STATE OF LOUISIANA	*	**NO. 2018-KA-0714**
VERSUS	*	**COURT OF APPEAL**
KERIANA M. ALEXCEE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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LEDET, J., CONCURS WITH REASONS

I write separately to address the following three issues: (1) the application of the rule of lenity in this case; (2) the scope of a hearing on a motion to quash pursuant to La. C.Cr.P. art. 532(5) and La. C.Cr.P. art. 485; and (3) the delegation under La. R.S. 14:134(B) of a duty imposed by law.

Rule of Lenity

Whether a judicial decree, judgment, or order may supply the "duty lawfully required" under La. R.S. 14:134 is *res nova*. Nonetheless, it is unnecessary to resolve that issue in this case. Even assuming, *arguendo*, that a judicial decree, judgment, or order may supply the duly lawfully required under La. R.S. 15:134, the language of the Consent Decree cannot be read, under the rule of lenity, to have imposed any duty on Ms. Alexcee.

Discussing the rule of lenity, the Louisiana Supreme Court has observed as follows:

> The principle of lenity developed on the basis that a person should not be criminally punished unless the law has provided a fair warning of what conduct will be considered criminal. 3 N. Singer, at § 59.04. The rule does not merely reflect a convenient maxim of statutory construction, but is based on the fundamental principle of due process that no person should be forced to speculate whether his conduct is prohibited. *Dunn v. United States*, 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). Questions concerning the ambit of a criminal statute should be resolved in favor of lenity. *Huddleston v. United States*, 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974).

State v. Piazza, 596 So.2d 817, 820 (La. 1992). Thus, in considering whether there exists a duty lawfully imposed, "[t]he duty must be expressly imposed by law upon the official." *State v. Perez*, 464 So.2d 737, 741 (La. 1985).

One provision of the Consent Decree unambiguously imposes on the Orleans Parish Sheriff's Office ("OPSO") a duty "to ensure that correctional officers conduct appropriate rounds at least once during every 30-minute period, at irregular times, inside each general population housing unit and at least once during every 15-minute period of special management prisoners, or more often if necessary" (the "Duty"). Nonetheless, the State contends that the Consent Decree imposed the Duty on Ms. Alexcee—directly and personally—by virtue of her status as an OPSO employee. In support, the State relies on another provision of the Consent Decree that makes the Consent Decree "applicable to, and binding upon, all Parties, their officers, agents, employees, assigns, and their successors in office."

These two inconsistent provisions render the Consent Decree, at best, ambiguous as to whether it imposed "an affirmative, personal duty" on Ms. Alexcee in her role as an OPSO Deputy. *State v. Petitto*, 10-0581, p. 9 (La. 3/15/11), 59 So.3d 1245, 1251. Because this prosecution is based on the Consent Decree and the Consent Decree is ambiguous, the rule of lenity requires us to find that it did not impose any duty on Ms. Alexcee.[1] *See State v. Small*, 2011-2796 (La. 10/16/12), 100 So.3d 797, 811 (observing that the rule of lenity requires that

[1] The State contends, essentially, that the rule of lenity should not apply in this case because Ms. Alexcee was aware of the Duty and that it applied to her. In support, the State contends that it "presented Lt. Catalanatto's testimony regarding the defendant's actions on October 17, 2016 and her training, submitted numerous documents pertaining to the defendant's training, and submitted the [Consent Judgment] to establish an affirmative duty." This argument fails for two reasons. First, as discussed elsewhere in this concurrence, none of that evidence was admissible at the hearing on the motion to quash. Second, none of that evidence is relevant; the law itself—without recourse to additional notice—must be unambiguously clear. *See Perez*, *supra*. (observing that "the duty must be expressly imposed by law upon the official because the official is entitled to know exactly what conduct is expected of him in his official capacity and what conduct will subject him to criminal charges").

"where there is any doubt as to the interpretation of a statute upon which a prosecution is based, [the] doubt must be resolved in favor of the accused"); *accord State v. Petitto*, 10-0581 (La. 3/15/11), 59 So.3d 1245, 1255 (Knoll, J., dissenting) (observing that "the majority opinion disregards the well-established rule of lenity in construing La. Rev. Stat. 42:1111E(1) and 42:1112B(1) as a basis for charging a violation of an express duty of which the public official had notice, *i.e.*, a malfeasance charge")

Scope of Hearing

The State also contends, in the alternative, that if the Duty was not imposed on Ms. Alexcee directly, it was nonetheless delegated to Ms. Alexcee under La. R.S. 14:134(B). When a prosecution for malfeasance is based on the delegation of a duty lawfully imposed on another, delegation is an essential element of the crime. *See State v. Haltom*, 462 So.2d 662 (La. App. 1st Cir. 1984). Thus, when the State has employed a short-form bill of information or indictment and the defendant has requested a bill of particulars, delegation must be alleged expressly in the bill of particulars. *See State v. Smith*, 14-0213, p. 13 (La. App. 4 Cir. 12/17/14), 156 So.3d 1227, 1234 (finding that because "the allegations against defendant cannot satisfy the essential elements of the offense of second degree murder . . . the trial court properly granted the motion to quash the bill of indictment").[2] The failure to do so warrants quashal of the prosecution. *See* La. C.Cr.P. art. 485 (providing that

[2] *See also State v. Schmolke*, 12-0406, pp. 3-4 (La. App. 4 Cir. 1/16/13), 108 So.3d 296, 299, observing that:

> Essentially, the inquiry is whether any conceivable set of the facts as alleged in the bill of information together with those specified in the bill of particulars (when particulars have been provided) if "found credible by the trier of fact" can support a conviction. *State v. Advanced Recycling, Inc.*, 02–1889, pp. 9–10 (La. 4/14/04), 870 So.2d 984, 989. And support for a conviction, of course, requires that any reasonable trier of fact considering the evidence in the light most favorable to the prosecution could conclude that every element of the offense charged has been proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also* [*State v. Lagarde*, 95-1497, p. (La. App. 4 Cir. 4/3/96), 672 So.2d 1102, 1104].

"i]f it appears from the bill of particulars furnished under Article 484, together with any particulars appearing in the indictment, that the offense charged in the indictment was not committed, or that the defendant did not commit it, or that there is a ground for quashing the indictment, the court may on its own motion, and on motion of the defendant shall, order that the indictment be quashed unless the defect is cured").

Here, the State failed to allege, in either the bill of information or any of the three bills of particulars, that the Duty was delegated by the OPSO to Ms. Alexcee.[3] Nonetheless, the State relies on testimony—rendered in connection with Ms. Alexcee's motion to suppress statement—that, as an employee of the OPSO, Ms. Alexcee received extensive training regarding the Duty. As the State repeatedly acknowledges in brief, however, "[a]t a hearing on [a motion to quash], *evidence is limited to procedural matters* and the question of factual guilt or innocence is not before the court." *State v. Byrd*, 96-2302, p. 18 (La. 3/13/98), 708 So.2d 401, 411 (observing that "[i]n considering a motion to quash, a court must accept as true the facts contained in the bills of information and in the bill of particulars, and determine as a matter of law and *from the face of the pleadings*, whether a crime has been charged; while evidence may be adduced, such may not include a defense on the merits") (emphasis added). Thus, the testimony relied on by the State was outside the scope of the hearing on the motion to quash; and the State's failure to allege the essential element of delegation constitutes a defect in the bill of information.

Delegation

Ordinarily, when there is a defect in the bill of information that the State has not been afforded an opportunity to cure, we would vacate the judgment of the

[3] Indeed, it was not until the third bill of particulars that the State relied on the Consent Decree as the source of the duty lawfully imposed.

district court and remand to allow the State to cure the defect. *See State v. Estem*, 18-0560 (La. App. 4 Cir. 9/26/18), 2018 WL 4623176 (*unpub.*). In this case, however, the evidence adduced at the hearing on the motion to suppress statement—and here relied on by the State in opposition to the motion to quash—demonstrates that the State cannot cure the defect. Thus, to vacate and remand would be "a vain and useless act," which the law does not require. *State v. Hageman*, 123 La. 802, 813, 49 So. 530, 534 (1909); *see also* La. C.Cr.P. art. 921 (providing that "[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused").

The duty the State claims to have been delegated—expressly and unambiguously imposed by the Consent Decree on the OPSO—is an institutional duty "to ensure that correctional officers conduct appropriate [security] rounds . . . at least once during every 15-minute period of special management prisoners." While such an institutional duty may be delegable to a person holding a position of supervisory authority over other employees, the testimony at the hearing failed to establish that this institutional duty was, in fact, delegated by the OPSO to Ms. Alexcee.[4]

In any event, the testimony reflects that the duty the State actually claims Ms. Alexcee failed to perform is not the duty "to ensure that correctional officers conduct appropriate [security] rounds . . . at least once during every 15-minute period of special management prisoners." Instead, the the State claims Ms. Alexcee failed to perform a different duty—the individual duty of correctional officers (like

[4] To establish that this institutional duty was, in fact, delegated to Ms. Alexcee, the State relies on testimony that Ms. Alexcee, in connection with her employment at OPSO, received training regarding OPSO's duty "to ensure that correctional officers conduct appropriate [security] rounds . . . at least once during every 15-minute period of special management prisoners." The allegation that Ms. Alexcee received training to ensure that the OPSO was compliant with *its* duty, however, does not establish that the duty was delegated to Ms. Alexcee. To the contrary, the allegation that Ms. Alexcee received such training demonstrates that OPSO *retained*, rather than delegated, the duty.

Ms. Alexcee) to actually conduct security rounds. While such a duty may exist as a matter of OPSO policy—on which the State does not rely—it is not expressly set forth in the the Consent Decree. Thus, the OPSO could not have delegated this non-existent duty to Ms. Alexcee.

Finally, although it is possible to construe the institutional duty set forth in the Consent Decree broadly enough to embrace an individual duty of correctional officers to conduct security rounds, such a broad construction is foreclosed by the rule of lenity. *State v. Ritchie*, 590 So.2d 1139, 1149 (La. 1991) (*on reh'g*) (Dec. 12, 1991) (observing that "[t]he principle of lenity directs that a court construe a criminal statute in favor of the most narrow application when there are serious doubts concerning a meaning of a term"). Thus, even if the State were allowed to amend its bill of particulars, the State would not be able to allege facts sufficient to establish the essential element of delegation. Thus, vacating and remanding for amendment of the bill of particulars would be improper. *See State v. Legendre*, 362 So.2d 570, 571 (La. 1978) (observing that "[i]t will not do to base an indictment for a serious offense, as in this case, upon an allegation of fact which cannot conceivably satisfy an essential element of the crime, and compel the accused to withstand the rigors of a jury trial with no expectation that a conviction can be supported by such an allegation").

In sum, I would find the language of the Consent Decree relied on by the State is ambiguous and that the rule of lenity thus requires a finding that the Consent Decree did not impose the Duty on Ms. Alexcee personally. The State failed to allege in any of its bills of particulars that OPSO delegated the Duty to Ms. Alexcee—here, an essential element of the crime of malfeasance. Vacating the district court's judgment and remanding to allow the State to amend its bill of particulars would be improper because the State can allege no set of facts sufficient to establish that OPSO delegated any duty to Ms. Alexcee. Accordingly, I concur.