GILMAN LAW LLC

812 PITKIN AVE #102
P.O. BOX 2192
GLENWOOD SPRINGS, COLO. 81602
970.945.5671
GILMANLAWLLC@YAHOO.COM

Delivered via email to Andrew Quiat at
aquiat@alqpclaw.com

September 29, 2016

This opinion is prepared to evaluate whether or not a county commissioner violated C.R.S. 18-8-407(1) when executing a scheme where, while traveling to and attending an conferences, the commissioner collected cash per diem from another intergovernmental organization to pay for his meals while simultaneously charging the county purchasing card for those meals the organization intended the per diem to cover where the county has a policy restricting purchasing card use to authorized expenses.

Given that this is a criminal statute whose ultimate proof is subject to the beyond a reasonable doubt standard but sustains an indictment upon probable cause, this opinion will focus its factual inquiry to "determine whether the evidence, viewed as a whole, and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crimes charged beyond a reasonable doubt." *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988). Using the "sufficiency of the evidence" test gives us a useful tool to handle the facts and clarify the legal analysis. As for legal analysis, legal conclusions are made without using any test but reasonableness given the unavoidable hurdle of *stare decsis*.

Based on the facts pattern presented to me that I recite below, there is sufficient evidence to determine this county commissioner violated C.R.S. 18-8-407(1) under two theories: (1) that keeping the cash per diem while charging the card is embezzlement of public funds, and (2) that the meal charges to the card were made in violation of county policy because those charges were not authorized given the manner the commissioner made them and is embezzlement.

This opinion will first recite the fact pattern presented. It then will discuss the statute and its elements followed by an analysis that concludes the commissioner's acts satisfy all elements of embezzlement of public property under both theories.

The Facts

An organization the county pays thousands of dollars in annual dues to and is a member of has a policy of paying members (that is the county) a per diem of $50 per day for meal expenses incurred by a county commissioner attending conventions on its behalf. This organization also pays for the hotel and travel expenses of the commissioner upon the county

requesting reimbursement. The per diem, however, is provided in advance to the commissioner attending the meetings unless the attendee notifies the organization to cancel the advance.

The commissioner attended three of these conferences a year for three years and personally received a $50 per day per diem advance to attend these meetings. The commissioner did not disclose these per diem advances, no one else at the county knew about these advances, and the commissioner did not keep a contemporaneous accounting of the use of the per diem advance. The commissioner ultimately received $1,800.00 in per diem advances.

The commissioner has a purchasing card issued by the county whose use is subject to the rules and regulations of county. The county has specific policies addressing travel expenditures and purchasing card that requires receipts and sufficient documentation to substantiate the business purpose for the expense and identify other attendees to meals purchased with county funds.

Despite receiving this per diem, he charged the purchasing card for nearly $3,000.00 worth of meals while at these conventions. The commissioner did obtain receipts for these purchases but did not provide sufficient documentation to substantiate the business purpose for the expense and identify other attendees as required by county policy and IRS regulations. Specifically, there is a receipt that has three entrees purchased but the commissioner disclosed one other attendee.

The facts were uncovered when an assistant to the commissioner compiled the total expenses (including meals) the commissioner incurred for a single convention and sought reimbursement for the county from the organization. The organization replied that it would not reimburse the county for meal charges because it had already paid the commissioner a per diem advance for those meals already.

The commissioner was confronted with the information and, while admitting that the documentation he provided to the county was "probably inadequate," provided an explanation for his actions. The commissioner said that he would use his per diem while he was on "conference time" and the purchasing card while he was on "county time." However, receipts he provided show that he made purchases for meals on the card during these conferences. After confrontation, the commissioner also provided a handwritten accounting documenting his use of per diem for the latest conference, but this was prepared after the conference happened and after the confrontation. No receipts to support this per diem accounting were provided

Subsequently, the county ordered the commissioner to pay it $1,800.00 and instructed him to pay over any per diem received in the future and to put all purchases for these conferences on the purchasing card. The commissioner paid the county $1000.00 and his fellow commissioners each contributed $400.00 to reimburse the county fully for the per diem.

The Statute and its Elements

Colorado law defines embezzlement of public property as a crime where a "public servant who . . . comes into possession of any public moneys or public property of whatever description . . . and who knowingly converts any of such public moneys or property to his own use or to any use other than the public use authorized by law is guilty of embezzlement of public property." C.R.S. 18-8-407(1). There are four elements: (1) a public servant, (2) converts, (3) public moneys or properties, (4) to personal use or any use other than the public use authorized by law; there is no fraudulent intent requirement. *People v. McKnight*, 567 P.2d 811 (1977). It is uncontested the commissioner is a public servant.

Actions such as "submitting false vouchers, billing counties for non-reimbursable expenses, double-billing expenses, stealing cash from the petty cash fund, converting deposits belonging to a county, or any number of other acts" can constitute embezzlement. *People v. Tucker*, 631 P.2d 162, 164 (Colo. 1981). This should mean that the courts would find embezzlement even when presented with facts patterns dissimilar to precedent. *See id.*

Conversion a.k.a Theft

Conversion is "any distinct, unauthorized act of dominion or ownership exercised by one person over personal property belonging to another." *Byron v. York Inv. Co.,* 296 P.2d 742, 745 (1956). "Conversion of personal property cannot be maintained unless [deprived party] had a general or special property in the [items] converted, coupled with possession or the immediate right thereto." *Id.* The Court of Appeals has, however, held civil conversion and criminal theft are identical for issue preclusion purposes and satisfying the elements of theft would satisfy the element of conversion. *See A-1 Auto Repair & Detail v. Bilunas-Hardy*, 93 P.3d 598, 602 (Colo. App. 2004).

The elements of theft are: (1) that the defendant knowingly, (2) obtained, retained, or exercised control over anything of value, (3) of another (4) without authorization or by threat or deception, and (5) with the intent to deprive the other person permanently of the use or benefit of the thing of value. C.R.S. 18-4-401.

"A person acts knowingly or willfully, with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result." C.R.S. 18-1-501(6). Such awareness may be proven through circumstantial evidence. *People v. Quick*, 544 P.2d 629, 630 (Colo. 1976).

"Obtained, retained, or exercised control" includes the "failure to pay over the money collected for another" and the use of a government credit card in excess of authorization. *See Hucal v. People*, 493 P.2d 23, 26 (Colo. 1971); *See People v. Morise*, 859 P.2d 247, 248 (Colo. App. 1993). "Control [of the property] need not be unauthorized from the outset" to sustain a conviction. *People v. Treat*, 568 P.2d 473, 476 (Colo. 1977).

Without authorization or by threat or deception includes purchases on account in excess of authorization. *See Morise*, 859 P.2d at 248-49. It also reaches the negotiation of instruments. *See Hucal*, 493 P.2d at 26.

"Intent to deprive another permanently of the use or benefit of a thing of value may be inferred from the defendant's conduct and the circumstances of the case." *People v. Pedrie*, 727 P.2d 859, 862 (Colo. 1986). "Such an intent is sufficiently established if the prosecution proves a knowing use by the defendant inconsistent with the owner's permanent use and benefit." *Id.* One does not need a conscious objective to deprive another, proving a course of acts "practically certain to result in depriving another person of the use or benefit of the [property]" is sufficient. *People v. Anderson*, 773 P.2d 542, 545 (Colo. 1989).

Public Moneys or Property

Colorado law recognizes that the prohibition of embezzlement specifically reaches "the using of public money by [a government] officer for his own gain." *See People v. Schneider*, 292 P.2d 982, 985 (Colo. 1956) (internal citations omitted). "The purpose of the statute is to prevent the intentional misapplication of public funds for private gain by those officers entrusted with the responsibility for the correct disposition of the moneys." *People v. Skrbek*, 599 P.2d 272, 272 (Colo. App. 1979). The General Assembly defined the term "public moneys" as "all moneys under the control of or in the custody of governmental units." *People v. Gallegos*, 260 P.3d 15, 22 (Colo. App. 2010) (citing the definition of "public moneys" at C.R.S 11-47-103(12)). When a third party writes a check that is intended to pay the government those moneys belong to the government and are public moneys. *See Hucal*, 493 P.2d at 26-27.

Personal Use or Any Use Other Than the Public Use Authorized by Law

The embezzlement statute also prohibits use of public moneys for "any use other than the public use authorized by law." C.R.S. 18-8-407(1). Authorization by law in the embezzlement context means in accordance with policy. *See People v. Morise*, 859 P.2d 247, 248 (Colo. App. 1993); *People v. Fielden*, 427 P.2d 880, 880-1 (Colo. 1967).

In *Morise*, a school board member obtained $3,700 is cash advances from the school credit card while in Las Vegas at a conference that were not used for school purposes. 859 P.2d, at 248. The relevant travel polices prohibited use of the credit card for "nonconference or nontravel related expenses." *Id.* at 249. The court found that even if the funds were used for a school purpose like the school board member maintained, it was in violation of the policy that restricted purchases to conference and travel related expenses. *Id.*

In *Fielden*, the court found that a hospital employee did not embezzle public funds when he purchased building materials for his mountain lodge using a hospital purchasing account. 427 P.2d, at 880-1. The court found that such purchases were authorized use of public moneys because there was an existing policy allowing for such purchases so employees could obtain the hospital's discount for building materials and the person in charge of approving such purchases authorized the purchase alleged to be embezzlement. *Id.* at 881.

Analysis

There are two theories of prosecution viable that this portion will address in turn: (1) that keeping the cash per diem while charging the card is embezzlement of public funds, and (2) that the meal charges to the card were made in violation of county policy because those charges were not authorized given the manner the commissioner made them and is embezzlement. Either theory shows that the commissioner's acts fulfill all elements of the offense elucidated above.

Keeping the Cash Per Diem Under These Circumstances Is Embezzlement

There are a few reported cases that cover similar fact patterns concerning liability under other statutes. *See e.g. United States v. Ackley*, 296 F.3d 603, 605 (7th. Cir. 2002) (tribal chief taking cash per diem for hotel expenses while charging hotel expenses to the tribal credit card was theft from a gaming establishment); *United States v. Bush*, 58 F.3d 482, 485 (9th. Cir. 1995) (union officer collecting per diem from international union for expenses that would also be charged to local union credit card not fraud because both international and local approved of conduct); *In re Lee*, 933 So.2d 736, 751 (La. 2006) (judge disciplined for obtaining advance per diem for travel expense and charging the same expenses on the court credit card).

However, there is no reported Colorado case involving per diem abuse. Despite this fact, the per diem in this case was public money that the commissioner converted to his own use if he failed to use this per diem for meals. Given the factual circumstances, a jury could find that the per diem was public money and the commissioner converted this public money for his personal use by failing to document his use of per diem for meals.

Keeping the Cash Was Conversion

The facts show that the commissioner's behavior satisfies two elements with limited analysis: the commissioner kept obtained, retained, or exercised control over anything of value when keeping the per diem and did so with the intent to deprive the county permanently of the money. The commissioner spent the money and only paid part of it back after being ordered to pay it all back and these elements are satisfied.

Whether this was done knowingly, without authorization, and to property "of another" requires greater consideration. Ultimately, all three of these elements are satisfied.

First, the commissioner used the per diem without authorization even if he purchased meals with the per diem. The purchasing card is intended to replace petty cash and reimbursements for small purchases, not as an additional benefit when one has received cash for purchases. *See* Garfield County Financial Procedure No. 1, "Purchasing Card," p. 3 (04/08/2013). If the commissioner wanted to use the purchasing card to buy meals while at the conventions he should have paid over the cash to the county. Instead, he either kept the per diem for personal use or spent it on undocumented meals and then decided to charge the purchasing card. The intent of the purchasing card policy was not to keep the cash and use the card, it was intended to have county employees use the card instead. The county did not authorize the per diem use because it directed the commissioner to use the purchasing card instead.

Second, the per diem was property of the county because it was public money. *See discussion infra*. The county pays thousands of dollars to the organization to receive the benefits of membership, including the right to reimbursement from that organization. Paying the per diem to the commissioner is supposed to relive the burden of the county to pay for meals and later seek reimbursement from the organization. Properly documenting meal expenses is more burdensome than documenting other travel expenses that are documented by a single invoice like transportation and accommodation. Per diem simplifies this by provisioning a flat payment for expenses that obviates the need to use a purchasing card, but the per diem is still the county's money because it is in control of a county fiduciary.

The commissioner will argue that the check was made out to him personally and therefore cannot be the county's money. The fact that the check was endorsed in the name of the commissioner is not dispositive for the commissioner because the county was the intended beneficiary of the funds. Even if the per diem was his personally upon receipt, the per diem became public moneys at the moment the commissioner decided to charge meals on the purchasing card because the commissioner possessed this per diem in his official character as trustee for the county. In that scenario he was to use the per diem for meals before using the purchasing card for meal costs in excess of the per diem.

Third, the circumstances show this commissioner did all of this knowing the result of the conduct. He knew about the county purchasing card policy, he knew that he was receiving per diem from the organization for meals while knowingly charging meals to the county, and he knew the county was the beneficiary of the money while concealing the fact he was receiving per diem from the county. The evidence sustains a finding that the commissioner converted property and we can move on to the other elements.

The Cash Was Public Money

The commissioner will undoubtedly argue the per diem was not public money because the check was made out to him personally. This argument fails because public moneys are "all moneys under the control of or in the custody of governmental units." *Gallegos*, 260 P.3d at 22. The per diem is in control of the county because the organization pays per diem to the commissioner as part of its reimbursement package it provides to the county for the commissioner's travel expenses and the commissioner has a fiduciary duty to use it for the county's benefit before appropriating it to his own use. *See McNally v. United States,* 482 U.S. 350, 355 (1987). The commissioner "possess[essed these funds] in his official character." *See United States v. Northway*, 120 U.S. 327, 331 (1887).

The per diem was obtained in the commissioner's official character because the organization's policy causing the issuance of the per diem check identifies the county as the beneficiary of the per diem. This policy creates a trust relationship given the commissioner's fiduciary duty to the county and the per diem is public money under this trust theory. The per diem is public money until the end of the day where the remainder not used for the purpose underlying the per diem (in this case meals) becomes the unencumbered property of the recipient. Only after the day covered by the per diem is done does a frugal commissioner gain the right to the remainder without abuse of trust. *See* 26 C.F.R §1.62-(2)(f)(2).

Here the evidence substantiates the allegations that the commissioner that used the per diem in connection with a purchasing card in a manner to maximize costs to the county and did not keep a contemporaneous accounting to refute this allegation. This fact is supported by his charges of nearly $3,000.00 for meals when a presumptive reasonableness for such meal costs for such time would be the obvious $1,800.00. Even if the commissioner is telling the truth, he spent far more on meals than is reasonable using public moneys.

The commissioner is also not an innocent frugal commissioner because he arbitrarily distinguished county time from organization time in order to minimize expenses on organization time and maximize expenses on county time to keep a maximum amount of per diem. The commissioner needed to properly document his per diem use on days he used the purchasing card for meal expenses because such expense could only be authorized if the per diem was first exhausted on meals.

Given that the commissioner was using his purchasing card for meals he needed to first exhaust his per diem to avoid misappropriating the public money represented by the per diem. The commissioner, however, failed to document the per diem's exhaustion and seems to not have used such per diem on meals at all given the number of meal expenses charged to the county. The evidence permits the inference that the per diem was under control of the county and therefore public moneys.

The Cash Was Used Personally

The commissioner's use of the cash was for personal gain under theory that he failed to use the per diem on meals so he could instead charge the meals on the purchasing card and keep the per diem for his unrestricted use. This conclusion is supported by the fact the commissioner failed to keep a contemporaneous accounting of his per diem and the fact some charges were made to the county while he was at the convention's proceedings in violation of his arbitrary excuse for why he charged the county purchasing card. Both facts support a finding of personal use of the per diem.

First, the commissioner did not make a contemporaneous accounting and one could infer that the per diem was not used for meals. Only when confronted did the commissioner provide a handwritten accounting of his per diem use. This was compiled after the latest convention and there was no accounting at all for all the rest of the conventions. While a prosecutor has the burden to prove this fact, the circumstances allow the inference that failing to properly account for the per diem means the per diem was not used for meals.

Second, the commissioner argues he split his meal spending between the per diem and the purchasing card based on a distinction between "county time" and "organization time" and this shows there was no personal use. However, the fact that the receipts show he charged items while undoubtedly on "organization time" shows he arbitrarily retained per diem while charging for meals that were supposed to be paid for with the per diem.

Based on these facts, an inference could be made that the commissioner pocketed the per diem for personal use rather than expended these funds for county purposes.

The Charges for Meals Were Unauthorized and That Is Embezzlement of Public Property

Since using a purchasing card to receive cash advances is probably not distinct enough from using a purchasing card for purchases of goods and services to matter, this theory has the strength of clear precedent showing that purchasing card charges in excess of policy sustains a conviction. *See Morise*, 859 P.2d at 248-49. There are distinctions between *Morise* and this fact pattern that merit discussion though.

Ultimately, these distinctions likely do not matter. The policy is clear, either document the charges sufficiently or face personal responsibility for those charges. The commissioner did not document the charges sufficiently and did not personally reimburse the county for those charges and therefore violated the policy. Given the other facts, this was embezzlement of public property.

The Charges Are Conversion

Three of conversion's elements require little analysis: the commissioner kept obtained, retained, or exercised control over anything of value; he ate the meals after all. The property converted was the county's because the county had to pay for the meal charges. And there is evidence of intent to permanently deprive the county of these moneys because commissioner did not pay the county back for these charges and the fact he only paid $1000.00 toward the per diem reimbursement shows he did not have the money to pay the county back for the charges. The more significant issues are whether this was done knowingly and without authorization.

First, the commissioner may argue that he was authorized to charge the card for his meals. This argument fails because the policy only authorizes charges that are reasonable and if documented properly or, in the case of charges that have faulty documentation or unreasonable, authorizes charges if the charger takes personal responsibility for the charge. It also fails because if the commissioner was really using the $50 per diem for meals these excess charges were unreasonable given that the maximum IRS authorized per diem was $71. The purchasing card charges are in excess of $21 dollars almost everyday and the county's policy is to not exceed the IRS guidelines to avoid the IRS finding its reimbursement plan "unaccountable." *See* 26 C.F.R §1.62-2(h)(2)(i)(b).

Second, the circumstances show this commissioner did all of this knowing the result of his conduct. He knew about the county purchasing card policy requiring documentation and reasonableness, he knew that he was not documenting his purchases properly and spending in excess of guidelines, and he knew the county was the ultimate payer of these charges. The evidence sustains a finding that the commissioner converted property and we can move on to the other elements.

The Charges Are the Use of Public Moneys

The commissioner may argue that even if he violates his duty to reimburse, such failure does not involve "public moneys" because the charges to the card did not use public moneys; it was the county paying the monthly bill that did. This argument seems foreclosed by *Morise* because that case involved cash advances from a credit card and that does not seem distinct enough from meal charges to say violative meal charges do not implicate public moneys but violative cash advances do. But *Morise* does not explicitly reach this issue and there is some difference of opinion in other jurisdictions. *Compare Bradley*, 142 Cal.App.4th at 259-260, *with State v. Pruett*, 139 P.3d 753, 757, n. 4 (Ida. App. 2006) (suggesting unauthorized credit card use cannot misappropriate public moneys under Idaho law.)

Given that *Morise* did not seem concerned with this issue and assumed the unauthorized credit card use qualified use of public moneys and *Pruett*'s discussion is not structurally persuasive — it is out of state, from an intermediate court of appeal, and dicta — the charges are the use of public moneys in Colorado.

The Charges Were Unauthorized

Morise and *Fielden*, described *supra*, represent the opposite poles of what is a charge without authorization. *Morise* is basically a case where a person got cash to gamble with by doing cash advances on the school credit card. *Fielden* is a case where an employee had permission for the purchase and such purchases through the hospital were common, so long as the employee reimbursed the funds. The commissioner's fact pattern is closer to *Morise* than *Fielden* because the commissioner failed to comply with county policy and concealed facts related to those violations.

The relevant policy in *Morise* restricted purchases to conference and travel expenses so even if the purchases were for school related items they were unauthorized. The relevant policy in the fact pattern makes charges the personal responsibility of the charger if the policy is not followed. The commissioner, based on his own admissions and based on the other evidence, violated the travel expenditures policy by failing to fully document his purchases and failing to reimburse the county for those inadequately documented purchases.

It could be argued, however, that the commissioner's purchases are like the ones in *Fielden* because the commissioner can reimburse the county and stay within policy just like the employee in *Fielden* could reimburse the hospital and stay within policy. There is a substantial difference between the two; the employee in *Fielden* complied with the relevant policy and the commissioner violated the relevant policy. The policy here required the commissioner to provide a specific level of documentation for all travel expenses made on the purchasing card within 30 days or take personal responsibility for those charges.

While the commissioner may argue the per diem reimbursement means the county decided to reach an $1,800.00 settlement with him for the reimbursement of all unauthorized charges and bring him into compliance with policy, this argument fails like the employee's in *Hucal*. The argument in *Hucal* was that because the city ultimately received the $1,000.00 that the embezzler stole, there was no permanent deprivation of property. The court characterized this

argument as requiring "every time stolen property was recovered and returned to its true owner the thief . . . be acquitted" and called "[s]uch a rule . . . inane." Finding that the commissioner's unauthorized expenses that require personal responsibility turn into authorized expenses that cause no personal liability is similarly inane because it the acquits the commissioner so long as he has a cooperative county government that ignores the policy.

Second, the documentation was false in at least two circumstances: (1) when meals were charged under the "county time" theory when is was clearly not "county time" at the time of the charge, and (2) when the commissioner listed only two attendees for county purchased dinner when the meal count shows three attendees. Submitting false documentation is not in accordance with policy and triggers personal responsibility.

The commissioner failed to follow policy by failing to document these charges and thus was liable to the county for reimbursement. The commissioner may have reimbursed the county for the per diem retained, but the commissioners failings here have nothing to do with the per diem and his use of the purchasing card was unauthorized by failing to document the meal purchases and failing to reimburse the county for those poorly documented purchases.

Conclusion

Embezzlement of public property is a class five felony with a potential sentence of one to three years in the custody of the Department of Corrections. C.R.S. 18-8-407 .The law further provides that "[e]very person convicted under the provisions of this section shall be forever thereafter ineligible and disqualified from being a member of the general assembly of this state or from holding any office of trust or profit in this state." *Id*.

The offense has four elements: (1) a public servant, (2) converts, (3) public moneys or properties, (4) to personal use or any use other than the public use authorized by law; there is no fraudulent intent requirement. *People v. McKnight*, 567 P.2d 811 (1977). Given the fact pattern, all four elements are satisfied given reasonable inferences made based on the facts.

1. It is uncontested the commissioner is a public servant so this is satisfied.

2. The commissioner converted the per diem from the county to his personal use and converted money from the county by using his purchasing card in violation of policy.

3. The per diem was public moneys because those moneys were under control of a county fiduciary for the purpose of purchasing meals. The purchasing charges undoubtedly caused public moneys to be spent.

4. If the per diem was not used for meals it was converted to personal use. If charges were not documented according to policy and there was no reimbursement it was not a public use authorized by law.

It is my opinion that, under the sufficiency of the evidence standard, there is sufficient evidence to sustain an embezzlement of public property conviction under C.R.S. 18-8-407. This opinion is drafted based on the facts presented to me that are recited in this memorandum. There may be additional facts unknown to me that may reinforce my opinion or render it irrelevant. This opinion is not intended to be relied upon by any prosecutor, grand jury, or tribunal and is made for the purposes of analyzing the fact pattern recited and how C.R.S. 18-8-407 applies to it.

Ryan C. Gilman, Esq.