

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2536-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOHN RAABE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Iron County:
DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. The State appeals an order dismissing a criminal complaint against John Raabe. Because the complaint did not give Raabe fair notice of what the State now alleges to be the nature of his criminal conduct, we affirm the dismissal.

The sufficiency of a complaint is a question of law that we review independently on appeal. *See First Nat'l Bank v. Dickinson*, 103 Wis.2d 428, 433, 308 N.W.2d 910, 912 (Ct. App. 1981). A criminal complaint must give sufficient notice to allow the defendant to plead and prepare a defense. *See Blenski v. State*, 73 Wis.2d 685, 695, 245 N.W.2d 906, 912 (1976).

The complaint was filed pursuant to a John Doe investigation. It alleges that Raabe, as town chairman, violated § 946.12(3), STATS., on three occasions: he listed Town property for sale, accepted an offer, and executed a warranty deed, all without authority of the town board. Other documents incorporated into the complaint show that Raabe's wife was associated with the real estate company and received a \$405 commission as a result of the sale.

Section 946.12(3), STATS., Misconduct In Public Office, is committed by one who, whether by act of commission or omission, in his capacity as an officer or employe, exercises a discretionary power in a manner inconsistent with the duties of his office or employment or the rights of others and with intent to obtain dishonest advantage for himself or another. The trial court dismissed the complaint, concluding that Raabe was not acting within the scope of his duties as town chairman as enumerated in § 60.24, STATS. The town chairman does not have the power to list property for sale, contract for sale, or convey the property. The trial court concluded that Raabe could not be charged with a violation of § 946.12(3), STATS., because an element of that offense is that his actions be taken in his official capacity.

The State's argument on appeal differs substantially from the argument it made in the trial court and from the description of the criminal conduct contained in the complaint. On appeal, the State focuses on Raabe's

failure to inform the town board of his conflict of interest and argues that his discretionary powers include de facto powers arising out of custom or usage. This theory, however, is not presented by a fair reading of the complaint. The crux of the three charges was that Raabe performed acts without having discretionary authority to do so and without the town board's consent. The charging portion of the complaint does not identify any discretionary duty or de facto power or describe how Raabe exercised the power in a manner inconsistent with the duties of his office to obtain dishonest advantage. The John Doe transcripts and other exhibits attached to the complaint do not give notice that the State alleges de facto powers created by custom and practice. The State's theory that Raabe has de facto powers is a direct contradiction of the essence of the allegations made in the complaint that he acted without authority.

Raabe was prejudiced by the State's failure to decide on its theory before the complaint was filed because the complaint suggests that Raabe could defend against the charge by establishing the de facto authority that the State now identifies as an important part of its case. Under these circumstances, citation to the correct statute number is not sufficient to support the prosecution. *See State v. Petrone*, 161 Wis.2d 530, 552-53, 468 N.W.2d 676, 684 (1991).

Because we conclude that the complaint does not give sufficient notice of the crime charged, we affirm the dismissal without reviewing the trial court's analysis. We also decline to review the other potential grounds for dismissal asserted by Raabe and we do not determine whether the conduct described in the complaint can be charged as a crime.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

