

[J-26-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 126 M.D. Appeal Docket 1998
	:	
Appellee	:	Appeal from Order of Superior Court
	:	entered 4/11/97 at No. 2028PHL96
v.	:	affirming in part and vacating in part the
	:	judgment of sentence entered 5/20/96 of
	:	the Court of Common Pleas of Luzerne
RICHARD LUSSI,	:	County, Criminal Division, at No. 2515 of
	:	1994 and remanding for a hearing on
Appellant	:	restitution
	:	
	:	
	:	ARGUED: February 3, 1999

DISSENTING OPINION

MADAME JUSTICE NEWMAN

DECIDED: August 22, 2000

As I wrote in the Opinion in Support of Affirmance in Commonwealth v. Parmar, 710 A.2d 1083 (Pa. 1998), to determine whether the Commonwealth could proceed pursuant to both a general and specific criminal statute in prosecuting a defendant, we should apply the analysis set forth in Commonwealth v. Warner, 504 Pa. 600, 476 A.2d 341 (1984). Any actual conflict between two statutes can only be established after the facts of the case are fully developed at trial. Thus, at the conclusion of the case, a court can properly determine if the general statute had an additional element in comparison with the specific statute so as to give effect to both or to eliminate the charge pursuant to the more general offense. Id.

Here, the Commonwealth ultimately prosecuted Lussi for both theft by failure to make required disposition of funds (theft), 18 Pa.C.S.A. § 3927 and embezzlement by a defaulting tax collector, 72 Pa.C.S.A. § 5511.39. The jury found him guilty on both counts.

From my review of the statutes, as applied to the evidence developed at the trial of this matter, I do not agree with the Majority's conclusion that the Commonwealth was precluded from prosecuting Lussi pursuant to both statutes because the two statutes have different elements of proof.

Theft by failure to make required disposition of funds received, 18 Pa.C.S.A. § 3927, contains a mens rea requiring that an official violate a known legal obligation. Further, the official must intentionally take property for his own use, and intentionally fail to make a required payment. 18 Pa.C.S.A. § 3927(a). The specific statute, 72 Pa.C.S.A. § 5511.39, has no requirement that the official violate a known duty and does not have a mens rea for intentional conduct. Further, improper conduct can include appropriating monies for use as an "investment." Id. While I would apply the analysis set forth in the Opinion in Support of Affirmance in Parmar to conclude that 72 Pa.C.S.A. § 5511.39 must have some element of culpability pursuant to 18 Pa.C.S.A. § 302, it does not require "intentional" conduct. Instead, it can include merely negligent conduct. See Parmar, 710 A.2d at 1088-90. I accordingly agree with the arguments of the Commonwealth that 18 Pa.C.S.A. § 3927 contains a more stringent mens rea requirement than that required by the offense defined under the Local Tax Collection Law. Further, like in Parmar, I believe that the general statute has the additional element of intentionally violating a known duty, whereas the specific statute contains no such element. Because the general statute has elements outside of the specific statute, the trial court appropriately allowed the Commonwealth to proceed under both.

In addition, I share the trial court's view in not believing that the

Legislature ever intended to strip the prosecuting officials of the authority to view the conduct of a tax collector and to require all cases of theft by embezzlement involving a tax collector to be prosecuted as a misdemeanor under the Collection Law. Clearly, the District Attorney should have the authority, when

appropriate, to initiate felony charges and should not be restricted, as Lussi argues, to a prosecution of a lesser degree.

Trial Court opinion at 4. For these reasons, I respectfully dissent and would affirm the decision of the Superior Court.

Mr. Justice Castille joins this Dissenting Opinion