IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

05-1351
Howe

STATE OF ARIZONA,	) 1 CA-CR 05-1188
	) 1 CA-CR 05-1189
Appellant,	) (Consolidated)
	)
v.	) DEPARTMENT E
	)
BRIAN HOUGH AND BRIAN HOUNSHELL,	) Maricopa County
	) Superior Court Nos.
Appellees.	) CR 2005-010006-002 DT
	) CR 2005-010006-001 DT

ORDER

The above-mentioned matter was duly submitted to the Court. The Court has this day rendered its Memorandum Decision.

IT IS ORDERED that the Memorandum Decision be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the Memorandum Decision, be sent to each party appearing herein or to the attorney for such party, and to the Honorable J. Richard Gama, Judge.

DATED this 9th day of January, 2007.

Patricia K. Norris

PATIRICA K. NORRIS, Judge

1 CA-CR 05-1188

Consolidated with:
1 CA-CR 05-1189

Maricopa County Superior Court
CR2005-010006-002DT

A true copy of the foregoing
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellant, v. BRIAN HOUGH AND BRIAN HOUNSHELL, Appellees.	)	1 CA-CR 05-1188 1 CA-CR 05-1189 (Consolidated) DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

05-1351
Howe

Appeal from the Superior Court in Maricopa County

Cause Nos. CR 2005-010006-002 DT and CR 2005-010006-001 DT

The Honorable J. Richard Gama, Judge

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

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N O R R I S, Judge

¶1 In these consolidated cases, the State of Arizona appeals the dismissal of the indictments against Brian Hounshell

and Brian Hough for lack of venue. For the following reasons, we affirm the decision of the superior court in part and reverse and remand in part.

FACTS AND PROCEDURAL BACKGROUND

¶2 Brian Hounshell is the sheriff of Apache County and Brian Hough is the chief deputy. In May 2005, a state grand jury indicted Hounshell and Hough for offenses alleged to have been committed in the course of their duties with the sheriff's office. Hounshell was charged with two counts of misuse of public monies, one count of fraudulent schemes and artifices, and one count of theft. Hough was charged with two counts of misuse of public monies.

¶3 The indictment did not allege that any offense occurred at any specific time, but alleged only that each occurred in the five-year period between January 1, 2000 and December 31, 2004. Further, the indictment did not provide a factual basis for any of the counts, but instead recited the applicable statutes.[1] The transcripts of the grand jury proceeding presented to the superior court ("grand jury record"), the State's response to the motions to dismiss, and the State's opening appellate brief focused on the following allegations. As to Hounshell:

[1]We express no opinion regarding the sufficiency of the indictment.

In February 2002, Hounshell and two employees of the sheriff's office used a county vehicle to travel to Phoenix to purchase materials to remodel a bathroom in Hounshell's home. The trip took two days, and the personnel involved were paid their regular salary as well as per diem.

In August 2002, Hounshell directed two employees of the sheriff's office to travel to Phoenix in a county vehicle to obtain campaign signs for then-gubernatorial candidate Janet Napolitano and return those signs to Apache County. Those employees were paid their regular salary as well as per diem.

In August 2003, Hounshell and an employee of the sheriff's office used a county truck and trailer to travel to Phoenix to haul a pickup for Hounshell's son.

In May 2004, Hounshell used a county trailer to haul his personal motorcycle from his home in Apache County to a motorcycle dealer in Mesa and return it that same day. It was further alleged that county funds were used to purchase fuel for this trip, and that Hounshell purchased the fuel in Maricopa County with a county credit card.

¶4 As to Hough:

Hough approved the time sheets and per diem requests of the employees of the sheriff's office who participated in the above events, even though Hough knew these employees were not conducting county business during the time claimed.

¶5 Each offense was alleged to have occurred in Apache, Maricopa, Navajo, Gila and/or Coconino Counties. Pursuant to

Arizona Revised Statutes ("A.R.S.") section 21-425 (Supp. 2006),[2] the indictment included a finding that the offenses were committed in whole or in part in Maricopa County. Based on this finding, the assignment judge designated Maricopa County as the county of venue for purposes of trial.

¶6 Hounshell and Hough each moved to dismiss the indictment for lack of venue. Each argued that venue could not lie in Maricopa County because the events in question arose in the context of their duties with the Apache County Sheriff's Office, and any alleged criminal conduct occurred in Apache County. They further argued that any acts that occurred in Maricopa County were not criminal.

¶7 The superior court granted the motions to dismiss. The court held:

> The Court does find that the acts/conduct [constituting an element of the offenses charged] alleged to have been committed by these defendants occurred principally in Apache County. The conduct alleged against Defendant Hounshell occurred in his official capacity as Sheriff of Apache County. Further, the acts requisite to the commission of the alleged offenses principally occurred within Apache County. Similarly, Defendant Hough's alleged conduct arose from his employment with the Sheriff of Apache [County] and this conduct occurred exclusively within Apache County.

[2]We cite to the current version of a statute when it is effectively the same as the version in effect at the time of the alleged offense.

(First alteration in original.)

¶8 The superior court further found "that the record is procedurally defective in that the assigned grand jury judicial officer did not address and/or set forth the appropriate factual findings regarding the issue of venue." Finally, the court concluded:

> The Court having considered the acts requisite and/or essential to the commission of these alleged criminal offenses does, further finds [sic] that venue appropriately lies in Apache County. Under these circumstances, Apache County should have been the county of venue designated for purposes of trial.

The State timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (Supp. 2006), 13-4031 (Supp. 2006), and -4032(1) (Supp. 2006).

I. A.R.S. § 21-425; Designation of Venue

¶9 In dismissing the indictments for lack of venue, the superior court found the grand jury record "procedurally defective" because the "assigned grand jury officer did not address and/or set forth the appropriate factual findings regarding the issue of venue," as required by A.R.S. § 21-425. The record was not procedurally defective. Section 21-425 provides that an indictment shall include a finding as to the county or counties in which the offense was committed.

"Thereupon, the assignment judge shall, by order, designate the county of venue for the purpose of trial." A.R.S. § 21-425. The indictment in this case stated that the offenses were committed in whole or in part in Maricopa County, and made express reference to A.R.S. § 21-425. By separate order, the assignment judge designated Maricopa County as the county of venue for purposes of trial and all further proceedings. Nothing more was required.

II. Applicable Venue Provisions

¶10 The superior court's order dismissing the indictments necessarily implicates Arizona's constitutional and statutory provisions regarding venue. *State v. Aussie*, 175 Ariz. 125, 126, 854 P.2d 158, 159 (App. 1993); *State v. Cox*, 25 Ariz. App. 328, 332, 543 P.2d 449, 453 (1975).[3]

¶11 The Arizona Constitution, Article 2, Section 24 states: "In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . . ." In criminal prosecutions, venue is governed by A.R.S. § 13-109 (Supp. 2006). Subsection A of that statute provides, "Criminal prosecutions shall be tried in the county in which conduct constituting any element of the offense or a

[3] We review a superior court's decision on a motion to dismiss criminal charges for an abuse of discretion. *State v. Ramsey*, 211 Ariz. 529, 532, ¶ 5, 124 P.3d 756, 759 (App. 2005).

result of such conduct occurred, unless otherwise provided by law." A.R.S. § 13-109(A).[4] Section 13-109 (B)(1) provides, "If conduct constituting an element of an offense or a result constituting an element of an offense occurs in two or more counties, trial of the offense may be held in any of the counties concerned[.]" A.R.S. § 13-109(B)(1). In addressing venue issues, Arizona courts have considered the constitutional and statutory provisions in tandem. *See State v. Comer*, 165 Ariz. 413, 422-23, 799 P.2d 333, 342-43 (1990). Venue need only be proven by a preponderance of the evidence, and may be established through circumstantial evidence. *State v. Mohr*, 150 Ariz. 564, 566, 724 P.2d 1233, 1235 (App. 1986).

III. The Right to a Particular Venue

¶12 As an initial matter, Hounshell and Hough argue that pursuant to Article 2, Section 24, they have an absolute right to be tried in Apache County because the offenses occurred there. And, through counsel at oral argument before this court, Hough argues that if venue would be proper in multiple counties, this provision requires the defendant to be tried in the county where he lives "so he may have the benefit of his good character and standing with his neighbors . . . ." *Cox*, 25 Ariz. App. at 328-30, 543 P.2d at 451 (quoting *State v. Bunker*, 17 P. 651, 653

[4] "Conduct means an act or omission and its accompanying culpable mental state." A.R.S. § 13-105(5) (Supp. 2006).

(Kan. 1888)). The State counters that the constitutional provision was not designed to establish a particular venue but to guarantee a criminal defendant a trial by an impartial jury in the county in which the offense is alleged to have been committed. We agree with the State.

¶13 It has long been held that this constitutional provision preserves "the right of trial by an *impartial jury in the county* in which the offense is alleged to have been committed [] rather than the absolute right *to a trial in the county.*" *State ex rel. Sullivan v. Patterson*, 64 Ariz. 40, 47, 165 P.2d 309, 313 (1946)(emphasis in original). In other words, the provision emphasizes the right to an impartial jury in the county in which the offense was allegedly committed, not the right to a trial in a particular county.

¶14 Further, although Article 2, Section 24, limits venue to the county in which the offense is alleged to have been committed, it does not on its face require criminal charges to be tried in a particular county when criminal conduct has occurred in multiple counties. In such a situation, the constitutional provision, when applied in tandem with the venue statute, allows the criminal prosecution to be tried in any county in which "conduct constituting an element of an offense or a result constituting an element of the offense" occurred.

Thus, the constitutional provision, although implicated here, does not give Hounshell and Hough an absolute right to be tried in Apache County.

IV. Venue

¶15 The trial court found that "the acts/conduct [constituting an element of the offenses charged] alleged to have been committed by [Hounshell and Hough] occurred principally in Apache County," and that, for this reason, "Apache County should have been the county of venue designated for purposes of trial." (First alteration in original.) Whether acts or conduct "principally occurred" in a given county is not the test for venue. Instead, as discussed above, a criminal case "shall be tried in the county in which conduct constituting any element of the offenses or a result of such conduct occurred[,]" and if "conduct constituting an element of an offense or a result constituting an element of an offense occurs in two or more counties," trial is proper in any of the "counties concerned[.]" The question we must decide, therefore, is whether these provisions authorized venue in Maricopa County.[5]

[5]It is not completely clear whether under A.R.S. § 13-109(A), simply causing a "result" in a given county confers venue in that county. *Aussie*, 175 Ariz. at 127, 854 P.2d at 160. However, whether simply causing a result under that provision confers venue in a particular county is not an issue we must decide as against either Hounshell or Hough. As to Hounshell, conduct constituting elements of the charged offenses

A. Theft

¶16 Hounshell was charged with one count of theft pursuant to A.R.S. § 13-1802. The indictment alleged three alternate theories. Significantly, it was alleged that Hounshell committed theft by conversion pursuant to A.R.S. § 13-1802(A)(2). This section provides that a person commits theft if, without lawful authority, he knowingly converts for an unauthorized term or use, the services or property of another which has been entrusted to him for an authorized and limited term or use. A.R.S. § 13-1802(A)(2) (Supp. 2006). While the indictment did not provide any factual basis for the theft charge, each of the four alleged events could have constituted a violation of this offense. Hounshell arguably converted for an unauthorized term or use (that is, for his personal affairs) the services and property of another (that is, employees of the Apache County sheriff's office, as well as county vehicles) that had been entrusted to him as the county sheriff for a limited, authorized term or use (that is, for the official business of the county sheriff's office).

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occurred in Maricopa County. *See supra*, ¶ 3. As to Hough, even if we were to assume simply causing a result sufficed for venue, Hough did not cause any result in Maricopa County, nor did he commit any conduct constituting an element of the offense charged against him in Maricopa County.

¶17 Importantly, this particular theft offense is a continuing offense. "[A] 'continuing offense' endures over a period of time, and its commission is ongoing until cessation of the proscribed conduct." *State v. Helmer*, 203 Ariz. 309, 310, ¶ 8, 53 P.3d 1153, 1154 (App. 2002). The continuing nature of the offense is established by "the explicit language of the substantive criminal statute[.]" *Id.* at 311, ¶ 8, 53 P.3d at 1155 (quoting *Toussie v. United States*, 397 U.S. 112, 115 (1970)).[6] Pursuant to the language of A.R.S. § 13-1802(A)(2), the offense of theft by conversion is ongoing so long as the unauthorized term or use continues.

¶18 In this case, the unauthorized "term or use" was ongoing so long as the personnel and equipment were being used for Hounshell's personal benefit and not for official county business. Therefore, the conversion and the "term or use," which are elements of theft by conversion, continued during the time that the equipment and personnel were in Maricopa County. Therefore, venue for this offense was proper in Maricopa County.

B. Fraudulent Schemes and Artifices

¶19 Hounshell was also charged with fraudulent schemes and artifices ("fraud") pursuant to A.R.S. § 13-2310(A). This

[6]An offense may also be a continuing offense when "the nature of the crime involved is such that [the legislature] must assuredly have intended that it be treated as a continuing one." *Id.* (alteration in original).

section provides, "Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony." A.R.S. § 13-2310(A) (Supp. 2006). Again, while the indictment did not provide any factual basis for the fraud charge, each of the four events described above arguably could have constituted a violation of this offense.

¶20 One of the elements of fraud is "obtain[ing] any benefit." *State v. Cook*, 185 Ariz. 358, 363, 916 P.2d 1074, 1079 (App. 1995). Here, the alleged benefit to Hounshell was the use of county vehicles and personnel for his personal affairs. That benefit continued as long as county personnel and vehicles were used to conduct Hounshell's personal affairs. Those personnel and vehicles were used in part in Maricopa County. Therefore, the benefit to Hounshell was obtained in part in Maricopa County. Because conduct constituting an element of the offense of fraud occurred in Maricopa County, venue for the charge of fraud is proper in Maricopa County. The superior court should not have dismissed the indictment on this count for lack of venue.

C. Misuse of Public Monies

1. Hounshell

¶21 Hounshell was charged with two counts of misuse of public monies (misuse) pursuant to A.R.S. § 35-301. This offense applies to public officers or other persons charged with "the receipt, safekeeping, transfer or disbursement of public money[.]" A.R.S. § 35-301 (2000). Section 35-301(1) provides that such a person is guilty of a class 4 felony if that person, "without authority of law, appropriates [public money], or any portion thereof, to his own use, or to the use of another." A.R.S. § 35-301(1). Subsection (9) provides that a person is guilty of the offense if he "knowingly transfer[s] [] the money when not authorized or directed by law." A.R.S. § 35-301(9). "Public money" is defined in relevant part as money belonging to, received by, or held by county officers in their official capacity. A.R.S. § 35-302 (Supp. 2006).

¶22 As with all the other counts, the indictment did not provide any factual basis for the counts of misuse of public monies. However, the actions of Hounshell in connection with one of the alleged events - the May 2004 use of a county trailer to haul his motorcycle from his home in Apache County to a motorcycle dealer in Mesa - arguably constituted a violation of A.R.S. § 35-301. The grand jury record presented to the

superior court reflected Hounshell had used a county credit card to purchase gas in Maricopa County on this trip. Hounshell's alleged use of this credit card could constitute either unlawful appropriation or transfer, each of which is an element of the offense of misuse of public monies as charged against him. Accordingly, venue for these charges was proper in Maricopa County.

2. Hough

¶23 Hough was also charged with misuse under A.R.S. § 35-301. The superior court correctly held that venue in Maricopa County was improper on this count. The grand jury record before the superior court did not reflect any conduct constituting an element of this offense, or, for that matter, conduct causing a result, in Maricopa County. *See supra* ¶ 4.

¶24 The only evidence introduced to the grand jury was that Hough approved the time sheets and per diem requests of the employees who performed the work with Hounshell, or for him, even though Hough knew those employees were not conducting county business. Hough's approval of these time sheets and per diem requests occurred solely in Apache County, and the arguable misuse of public monies (in other words, the transfer) could only have occurred in Apache County when the employees received

their pay and per diem after Hough had approved those payments.[7]

V. Joinder and Consolidation

¶25 In his answering brief, Hounshell argues that if we reverse the superior court's venue ruling as to him, but affirm its ruling as to Hough, we should hold that Apache County is the proper venue for both cases for reasons of judicial economy and efficiency. This issue was neither presented to nor decided by the superior court and we decline to decide whether the cases against Hounshell and Hough may be joined, or consolidated, or both, in a single action in either Maricopa or Apache Counties pursuant to Rule 13.3(b) and/or (c). While we have addressed the issue of which county or counties in which venue may lie pursuant to A.R.S. § 13-109, our decision does not preclude the possibility of joinder, consolidation, or severance of any combination of offenses or parties pursuant to Rules 13.3 and 13.4. However, the propriety of any of those actions is not

[7]In oral argument, the State asserted that the misuse of public monies charge could be tried in Maricopa County because the indictment charged Hough as an accomplice. Although the count of the indictment against Hough listed the accomplice statutes, the grand jury record presented to the superior court contained no evidence that Hough acted as an accomplice to Hounshell's alleged misuse of public monies. Further, the grand jury record contained no evidence that Hough served as an accomplice to anyone else's misuse of public monies. We note that during oral argument, the State acknowledged that the only evidence contained in the grand jury record as against Hough was that he had approved the times sheets and per diem requests submitted to him.

properly before us.

CONCLUSION

¶26 For the reasons stated above, we affirm the superior court's ruling that venue for the charge of misuse of public monies against Hough lies solely in Apache County and not Maricopa County. We reverse the superior court's ruling that venue for the charges against Hounshell does not lie in Maricopa County and remand for proceedings consistent with this decision.

PATRICIA K. NORRIS, Judge

CONCURRING:

ANN A. SCOTT TIMMER, Presiding Judge

DIANE M. JOHNSEN, Judge