STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 7, 1999
v	No. 191839 Livingston Circuit Court
DOUGLAS VANSICKLE, Defendant-Appellant.	LC No. 94-008307-FH ON REMAND

Before: Hoekstra, P.J, and Griffin and Bandstra, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. ___ Mich ___; ___ NW2d ___ (1999). In our prior opinion, we held that pursuant to the reasoning of the then recently decided case of *People v Carlin*, 225 Mich App 480, 485; 571 NW2d 742 (1997), the trial court should have granted defendant's motions for a directed verdict because there was insufficient evidence from which the jury could conclude that defendant, a lieutenant police officer for the Hamburg Township Police Department, was a public officer. *People v Van Sickle*, unpublished opinion per curiam of the Court of Appeals, issued 1/16/98 (Docket No. 191839), slip op 2. Our Supreme Court subsequently held that the decision in *Carlin* was improperly decided. *People v Coutu*, 459 Mich 348; 589 NW2d 458 (1999). In lieu of granting leave to appeal in this case, our Supreme Court vacated our prior opinion and remanded for reconsideration in light of *Coutu*. After reconsideration, we affirm defendant's convictions.

I

This case arose from several remodeling tasks that were performed by an inmate in defendant's home while the inmate was on a work pass from the Department of Corrections to the police department where defendant was employed. Based upon five different instances where remodeling tasks were performed, defendant was bound over on five counts of violating the common-law felony offense of misconduct in office, MCL 750.505; MSA 28.773, and five counts of conspiring to willfully and knowingly fail to uphold or enforce the law, MCL 752.11; MSA 28.746(101), MCL 750.157a; 28.354(1). Defendant's motion to quash was granted as to the conspiracy charges against him but denied as to the misconduct charges. Following a jury trial, defendant was convicted of three of the

counts of misconduct in office and acquitted of the remaining charges against him. For each of his three convictions, defendant was ordered to pay a fine of $5,000. The trial court denied defendant's motions for directed verdict, new trial, and resentencing.

II

We first turn to reconsider our conclusion that the trial court should have granted defendant's motions for a directed verdict because there was insufficient evidence from which the jury could conclude that defendant was a public officer, an element of the misconduct in office charge against him. See *Coutu, supra* at 354, citing Perkins & Boyce, Criminal Law (3d ed), p 543.

When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). Thus, we must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that this essential element of the charged crime was proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In *Coutu, supra* at 354, our Supreme Court applied the following five-part test from *People v Freedland*, 308 Mich 449, 457-458; 14 NW2d 62 (1944), in order to determine whether a position constituted public office:

> (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional.

The Court also noted that oath and bond requirements are also of assistance in determining whether a position is a public office. *Coutu, supra*.

Applying those elements in *Coutu, supra* at 354-355, our Supreme Court concluded that a deputy sheriff is a public official for purposes of the common-law offense of misconduct in office. First, the Court found that the Legislature had provided for the creation of deputy sheriffs. MCL 51.70; MSA 5.863. Second, citing *Tzatzken v Detroit*, 226 Mich 603, 608; 198 NW 214 (1924), the Court found that deputy sheriffs exercise sovereign power while engaged in the discretionary discharge of their duties. Third, the Court found that the Legislature had at least partially defined the powers and duties of deputy sheriffs. MCL 51.75; MSA 5.868; MCL 51.76(2); MSA 5.868(16)(2); MCL 51.221; MSA 5.881. Fourth, the Court found that although deputy sheriffs do not perform their duties independently

or without the control of a superior power other than the law, their positions are encompassed as inferior or subordinate offices specifically placed under the control of such a superior office. Fifth, the Court observed that the positions of deputy sheriff are generally permanent positions of employment. Finally, the Court noted that deputy sheriffs are required to take an oath before entering upon their duties of office.

Application of *Coutu* in this case leads to a similar conclusion. First, although the Legislature has not explicitly provided for the creation of lieutenant police officers, it has provided for townships to establish a police department, MCL 41.181; MSA 5.45(1), which may "employ and appoint on behalf of an individual township a police chief and fire chief and other police and fire officers," MCL 41.806(1); MSA 2640(6)(1). Second, a lieutenant police officer, like other law enforcement personnel, exercises sovereign power while engaged in the discretionary discharge of his or her duties. See *Tzatzken*, *supra*. Third, the Legislature granted townships the authority to prescribe the powers and duties of the officers. MCL 41.806(1); MSA 2640(6)(1). Fourth, the position of lieutenant police officer, like the position of deputy sheriff, is encompassed as an inferior or subordinate office specifically placed under the control of a superior office, which in turn performs its duties independently or without the control of a superior power other than the law. Fifth, the position of lieutenant police officer is generally a permanent position of employment. Presumably, every police officer who joins the Hamburg police department must take an oath of office to diligently and faithfully execute his or her office.

Viewed in the light most favorable to the prosecution, the evidence presented by the prosecution about defendant's position in the township police department was sufficient for a rational trier of fact to find beyond a reasonable doubt that defendant was a public officer. Therefore, although we originally held that the trial court should have granted defendant's motions for a directed verdict, our Supreme Court's holding in *Coutu* dictates the opposite conclusion upon reconsideration. Accordingly, we affirm the trial court's order denying defendant's motions for a directed verdict.

III

Because of our original holding that defendant was not a public officer, it was previously unnecessary for us to address defendant's remaining four issues; however, we now turn to resolve those issues. The first of these remaining issues again concerns the sufficiency of the evidence against defendant. Defendant does not dispute that the inmate aided him in his remodeling tasks; rather, defendant argues that there was insufficient evidence to support his convictions beyond a reasonable doubt (1) because the inmate performed the tasks as a "friendly gesture" to defendant, who was his friend; (2) because defendant had no corrupt intent in procuring the inmate's help; and (3) because there was no financial gain to defendant and no financial loss to the police department. We disagree with each of defendant's arguments.

First, the inmate's intent or motivation is irrelevant to whether a rational trier of fact could find that the prosecution proved the charged crime against defendant beyond a reasonable doubt.

Second, the crime for which defendant was convicted requires only that defendant engage in "corrupt behavior" while exercising his duties or acting under color of office. *Coutu*, *supra* at 354,

citing Perkins & Boyce, Criminal Law (3d ed), p 543. Thus, the adjective "corrupt" describes the behavior in which defendant allegedly engaged, not his state of mind. See *Carlin, supra* at 484 (citing Perkins & Boyce, *supra* at 540, for the proposition that a public officer has committed the common law offense when engaging in "any act which is wrongful in itself – malfeasance").

Here, the prosecution presented evidence that inmates from Camp Brighton were strictly limited to performing municipal work and that contrary to this contractual limitation between the township and the Department of Corrections, the inmate had performed remodeling tasks for defendant, including painting defendant's garage, removing carpet from defendant's home, and hanging wallpaper in defendant's home. Hence, the prosecution presented sufficient evidence to support the jury's verdict that defendant committed and engaged in "corrupt behavior."

Third, neither defendant's financial gain nor the police department's financial loss are relevant because they are not elements the prosecution was required to prove in order to find defendant guilty of the charges against him.

Therefore, defendant's arguments do not present any basis upon which to find that the evidence presented by the prosecution was insufficient for a rational trier of fact to find beyond a reasonable doubt that defendant engaged in corrupt behavior while exercising his duties or acting under color of office.

IV

Next, defendant argues that the trial court should have either dismissed the misconduct charges against him and proceeded under the lesser charge of using a prisoner for personal gain, which is a misdemeanor pursuant to MCL 801.10(2); MSA 28.1730(2), or at the least, the trial court should have instructed the jury on the misdemeanor offense as a lesser included offense. We again disagree with defendant's arguments.

In its opinion partially denying defendant's motion to quash the information, the trial court below correctly stated that MCL 801.10; MSA 28.1730 applies to county jail prisoners, whereas the inmate in this case was in the custody of the Michigan Department of Corrections. Therefore, neither the dismissal nor the instruction desired by defendant would have been appropriately permitted by the trial court.

IV

Next, defendant argues that the trial court erred in denying his motion to quash as to the misconduct charges against him. However, to the extent defendant argues that there was insufficient evidence produced at the preliminary examination to show a crime, that argument lacks merit because it is subsumed in defendant's similar challenges to his convictions, which we have rejected. See, e.g., *People v Dilling*, 222 Mich App 44, 51; 564 NW2d 56 (1997).

To the extent defendant incorporates his argument made below that he could not be bound over on a felony charge that was a misdemeanor at common law, this argument also lacks merit. See *People*

v Thomas, 438 Mich 448, 458 n 8 (stating that the defendant in that case could be charged with the common-law offense of misconduct in office pursuant to MCL 750.505; MSA 28.773), 460-462 (Boyle, J., concurring); 475 NW2d 288 (1991). See also *People v Bonoite*, 112 Mich App 167; 315 NW2d 884 (1982) (stating that even the dicta of our Supreme Court is entitled to "considerable deference" where the dicta reveals an "application of the judicial mind to the precise question adjudged, regardless of whether it was necessary to decide the question to decide the case").

V

Last, defendant argues that his sentence was an abuse of discretion because it was disproportionate to any financial gain he received from the tasks in which the inmate assisted and was imposed without any concern for defendant's ability to pay. We disagree.

In sentencing a defendant for a conviction under MCL 750.505; MSA 28.773, a trial court has the discretion to sentence the defendant to five years' imprisonment, or a fine of not more than $10,000, or both. Although our Supreme Court in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), did not directly address the issue of appellate review of fines imposed for violation of a statute, this Court has found that analyzing the proportionality of a fine is appropriate and consistent with the rationale of *Milbourn*. *People v Antolovich*, 207 Mich App 714, 719; 525 NW2d 513 (1994). Specifically, this Court found guidance in the following statement in *Milbourn*, *supra* at 654: "Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then the trial court is not justified in imposing the maximum or minimum penalty, respectively." *Id.*

Contrary to defendant's representation, the sentencing transcript reveals that the trial court fully considered defendant's ability to pay, but settled upon fining defendant rather than imprisoning him because it found that the motivating factor in this case was defendant's greed. Moreover, the trial court rejected defendant's argument that the fine was disproportionate to any financial gain he received from the tasks in which the inmate assisted, observing that defendant had taken advantage of his office in order to have several remodeling tasks done at no cost to himself. Indeed, defendant's fine was arguably at the low end of the sentencing range within the trial court's discretion because the court could have imposed not only an additional $5,000 fine per conviction, but also a term of imprisonment. Therefore, defendant has not shown that the fines he received were disproportionate to the circumstances of this case.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Griffin
/s/ Richard A. Bandstra