

STATE OF LOUISIANA * **NO. 2018-KA-0714**
VERSUS * **COURT OF APPEAL**
KERIANA M. ALEXCEE * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 533-997, SECTION "H"
Honorable Camille Buras, Judge

Judge Tiffany G. Chase

(Court composed of Judge Edwin A. Lombard, Judge Rosemary Ledet, Judge Tiffany G. Chase)

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AFFIRMED
DECEMBER 26, 2018

The State of Louisiana (hereinafter “the State”) appeals the trial court’s granting of the motion to quash the bill of information filed by the defendant, Keriana Alexcee (hereinafter “Ms. Alexcee”). Ms. Alexcee was charged with malfeasance in office, a violation of La. R.S. 14:134. The State also appeals the trial court’s granting of a motion to suppress statements given by Ms. Alexcee in the course of an investigation by the Orleans Parish Sheriff’s Office (hereinafter “OPSO”). The State lists two assignments of error for review. After consideration of the record before this Court and the applicable law, we find the trial court did not err in granting the motion to quash and pretermit discussion of the motion to suppress. For the reasons that follow, we affirm the ruling of the trial court quashing the bill of information.

RELEVANT FACTS AND PROCEDURAL HISTORY

Ms. Alexcee was a recruit in the employ of the OPSO. On October 17, 2016, she was assigned to work on a specialty tier of the Orleans Parish Prison (hereinafter “OPP”). A 15-year-old juvenile inmate was housed in a cell in the tier on which Ms. Alexcee was assigned and committed suicide by hanging. An investigation into the incident was conducted by Lieutenant Joseph Catalanatto

(hereinafter “Lt. Catalanatto”) of the OPSO. Lt. Catalanatto initially interviewed Ms. Alexcee, on the night of the incident. At the conclusion of the interview she was suspended and sent home.

As the investigation continued, Lt. Catalanatto determined that Ms. Alexcee may have violated certain policies of the OPSO. She was later called in for a second interview. At some point during the second interview, Lt. Catalanatto felt his questions were seeking to elicit potentially incriminating responses from Ms. Alexcee so he stopped and advised her of her constitutional rights. Ms. Alexcee invoked her rights and declined to answer any further questions. The investigation concluded in December of 2017. Four months later, in April of 2017, Ms. Alexcee was arrested. The State filed a bill of information alleging she “committed malfeasance in office.”

On October 6, 2017, Ms. Alexcee filed a motion for a bill of particulars requesting the State to provide: (1) the subsections of La. R.S. 14:134 that were allegedly violated; (2) the lawfully required affirmative duty that was allegedly violated; and (3) how Ms. Alexcee’s actions constituted a violation of said affirmative duty. The State’s initial bill of particulars erroneously identified the applicable provisions of the malfeasance statute as 14:153(A)(1) and (2). The State further requested a continuance pending the Louisiana Supreme Court’s review of a recent malfeasance case from this Court. An amended bill of particulars followed on February 7, 2018, stating Ms. Alexcee was being charged

with a violation of La. 14:134(A)(1) and (2) and that the affirmative duties she violated were La. Const. Art. X Sec. 30, La. R.S. 14:93, and La. R.S. 15:704.¹

On March 15, 2018, Ms. Alexcee filed a motion to quash pursuant to La. C.Cr.P. arts. 532(4) and 532(5). The State filed a second amended bill of particulars on the morning of the hearing, amending the bill of information to a violation of La. R.S. 14:134(A)(1) and alleging that Ms. Alexcee failed to perform a duty lawfully required of her, when she intentionally left her assigned post, pursuant to the consent judgment in *Jones, et al. v. Gusman, et al.*, EDLA 12-00859 (hereinafter “the Consent Decree”).²

More specifically, the State cited to paragraph (d) under the “Safety and Supervision” sub-heading of the Consent Decree which states that the OPSO shall:

Continue 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. All security rounds shall be documented on forms or logs that do not contain pre-printed rounding times.³

The State contended that the second amended bill of particulars rendered the motion to quash moot. Ms. Alexcee disputed this contention arguing the Consent Decree failed to serve as the requisite affirmative duty of law as it imposed a duty on the OPSO rather than Ms. Alexcee individually. The matter was taken under

¹ The State has abandoned these grounds as they were only obliquely referenced at the hearing and are not briefed or relied upon on appeal. See Uniform Rule, Courts of Appeal, Rule 2-12.4(B)(4).

² The Consent Decree was entered into to correct the violations of federal rights at OPP as alleged by the prisoners and the United States Department of Justice.

³ The Consent Decree further defines “special management units” as those housing units designated for offenders under the age of 17, in protective custody, on suicide prevention or in administrative or disciplinary segregation.

advisement and the trial court ultimately granted the motion to quash. This appeal followed.

DISCUSSION

Although the State assigns two assignments of errors for review, we pretermit discussion of the second, regarding the motion to suppress, as our disposition on the motion to quash renders the assignment moot.

A motion to quash is appropriate whenever “[a] bill of particulars has shown a ground for quashing the indictment under Article 485.” La. C.Cr.P. art. 532(5). When it appears from the bill of information and bill(s) of particulars that the defendant did not commit the offense charged then a motion to quash is properly granted unless the defect is cured. La. C.Cr.P. art. 485. We review a trial court’s judgment on a motion to quash *de novo*, accepting the facts as alleged in the bill of information and bill of particulars as true. *State v. Ferguson*, 2014-1305, p. 6 (La.App. 4 Cir. 9/2/15), 176 So.3d 449, 454 (citing *State v. Ancalade*, 2014-0379, p.10 (La.App. 4 Cir. 1/14/15), 158 So.3d 891, 897).

In its second amended response to Ms. Alexcee’s motion for a bill of particulars, the State alleges she violated La. R.S. 14:134(A)(1) which provides:

A. Malfeasance in office is committed when any public officer or public employee shall:

(1) Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee.

“It is the violation of an affirmative duty, coupled with the requisite wrongful, criminally culpable intent which gives rise to the crime of malfeasance.” *State v. Petitto*, 2010-0581, p. 11 (La. 3/5/11), 59 So.3d 1245, 1252. Thus, malfeasance

presupposes the existence of an affirmative duty. *State v. Perez*, 464 So.2d 737, 741 (La. 1985) (citing *State v. Passman*, 391 So.2d 1140, 1141 (La. 1980)).

Affirmative Duty

“[T]he focus of the courts has been on whether there is a statute or provision of law which imposes an affirmative, personal duty on the public officer.” *Petitto*, 2010-6581, at p. 9, 59 So.3d at 1251-52. Whether a federal consent decree can serve as a “provision of law” and act as the requisite affirmative duty for a charge of malfeasance in office is a matter of first impression for this Court. However, we turn our attention to the specific facts of this case prior to addressing the broader matter.⁴ The question, therefore before us, is whether the Consent Decree imposes an affirmative, personal duty on Ms. Alexcee sufficient to meet the requirement of La. R.S. 14:134.

The State avers the Consent Decree acts as a “provision of law” such that it satisfies the affirmative, personal duty requirement of the malfeasance statute.

⁴ In *Passman*, the Louisiana Supreme Court pretermitted the issue of whether the violation of administrative regulations could serve as the basis for a charge of malfeasance. 391 So.2d at 1144. In *Perez*, Justice Lemmon dissented from the majority’s holding that the Oath of Office provision in La. Const. Art. X, Sec. 30 could also act as an affirmative duty. 464 So.2d at 746 (Lemmon, J., dissenting). “The [*Passman*] court held that the defendant’s misconduct did not constitute the crime of malfeasance if no statute delineated the affirmative duty that defendant was charged with failing to perform. By adopting this narrow ‘express legislative requirement’ approach, the court obviously rejected the idea that the Legislature intended to adopt an open-ended offense covering general derelictions of duty.” *Id.* Justice Lemmon concluded that the issue is “whether the bill of information charges conduct that involves the failure to perform a specific duty expressly defined by the Legislature.” *Id.* In *Petitto*, the majority of the Court affirmatively cited Justice Lemmon’s appreciation of the jurisprudence defining “malfeasance in office as the intentional failure to perform a specific duty *expressly defined by the legislature*.” 2010-0581, p. 8, 59 So.3d at 1251 (emphasis in original). However, the Court slightly diverged from Justice Lemmon’s rational by opining that “[a]lthough criminal statutes are subject to strict construction under the rule of lenity, the rule is not to be applied with such unreasonable technicality as to defeat the purpose of all rules of statutory construction, which is to ascertain and enforce the true meaning and intent of the statute.” *Id.* 2010-0581, p. 7, 59 So.3d at 1250 (citing *State v. Shaw*, 2006-2467, p. 14 (La. 11/27/07), 969 So.2d 1233, 1242). The Louisiana Supreme Court still abides by its holding in *Petitto*. See, e.g., *State v. Thompson*, 2015-0886, p. 43 (La. 9/8/17), 233 So.3d 529, 556. However, the door left open in *Passman* regarding the ability of administrative regulations or potentially other “provisions of law” to meet the affirmative duty requirement necessary for malfeasance is presumably still open to this day.

More specifically, the State cites to language in the Consent Decree that declares it “shall be applicable to, and binding upon all parties, their officers, agents, employees, assigns, and their successors in office.” The Consent Decree also defines “staff members” to include “all employees, including correctional officers, who have contact with prisoners.”

Ms. Alexcee refutes the State’s contention that the language in the Consent Decree applies to her specifically. She contends the “Substantive Provisions” section makes it clear that the affirmative duty is placed upon the OPSO and not her individually. Under the “Safety and Supervision” sub-heading, the Consent Decree dictates that the “OPSO shall take all reasonable measures to ensure that prisoners are not subjected to harm or the risk of harm.” It additionally mandates that the OPSO shall perform the underlying security checks the State has alleged Ms. Alexcee intentionally failed to perform. Ms. Alexcee asserts that allowing the State to prosecute individual employees of the OPSO, based on a duty that arises from the Consent Decree, is too far attenuated from its intended purpose, i.e., to secure the Sheriff’s compliance and prevent constitutional deficiencies. We agree.

Consent Decree as Contract

“A consent judgment is a bilateral contract wherein parties adjust their differences by mutual consent and thereby put an end to a lawsuit with each party balancing hope of gain against fear of loss.” *Plaquemines Par. Gov’t v. Getty Oil Co.*, 1995-2452, p. 6 (La. 5/21/96), 673 So.2d 1002, 1006. “[I]nterpretation of a consent judgment, i.e., a contract between parties, is a determination of the common intent of the parties.” *Mayo v. Hutchinson*, 2016-1642, p. 10 (La.App. 1 Cir. 9/27/17), 232 So.3d 567, 574 (citing La. C.C. art. 2045). The intent of the parties is to be determined by the words of the contract when those words are clear

and explicit and lead to no absurd consequences. *Id.* We therefore turn to the Civil Code for guidance on interpreting the Consent Decree.

The parties to the Consent Decree are the United States Department of Justice, the class of inmates of OPP, and Sheriff Marlin Gusman in his official capacity as Orleans Parish Sheriff. The language of the Consent Decree provides, “the Parties seek to ensure the conditions in OPP protect the constitutional rights of prisoners confined there.” It further charges that the Sheriff (and his successors in office) “shall ensure that the [OPSO] will take all actions necessary to comply with the provisions of [the Consent Decree].” Concordant with this mandate, the words “OPSO shall” are consistently used in the language of the “Substantive Provisions” section. “Each provision in a contract must be interpreted in light of the other provisions so that each is given meaning suggested by the contract as a whole.” La. C.C. art. 2050. To that effect, a reading of the language relied upon by the State, that the Consent Decree “shall be applicable to, and binding upon all parties, their officers, agents, employees, assigns, and their successors in office,” is more consistent with the Consent Decree as a whole, which suggests it is intended to ensure that responsibility for the actions of individual employees flows back to its signatories. We therefore disagree with the State’s contention this cited language acts to impose an affirmative, personal duty on individual OPSO employees.

In support of its delegation argument, the State cites to La. R.S. 14:134(B) which provides:

Any duty lawfully required of a public officer or public employee when delegated by him to a public officer or public employee shall be deemed to be a lawful duty of such public officer or employee. The delegation of such lawful duty shall not relieve the public officer or employee of his lawful duty.

An affirmative duty by way of delegation necessarily requires a predicate affirmative duty to delegate. The public officer who delegated the duty is not absolved of that duty when it is delegated.

The “Incidents and Referrals” sub-section of the Consent Decree requires the OPSO to implement a policy providing for disciplinary infractions if a staff member fails to report a reportable incident. The failure to “report any observed prisoner injury may result in staff discipline, up to and including termination.” As criminal statutes are narrowly construed, “[o]ne of the inevitable consequences of [such] construction is that some forms of analogous misconduct will fall beyond the scope of a particular statute.” *Perez*, 464 So.2d at 746 (Lemmon, J., dissenting). In *Passman*, the Louisiana Supreme Court “obviously rejected the idea that the Legislature intended to adopt an open-ended offense covering general derelictions of duty” such as the one the State alleges in the case *sub judice*. *Id.*

Our interpretation of the Consent Decree is in accord with Louisiana jurisprudence interpreting the malfeasance statute. “In *Passman*, this court was unwilling to say that any willful dereliction of duty constituted an intentional refusal or failure to perform a duty *lawfully* required of the public officer by the malfeasance statute.” *Perez*, 464 So.2d at 746. (Lemmon, J., dissenting).⁵ Justice Lemmon further opined that “the malfeasance statute was not designed to punish all forms of misconduct in office” and that “[s]ome forms of misconduct by public officials are subject to other sanctions.” *Id.* A prosecution for malfeasance should be “reserved for those cases in which a public official has blatantly abused the

⁵ As previously noted Justice Lemmon’s appreciation of the holding in *Passman* was affirmatively cited by the majority of the Louisiana Supreme Court in *Petitto*.

authority of his office and violated the public trust by his direct personal acts or failure to act.” *State v. Coker*, 625 So.2d 190, 197-98 (La.App. 3 Cir. 1993).

In light of the law and plain language of the Consent Decree, we do not find that the Consent Decree imposes an affirmative, personal duty on Ms. Alexcee. Even accepting the facts as alleged in the bill of information and bills of particulars as true, we find the State has failed to satisfy the essential element of the existence of an affirmative, personal duty on Ms. Alexcee, a necessary prerequisite to the charge of malfeasance.

DECREE

For the foregoing reasons, the judgment of the trial court granting the motion to quash is affirmed.

AFFIRMED