NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ERIC HOUSTON,

Appellant,

v.

CITY OF TAMPA FIREFIGHTERS AND POLICE OFFICERS' PENSION FUND BOARD OF TRUSTEES,

Appellee.

Case No. 2D19-2119

Opinion filed May 29, 2020.

Appeal from the Board of Trustees of the City of Tampa Firefighters and Police Officers Pension Fund.

Clifford A. Taylor and Megan A. Rosenberg of The Hogan Law Firm, Brooksville, for Appellant.

Robert D. Klausner and Anna R. Klausner Parish of Klausner, Kaufman, Jensen Levinson, Plantation, for Appellee.

CASANUEVA, Judge.

Eric Houston, a former City of Tampa police officer, appeals a final order of the Board of Trustees of the City of Tampa Firefighters and Police Officers Pension Fund (Board) that forfeited his retirement benefits. Before proceeding to a discussion of the instant case, we note that a companion case involving Mr. Houston's wife was

recently resolved by this court. In Houston v. City of Tampa Firefighters & Police Officers' Pension Fund Board of Trustees, No. 2D18-4279, 2020 WL 2549563 (Fla. 2d DCA May 20, 2020) (hereinafter Houston I), this court reversed a similar order of the Board that had forfeited the retirement benefits of Mr. Houston's wife. The issues there are similar, if not identical, to the issues presented here, and we also reverse the order forfeiting the pension benefits of Mr. Houston.

I. OVERVIEW

The superstructure of the law governing the forfeiture of a public employee's pension begins with our state's constitution and the statutory implementation of that provision. Article II, section 8(d), of the Florida Constitution, in order to ensure compliance with the "public trust" by those who would use their public authority in an improper manner, provides that "[a]ny public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law." Art. II, § 8(d), Fla. Const. To implement this constitutional provision, the legislature of our state enacted section 112.3173, Florida Statutes (2017), to identify the specific felonies that rise to the level of a breach of the public trust.

Pursuant to this statute, a public employee forfeits his or her retirement benefits, except for the employee's contributions, when the employee "is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense." § 112.3173(3). As in his wife's case, the order in Mr. Houston's case

specifically found that he committed the following two specified offenses defined by the statute:

> "Specified offense" means:
>
> 1. The committing, aiding, or abetting of an embezzlement of public funds; [or]
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> . . . .
>
> 6. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position.

§ 112.3173(2)(e).

Subsection (2)(e)(6) is commonly referred as "the 'catch-all' provision." Simcox v. City of Hollywood Police Officers' Ret. Sys., 988 So. 2d 731, 733 (Fla. 4th DCA 2008). As this court noted in Houston I, this catch-all provision "applies where the conduct at issue (1) constitutes a felony, (2) is committed by a public employee, (3) is done willfully and with intent to defraud the public or the public employer of its right to the employee's faithful performance, (4) is done to obtain a profit, gain, or advantage for the employee or some other person, and (5) is done through the use or attempted use of the power, rights, privileges, duties, or position of the employee's employment." Houston, 2020 WL 2549563, at *2 (citing Cuenca v. State Bd. of Admin., 259 So. 3d 253, 258 (Fla. 3d DCA 2018)).

In the context of this provision "the Board had to establish the existence of a 'nexus' between the offense or offenses committed and" Mr. Houston's position as a City of Tampa police officer. Rivera v. Bd. of Trs. of City of Tampa's Gen. Emp't Ret. Fund, 189 So. 3d 207, 210-11 (Fla. 2d DCA 2016). The nexus determination focuses upon the conduct of the public employee. Cuenca, 259 So. 3d at 258.

II. FACTS

At the forfeiture hearing the parties stipulated, in part, to a factual record and proceeded thereafter to allow testimonial evidence from witnesses. As the forfeiture order is premised upon criminal conduct, we will begin with those facts.

Mr. Houston entered a guilty plea in a federal court pursuant to a plea agreement, he was adjudicated guilty, and he was sentenced to six months in prison. More particularly, he entered a plea to count six of a superseding indictment, which alleged the theft of government property. The language of the charging instrument set forth that Mr. Houston "did willfully and knowingly receive, conceal, and retain stolen property of the United States, that is federal income tax refunds with an aggregate value in excess of $1000, . . . with the intent to convert said property to [his] own use and the use of others, then knowing said property to have been stolen" in violation of 18 U.S.C. §§ 641, 642 (2017). Count six alleged that $2000 of the funds were used to make a payment on Mr. Houston's Home Depot credit card. We note that Ms. Houston entered a guilty plea to count four of the superseding indictment, which alleged the same offense; however, it alleged that $2000 of the funds were used to make a payment on her Target Visa. It must be kept in mind that the facts placed in the superseding

indictment are allegations only, but these allegations establish the framework for the facts that are to follow.

The first source of undisputed admitted facts is the written plea agreement entered into by Mr. Houston and the United States. A number of its terms help to establish the factual parameters found within the evidentiary frame.

First, the plea agreement sets forth a number of "Particularized Terms," several of which are important. Pursuant to the agreement, Mr. Houston acknowledged that the elements of the offense to which he was pleading guilty are as follows: 1) "[t]he defendant knowingly received, concealed, or retained money or property of value"; 2) "[t]he money or property belonged to the United States"; 3) "[t]he defendant knew that the money or property had been embezzled, stolen or converted from the United States"; 4) "[t]he defendant intended to convert the money or property to his own use or gain"; and 5) "[t]he value of the money or property was more than $1000." Importantly, the money or property was alleged to have been obtained in three possible ways: "embezzled, stolen or converted."

The plea agreement contained a section titled "factual basis" in which Mr. Houston admitted to a statement of the facts supporting the plea. It stated that in 2011, while a detective with the Tampa Police Department, Mr. Houston was the sole account holder of a Home Depot credit card. Mr. Houston and others used the credit card to acquire over $5000 worth of items beginning in late 2010. Mr. Houston made three payments on this credit card at the end of 2010 and the beginning of 2011 from his own account. In 2011, Rita Girven opened a separate bank account and between February

and April, nine fraudulently obtained federal income tax refunds were deposited into the account. The fraudulently obtained refunds were procured by Ms. Girven.

In March 2011, payments were made to Home Depot credit card using a debit card associated with the bank account opened by Ms. Girven. The payments were used to satisfy Mr. Houston's credit card account with Home Depot. The funds "were generated from the filing of false and fraudulent federal income tax returns by Rita Girven." Additionally, Mr. Houston agreed that he had knowledge "that the account was paid off with the proceeds of tax fraud."

At Mr. Houston's sentencing hearing, the prosecutor indicated that Mr. Houston was less involved in the fraud than his wife and Ms. Girven but that it was equally "true that Eric Houston passively received but knowingly received" financial benefits from the fraud.

During the sentencing hearing, the court inquired whether the money "used to pay down the Home Depot [credit] card [was] a product of fraud that originated through the use of personal identifying information reposed in the police department." The prosecutor's response was one word, "No." Instead, the source of the funds was the nine fraudulent tax returns filed by Ms. Girven.

At the forfeiture hearing, additional matters were brought to the attention of the Board. One matter was whether Mr. Houston had used Ms. Girven as a confidential informant. He denied using her as a confidential informant but admitted that he paid her as a source of information from his own funds. He declared that he had "never utilized department funds to pay Rita Girven anything." No other evidence was adduced to establish that Ms. Girven was used as a confidential informant by Mr.

Houston. While the Board may not have found his testimony credible and was permitted to disregard that testimony, there is no other evidence that would establish that Ms. Girven worked as a confidential informant for Mr. Houston.

III. DISCUSSION

A. Standard of Review

We note that this court's review of the Board's order is governed by section 120.68, Florida Statutes (2016). An appellate court may set aside the Board's action in a few circumstances, including: when the Board's action is not supported by competent, substantial evidence in the record of the hearing; or when the Board "has erroneously interpreted a provision of law and a correct interpretation compels a particular action." § 120.68(7)(b), (d); see also Rivera, 189 So. 3d at 210.

The question to be decided here is whether Mr. Houston's crime falls within the terms of Florida's pension forfeiture statute. It is not enough that Mr. Houston "was convicted of a crime while he was a public employee, nor is it enough that the crime bears some relationship to his public duties." Warshaw v. City of Miami Firefighters' & Police Officers' Ret. Tr., 885 So. 2d 892, 896 (Fla. 3d DCA 2004) (Cope, J., dissenting).

We agree with the arguments that Mr. Houston raises on appeal; first, the Board erred by finding that his guilty plea to the federal offense of receiving stolen property constituted a qualifying offense conviction under section 112.3173(2)(e)(1); and, second, the Board erred in concluding that the so-called "catch-all' provision contained in section 112.3173(2)(e)(6) authorized the pension forfeiture.

B. Embezzlement

As previously noted, a specified offense under section 112.3173(2)(e)(1) is the act of "committing, aiding, or abetting of an embezzlement of public funds." Reviewing Mr. Houston's superseding indictment and the plea agreement, the Board noted the elements of the crime that must be proven. It did not review the facts adduced by the government to prove its case but instead focused on the element of the crime requiring the accused to have knowledge that the money or property had been embezzled, stolen or converted. In its conclusions of law, the Board found that "Mr. Houston pled guilty to the very crime of embezzlement of public funds." And it later concluded that in Florida "embezzlement means theft." Yet, section 112.3173 does not define the term "embezzlement." For that we must look elsewhere.

For a definition of embezzlement, we turn first to federal law.

> Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted [sic], or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Moore v. United States, 160 U.S. 268, 269-70 (1895). More recently it was recognized:

> The crime of embezzlement builds on the concept of conversion, but adds two further elements. First, the embezzled property must have been in the lawful possession of the defendant at the time of its appropriation. Second, embezzlement requires knowledge that the appropriation is contrary to the wishes of the owner of the property. In less formal language, the defendant must have "taken another person's property or caused it to be taken, knowing that the other person would not have wanted that to be done."

United States v. Stockton, 788 F.2d 210, 216-17 (4th Cir. 1986) (footnote omitted) (citations omitted) (citing United States v. Silverman, 430 F.2d 106, 126-27 (2d

Cir.1970), cert. denied, 402 U.S. 953 (1971)). Thus, "[e]mbezzlement exists where a 'party has lawfully come into possession of property which belongs to another and then knowingly and willfully misapplies or converts that property.' " Developers Sur. & Indem. Co. v. Bi-Tech Const., Inc., 979 F. Supp. 2d 1307, 1319 (S.D. Fla. 2013) (quoting In re Rigsby, 152 B.R. 776 (Bkrtcy. M.D. Fla. 1993)).

Turning to Florida law, embezzlement has been incorporated into the obtaining or using of property, § 812.012(3)(d)(1), Fla. Stat. (2017), a phrase found in Florida's theft statute, § 812.014, Fla. Stat. (2017). Section 812.012(3)(d)(1) defines "[o]btains or uses" to include conduct that was "previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception."

In Fitch v. State, 185 So. 435, 440 (Fla. 1938) (quoting Tipton v. State, 53 Fla. 69, 74 (Fla. 1907)), the court recognized that "the gist of the offense of embezzlement * * * is a breach of trust." Interestingly, Fitch sets forth a definition of larceny that greatly resembles the language of Florida's present theft statute. See § 812.014. The supreme court held as follows:

> Larceny at common law may be defined as the felonious taking and carrying away of the personal property of another, which the trespasser knows to belong to another, without the owner's consent, and with the intent permanently to deprive the owner of his property therein, and convert it to the use of the taker or of some person other than the owner.

Id. at 437.

> Further, as this court held in Houston I, embezzlement suggests
>
> the fraudulent appropriation of property by a person to whom that property has been entrusted by reason of some office, employment, or position of trust. . . . Thus, an

> embezzlement occurs when a person lawfully comes into possession of the property (whether public or otherwise) of another (such as through a public office) and fraudulently converts it to his or her own use.

Houston, 2020 WL 2549563, at *5-6 (citations omitted).

Measuring the facts as presented to the Board against the definitions provided, we hold that criminal conduct defined as embezzlement was not established in this case. Although the elements of theft may have been established under section 812.014, Florida Statutes (2017), those elements of theft do not comport with the definitional elements of embezzlement under either federal or Florida state law. Here, the record establishes unequivocally that no one who came into contact with the property did so lawfully. Nor can it be found that the property was entrusted to Mr. Houston in a fiduciary capacity. The United States did not place the funds at issue in his possession as a matter of trust. This court made the identical observation in Houston I: "This is not a case of anyone coming into possession of property lawfully, such as through a public office or employment; everyone who came into the possession of the tax refunds did so entirely unlawfully." Houston, 2020 WL 2549563, at *6. Mr. Houston's plea agreement, similar to that of his wife, did not contain any admission to an embezzlement or knowingly receiving embezzled money. It contained only an admission to knowingly receiving stolen property. Thus, nothing in his plea or judgment establishes a conviction of or admission to either embezzlement or to aiding and abetting embezzlement.

C. Section 112.3173's "Catch-All" Provision

We turn next to the "catch-all" provision of section 112.3173(2)(e)(6). The Board determined that Mr. Houston's "practice of personally paying Rita Girven for

information off the books qualified her as a confidential informant" and that he "used his position as a Tampa police officer and detective to cultivate his relationship with Rita Girven, and then accepted a benefit or payment from her, in the form of his Home Depot credit card being paid off."

It is the Board's burden to establish the nexus between Mr. Houston's position as an employee of the City of Tampa Police Department and his commission of the offense to which he pleaded guilty. See Rivera, 189 So. 3d at 212. The nexus must be established by competent, substantial evidence. We conclude that the record does not support the Board's findings.

There was no evidence presented at the hearing that Mr. Houston used Rita Girven as a confidential informant, and Mr. Houston specifically denied this allegation. To him, she was but a purveyor of information. Although the Board was within its authority to find that Mr. Houston lacked credibility and to disregard his testimony on this point, in doing so there is still no evidence in the record to support its legal conclusion that under the City of Tampa's police department guidelines, Mr. Houston's conduct conferred this status upon Ms. Girven. "Findings of fact shall be based upon a preponderance of the evidence . . . and shall be based exclusively on the evidence of record and on matters officially recognized." § 120.57(1)(j), Fla. Stat. (2017). Whether a fact or a conclusion of law, there is a dearth of evidence to find Ms. Girven was Mr. Houston's confidential informant.

Additionally, there was no evidence establishing a nexus between Mr. Houston's position as a Tampa police officer and detective and his use of the fraudulent funds. At Mr. Houston's sentencing hearing, the prosecutor indicated to the sentencing

court that Mr. Houston was a passive recipient of the money obtained through Ms. Girven's conduct. Mr. Houston did not use the police department's personal identification information system to assist Ms. Girven. And no evidence was adduced to establish that department funds were used improperly by Mr. Houston to pay Ms. Girven for information. The record fails to provide a link between Mr. Houston's conduct, as an employee of the Tampa Police Department, and the crime for which he was convicted. See Cuenca, 259 So. 3d at 258. There is nothing in the record to support a conclusion that Mr. Houston "used the expertise he gained as a law enforcement officer to facilitate the scheme." Simcox, 988 So. 2d at 734.

We note that this court reached a similar conclusion in the case involving Mr. Houston's wife: "[T]here was no evidence bearing on whether Ms. Girven was an informant at the time of the crime." Houston, 2020 WL 2549563, at *8 n.3.

Because both grounds used to apply the catch-all provision fail, the Board's forfeiture order based on this provision must also fail.

IV. CONCLUSION

We reverse the final order forfeiting Mr. Houston's retirement benefits and remand to the Board with instructions to enter an order restoring his benefits. Additionally, the order on remand shall provide for the payment to Mr. Houston of any past due benefits with interest. Houston, 2020 WL 2549563, at *11; Rivera, 189 So. 3d at 213.

Reversed and remanded with instructions.

NORTHCUTT and BADALAMENTI, JJ., Concur.