

RENDERED: November 22, 1996; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 96-CA-0862-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE DANNY P. CAUDILL, JUDGE  
ACTION NO. 95-CR-120

RAYMOND MICHAEL JARRELL

APPELLEE

OPINION  
REVERSING AND REMANDING

\* \* \* \* \*

BEFORE: GUIDUGLI, JOHNSON, and KNOPF, Judges.

KNOPF, JUDGE: This is an appeal from a judgment of the Floyd Circuit Court dismissing an indictment against the appellee, Raymond Michael Jarrell, which charged theft by failure to make required disposition of property in violation of KRS 514.070.

The precise language of the indictment is as follows:

The grand jury charges: That during the period of time between the 1st day of April, 1989, and the 31st day of May, 1989, in Floyd County, Kentucky, the above named defendant committed the offense of theft by failure to make required disposition of property, in violation of KRS 514.070, when, he obtained gravel worth more than \$300.00 and subject to a known legal obligation to be used only on public roads for public purposes, and intentionally dealt with the gravel as his own by having placed it on private property.

Jarrell moved to dismiss on the ground that the indictment did not comply with RCr 6.10(2) insofar as it failed to state the essential facts constituting the offense charged, and that evidence presented to the grand jury did not support the charged offense. The trial court granted the motion to dismiss the indictment without an opinion. The Commonwealth now appeals. We agree with the Commonwealth, and reverse the trial court.

Jarrell raises the same three (3) related arguments as he made before the trial court. He asserts that the indictment did not state the essential element that he received the property. He also argues that there was no evidence presented to the grand jury that he received the property. Consequently, he asserted that the only offense which the indictment could have charged was the misdemeanor offense of misapplication of entrusted property in violation of KRS 517.110; a charge which was barred by the statute of limitations.

The indictment must be examined in light of the statute under which Jarrell was charged. KRS 514.070 provides that:

(1) A person is guilty of theft by failure to make required disposition of property received when:

(a) He obtains property upon agreement or subject to a known legal obligation to make specified payment or other disposition whether from such property or its proceeds or from his own property to be reserved in an equivalent amount; and

(b) He intentionally deals with the property as his own and fails to make the required payment or disposition.

The question presented is whether the indictment achieved its purpose, that is, to give Jarrell notice of the charge against him and to protect him from a subsequent prosecution for the same offense. An indictment under RCr 6.10 "is sufficient if it informs the accused of the specific offense with which he is charged and does not mislead him". Wylie v. Commonwealth, Ky., 556 S.W.2d 1, 2 (1977). "The omission of details or the absence of allegations of all of the elements of the offense generally may be overlooked, especially when the indictment includes a citation to the applicable statute that was violated." 8 Leslie W. Abramson, Ky. Criminal Practice and Procedure, § 12.8 (2d ed., 1987); citing Godsey v. Commonwealth, Ky. App. 661 S.W.2d 2 (1983); and Wylie v. Commonwealth, supra.

In Stark v. Commonwealth, Ky., 828 S.W.2d 603 (1992), the Supreme Court held that the indictment's failure to include an essential element of the offense constituted a failure to state a public offense. As a result, the defective indictments in Stark were dismissed, even though the error had not been raised before the trial court. Id., 828 S.W.2d at 606. However, in a recent to-be-published opinion, Thomas v. Commonwealth, Ky., 95-SC-234 (rendered September 26, 1996, finality endorsement granted October 17, 1996), the Supreme Court of Kentucky partially overruled Stark. In Thomas, the Court held that when an indictment charges an offense, states the statute under which the defendant is being charged, and provides the date and location of the alleged offense, it is sufficient to put the defendant on notice of the nature of the charge. When an

otherwise valid indictment is issued, but it fails to state an element of the offense charged, the defendant's proper remedy is to obtain a bill of particulars. Id., Slip Op. at 9-10.

As was the case in Thomas, the indictment against Jarrell stated the dates on which the alleged offenses occurred, the location of the alleged offense, and the statute under which he was being charged. The record is unclear regarding the circumstances under which Jarrell obtained the gravel. The indictment states only that he "obtained" it, "subject to a known legal obligation to be used only on public roads for public purposes". While the facts presented in the indictment are sketchy, we find that they were sufficient to put Jarrell on notice of the nature of the charge against him.

We also disagree that the facts as alleged in the indictment more specifically describe the offense of misapplication of entrusted property. As stated above, the description of the offense in the indictment adequately outlines the offense of theft by failure to make required disposition of property. Furthermore, we find that there is no conflict between KRS 514.070 and 517.110. While both statutes require an unauthorized disposition of property, the offense of misapplication of entrusted property requires that a defendant must know that the unauthorized disposition involves a substantial risk of loss to the owner of the property. On the other hand, KRS 514.070 requires that the defendant intentionally deal with the property as his own and fail to make the required payment or disposition. Where the gravamen of the two (2)

offenses are different, the statutes do not conflict and it is unnecessary to apply the rule that specific legislation prevails over a general statute. Commonwealth v. McKinney, Ky. App., 594 S.W.2d 884, 887 (1980).

Finally, we agree with the Commonwealth that the trial court could not have dismissed the indictment for lack of evidence presented to the grand jury. As this court recently stated in Commonwealth v. Hamilton, Ky. App., 905 S.W.2d 83, 84 (1995):

[t]here is no authority for the use of summary judgment procedure in a criminal prosecution, and it is our opinion that the evidence could not properly be considered on the motions to dismiss.

Commonwealth v. Hayden, Ky., 489 S.W.2d 513, 516 (1972). If the indictment is valid on its face and conforms to the requirements of RCr 6.10, the Commonwealth is given the burden of proving all of the elements of the crime.

The grand jury is not an agency or an adjunct of the prosecuting attorney. 38 C.J.S. Grand Juries § 1, p. 982. We would view with great suspicion an indictment which was returned by a grand jury in the absence of any evidence whatsoever. Generally, the validity of any indictment cannot be successfully attacked upon the ground of insufficient evidence. King v. Veneers, Ky., 595 S.W.2d 714, 715 (1980).

Consequently, the only relevant question is whether the indictment meets the requirements of RCr 6.10. If the indictment satisfies this threshold, the decision whether or not to prosecute, and what charge to bring before the grand jury

generally rests entirely in the prosecutor's discretion.  
Commonwealth v. McKinney, 594 S.W.2d at 888; quoting,  
Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d  
604, 611 (1978). It is presumed as a matter of course that the  
prosecutor will exercise proper discretion in these duties. If  
the Commonwealth fails to present evidence at trial that Jarrell  
"obtained" the gravel, then he will be entitled to a directed  
verdict at the close of the Commonwealth's case. Until that  
time, the trial court may not dismiss the indictment for lack of  
evidence.

Accordingly, the judgment of the Floyd Circuit Court is  
reversed, and this action is remanded with directions to  
reinstate the indictment against the appellee.

ALL CONCUR.

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