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ORDER

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

DEC 07 2009

DISTRICT COURT
CLARK COUNTY, NEVADA

Denise Husted
DENISE HUSTED, DEPUTY

STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
BRIAN K. KROLICKI and)
KATHRYN A. BESSER)
)
Defendants.)
_____)

Case No. C250045
Dept. No. XXI

ORDER GRANTING MOTION TO DISMISS

A hearing was held before the Court on November 24, 2009, in the above referenced matter with Richard A. Wright and Margaret M. Stanish appearing on behalf of Defendant Brian K. Krolicki, Lidia S. Stiglich appearing on behalf of Defendant Kathryn A. Besser, Chief Deputy Attorney General Conrad Hafen, Chief Deputy Attorney General Christine M. Guerci-Nyhus, and Senior Deputy Attorney Thom Gover, representing the State of Nevada. Following arguments of counsel the Court took this matter under advisement. The Court now renders its decision herein:

Former State Treasurer Brian Krolicki is charged with two counts of Misappropriation and Falsification of Accounts by a Public Officer pursuant to NRS 204.030 and two counts of Misappropriation by Treasurer pursuant to NRS 204.050. Krolicki's former Chief of Staff,

1 Kathryn Besser, is charged as an aider and abettor with one count of Misappropriation and
2 Falsification of Accounts by a Public Officer (NRS 204.030) and one count of
3 Misappropriation by Treasurer (NRS 204.050).

4 Although it is not apparent from the face of the Indictment, the basis for the charges is
5 that, as State Treasurer, Krolicki failed to deposit fees generated by the Nevada College
6 Savings Program (herein after referred to as "CSP") into the State General Fund as required by
7 the State Budget Act. NRS 353.150, *et. seq.* The State argues, but did not plead, that these
8 funds were used to purchase advertising for the CSP in an amount which exceeded that
9 authorized by the Legislature. The State argues, but again did not plead, that Krolicki
10 benefited by appearing in the advertising thereby increasing his visibility and name
11 recognition. Krolicki maintains that he had the authority to use the fees to promote the CSP
12 and, hence, did nothing wrong. There is neither evidence nor contention that Defendants
13 converted State funds to their own use.

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16 The instant motion raises a number of challenges to the Indictment and the proceedings
17 before the Grand Jury, including: (1) the constitutionality of NRS 204.050, (2) the sufficiency
18 of the pleading of the indictment, (3) the presentation of expert opinion testimony before the
19 Grand Jury, (4) the adequacy of the law provided to the Grand Jury and (5) the Attorney
20 General's conflict of interest. The Defendants affirmatively argue the purportedly illegal
21 conduct was authorized pursuant to NRS 353B.340, the statute creating the Nevada College
22 Savings Trust Fund.

23
24 Defendants contend that the Indictment does not provide sufficient notice of the
25 charges against them. The Court agrees.

1 Under NRS 173.075, an indictment “must be a plain, concise, definite written
2 statement of the essential facts constituting the offense charged.” “The indictment, standing
3 alone, must contain: (1) each and every element of the crime charged and (2) the facts showing
4 how the defendant allegedly committed each element of the crime charged.” State v. Hancock,
5 114 Nev. 161, 164; 955 P.2d 183, 185 (1998). The description of the particular acts giving
6 rise to the offense must be sufficient to enable the defendant to properly defend against the
7 accusations, thereby protecting the constitutional right to due process of law. Id.; see also,
8 Simpson v. Eighth Jud. Dist. Ct., 88 Nev. 654, 659; 503 P.2d 1225, 1229 (1973). As the
9 Supreme Court stated:
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11 ‘Whether at common law or under statute, the accusation must include a
12 characterization of the crime and such description of the particular act alleged
13 to have been committed by the accused as will enable him properly to defend
14 against the accusation, the description of the offense must be sufficiently full
15 and complete to accord to the accused his constitutional right to due process of
16 law.’ Id. at 660-61 (quoting 4 R Anderson, Wharton’s Criminal Law and
17 Procedure, § 1760 at 533 (1957)).

18 In pretrial challenges to the sufficiency of the indictment, the court is limited to a review of the
19 four corners of the indictment itself. Id. The State cannot defend the sufficiency of the
20 indictment by referring to evidence presented at the Grand Jury. Id.

21 The Indictment alleges that the crimes occurred over a five year period. It does not
22 specify which funds were utilized, the accounts which were used, or the transactions at issue.
23 The Indictment also fails to specify the duty that was allegedly violated.

24 The State asserts that the Indictment is sufficient because it sets forth the statutory
25 provisions in each count. While that may be acceptable in a case involving a single transaction
26 or occurrence, given the complexity of this case, the five year time period when the events are
27 alleged to have occurred, and the numerous transactions at issue, it is not sufficient and does
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1 not satisfy due process. See Givens v. Housewright, 786 F.2d 1378, 1380-81 (9th Cir.1986);
2 Russell v. United States, 369 U.S. 749, 764-64 (1962).

3 The Indictment is further deficient as it relates to Defendant Kathryn Besser. The law
4 imposes a heightened standard of pleading when a defendant is charged as an aider and
5 abettor. “[W]here the prosecution seeks to establish a defendant’s guilt on a theory of aiding
6 and abetting, the indictment should specifically allege, the defendant aided and abetted, and
7 should provide additional information as to the specific acts constituting the means of aiding
8 and abetting so as to afford the defendant adequate notice to prepare his defense.” Barren v.
9 State, 99 Nev. 661, 668, 669; P.2d 725, 730 (1983). The instant Indictment fails to assert any
10 specific acts allegedly committed by Besser.
11

12 The State argues that, if the Indictment is found to be deficient, it should be allowed to
13 a file an amended indictment. NRS 173.095 (1) provides:
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15 The court may permit an indictment or information to be amended at any time
16 before verdict or finding if no additional or different offense is charged and if
substantial rights of the defendant are not prejudiced.

17 Thus, the issue at bar is whether an amendment would prejudice the substantial rights of the
18 Defendants.

19 In this case, the amendments needed to satisfy due process notice requirements and
20 Barren are significant and require resubmission to the Grand Jury. To allow the State to
21 simply file an amended indictment would prejudice the substantial rights of Defendants,
22 undermine the function of the Grand Jury, and force Defendants to stand trial on allegations
23 for which the Grand Jury may not have found probable cause. “To allow the prosecutor, or the
24 court, to make a subsequent guess as to what was in the minds of the grand jury at the time
25 they returned the indictment would deprive the defendant of a basic protection which the
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guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." Simpson, 88 Nev. at 660.

With respect to Defendants' other arguments, the Court finds them to be either without merit or not properly before the Court.

For the foregoing reasons, the COURT ORDERS, the Motion to Dismiss is granted and the Indictment is dismissed without prejudice.

DATED this 4th day of DECEMBER, 2009.

VALERIE ADAIR

VALERIE ADAIR
District Court Judge, Dept. XXI