

14-0904

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**IN THE CIRCUIT COURT OF JEFFERSON
COUNTY, WEST VIRGINIA**

STATE OF WEST VIRGINIA,

v.

Criminal Action No. 13-F-73

**ELIZABETH SHANTON,
Defendant.**

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT 1 AND
GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS 2 THROUGH 54**

This September 5, 2014, the Court considered Defendant Elizabeth A. "Libby" Shanton's motions, by counsel Shawn McDermott, to dismiss on a variety of grounds, all counts of the fifty-four (54) count indictment. On April 17, 2014, Defendant was indicted on Count 1 for fraudulent schemes, and Counts 2 through 54 for fraudulent or unauthorized use of a purchasing card. On March 24, 2014, Defendant filed a motion to dismiss Counts 2 through 54 for insufficiency. On April 3, 2014, Defendant filed two (2) more motions to dismiss: one arguing that Counts 2 through 54 are unconstitutional, and the other arguing that this Court lacks jurisdiction with respect to Counts 2 through 9, 12 through 16, 18 through 26, 32 through 36, and 38 through 54. On May 23, 2014, the State filed its response, by assistant prosecuting attorney Brandon Sims, defending all fifty-four (54) counts and relying on State v. Dennis, 216 W. Va. 331, 607 S.E.2d 437 (2004), State v. Rogers, 209 W. Va. 348, 547 S.E.2d 910 (2001), and State v. Jerome, 233 W. Va. 372, 758 S.E.2d 576 (2014), among other decisions. The Court heard the representations of counsel for both the Defendant and the State at a hearing on these motions on June 30, 2014. Thereafter on August 27, 2014, the Court held a conference call with counsel for the State and Defendant, which precipitated the State's Responses to

Factual Inquiries of the Court, filed on September 4, 2014.

In the motion regarding unconstitutionality, the Defendant proffers two (2) distinct arguments under double jeopardy principles. The Defendant first argues that, based upon recent amendment to W.Va. Code §12-3-10b and State ex rel. Porter v. Recht, 211 W.Va. 396, 566 S.E.2d 283 (2002), the indictment violates the Defendant's right to be free from double jeopardy as Counts 2 through 54 charge her for the same offense and as such are duplicative. The Defendant's second argument on double jeopardy grounds attacks the entirety of the indictment by pitting Count 1 against Counts 2 through 54, as the charge of fraudulent schemes completely overlaps the set of charges that are based upon a violation of W.Va. Code §12-3-10b.

Both the State and the Defendant have submitted a version of the aforementioned amendment to W.Va. Code §12-3-10b. The State is correct to note that the version of the amendment attached to the Defendant's motion is not the version of the bill passed into law. However, the version of the amendment which was passed into law – attached as Exhibit E to the State's Response to Defendant's Motions to Dismiss Indictment for Lack of Jurisdiction, Insufficiency and Unconstitutionality – actually does still contain the language cited by the Defendant in support of the contention that the legislature has now defined violations of W.Va. Code §12-3-10b as a continuing offense:

AN ACT to amend and reenact ... §12-3-10b of said code, all relating to fraudulent or unauthorized use of purchasing cards; ensuring that the courts of West Virginia have jurisdiction over fraudulent or unauthorized use of purchasing cards; establishing jurisdiction; and defining the conduct as a continuing offense.

[Emphasis added]. S.B. 267, 81st Leg., Reg. Sess. (W.Va 2014).

While it is true that the series of counts charged pursuant to W.Va. Code §12-3-10b can be separated by item purchased, as the State suggests, the recent legislative intent persuades

this Court to construe the word “use” to refer to not singular swipes or verifications of the purchasing card, but the overall pattern of use, such that Counts 2 through 54 would necessarily be collapsed into one count of violation of W.Va. Code §12-3-10b in order to avoid running afoul of double jeopardy principles. This point is further underscored by the “unit of prosecution” and “operative verb” rationale of Porter, a case in which multiple statements made in connection to a single act of swearing allowed not for multiple counts (a count for each false statement in the affidavit), but rather, a single count of false swearing. See Porter v. Recht, 211 W.Va. 396, 399 (2002). Even Syllabus Point 2 of Jerrome tends to support this finding: “the controlling factor is whether the separate takings were part of a single scheme or continuing course of conduct. If so, the values of the property may be aggregated to determine the grade of the offense.” State v. Jerrome, 233 W. Va. 372 (2014). The State distinguishes the single larceny doctrine by noting that the alleged misuse of the purchasing card occurred over the course of nearly two years, as opposed to all at once. However, the nature of a “continuing course of conduct” inherently suggests that such continuing conduct may not be limited to a one-time transaction, but a series of transactions continuing over a period of time.

Based upon the Court’s resolution of this first double jeopardy issue, it appears then that the second double jeopardy issue would be a question of whether the single count stemming from Counts 2 through 54 overlaps the elements of Count 1 of the indictment. The discussion of double jeopardy in Rogers with respect to larceny by false pretenses vis-à-vis larceny by fraudulent scheme is on point. In Rogers, the Supreme Court of Appeals of West Virginia held that “every element necessary for a larceny conviction under West Virginia Code § 61-3-24 (false pretenses) is also an element for a larceny conviction under West Virginia § Code 61-3-24d (fraudulent scheme).” State v. Rogers 209 W. Va. 348, 359. At first blush, the version of

the statute under which the Defendant is charged in Counts 2 through 54 seems to survive Blockburger/Zaccagnini/Gill scrutiny, because unlike West Virginia Code §61-3-24d, which requires that a person “willfully deprives another,” West Virginia Code §12-3-10(a) does not so obviously include an intent element. (West Virginia Code §12-3-10b(b) does, however, include the “knowingly and intentionally” element; but this is not the language used in the fifty-three counts of the indictment). Yet the Rogers analysis creates the possibility for a statute to include an element of intent in the form of less obvious language:

With regard to intent, the larceny by fraudulent scheme statute requires that the perpetrator act “willfully” to acquire the property of another by means of fraudulent pretenses, representations or promises, whereas the larceny by false pretense statute requires that one obtain property by any false pretense, token or representation “with intent to defraud.”...The term “willfully,” requires that the perpetrator have the specific intent to commit the offense; the terms “false pretense” or “representation” or “promise” mean a pretense, representation or promise that was in fact not true or was otherwise a false statement; and the term “fraud” means an intentional perversion of truth for the purpose of inducing others to part with something of value or part with a legal right. Again, we discern no substantial difference between one who acts with specific intent to deprive another of his property using false statements and one who acts “with the intent to defraud” by employing false representations.

209 W.Va. 348, 359. Thus, to follow suit, this Court discerns no substantial difference between one who acts with specific intent to deprive another of his property using false statements, and one who uses a purchasing card in a manner contrary to the rules governing such use, where such use includes the verification that said use was permitted (thus in so doing, employing the false representation that such use was permitted). The other elements of these statutes, West Virginia Code §61-3-24d and West Virginia Code §12-3-10b(a), align in a fashion similar to the two statutes discussed in Rogers.¹ Thus, this Court agrees with the Defendant that “Ms. Shanton can only be charged with either a violation of Section 12-3-10b or a violation of W.

¹ In Rogers, the court found no substantial difference between the word “deprive,” found in West Virginia Code §61-3-24d, and the word “obtains,” found in West Virginia Code §61-3-24. Likewise, here, the words “deprives another of any money, goods, property or services” cannot be said to differ from the phrase “make any purchase of goods or services” (from West Virginia Code §12-3-10(b)) in a contextually meaningful way. 209 W. Va. at 358.

Va. Code §61-3-24d.” Defendant Elizabeth Shanton’s Motion to Dismiss Indictment for Unconstitutionality at 29. For these reasons, and after reviewing the pleadings of both the State and the Defendant and the double jeopardy clauses of the West Virginia and the United States Constitutions, this Court GRANTS the Defendant’s motion to dismiss Counts 2 through 54 of the indictment and DENIES the Defendant’s motion to dismiss Count 1 of the indictment.

With only Count 1 left standing, the other issues raised with regard to Counts 2 through 54 of the indictment need not be addressed by the Court at this time. Therefore, the Court need not reach the other questions of constitutionality (such as overbreadth and void for vagueness) raised in connection with West Virginia Code §12-3-10b. Nor need the court address the question of sufficiency of Counts 2 through 54 of the indictment. Similarly, the Defendant’s claim that this Court lacks jurisdiction with regard to Counts 2 through 9, 12 through 16, 18 through 26, 32 through 36, and 38 through 54 is moot.

The Clerk shall enter this order and forward an attested copy thereof to all counsel of record.

Dated: September 5, 2014



David H. Sanders, Judge
The 23rd Judicial Circuit, West Virginia

Read, Reviewed + Telephonically
Approved by Judge Sanders.
9/5/2014

acc:
PROS/B. SMIS
S. McDERMOTT
9/5/14
MT