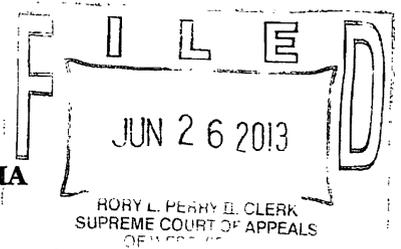


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0367



ANTHONY SOUSTEK
Petitioner

V.)

STATE OF WEST VIRGINIA,
Respondent

Appeal from a final order
of the Circuit Court of Morgan
County (12-F-85)

Petitioner's Brief

Counsel for Petitioner, Joseph R. Kinser, Esq.

#11820
Public Defender Corporation
295 Monroe Street
Martinsburg, West Virginia 25404
JosephKinser@gmail.com

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TABLE OF AUTHORITIES

Case:

United States of America v. Laurenzana, 113 F.3d 689 (7th Cir. 1997).

Statutes:

W. Va. Code § 61-3-52 (2012).

18 U.S.C.A § 1956(c)(3) (2012).

ASSIGNMENTS OF ERROR

- 1) The Circuit Court erred by finding that the Criminal Bail Agreement is a financial transaction as contemplated by W. Va. Code § 61-3-54. Such an interpretation encompasses conduct which was not intended to be regulated by this law.
- 2) The Circuit Court erred by finding that the Affidavit for Appointed Counsel is a financial transaction as contemplated by W. Va. Code § 61-3-54. Such an interpretation encompasses conduct which was not intended to be regulated by this law.

STATEMENT OF THE CASE

This case comes before the Court by way of a conditional guilty plea, entered into by the named Petitioner on December 17th, 2012. (see A.R. 10). Per the conditional plea, the Petitioner was permitted to appeal the Order of the Honorable Judge Andrew Frye from November 27th, 2012, denying the Petitioner's Motion to Dismiss Counts I and II of the Indictment.

Facts:

On Friday April 6th, 2012, A Morgan county deputy initiated a traffic stop on Mr. Soustek due to a defective brake light. (A.R. 37). The officer detected the odor of an alcoholic beverage so Mr. Soustek was put through the battery of field sobriety tests. After completion of those tests, the deputy administered a preliminary breath test, which Mr. Soustek failed. During the stop an additional deputy arrived along with the Morgan County Sheriff Department K-9. The K-9 alerted on the vehicle so a search was

conducted. That search revealed trace amounts of marijuana and 30 pills of Alprazolam. Mr. Soustek did not have identification on him and his license had been suspended administratively (non-DUI). When asked by the Deputies, Mr. Soustek gave them his brother's name, Alexander Jacob Soustek. Based upon that information, the Deputies ran the name Alexander Soustek and found a valid driver's license. Mr. Soustek was then arrested for Driving Under the Influence, two counts of Possession of a Controlled Substance, and No Proof of Insurance under his brother's name. (A.R. 37)

It is common practice, at least in Morgan County, for the Magistrate to fill out all of the paperwork associated with arraignment, including the Criminal Bail Agreement and Affidavit for Appointed Counsel. Once the documents have been prepared by the Magistrate they are signed by the defendant. During Mr. Soustek's arraignment the Magistrate entered all of Mr. Soustek's brother's information onto Criminal Bail Agreement and the Affidavit for Appointed Counsel, as that was the name given to police at the time of the arrest. Anthony Soustek signed these documents at the arraignment ***but signed them in his own name, not his brother's***. (Contrary to the Criminal Complaint, A.R. 28).

Shortly after April 6th, Alexander Soustek (Petitioner's brother) realized that his brother Anthony had given the police his name when being arrested and he contacted the Eastern Regional Jail regarding the issue. This made the State aware that the man in jail under the name Alexander Soustek was in fact Anthony Soustek. The Petitioner was subsequently indicted in September of 2012 for the underlying misdemeanors as well as two counts of Identity Theft under West Virginia Code § 61-3-54, which states:

Any person who knowingly takes the name, birth date, social security number or other identifying information of another person, without the consent of that other

person, with the intent to fraudulently represent that he or she is the other person for the purpose of making financial or credit transactions in the other person's name, is guilty of a felony. (A.R. 6).

Outcome Below

Mr. Soustek, by Counsel, filed a Motion to Dismiss Counts I and II of the Indictment (Identity Theft), asking the Court to find, as a matter of law, that the Criminal Bail Agreement and Affidavit for Appointed Counsel are not financial or credit transactions as contemplated by the legislature when it created the Identity Theft law. (A.R. 3-4) Mr. Soustek argued that even if the state proved what it alleged in the Indictment, such conduct did not rise to Identity Theft because the State alleged no financial transaction. (A.R. 4).

That Motion was denied on the merits and the Court found that both the Bail and Appointed Counsel paperwork were financial transactions as contemplated by the statute. The Court also found that the Motion was improper and untimely. (A.R. 21).

On November 26th, the State moved to Revoke Mr. Soustek's Bond based upon new charges which occurred while Mr. Soustek was on Bond Supervision. On the same day that the Circuit Court denied Mr. Soustek's motion to Dismiss, it also revoked Mr. Soustek's bond and remanded him to the Eastern Regional Jail. On December 17th, Mr. Soustek pleaded guilty to Felony Identity Theft, Possession of a Controlled Substance, and Driving Under the Influence, however that plea was conditional and allowed Mr. Soustek to appeal the previously mentioned Motion to Dismiss. (See A.R. 11). Mr. Soustek was sentenced to two years in the penitentiary for Identity Theft, ninety days in the regional jail for possession of a controlled substance, and fined \$100 for Driving

Under the Influence. These sentences were ran consecutively but all suspended in favor of three years of probation. (A.R. 11).

SUMMARY OF ARGUMENT

The issue in this case is incredibly narrow and limited to the Motion to Dismiss which was denied in Morgan County Circuit Court. The Petitioner seeks a ruling that the Circuit Court erred when it denied the Petitioner’s Motion to Dismiss. Specifically, Petitioner seeks a ruling that as a matter of law, the Criminal Bail Agreement and the Affidavit for Appointed Counsel are not “financial” or “credit” transactions and therefore, even if the State proved all that was alleged in the Indictment, Mr. Soustek could not be found guilty of Tidentity Theft.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING THE DEFENDANT’S MOTION TO DISMISS BECAUSE A CRIMINAL BAIL AGREEMENT IS NOT A FINANCIAL TRANSACTION.

A person commits the crime of Identity Theft in the State of West Virginia when he or she knowingly takes the name, birth date, social security number or other identifying information of another person, without the consent of that other person, with the intent to fraudulently represent that he or she is the other person for the purpose of making financial or credit transactions in the other person’s name. W. Va. Code § 61-3-54.

Count I of the subject indictment alleged that Mr. Soustek had committed the offense of identity theft by providing his brother's name and driver's license number on the Criminal Bail Agreement in the underlying Magistrate Court case.

The statute itself does not define financial transaction but common sense would suggest that there has to be an exchange of money for goods or services (or in the event of a credit transaction, the exchange of credit for goods or services). The United States Code defines a transaction generally as "a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition." 18 USCA § 1956(c)(3). Although Courts have found that *payment* of cash bond is a financial transaction (*U.S. v. Laurenzana*, 113 F.3d 689 (7th Cir. 1997)), there was no payment of bond alleged in this case. The only allegation, as it relates to Count I of the Indictment, is that name and drivers license number of Alexander Soustek (Petitioner's brother) was atop the Criminal Bail Agreement. The Petitioner, Anthony Soustek, signed that document in his own name, not his brother's. There was no transaction of any kind. No money or credit was ever exchanged, nor any benefit derived.

After being arraigned in Magistrate Court, the Petitioner remained incarcerated and was unable to post bond until the name error had been fixed. Therefore, by the time the Bond listed on the Criminal Bail Agreement was actually utilized and a transaction actually occurred, the name had already been corrected. Therefore, no transfer of credit or money ever occurred under that document.

The State argued at the Motion hearing on November 27th, 2012, that the Criminal Bail Agreement was a "financial Document." (A.R. 15, lines 7-11). There is an important distinction between a financial document and a financial transaction. A financial document could arguably include any document relating to money, credit, or finances.

W. Va. Code § 61-3-54 does not establish a felony for using someone else's name on a "financial document," but instead establishes as felonious conduct the taking of someone's personal information for the purpose of making financial transactions in their name. W. Va. Code § 61-3-54.

The State then claimed that the Affidavit for Appointed Counsel and the Criminal Bail Agreement were both "in the nature of financial transactions" and that they were therefore properly charged as identity theft. (A.R. 15, lines 11-13). That is not sufficient. Looking at the document itself, the Criminal Bail Agreement is a notice-style document, designed to provide notice to the criminal defendant of 1) the amount of their bond; 2) whether that bond is cash only or if surety is permitted; and 3) what conditions will revoke their bond if it is posted and they are released from incarceration. (A.R. 38-40). There was simply no financial transaction in the Criminal Bail Agreement as charged in Count I of the Indictment. The conduct alleged by the State in Count I is irreconcilable with the law. As a matter of law, without a financial or credit transaction the charge cannot stand and the decision of the Circuit Court must be reversed.

Additionally, as is common practice in Morgan County, the defendant was not the one who wrote brother's name or driver's license number on the Criminal Bail Agreement. That was written by the Magistrate during arraignment, more than likely based upon information provided by the arresting officer. Therefore, after the Petitioner provided his brother's name to law enforcement, the information on the Criminal Bail Agreement was filled in for him based upon that false information. Whether or not the Petitioner's refusal to act or correct the Magistrate regarding the name and driver's license number on the paper work during the arraignment process

creates an additional issue will not be addressed herein, as the scope of this appeal is limited to that which was described in the conditional plea. (A.R. 10)

II. THE CIRCUIT COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS BECAUSE THE AFFIDAVIT FOR APPOINTED COUNSEL IS NOT A FINANCIAL TRANSACTION.

The same law and basic principles argued in Argument I pertaining to the Criminal Bail Agreement also apply to the Affidavit for Appointed Counsel. The State charged, in Count II of the Indictment, that Mr. Soustek committed Identity Theft by using his brother's name and driver's license number on the Affidavit for Appointed Counsel.

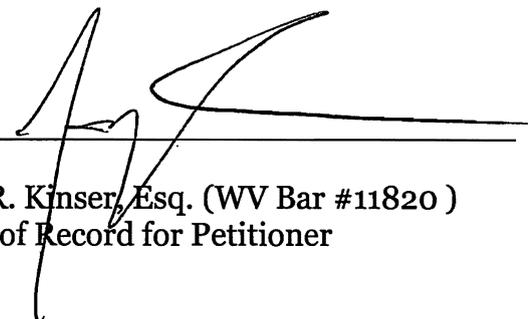
The Affidavit is not a financial transaction. It is a document, filled out by a Magistrate during arraignment, which determines the financial eligibility of a defendant to receive appointed counsel. (A.R. 29). After the identifying information atop the document is filled in by the Magistrate, the Court asks the defendant the information needed to answer the income, asset, and expenses section of the document. (A.R. 29). Once those sections are filled in, the defendant must sign at the bottom. While the subject matter is undeniably financial in nature, again there is no transaction. The State does not allege that Mr. Soustek misrepresented his income and the financial figures given to the Magistrate that day are correct. The only incorrect information on the Affidavit is the name and driver's license number listed at the top of the document, which were filled in by the Magistrate and not the defendant. (A.R. 29). While there are financial figures listed within the document it cannot be said that a financial transaction has taken place. The Affidavit is not used to purchase an attorney, it is simply a tool for the Circuit Judge to assess a defendant's indigence.

As a matter of law there is simply no financial transaction alleged by the State in Count II of the Indictment and therefore, the Circuit Court's denial of Mr. Soustek's Motion to Dismiss should be reversed.

CONCLUSION

In the Circuit Court of Morgan County, West Virginia v. Anthony Soustek, the State alleged Identity Theft. The State wanted to charge Mr. Soustek with Forgery, which is the norm when someone provides a sibling's name while being arrested for a misdemeanor. The problem was, after reviewing the evidence, Mr. Soustek signed all of the pertinent documents in his own name (A.R. 29, 31, 38,40). The State was not satisfied, however, with charging Mr. Soustek with misdemeanors, so it tried to stretch the law and charge him with Identity Theft. Even if the State proved all that it alleged, it would be unable to convict Mr. Soustek of Identity Theft because that crime requires the use of another's name and identifying information for the purpose of making a financial or credit transaction in that person's name. No financial transactions exist here; not in the Criminal Bail Agreement and not in the Affidavit for Appointed Counsel. It is not a question of fact, but a matter of law that these documents do not fall within the statute. For these reasons, the Circuit Court's denial of Mr. Soustek's Motion to Dismiss should be reversed, and this matter should be remanded for further proceedings.

Signed:


Joseph R. Kinser, Esq. (WV Bar #11820)
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2013 true and accurate copies of the foregoing **Petitioner's Brief** were sent overnight by UPS, contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Counsel for Respondent

Joseph R. Kinser, Esq. #11820
Public Defender Corporation
295 Monroe Street
Martinsburg, WV 25404
(304) 263-8909/fax (304] 267-0418

Signed: _____

Joseph R. Kinser, Esq. (WV Bar # 11820)
Counsel of Record for Petitioner