

FILED
04-18-2019
Iron County
Clerk of Circuit Court
2019CF000010

STATE OF WISCONSIN

CIRCUIT COURT

IRON COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2019 CF 10

NOEL W. BRANDT,

Defendant.

MOTION TO DISMISS

Noel Brandt, by counsel, moves the Court to dismiss the criminal complaint. Dismissal is appropriate, because the complaint is defective: within its four corners the complaint fails to provide sufficient information to demonstrate that a crime has been committed, and that the defendant was probably the person who committed it. In other words, the complaint lacks probable cause. It is not enough to allege that a public official did not do his job correctly. An allegation of misconduct in public office must do more; the complaint must demonstrate that the wrongdoing at issue is intended to prevent or call into question the proper or impartial performance of that public servant's official duties, or was allegedly committed with an intent to obtain a dishonest advantage. That much the

complaint in its brevity cannot do. No additional facts exist to support its claim.

At root, the criminal complaint has to allege facts showing that Noel Brandt's signature on a letter matters – either because another official relied on the representations contained in the letter, or because the act somehow accrued to his benefit. Inconsequential errors made by a public official do not create criminal liability. There must be more. The key, then, is the public official's intent.

As to this point, the complaint does not establish how Brandt's signature (or any alleged material misrepresentation that was contained in the correspondence), showed that Noel Brandt acted with an intent to obtain a dishonest advantage. "WIS. STAT. § 946.12(2) does not require that a dishonest advantage actually be obtained, only that a public employee act 'with intent to obtain a dishonest advantage.'" *Archer v. Chisholm*, 188 F. Supp. 3d 866, 884 (E.D. Wis. 2016), *aff'd*, 870 F.3d 603 (7th Cir. 2017). The statute does not make criminal poorly executed public service – for there to be a crime, the complaint must show criminal intent. *See State v. Stoehr*, 134 Wis. 2d 66, 78, 396 N.W.2d 177 (1986) (misconduct in public office is a specific intent crime).

The lack of probable cause also underscores another issue, namely that public officials – like Noel Brandt – have not been given notice that their actions, made in good faith, without the benefit of legal counsel, and without evidence of an intent to obtain a dishonest advantage would cause them to be charged with a

crime.

Noel Brandt relies on his rights under the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 7 & 8 of the Wisconsin Constitution, and those cases cited herein.

In further support of his motion, Noel Brandt offers to show the following:

1. The complaint alleges that Noel Brandt was an elected officer of the Mercer School Board.

2. In that capacity, the complaint alleges, he signed a letter addressed to the Wisconsin Department of Public Instruction. Brandt notes that the complaint does not establish whether he did, in fact, sign the letter that was sent to the Wisconsin Department of Public Instruction; the complaint contains the bare assertion, but it offers no facts to verify this assertion.

3. The letter, the complaint alleges, represented that the information contained in the letter had been approved by the Mercer School Board. But, as the complaint alleges, some of the signatories were not members of the School Board when they signed the letter—rather, at least two of the signatories had been members in the not too distant past.¹ As is critical to the complaint, Noel Brandt was an officer of that board.

¹ Upon information and belief, Denise Thompson and Colleen Kohegyi were members of the Mercer School Board during the time period under examination by the Wisconsin Department of Public Instruction relating to the school district's use of Fund 80 moneys.

4. Finally, the complaint asserts a legal conclusion in regard to the former School Board members, namely that “[i]t is forbidden by law to exercise a function of public office knowing that his/her right to so act had ceased.” No reference to a statute or legal duty is offered for this legal conclusion.²

5. Brandt pauses to note here that, as set forth in the complaint, the core of the offense is his *signing* the letter. The offense is not found in the substance of the letter, nor in the actions leading to the Wisconsin Department of Public Instruction’s audit of funds spent by the school district.

6. Based on the foregoing, for signing the letter, the complaint charges Brandt with misconduct in public office, a violation of WIS. STAT. § 946.12(2). This statute makes it a crime for a public officer to do an act which he knows is in excess of his lawful authority or which he knows he is forbidden by law to do in an official capacity.

7. Key to the sufficiency of the criminal complaint are the third and fourth elements of the offense. *See* WIS. JI – CRIM 1731. These two elements require proof that, either the defendant acted in excess of his lawful authority, or that he was forbidden by law to engage in this conduct in his official capacity. *Id.* Too,

² WIS. STAT. § 120.12 enumerates the duties of a school board. What is described by the criminal complaint does not correspond with any of the subsections.

the criminal complaint must demonstrate facts to show that the defendant knew either that the conduct was in excess of his lawful authority, or that he knew he was forbidden by law to engage in the conduct in his official capacity. *Id.* Beyond the bare assertion of the legal conclusion as to the third element, the criminal complaint offers no information as to either the third or fourth elements; and no reasonable inference can be drawn to support these elements from the information in the complaint.

8. As to Noel Brandt, and aside from reference to his signature on the letter, the criminal complaint provides no facts to inform the Court of whether Brandt signed the letter; who wrote the letter; whether Brandt offered or made editorial suggestions to the letter; when Brandt signed the letter; what his intent in signing the letter was; whether Brandt obtained a dishonest advantage by signing the letter; whether he knew that others, not presently members of the school board, were to sign the letter; why others, not presently members of the school board, signed the letter; what the intent of the others in signing the letter had; what statute defines the lawful authority of a school board member; and whether his signing the letter was a material misrepresentation, and why.³

³ The criminal complaint does not allege that Noel Brandt engaged in the offense as a party to the crime, WIS. STAT. § 939.05. As a result, the information contained in the criminal complaint must demonstrate facts to show that Brandt probably committed a crime. By the facts alleged, as a member of the School Board, it is reasonable to infer that he was authorized to sign a letter as an elected member of that body.

9. Allegations of misconduct in public office typically involve serious corruption, such as embezzlement of public funds, bribery, or the failure of public decision-makers to disclose certain conflicts of interest. In short, there must be some identifiable, direct, personal gain by the public official before a criminal charge may lie. It is not sufficient that the public official allegedly violated his fiduciary duty to the public. Nor is it enough to say that the public official did not do his job correctly. An allegation of misconduct in public office must do more than that: it must demonstrate that the wrongdoing at issue is intended to prevent or call into question the proper or impartial performance of that public servant's official duties. In other words, "although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result." *United States v. Sawyer*, 85 F.3d 31 (1st Cir. 2001); *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007). Such a result the criminal complaint does not support.

10. If the statute is applied in the manner as alleged by the criminal complaint, a third problem arises. The statute, as applied, is unconstitutional because it deprives public officials of fair warning that their signing a letter, which was drafted in good faith, without the assistance of counsel, and which does not

involve an intent to obtain personal advantage could expose them to criminal liability. Brandt finds no precedent for a prosecution based on the signing of a letter without evidence of intent to obtain a dishonest advantage. *State v. Kort*, 54 Wis. 2d 129, 194 N.W.2d 682 (1972) (In absence of any fair notice that his conduct was illegal or improper, act of town chairman in improperly claiming and receiving reimbursement for lost wages for time spent on official town business away from boundaries of town could not be punished under statute relating to misconduct in public office which punishes a public officer who does an act which he knows is in excess of lawful authority or which he knows he is forbidden by law to do in his official capacity); and *State v. Courtney*, 74 Wis. 2d 705, 709, 247 N.W.2d 714, 718 (1976) (“The concept of vagueness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication”).⁴

11. The sufficiency of a criminal complaint is judged by the information contained within its four corners. The complaint must set forth facts that, together with reasonable inferences from those facts, would allow a reasonable person to conclude that a crime had been committed and that the defendant probably

⁴ The charge, as applied, would support a theory of prosecution that if a District Attorney fails to disclose evidence to a defendant pursuant to WIS. STAT. § 971.23(1), or authorized the filing of a search warrant that was later found to be defective (leading to the suppression of evidence), he engages in misconduct and could be prosecuted under WIS. STAT. § 946.12(2), regardless of his intent, good faith and whether he obtained a dishonest advantage.

committed it. *State v. Chagnon*, 2015 WI App 66, ¶ 7, 364 Wis. 2d 719, 870 N.W.2d 27 (citing *State v. Adams*, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989)). A court must examine the statute that a defendant is alleged to have violated and the facts laid out in the complaint and any reasonable inferences generated therefrom in determining the sufficiency of the complaint. *Chagnon*, 2015 WI App at ¶¶ 7-8; *State v. Dunbar*, 2017 WI App 56, ¶ 11, 377 Wis. 2d 727, 902 N.W.2d 808.

WHEREFOR, as the criminal complaint does not contain information to demonstrate that Noel Brandt, by signing a letter to the Wisconsin Department of Public Instruction, acted in excess of his lawful authority, or that he was forbidden by law to sign the letter in his official capacity, and further, because the complaint lacks information to show that Brandt acted with intent to obtain a dishonest advantage, the complaint should be dismissed. The criminal complaint is defective and does not support facts showing probable cause to believe that Noel Brandt probably committed a criminal offense, WIS. STAT. § 946.12(2), in particular.

Respectfully submitted this 18th day of April, 2019.

NOEL W. BRANDT, *Defendant*

Electronically signed by Jonas B. Bednarek

Jonas B. Bednarek

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