

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1996 SESSION

**FILED**

**January 29, 1997**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

STATE OF TENNESSEE,  
Appellant,

\* C.C.A. # 03C01-9506-CR-00173

\* BRADLEY COUNTY

VS.

\* Hon. Mayo L. Mashburn, Judge

JOSEPH CATTONE,

\* (State Appeal)

Appellee.

\*

For Appellee:

Charles M. Corn  
Public Defender  
Attorney for Appellee  
P.O. Box 1453  
Cleveland, TN 37364-1453

For Appellant:

Charles W. Burson  
Attorney General & Reporter

Hunt S. Brown  
Assistant Attorney General  
Criminal Justice Division  
450 James Robertson Parkway  
Nashville, TN 37243-0493

Jerry N. Estes  
District Attorney General

Rebble Johnson  
Asst. District Attorney General  
Tenth Judicial District  
P.O. 1351  
Cleveland, TN 37364-1351

OPINION FILED: \_\_\_\_\_

REVERSED AND REMANDED

GARY R. WADE, JUDGE

## OPINION

The State of Tennessee appeals the dismissal of an indictment against the defendant, Joseph Cattone. There are four counts alleged:

- (1) Theft of services in an amount exceeding \$10,000 (Tenn. Code Ann. § 39-14-104);
- (2) Theft of services in an amount exceeding \$1,000 from the United Parcel Service (Tenn. Code Ann. § 39-14-104);
- (3) Theft in an amount exceeding \$500 from Kenneth Chase (Tenn. Code Ann. § 39-14-103); and
- (4) Theft in an amount exceeding \$500 from the Walter Champion Company (Tenn. Code Ann. § 39-14-103).

The issue on appeal is whether the trial court erroneously dismissed the indictment. Because we disagree with the ruling of the trial court, we must reverse the order of dismissal, reinstate the indictment, and remand for trial.

The indictment at issue provides as follows:

[COUNT I:] ...[O]n or about MAY, 1991, in Polk County, Tennessee, and before the finding of this indictment, did unlawfully, feloniously, knowingly and intentionally obtain services of Linda Taylor, Jamey Burnette, Sandra Williams, Anna Queen, Charlene Henderson, Chris Hughes, Elece Taylor, Meredith Tankersley, Wanda Stanley, Margie Allen, Louise Welch, Theresa Lovejoy, Angela Burger, Sherry Newman, Tammy Pearson, Judy Hayes, Ruby Brown, Brenda Loudermilk, Mike Dale, June Crowder, Marie Cochran, Cindy Holder, Lorretta Mealer, Billy Burger, Jewell Allen, Bety Allen, Rena Dixon, Steve Cross, Deborah Elrod, Geneva Graham, Greg Green, Elizabeth Green, Ron Ledford, Karen Sherbert, and Diana Wright, by use of deception, fraud, coercion, false pretense or other means for the purpose of avoiding payment for said services. Further, that said acts were a continuing, criminal impulse or intent or were pursuant to the execution of a general larcen[ous] scheme, thereby constituting a single act. Said services are valued at more than TEN THOUSAND AND 00/100 DOLLARS (\$10,000), in violation of [Tenn. Code Ann.] 39-14-104, all of which is against the peace and dignity

of the State of Tennessee;

COUNT II: ...[O]n or about MAY, 1991, in Polk County, Tennessee, and before the finding of this indictment, did unlawfully, feloniously, knowingly and intentionally obtain services of UNITED PARCEL SERVICE (UPS) by use of deception, fraud, coercion, false pretense or other means for the purpose of avoiding payment for said services. Said services are valued at more than ONE THOUSAND AND 00/100 DOLLARS (\$1,000), in violation of [Tenn. Code Ann.] 39-14-104, all of which is against the peace and dignity of the State of Tennessee;

COUNT III: ...[O]n or about MAY, 1991, in Polk County, Tennessee, and before the finding of this indictment, did unlawfully, feloniously and knowingly exercise control over property, to-wit:

personal property, over the value of FIVE HUNDRED DOLLARS (\$500),

of KENNETH CHASE without his effective consent, with the intent to deprive the said owner thereof, in violation of [Tenn. Code Ann.] 39-14-103, all of which is against the peace and dignity of the State of Tennessee; [and]

COUNT IV: ...[O]n or about MAY, 1991, in Polk County, Tennessee, and before the finding of this indictment, did unlawfully, feloniously and knowingly exercise control over property, to-wit:

personal property, over the value of FIVE HUNDRED DOLLARS (\$500),

of WALTER CHAMPION COMPANY without their effective consent, with the intent to deprive the said owner thereof, in violation of [Tenn. Code Ann.] 39-14-103, all of which is against the peace and dignity of the State of Tennessee.

Before the dismissal of the indictment, the state filed a bill of particulars. It later amended that bill. Meanwhile, the defendant filed his motion to dismiss on the basis that the indictment, as described in the bill of particulars, did not allege "any factual allegations amounting to a crime." The defendant specifically complained about Count I "transform[ing] allegations of numerous alleged misdemeanors into a single felony count"; Counts I and II failing to describe the

wrongdoing "allegedly perpetrated by the defendant"; and Counts III and IV failing to "adequately describe the goods [and] services allegedly received by the defendant." Thereafter, the trial court granted the motion to dismiss "upon the grounds that the facts did not support the criminal intent of theft of services."

The specific statutes at issue provide as follows:

**Theft of Property.**--A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent.

**Theft of Services.**--A person commits theft of services who:

- (1) Intentionally obtains services by deception, fraud, coercion, false pretense or any other means to avoid payment for the services;
- (2) Having control over the disposition of services to others, knowingly diverts those services to the person's own benefit or to the benefit of another not entitled thereto; or
- (3) Knowingly absconds from establishments where compensation for services is ordinarily paid immediately upon the rendering of them, including, but not limited to, hotels, motels and restaurants, without payment or a bona fide offer to pay.

Tenn. Code Ann. §§ 39-14-103, -104.

Article I, § 9 of the Tennessee Constitution entitles the criminally accused to know "the nature and cause of the accusation." See State v. Byrd, 820 S.W.2d 739 (Tenn. 1991). Article I, § 14 provides that "no person shall be put to answer any criminal charge but by presentment, indictment, or impeachment." This right to an accusation by a grand jury applies to all crimes except those involving a fine of \$50.00 or less. Capitol News Co. v. Metro. Gov't of Nashville, 562 S.W.2d 430 (Tenn. 1978).

In order to meet all of the requirements of law, the indictment must

contain all of the elements of the offense; provide notice of the offense charged; sufficiently inform the trial court for the entry of judgment; and provide the defendant with protection against double jeopardy. State v. Trusty, 919 S.W.2d 305 (Tenn. 1996); Frost v. State, 330 S.W.2d 303 (Tenn. 1959); Inman v. State, 259 S.W.2d 531 (Tenn. 1953). An indictment charges the offense stated and all lesser included offenses. Tenn. R. Crim. P. 31; Strader v. State, 362 S.W.2d 224 (Tenn. 1962). There is no constitutional right to have all lesser included offenses set forth in an indictment. James v. State, 385 S.W.2d 86 (Tenn. 1964).

Each count of a multiple count indictment is considered a separate indictment. State v. Gautney, 607 S.W.2d 907 (Tenn. Crim. App. 1980). Defenses and objections based upon defects in the indictment must be raised prior to trial. State v. Randolph, 692 S.W.2d 37, 40 (Tenn. Crim. App. 1985). The appropriate method of attack is by way of motion to dismiss under Rule 12(b)(2), Tenn. R. Crim. P.:

(b) **Pretrial Motions.**--Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

\*\*\*

Defenses and objections based on defects in the indictment, presentment or information (other than it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at anytime during the pendency of the proceedings).

Indictment is defined by statute as "an accusation in writing presented by the grand jury of the county, charging a person with an indictable offense." Tenn. Code Ann. § 40-13-101. Rule 7, Tenn. R. Crim. P., governs indictments, presentments, and informations, their amendments and, upon motion of the

defendant, a bill of particulars. A bill of particulars is not to be utilized by the defendant for the purpose of broad discovery. State v. Wiseman, 643 S.W.2d 354 (Tenn. Crim. App. 1982). Neither is the bill to be used by the defense as a means for determining either the proof or the theory of the state. State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994). So long as the defendant is not hampered by a lack of specificity in a bill of particulars or the state does not withhold information that might have helped pinpoint the nature, time or place of the offense, a subsequent conviction may be upheld. The bill serves "to provide defendant with information about the details of the charge against him if this is necessary to the preparation of his defense, and to avoid prejudicial surprise at trial." State v. Hicks, 666 S.W.2d 54, 56 (Tenn. 1984) (quoting 1 Charles Wright, Federal Practice and Procedure Crim. § 129 (1982) at 434).

A motion to dismiss an indictment attacks the validity of the document as drawn. The defendant insists the dismissal here is appropriate because the indictment improperly included several victims and legal theories as to Count I; commingled different offenses within a single count as to Count II; and provided an inadequate factual basis for theft of services as to both Counts I and II. He argues that the indictment should be dismissed because the bill of particulars does not describe crimes.

An indictment may fail because of its form. See, e.g., State v. Hudson, 487 S.W.2d 672, 674 (Tenn. Crim. App. 1972). An indictment certainly fails when it does not allege the essential elements of the offense, State v. Morgan, 598 S.W.2d 796, 797 (Tenn. Crim. App. 1979), or because it improperly joins offenses. Hardy v. State, 519 S.W.2d 400 (Tenn. Crim. App. 1974). Other grounds for dismissal include lack of jurisdiction, inordinate delay in instituting the charge or trial, the

unconstitutionality of the statute, or violation of double jeopardy. See David Raybin, Tennessee Criminal Practice and Procedure § 16.1-16.133.

The elements of each of the crimes alleged in this case are included in the four counts of the indictment. Rule 8, Tenn. R. Crim. P., governs mandatory and permissive joinder of offenses. Each offense must be "stated in a separate count." Count I of the indictment lists, by our assessment, 35 victims. At first blush, it would appear that a separate count for each victim would be appropriate. The record establishes, however, that the state claims that the defendant induced his employees to perform work for several pay periods with a larcenous intent to obtain their services without pay. The state alleged that each of the employees performed their services based upon the same expectation over the same pay period.

The office of the district attorney general, of course, has broad discretionary authority in the control of criminal prosecutions. State v. Gilliam, 901 S.W.2d 385 (Tenn. Crim. App. 1995). In 1989, the legislature eliminated traditional distinctions between various unlawful takings in favor of one general statute. Tenn. Code Ann. § 39-14-101, et seq. This court has held that the state did not abuse its discretion in charging a single count under very similar circumstances. State v. Barbara Byrd, No. 03C01-9505-CR-00145 (Tenn. Crim. App., at Knoxville, Nov. 6, 1996). We see no distinction here.

It is not the purpose of either the indictment or the bill of particulars to adequately prove the crime or to elect among alternative legal theories for the theft such as deception, fraud, or coercion. The complex nature of the facts underlying these offenses may present a significant burden to the state during the course of the trial; the charging document, however, is not defective. At the conclusion of the

proof by the state, it may be that the defendant is entitled to a judgment of acquittal:

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right.

Tenn. R. Crim. P. 29(a).

If it so desires, the trial court may reserve its decision on a motion for judgment of acquittal until the jury returns a verdict. It retains that authority even after the discharge of the jury. Tenn. R. Crim. P. 29(b), (c). Yet a dismissal of the indictment at this time would not be warranted. The state must be allowed to proceed.

Accordingly, the order of dismissal is set aside. The indictment is reinstated and the cause is remanded for trial.

---

Gary R. Wade, Judge



CONCUR:

---

Joe B. Jones, Presiding Judge

---

Paul G. Summers, Judge