

[J-17-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 49 WAP 2005
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered February 9, 2005 at No. 749
	:	WDA 2004, affirming the Order of the
v.	:	Court of Common Pleas of Mercer County
	:	entered April 13, 2004 at No. CP-43-CR-
	:	0000124-2003.
BARBARA JEAN ESTMAN,	:	
	:	
Appellee	:	SUBMITTED: March 2, 2006

CONCURRING OPINION

MR. JUSTICE EAKIN

DECIDED: FEBRUARY 21, 2007

I agree that 42 Pa.C.S. § 9303 cannot be applied retroactively here. However, I write separately as I believe Commonwealth v. Lussi, 757 A.2d 361 (Pa. 2000), was wrongly decided and should not have caused dismissal of the theft charges in the first place.

First, as pointed out in the dissent in Lussi, there are different elements in the tax statute and the Crimes Code statute: perhaps most significantly, the latter requires intent, while a conviction for the former may be based solely on negligence. As the two criminal statutes are not in conflict at all, § 9303 is irrelevant. There simply is no “irreconcilable conflict” in these two criminal provisions -- there is no conflict at all.

Further, the majority opinion in Lussi relies on 1 Pa.C.S. § 1933, which states:

Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest

intention of the General Assembly that such general provision shall prevail.

Id. (emphasis added).

There is no effort in Lussi to construe the two “if possible, so that effect may be given to both” -- the two are approached as “either/or,” and not as possibly coexisting. Further, the penultimate phrase of this statute is not mentioned by the Lussi Court. It says that special provisions prevail unless the general provision is enacted later, and there is manifest legislative intent that the general prevail. The embezzlement provision was codified as part of the Local Tax Collection Law in 1945. In 1972, the legislature enacted the Crimes Code, including §§ 3922 and 3927; these general provisions were enacted later. Section 107(b) of the 1972 Crimes Code expressly states the legislature’s intent that the Code supersede existing criminal statutes and that common law crimes be abolished. 18 Pa.C.S. § 107(b). Thus, both prongs of § 1933’s exception are met, and if there is an irreconcilable conflict here, the general provisions prevail.

It may also be said that Lussi yields an absurd result, providing a loophole for fraudulent public tax collectors. Is it not absurd for an individual who has violated a position of public trust by embezzling taxpayer funds to be shielded from the felony theft charges she would otherwise face but for her position as a tax collector? As the legislature does not intend such an absurd result, Lussi should be rejected when properly framed for this Court’s attention. As the parties did not raise this issue, however, I concur in the majority’s holding with regard to the issue before us, i.e., that § 9303 cannot be applied retroactively.

Mr. Justice Castille joins this concurring opinion.