STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMES COUTU, SR., ARTHUR KINNEY, GERALD REEVES and HOLLIE SPEAR,

Defendants-Appellees.

UNPUBLISHED
September 9, 1997

No. 188417
Oakland Circuit Court
LC No. 94-DA6172 AR

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES COUTU, SR.,

Defendant-Appellant,

and

ARTHUR KINNEY, GERALD REEVES, and HOLLIE SPEAR,

Defendants.

No. 188652
Oakland Circuit Court
LC No. 94-DA6172 AR

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EARL WATKINS,

No. 193680
Oakland Circuit Court
LC No. 95-DA6468 AR

Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

No. 195519
Oakland Circuit Court
LC No. 95-DA6431 AR

EARL WATKINS,

Defendant-Appellee.

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

In docket no. 188417, the prosecution appeals by leave granted from the circuit court's order affirming the district court's decision not to bind defendants James Coutu, Arthur Kinney, Gerald Reeves, and Hollie Spear over on charges of misconduct in office and conspiracy to commit misconduct in office, MCL 750.505; MSA 28.773, MCL 750.157a; MSA 28.354(1). In docket no. 188652, defendant Coutu appeals by leave granted from the circuit court order binding him over on the charge of aiding escape, MCL 750.183; MSA 28.278. In docket no. 193680, the prosecution appeals by leave granted from the circuit court order denying the prosecution's application for leave to appeal the district court's dismissal of a charge against defendant Earl Watkins of jail escape, MCL 750.195(2); MSA 28.392(2). In docket no. 195519, the prosecution appeals by leave granted from the circuit court order affirming the district court's dismissal of a charge against defendant Watkins of bribery, MCL 750.117; MSA 28.312. We affirm in part, reverse in part, and remand for further proceedings.

These consolidated appeals arise for the most part from various charges against defendants Coutu, Kinney, Reeves, and Spear, related to their alleged conduct in operating the Oakland County Work Release Facility. These defendants worked for the Oakland County Sheriff's Department and were assigned to the work release facility in 1992. Briefly, the alleged conduct of the defendant sheriff deputies at issue involved a range of actions, including aiding escape, selling favorable recommendations for early release and other favors to inmates, using inmate labor for personal purposes, and accepting gratuities from inmates in exchange for favorable treatment, all of which would be properly characterized as an abuse of the authority vested in the various defendants by the sheriff's department. Subsequent discovery of this alleged conduct led to various charges of misconduct in office, conspiracy to commit misconduct in office, and aiding escape. Defendant Watkins, who was charged with jail escape and bribery, was an inmate at the facility. The parties appeal the various bindover decisions of the circuit and district courts.

Docket No. 188417

Defendants Coutu, Kinney, Reeves, and Spear were charged with the common law crimes of misconduct in office and conspiracy to commit misconduct in office, both of which are punishable as a felony under MCL 750.505; MSA 28.773.[1] The district court refused to bind defendants over on these charges on the ground that direct proof of a quid pro quo linking the inmates' gifts to defendants' favors was an element of misconduct in office and that this element was not established. The circuit court affirmed the district court's determination.

On appeal, the prosecution argues that the lower courts erred in holding that proof of quid pro quo was necessary to convict defendants of misconduct in office and conspiracy to commit misconduct in office. A defendant must be bound over if, at the preliminary examination, evidence is presented that establishes that a felony was committed and there is probable cause to believe that the defendant committed the offense. *People v Goecke*, 215 Mich App 623, 628; 547 NW2d 338 (1996). "Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support the bindover of the defendant if such evidence establishes probable cause." *Id.* When the evidence presented at the preliminary examination conflicts or raises a reasonable doubt of the defendant's guilt, the question is one for the jury and bindover is required. *People v Honeyman*, 215 Mich App 687, 692; 546 NW2d 719 (1996). We review de novo the circuit court's review of the district court's decision regarding bindover to ascertain whether the district court abused its discretion in making the probable cause determination. *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996).

We affirm the dismissal of the charges in docket no. 188417, but on different grounds. See *People v Hegedus*, 169 Mich App 62, 66; 425 NW2d 729 (1988), rev'd on other grounds 432 Mich 598 (1989). We conclude that the defendant deputy sheriffs hold no "public office" within the meaning of the common law crime of abuse of office,[2] but are, to the contrary, mere employees. See *Schultz v Oakland Co*, 187 Mich App 96, 99-101; 466 NW2d 374 (1991). These defendants, having no "office," could not engage in the crime of misconduct in office. Consequently, the circuit court did not err in affirming the district court's decision to dismiss these charges. Because we have concluded as a matter of law that the deputy sheriff defendants could not be charged with abuse of office, we need not address the remaining issues associated with this appeal.

Docket Nos. 188652 and 193680

In docket no. 188652, defendant Coutu was charged with aiding in the escape of defendant Watkins in violation of MCL 750.183; MSA 28.380.[3] In docket no. 193680, defendant Watkins was charged with the crime of jail escape in violation of MCL 750.195(2); MSA 28.392(2).[4] Defendant Coutu (along with defendant Spear) was bound over for aiding in defendant Watkins' alleged escape, but the escape charge against defendant Watkins was dismissed.[5]

The "escape" involved an arrangement whereby defendant Watkins was accompanied by defendant Spear to Florida to attend to a criminal matter pending against defendant Watkins in that state. No extradition process had been initiated to compel defendant Watkins' presence in Florida. It appears that defendant Watkins merely arranged, with the knowledge and acquiescence of defendant

Coutu, to pay the expense (including overtime pay) of having defendant Spear accompany him to Florida. It further appears that defendant Spear observed few, if any, of the precautions one would expect a sheriff to take in transporting a prisoner. For example, defendant Watkins was not under restraint and both individuals were dressed in civilian clothes. There is also the suggestion that, at some point while in Florida, defendant Watkins consumed drugs because he tested "positive" when he returned from Florida, but was not sanctioned for the violation.

In declining to bind defendant Watkins over on the charge of escape, the district court stated:

> In this particular case, as I gather from the testimony I've heard, this gentleman went to Florida with Deputy Spears [sic] in Deputy Spears' [sic] company, Deputy Spears [sic] being a Deputy Sheriff, to clear up a case in Florida. And they then came back.
>
> It's also my understanding that this man paid the costs of said trip. There's no question it was done outside the law as we know it, extradition. No question about that at all. No question whatsoever that the Deputies involved should not have done something like this. There's no question at all but what [sic] the Sheriff's Department is very remiss and very sloppy in the handling of this particular matter. They certainly have house Counsel. They can find out how things can be done if they don't know how things should be done. They had no authority to do what the did, but they did it. They let the man go with the Deputy to Florida.
>
> The man himself did not walk out and go to Florida unaccompanied by the—by the law in the form of Deputy Spears [sic].

This Court has addressed the intent element of escape in the context of MCL 750.193(1); MSA 28.390(1), which involves prison escape.[6] *People v Benevides*, 204 Mich App 188; 514 NW2d 208 (1994). This Court in *Benevides* concluded that to convict a defendant of prison escape, the prosecution is required to prove that the defendant intended to escape from known confinement. *Id.* at 192. The Court recognized that it had previously held that escape from prison does not require a specific intent to escape, *People v Noble*, 18 Mich App 300, 303; 170 NW2d 916 (1969), but that at least two Michigan Supreme Court cases suggested that a requisite state of mind was required for the offense. *Benevides*, *supra* at 191, citing *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975), and *People v Quintero*, 399 Mich 888; 291 NW2d 925 (1977). The *Benevides* Court noted and approved of the definition of prison escape provided in *People v Marsh*, 156 Mich App 831, 834; 402 NW2d 100 (1986): "A prisoner escapes if he removes himself from the imposed restraint over his person and volition with knowledge of, and the intent to remove himself from, the restraints imposed." *Benevides*, *supra* at 192. Although MCL 750.193(1); MSA 28.390(1) refers to prison escape, the language used in MCL 750.195(2); MSA 28.392(2) proscribes similar conduct with regard to inmates of jails.[7]

In this case, the circuit court affirmed the decision of the district court. It concluded that Watkins did not hold the requisite intent to escape custody and in fact went to Florida with the

knowledge, consent and participation of the Oakland County Sheriff's Department. We agree. Because the lower courts concluded that defendant did not intend to escape, which is an element of prison or jail escape, they properly concluded that defendant Watkins should not be bound over for trial. We find no abuse of discretion on this record and affirm the circuit court's denial of leave to appeal the district court's decision to dismiss the escape charge against defendant Watkins in docket no. 193680.

With respect to defendant Coutu's appeal in docket no. 188652, we similarly conclude that there was no basis for the charge of aiding in an escape and reverse the decision of the circuit court binding defendant Coutu over on this charge. This Court has stated that violation of MCL 750.183; MSA 28.380 requires a general intent. *People v Potts*, 55 Mich App 622, 631; 223 NW2d 96 (1974). However, this general intent requires "the doing of a voluntary act which in fact aids or assists the escape of another." *Id.* Given that we find that defendant Watkins did not escape or attempt to escape, we conclude that defendant Coutu could not have aided in any such escape or attempted escape. Therefore, we reverse the decision of the circuit court to bind defendant Coutu over on the charge of aiding an escape. In light of this conclusion, we need not address defendant Coutu's remaining claim that the prosecution violated the parties' immunity agreement.

Docket No. 195519

In docket no. 195519, the district court initially bound defendant Watkins over on one charge of bribery arising out of a limousine ride he provided for defendant Coutu and his coworkers. On appeal from that decision, the circuit court remanded the matter based on defendant Watkins' argument that, if the testimony of a driver of the limousine had been taken at defendant Watkins' preliminary examination, the evidence would have shown that the limousine run was not gratuitous, thus requiring dismissal of the bribery charge. On remand, the district court, after hearing the driver's testimony, ruled that the limousine was a make-up run and not free. Therefore, it dismissed the bribery charge. The circuit court affirmed the district court's decision.

The district court concluded that because the evidence demonstrated that the limousine run was a make-up run, it was not free and the bribery charge could not stand. We disagree. Defendant Watkins testified that he did not charge anything for the limousine run, but that fifty dollars was given to the driver. The driver testified that she drove the Coutu party and received no payment for the run. She testified that the run was a make-up for an earlier one that was not taken. Although the driver testified that she understood that there was to be payment for the first run, she had no knowledge regarding how much the payment was to be, how it was to be made or whether it was ever paid. The driver was not privy to the arrangement between defendants Coutu and Watkins regarding the first limousine run.

We conclude that the testimony of defendant Watkins and the driver raise a question regarding whether the initial limousine run was gratuitous. Even if the second run was a make-up, if the first was supposed to be a free run, the evidence would support the charge of bribery. Additionally, we note that one of the passengers testified that the driver of the limousine was a man, not a woman. Because the district court apparently failed to recognize the conflicts in the testimony and the fact that these conflicts raised a question concerning the nature of the first limousine run and with respect to the witnesses'

credibility, it abused its discretion in failing to bind defendant Watkins over on the bribery charge. The evidence established probable cause that defendant Watkins bribed defendant Coutu through the limousine service. Thus, the circuit court erred in affirming the district court's decision dismissing the bribery charge against defendant Watkins.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.

[1] MCL 750.505; MSA 28.773 provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

As expressed by the plain language of the statute, the statute is a catchall-provision, residual in character and applicable only to common law crimes not covered by any other statute.

[2] The offense is defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." Perkins & Boyce, Criminal Law (3d ed), p 543. See also 67 CJS, Officers, § 256, pp 787-788.

[3] MCL 750.183; MSA 28.380 provides:

> Any person who shall . . . by any means whatever, aid or assist any . . . prisoner [lawfully committed or detained] in his endeavor to make his escape [from a jail, prison, or other like place of confinement], whether such escape be effected or attempted, or not, . . . shall be guilty of a felony . . .; or, if the person whose escape or rescue was effected or intended, was charged with an offense not capital, nor punishable by imprisonment in the state prison, then the offense mentioned in this section shall be a misdemeanor. . . .

[4] MCL 750.195(2); MSA 28.392(2) provides:

> A person lawfully imprisoned in a jail for a term imposed for a felony who breaks jail and escapes, breaks jail though an escape is not actually made, escapes, leaves the jail without being discharged from the jail by due process of law, or attempts to escape from the jail, is guilty of a felony.

[5] We note that defendant Spear has not appealed that bind over decision.

[6] MCL 750.193(1); MSA 28.390(1) provides:

> A person imprisoned in a prison of this state who breaks prison and escapes, breaks prison though an escape is not actually made, escapes, leaves the prison without being discharged by due process of law, attempts to break prison, or attempts to escape from prison, is guilty of a felony, punishable by further imprisonment for not more than 5 years.

[7] Given the fact that the statutes governing prison and jail contain virtually identical language, we find the cases construing the intent required to establish an escape under MCL 750.193; MSA 28.390 persuasive authority for construing MCL 750.195; MSA 28.392.