish the elements of Theft (Embezzlement).**

If this Court determines that Morse was not judicially estopped from raising his arguments and that he did not waive

those arguments, then the Court should find the evidence was sufficient to establish the elements of Theft (Embezzlement). Morse argues that the State failed to establish the elements of Theft (Embezzlement), largely because the State failed to establish who was the owner of the estate and because, as a personal representative, Morse was not a trustee for purposes of the prosecution. The State asserts that the evidence supports the convictions.

In reviewing the sufficiency of the evidence, this Court, in viewing the evidence in the light most favorable to sustaining a conviction, will only overturn a conviction where the evidence “is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

**a. By pleading guilty to Theft, Morse admitted to each of the elements and agreed that a factual basis existed to support a finding of guilt.**

Morse asserts the crime of Theft (Embezzlement) has five elements in his Brief, none of which were met by the State’s evidence. According to Wisconsin Jury Instruction 1444, which has been cited as the correct breakdown of the elements of Theft (Embezzlement), there are four elements. *See State v. Halverson*, 32 Wis. 2d 503, 509, 145 N.W.2d 739 (1966); *State v. Blaisdell*, 85 Wis. 2d 172, 176, 270 N.W.2d 69 (1978). The four elements of Theft (Embezzlement) are:

1. The defendant had possession of money belonging to another because of his employment.
2. The defendant intentionally used the money without the owner’s consent and contrary to the defendant’s authority.
3. The defendant knew that the use of the money was without the owner’s consent and contrary to the defendant’s authority.
4. The defendant intended to convert the money to his own use or the use of any other person.

WIS JI-CRIM 1444

Morse was informed of each of these elements during the plea hearing. (R. 40:7). The State provided a proffer, in which it laid out the factual basis of Morse using estate funds for his personal purposes and not returning the funds to the new personal representative. (R. 40:14-15). The State also relied upon the criminal complaint as a factual basis for the elements above, which Morse agreed to through his attorney. (R. 40:15). The circuit court found a factual basis to support each of the charges Morse plead guilty to. (R. 40:15). There is nothing in the record to support overruling the circuit court's findings of a factual basis to support the convictions. None of the factual findings made by the circuit court are "against the great weight and clear preponderance of the evidence," that would require the findings be overturned. *See State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (citations omitted). As such, there was sufficient evidence to support each element of the offense.

**b. Morse had possession of funds of another due to his employment.**

Morse argues that, as the personal representative of the estate, he was not a trustee. (Resp. Br. at 5). He also argues that, as the personal representative under Wis. Stat. § 857.01, he was the individual who was the "owner" for purposes of being authorized to speak for the estate and consent for use. (Resp. Br. at 6, 8).

It has long been the law that a personal representative has duties and responsibilities akin to those of a trustee. The administrator of the estate has duties that are "trust duties," and "is regarded in courts of equity as a trustee." *McKeigue v. Chicago & N.W.R. Co.*, 130 Wis. 543, 546, 110 N.W. 384, 385 (1907)(citations omitted). The term "trustee" includes "all persons vested with the title or control of property and charged with fiduciary duties in relation thereto for the benefit of another." *Id.* Here, as personal representative, Morse had control of the estate funds and was charged with fiduciary duties as to those funds. As such, he was a trustee as the Wisconsin Supreme Court has used that term.

In addition, the Wisconsin Supreme Court has already affirmed a conviction for a personal representative charged as a



trustee and rejected the argument of personal representative as owner. *See State v. Doss*, 2008 WI 93, 312 Wis. 2d 570, 754 N.W.2d 150. In *State v. Doss*, Doss was co-personal representative for her father's estate. *Doss*, 2008 WI 93, ¶ 7. During the administration of the estate, Doss withdrew all of the money from the estate's accounts and deposited them in her personal accounts. *Id.* at ¶ 10. Despite a court order to return the money, Doss never did so. *Id.* at ¶ 13. Doss was ultimately charged with Theft as a Trustee/Bailee, in violation of Wis. Stat. § 943.20(1)(b), and found guilty following a jury trial. *Id.* at ¶ 14. Among other argument on appeal, Doss argued the evidence was insufficient to sustain a conviction and that she was the owner of the estate funds under § 857.01 and thus couldn't have stolen them. *Id.* at ¶¶ 57, 88.

At no time during its opinion did the *Doss* Court raise any concerns about whether a personal representative would be considered a trustee for purposes of the Theft statute or the ability of the personal representative to consent to use of estate funds. In fact, the *Doss* Court explicitly found that the evidence was sufficient to establish each element of the offense, including the elements surrounding Doss' possession of the estate money as a personal representative and her use without consent. *Id.* at ¶ 63-64. Although the parties did not expressly raise that issue, the Court had the inherent power and explicit statutory authority to raise the issue and reverse the conviction in the interests of justice "if it appear[ed] from the record that the real controversy ha[d] not been fully tried," or there was a miscarriage of justice. Wis. Stat. § 751.06. *See also State v. Maloney*, 2006 WI 15, ¶ 14, 288 Wis. 2d 551, 709 N.W.2d 436; *State v. Armstrong*, 2005 WI 119, ¶ 113, 283 Wis. 2d 639, 700 N.W.2d 98. The Supreme Court can exercise this authority regardless of whether the defendant made such a motion. *See Maloney*, 2006 WI 15, ¶ 16 (*citing* Wis. Stat. § 751.06). The *Doss* Court did not exercise its authority, thus indicating that a conviction for theft by trustee of a personal representative did not result in the real controversy not being tried and was not a miscarriage of justice.

In addition, the *Doss* Court also addressed Doss' argument that, as personal representative, she was the owner of the estate funds. *See Doss*, 2008 WI 93, ¶ 88. Doss argued that the "fundamental principles of probate law" established that

she was the owner of the funds.<sup>2</sup> *Id.* at ¶ 88. The Court noted that the Theft statute, Wis. Stat. § 943.20(1)(b) does not require the owner to be named in the jury instruction and that a jury conclusion that the money Doss converted did not belong to her encompassed the conclusion that Doss was not the owner of the money. *Id.* at ¶ 89. The *Doss* court noted that the jury was not required to identify beyond that who the owner is. *Id.* The Court stated 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.*

As in *Doss*, Morse did not immediately return the estate funds to the successor personal representative once Morse no longer had any involvement with the estate. The successor personal representative was required to make several requests and file an Order to Show Cause in probate court before Morse complied. (R. 1:19-20). This establishes that, even if Morse held some title to the assets before, nothing justified him in refusing to turn the estate assets over to the successor personal representative once he was no longer the personal representative.

Based on the *Doss* Court’s findings that the evidence there supported a conviction in a situation involving substantially similar facts, it leads to the conclusion that Morse’s claim that he was insulated from prosecution should be rejected as well.

**c. Morse used the estate funds without consent and contrary to his authority.**

Morse further argues that, as the personal representative, he had total authority to transfer the estate’s assets. (Resp. Br. at 10). This is not correct. As the personal representative, Morse’s authority was limited by the powers and duties

---

<sup>2</sup> In support for that proposition, Doss cited to Wis. Stat. § 857.01, as well as *Peters v. Kell*, 12 Wis. 2d 32, 41, 106 N.W.2d 407 (1960), *Krause v. Krause*, 240 Wis. 2d 72, 75-76, 2 N.W.2d 733 (1942), and *Schoenwetter v. Schoenwetter*, 164 Wis. 131, 134, 159 N.W.2d 737 (1916). See *State v. Doss*, 2008 WI 93, ¶ 88. These are the exact same authorities that Morse uses for the proposition that he was the owner of the estate funds at issue. (Resp. Br. at 9).

discussed in Wis. Stat. 857.03.<sup>3</sup> These duties place constraints on the authority of the personal representative, such that, when taking actions contrary to those duties, the personal representative is acting contrary to his or her authority. Nowhere in those duties is it considered within the personal representative's authority to use the decedent's estate to pay for personal and business expenses unrelated to the administration of the estate.

Morse notes that he had assumed total liability for the assets of the estate by pledging his own personal assets as bond. However, the fact that Morse may have had sufficient assets to cover any losses by his actions does not mean a crime was not committed. The intent to pay back money at a later time is not a defense to theft under § 943.20(1)(b). *See Boyd v. State*, 217 Wis. 149, 258 N.W. 330 (1935); *McGeever v. State*, 239 Wis. 97, 93-94, 300 N.W. 486 (1941).

**d. Morse knew the use of the money was without consent and contrary to his authority.**

The evidence was sufficient to establish Morse knew his use of the estate funds was without consent and contrary to his authority. This evidence was again derived from Morse's agreement to the State's proffer and the criminal complaint as a factual basis for his guilty pleas. (R. 40:14-15). Morse's knowledge of the improper use can also be inferred from the fact that he was not making mortgage payments for the estate in a timely fashion nor paying for repair and maintenance bills. (R. 1:19). The fact that Morse repeatedly failed to provide an accounting of the estate funds to the estate heirs and the successor personal representative, also supports the inference that Morse had knowledge his use of the estate funds was without consent and contrary to his authority. (R. 1:19-20).

---

<sup>3</sup> "The personal representative shall collect, inventory and possess all the decedent's estate; collect all income and rent from decedent's estate; manage the estate and, when reasonable, maintain in force or purchase casualty and liability insurance; contest all claims except claims which the personal representative believes are valid; pay and discharge out of the estate all expenses of administration, taxes, charges, claims allowed by the court, or such payment on claims as directed by the court; render accurate accounts; make distribution and do nay other things directed by the court or required by law." Wis. Stat. § 857.03.

The evidence presented via the criminal complaint and State's proffer created abundant reasonable inferences establishing the evidence was sufficient to support the circuit court findings. *See State v. Doss*, 2008 WI 93, ¶63 (*citing State v. Fonte*, 2005 WI 77, ¶ 19, 281 Wis. 2d 654, 698 N.W.2d 594).

**e. Morse intended to convert the estate funds to his own use.**

Morse denies he ever had the intent to convert any of the money to his own use because he was personally liable for the funds. (Resp. Br. at 11). This denial is in direct contradiction to his guilty plea, where he agreed that he did commit the offenses in the amended information. (R. 40:12). His agreement that he committed the offenses thus establishes sufficient evidence for the factual basis, despite his later dissatisfaction.

Furthermore, under Wis. Stat. §943.20(1)(b), the refusal to deliver money held in one's possession due to one's employment upon the demand of the person entitled to receive that money is *prima facie* evidence of an intent to convert to that person's own use. Wis. Stat. § 943.20(1)(b). Here, the criminal complaint outlined how the new personal representative, Larson, made several requests for the estate funds and how Morse did not comply until after an order to compel was filed. (R. 1:19-20). Further, the State's proffer during the plea colloquy included the factual basis that Morse did not return the money to Larson until the order to show case was brought in probate court. (R. 40:15). Morse acknowledged the accuracy of the State's proffer and agreed, through his attorney, to use the complaint as a factual basis for the plea. (R. 40:15). As such, the unrefuted evidence supported a finding of an intent to convert.

Morse argues that it would be impossible to carry out a personal representative's duties without "using" the assets of the estate. (Resp. Br. at 11). However, Morse was not prosecuted for using the estate assets. His prosecution was based on his use of the estate funds without consent and contrary to his authority. (R. 1, 20). Nothing in the criminal code prevents a personal representative from using the assets of an estate within the scope of the consent and authority given to

them. It is only when the personal representative goes outside of that scope, as Morse did, that a criminal prosecution arises.

### **CONCLUSION**

In entering his guilty pleas to the three counts in the amended information, Morse is judicially estopped from taking the contradictory position that his pleas were not supported by the evidence. In addition, Morse waived the ability to raise any additional defenses to or defects in the criminal prosecution by those guilty pleas. Finally, the evidence, which Morse voluntarily accepted through his agreement with the State's factual basis and criminal complaint, was sufficient to establish each element of the offenses to which Morse plead guilty. The State respectfully requests this Court AFFIRM the circuit court rulings finding Morse guilty of the crimes to which he plead.

Dated this 7th day of November, 2018.

Respectfully submitted,

JOHN CHISHOLM  
District Attorney  
Milwaukee County

---

Matthew R. Westphal  
Assistant District Attorney  
State Bar No. 1071292

**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 4,973.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Matthew R. Westphal  
Assistant District Attorney  
State Bar No. 1071292

**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 s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Matthew R. Westphal  
Assistant District Attorney  
State Bar No. 1071292

**P.O. Address:**

Milwaukee County District Attorney's Office  
821 West State Street- Room 405  
Milwaukee, Wisconsin 53233-1485  
(414) 278-4646  
Attorneys for Plaintiff-Respondent.