

IN THE CIRCUIT COURT FOR BALTIMORE CITY

State of Maryland

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vs.

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Case No. 109009009

Sheila Ann Dixon

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MEMORANDUM

Before the Court is the Motion to Dismiss Indictment filed by Defendant Sheila Ann Dixon. An opposition to the motion was filed by the State. A hearing was held on the motion on April 23, 2009. This memorandum constitutes the Court’s reasons for its ruling on the motion on all grounds except those pertaining to legislative immunity, which the Court discusses in a separate Memorandum that is filed with this Memorandum.

Background

On January 9, 2009, the State Prosecutor filed an Indictment against Defendant Sheila Ann Dixon. In the 31-page indictment, the Defendant was charged with twelve counts of violation of Maryland law. Counts One through Four charge the Defendant with perjury concerning her Financial Disclosure Statements from 2004 to 2006, and her alleged failures to disclose required items. Counts Five through Eight charge the Defendant with theft concerning certain “gift cards”. Counts Eight through Ten charge the Defendant with fraudulent misappropriation by a fiduciary concerning those same gift cards. Finally, Counts Eleven and Twelve charge the Defendant with the common

law offense of misconduct in office relating to the same conduct charged in the other counts.

Applicable Standards

Motions to dismiss indictments are rare in Maryland criminal law, and even more rarely succeed because such motions can be granted on only the most limited grounds. In *State v. Taylor*, 371 Md. 617 (2002), the court held that such motions should be granted only where there is some substantial defect on the face of the indictment, or in the indictment procedure, or where there is some specific statutory requirement pertaining to the indictment that has not been followed. *Id.*, at 645. *See also, State v. Deleon*, 143 Md. App. 645 (2001) and *State v. Bailey*, 289 Md. 143 (1980).

Allegations About Counts One Through Four and Twelve, Concerning Notice, Rule 4-202 Requirements, and Failure to State a Crime

Defendant Dixon contends that Counts One Through Four must be dismissed because they fail to meet the notice requirements of Articles 21 and 24 of the Maryland Declaration of Rights, fail to contain a definite statement of essential facts required by Rule 4-202, and fail to state a crime.

It is instructive to first look at what is precisely set out in the Counts. Count One deals with the Defendant's Fiscal 2004 Financial Disclosure Statement. It is alleged that the Defendant filed a document "signed under oath and under penalties of perjury", and that the document was required by law to be submitted and filed with the Baltimore City Ethics Board. The Count recites that she was required to identify and report her receipt of gifts, including the name of the person making the gift and the nature of the gift. ¶87.

She disclosed no gifts on the form other than a pass for two from the Senator Theatre.

She also did not disclose any "Travel Expenses". ¶90.

In ¶92, it is alleged that the Defendant

did willfully and falsely make an oath and affirmation under penalties of perjury that the contents of the [sic] her Fiscal 2004 Fiscal Disclosure Statement were true to the best of her knowledge, information and belief when in truth and in fact SHEILA DIXON knew that the gifts which she had received from July 1, 2003 through June 30, 2004, including the Mano Schwarz gift certificate and her travel expenses which were paid by Developer A were required to be reported on her Fiscal 2004 Financial Disclosure Statement in violation of Sec. 9-101 of the Criminal Law Article...

Count Two contains virtually identical allegations for the separately filed Calendar 2004 Financial Disclosure Statement. It also alleged a violation of Criminal Law Article, Sec. 9-101.

Count Three deals with the Calendar 2005 Financial Disclosure Statement and charges that

on or about May 1, 2006, SHEILA DIXON did willfully and falsely make an oath and affirmation under penalties of perjury that the contents of her Calendar 2005 Fiscal Disclosure Statement were true to the best of her knowledge, information and belief when in truth and in fact SHELIA DIXON knew that the gifts which she had received from January 1, 2005 through December 30, 2005, including the various gift cards for Best Buy and Target which were paid by Developers A and B in calendar year 2005, were required to be reported on her Calendar 2005 Financial Disclosure Statement, in violation of Sec. 9-101 of the Criminal Law Article...

Count Four is similar to the other counts but pertains to the Calendar 2006 Financial Disclosure Statement, and in the operative paragraph, ¶116, it concludes that

SHEILA DIXON did willfully and falsely make an oath and affirmation under penalties of perjury that the contents of her Calendar 2006 Financial Disclosure Statement were true to the best of her knowledge, information and belief when in truth and in fact "SHELIA DIXON" knew that the gifts which she had received from January 1, 2006 through December 30, 2006, including the various gift cards for Best Buy, Old Navy and Circuit City which were purchased by Developer A in calendar year 2006, were required to be reported on her Calendar 2006 Financial Disclosure Statement, in violation of Sec. 9-101 of the Criminal Law Article....

The Criminal Law Article provision that underlies these four counts provides that "a person may not willfully and falsely make an oath or affirmation as to a material fact" if one is required to complete an affidavit required by law. Sec. 9-101.

Count Twelve charges the Defendant with the Common Law crime of Misconduct in Office and notes that the Defendant was a public officer who was acting as the President of the Baltimore City Council and Chairperson of the Baltimore City Board of Estimates. It further alleges in ¶ 134 that:

On or about April 30, 2007, at Baltimore City, SHELIA DIXON did corruptly and in violation of her duties under the Baltimore City Ethics Ordinance commit malfeasance by submitting to the Baltimore City Board of Ethics a false statement under oath, to wit: the Calendar 2006 Financial Disclosure Statement, well knowing that the statements contained therein were false and failed to include gifts, including Best Buy, Circuit City, Old Navy and other gift cards, which were provided to her by Developer A, well knowing that Developer A and the various entities owned and controlled by Developer A did business with the City of Baltimore and engaged in activities which were regulated by the Baltimore City Council and the Baltimore City Board of Estimates in violation of the common law, and against the peace, government and dignity of the State.

The Defendant's challenge that there was not adequate "notice" in these counts of the indictment to satisfy constitutional and Rule requirements or to adequately state a

crime revolve around the Defendant's belief that the prosecutors had a mistaken view of the Public Ethics Law of Baltimore City when they indicted the Defendant. The Defendant believes that the State improperly used standards under §§6-26 and 6-27 of the Ethics Law and imported these standards into the requirements under §7-23 for financial disclosure. Defendant contends that the gifts required to be disclosed in the disclosure form are much more limited than those specified in §§6-26 and 6-27. To support the contention, the Defendant cites various paragraphs of the indictment such as ¶¶8, 11, 15 and 17, which make reference to these sections, and the Defendant also references a press release issued by the State Prosecutor at the time of the indictment which the Defendant contends employs language derived from §§6-26 and 6-27. The Defendant also offers an affidavit from the City Solicitor, which sets out a view of the legal principles employed in the Ethics Law.

It is Defendant's contention that the State's "mistaken legal concept is so enmeshed in the indictment's various allegations" that corrective action is needed by the court now and the counts should be dismissed.

The State in its response argues that the indictment provides fully-adequate notice, and that on its face, the indictment states crimes that are sufficient to survive a motion to dismiss. To the extent that the Defendant imports extraneous materials into the discussion, such as the affidavit of the City Solicitor, the State contends that such material is inappropriate to be considered on a motion to dismiss. Alternatively, the State contends that the view of the City Solicitor should be viewed with skepticism since it comes from an appointee of the Defendant and, further, was stated for the first time after the indictment was issued.

After a review of the matter, the Court agrees with the State that at this preliminary stage of the litigation, the motion to dismiss stage, the indictment is fully sufficient on its face to provide notice to Defendant in a fashion that satisfies constitutional requirements and meets the requirements of the Maryland Rules. Each of the Counts One through Four states that the Defendant, “willfully and falsely made an oath” and that she “knew” that, by law, the gifts or travel expenses had to be reported. The counts also specify the gifts that were allegedly not disclosed. Count Twelve is similarly specific.

It is clear that the State and the Defendant have a markedly different way of reading the requirements of the Ethics Law. Under §7-23 (b) (2) a gift is one that is:

given by or on behalf of, directly or indirectly, any person
that was:

- a lobbyist;
- a person regulated by the City; or,
- a person doing business with the City.

The State reads the terms more broadly and expansively than the Defendant would, also relying on the words that the gift may come either “directly or indirectly’. The Defendant’s reading of the law would not include the donors of the gifts mentioned in the indictment as a “person” under the law; nor would they be considered to be either regulated by the City” or “doing business with the City.”

There is apparently little established “law” in the way of court opinions or legal or administrative interpretations of the relevant provisions of the Ethics Law that predate the indictment in this case. In such virgin territory it is not surprising that talented lawyers on opposite sides of a serious and significant case have developed

interpretations of the law that are at odds. The Defendant is certainly free to advocate the view of the Ethics Law that she has presented in her brief, and there may be merit to it, but at this stage, the Court believes that Counts One through Four and Twelve adequately provide notice to the Defendant in sufficient form to satisfy constitutional and rule requirements.

With adequate notice having been given by the indictment, the Court does not believe it should decide the nuances of the interpretations of the Ethics Law at this juncture. There will be ample opportunity to do so in connection with an appropriate motion for judgment at the conclusion of the State's case, in connection with jury instructions on the law applicable to the case, or at another point in the trial of the case.

Allegations About Prosecutor Misleading Grand Jury on the Applicable Law

Defendant further contends that Counts One through Four and Twelve must be dismissed because the State Prosecutor misled the Grand Jury as to crucial aspects of law relating to financial disclosure by public officials, and thereby deprived the Defendant of due process of law. This argument is derived from the first argument made by the Defendant. The assertion is that the prosecution, in making references to the Grand Jury about §§6-26 and 6-27 of the Ethics Law, instead of focusing solely on §7-23, "misled" the Grand Jury and that the State was presenting the "wrong law", which prevented the Grand Jury from being able to exercise its function. In response, the State argues that there is no Maryland law that requires the dismissal of the indictment even if the Grand Jury was exposed to tainted or erroneous information. In fact, the cases seem to lean the other way. *See, Clark v. State*, 140 Md. App. 540 (2001);

Bartram v. State, 280 Md. 616 (1977); *State v. Bailey*, 289 Md. 143 (1980); and *Everhart v. State*, 274 Md. 459 (1975). The State also argues that the Defendant has presented only selected portions of the Grand Jury testimony, and that a fuller review of the record shows that the Grand Jury was operating under a complete view of the law and facts. See, State's Opposition, pages 17 to 21.

The Court agrees with the State. Maryland case law, at least as it has evolved so far, does not support the proposition that a defendant can engage in a selective exegesis of a grand jury transcript and attack the indictment because the defendant's view of the law differs from that of the prosecutor. There is no credible suggestion here that the State intentionally misled the Grand Jury in an effort to get it to indict the Defendant when the prosecutor knew there was no basis for doing so. At most, it appears that the Defendant is arguing that the State should have adopted her view as to which sections of the Ethics Law are most relevant to the charges here. Such a contention is not a basis for the dismissal of an indictment under Maryland law, and the Court finds no grounds for doing so.

Allegation About the Effect of the City's Failure to Maintain a List of Businesses

Defendant asserts that to the extent the Ethics Code requires financial disclosure of gifts from persons doing business with the City, the Code is void for failure of the City to prepare and maintain a certified list of entities doing business with the City. As a result, Defendant contends that Counts One through Four and Twelve, to the extent that they charge failure to report such gifts, must be dismissed.

Under §7-1 of the Ethics Law, the City's Finance Director must annually certify to the Ethics Board a "list of all business entities doing business with the City", and the Ethics Board was required to keep the list on file and available to all persons subject to the Code. It appears undisputed that no such list was prepared or kept during the years relevant to the Counts in the indictment. Defendant argues that this failure "operates to void the disclosure requirements relating to gifts from persons doing business with the City", and therefore, the affected counts of the indictment must be dismissed. Defendant relies almost exclusively for this argument on *Hirsch v. Department of Natural Resources*, 288 Md. 95 (1980), which held that wetlands regulations promulgated by the Secretary of Natural Resources were void for failure to file a list of regulated properties among the land records of Anne Arundel County as mandated by statute.

The State asserts that this failure does not gut the law or its requirements of filing reports based on what covered persons actually knew. The list was clearly meant to be an aid to persons completing the forms, and had it existed, it might have created a "safe harbor" for those filing, at least as far as the category of those who "did business with the city". As the State notes, the list was never intended to deal with the other category, those who are "regulated by the City". In any event, the lack of a list presented no insurmountable practical problem as gauged by the fact that the Defendant and presumably others routinely filed the forms annually without the list being available.

The *Hirsch* case is not controlling. That case dealt with a unique situation where the State's regulatory efforts were affecting land rights, where the plats of wetlands would be integral to the regulatory scheme, and which would place landowners and other affected parties on notice of the State's imposition of a regulatory scheme as to

specific properties. The court was specifically concerned with the unfairness of creating such impositions on land when prospective purchasers, creditors, or others contemplating the acquisition of some type of interest in the land would have had no way of learning of the burden on the land, except for a filing in the land records in the same manner as liens and other encumbrances on land are traditionally recorded. *Id.* at 113. The *Hirsch* court stated that the effect of even a mandatory provision not being complied with depends upon the legislative intent reflected in the particular statute involved and the nature of the violation. *Id.* at 118. As the State notes, cases such as *Samet v. Supervisor of Assessments of Baltimore City*, 290 Md. 357 (1981), stand for the proposition that failure to follow a mandatory provision of the law does not eviscerate a regulatory scheme, especially where compliance with the law was otherwise feasible.

It is hard to see how the lack of a list for City employees would have been seen by the drafters of the Ethics Law to be of such a nature that it would have totally voided the requirements of Subtitle 7 on Financial Disclosure until it was in place. This would seem to be at odds with the findings, goals and purposes of the Law. See, §1-1, Findings and §1-2, Goals. Here, the unavailability of the list did not hamper the ability of the Defendant to answer the questions as truthfully as she was able based on her own knowledge. Each of the Counts at issue specifically charges that the Defendant “knew” that the gifts in question had to be reported.

Under these circumstances, the failure of the City’s Finance Director to prepare the list is not fatal to the regulatory scheme of Subtitle 7 of the Ethics Law or to the validity of the indictment in this case.

Allegations About the Theft Counts

Defendant contends that the Theft Counts Five, Six, Eight and Nine are mutually inconsistent and fail to allege an offense because they conflict with Perjury Counts Three and Four, and Misconduct, Count Twelve.

Defendant's assertion is that the counts at issue are not consistent and that they must fail since, for example, it can not be that Defendant both received the gift cards as "gifts" and that she "misappropriated" the very same cards in violation of her fiduciary duty to the City. See, Defendant's Memorandum, page 42. Defendant cites only *Price v. State*, 405 Md. 10 (2008), a Court of Appeals decision on inconsistent verdicts by a jury, which found such verdicts to be invalid. In its reply, the State, citing cases such as *Douglas v. Long*, 661 F.2d 744 (9th Cir. 1981), noted that there is nothing impermissible in the State charging in *separate* counts crimes as having been committed in different ways or by different methods in order to anticipate and accommodate every possible contingency in the evidence.

The State has the better of the arguments. An inconsistent verdict by a jury is what must be guarded against. Indictments, which charge a crime in various forms and means that may be supported by the evidence presented are not forbidden under Maryland law, and in fact, are routinely done.

Defendant also asserts that each of Counts Three and Four, in charging theft by false pretenses and failure to report a gift, must be dismissed for internal inconsistency, repugnancy and duplicity. Defendant alleges that these counts of the Indictment are defective because they charge that the Defendant obtained the very same gift cards by false pretenses and, at the same time, as a "gift" for her personally. The State notes in

its opposition that the doctrine of repugnancy is not offended by the charges here, where the gift cards may have been given to the Defendant under the misapprehension that they would be used to benefit the needy, but that is in no way inconsistent with their potential character as “gifts” under the Ethics Law if the Defendant’s illegal actions made them so as to her. Duplicity is violation of the general rule that an indictment should not charge the commission of two or more substantive offenses in the same count. This does not apply here because, indeed, the offenses are charged in separate counts.

Finally, Defendant asserts that Counts Seven, Ten and Eleven fail to charge an offense. As to these counts, the Defendant alleges, for example, that in Count Seven, the Indictment does not allege that the intended beneficiary of the gift card was not a “needy and underprivileged” child. In other words, the facts alleged do not show an act of dominion or control of the property that is inconsistent with the owner’s rights. Similar arguments are made by Defendant pertaining to Counts Ten and Eleven, i.e. that no facts are alleged that indicate the Defendant took any act inconsistent with the owner’s intentions. As the State notes, the Defendant’s arguments fail by even the most rudimentary examination of the language of Counts Seven, Ten and Eleven. They allege what they must. Nothing more is required.

Conclusion

As noted in the beginning of this Memorandum, motions to dismiss indictments are rare in Maryland criminal law, and even more rarely succeed because such motions can be granted on only the most limited grounds. In *State v. Taylor*, the court held that

such motions should be granted only where there is some substantial defect on the face of the indictment, or in the indictment procedure, or where there is some specific statutory requirement pertaining to the indictment that has not been followed. 371 Md. 617, 645 (2002); see also, *State v. Deleon*, 143 Md. App. 645 (2001) and *State v. Bailey*, 289 Md. 143 (1980). The allegations which the Defendant raises and which are discussed in this Memorandum are not of sufficient merit to warrant the extraordinary and rare remedy of a motion to dismiss. The Court will consider the additional arguments presented by the Defendant regarding legislative immunity in a separately-filed memorandum.

____ May 28, 2009 _____
Date

_____/S/_____
Dennis M. Sweeney
Circuit Court Judge