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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JIM TERRY — APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS. — NO. 2007-KA-2260

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JIM TERRY **APPELLANT**

vs. **CAUSE No. 2007-KA-02260-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Lowndes County, Mississippi in which the Appellant was convicted and sentenced for his felony of **EMBEZZLEMENT**.

STATEMENT OF FACTS

The Appellant brings no challenge as to the sufficiency or weight of the evidence in support of his conviction. Accordingly, it is unnecessary to set out the facts of his guilt in detail.

The Appellant was a member of the Lowndes County Board of Supervisors. On account of his position with the county government, he was issued a county - owned automobile for use in his work as a supervisor and a fuelman card and a personal identification number with which to use the card. The Appellant took office on the first Monday of 2004. (R. Vol. 2, pp. 124 - 129).

On 5 October 2005, the Lowndes County Sheriff asked one of his officers to investigate a

complaint from a citizen to the effect that the Appellant had used the county - issued fuelman card to pay for gasoline for a private vehicle. Toward this end, the officer viewed a security camera recording and spoke to employees of the gas station at which this occurred. The fuelman records pertaining to the Appellant's purchases of gasoline from the time he took office to September of 2005 were acquired. After reviewing the records, the decision was made to interview the Appellant.

The interview occurred in the Appellant's office. The interview was recorded. In this interview the Appellant admitted having used the fuelman card to buy gasoline for a non-county owned vehicle, but he said he did so because there was a "declared emergency" and that he had borrowed the truck so as to assist in removing felled trees. It was his opinion of law that a member of the board of supervisors had broad powers to do such things in the case of an emergency. He denied having used the card to buy gasoline for someone else.

There were discrepancies with respect to the mileage indicated when gasoline was purchased with the card. When questioned about this, the Appellant mentioned that he toured the Delta region of the State, that he took personal tours of the Delta in order to "network" with people. These tours seemed to involve locations near casinos. (R. Vol. 2, pp. 133 - 149; State's Exhibit 2).

The Appellant's comment about his "personal tours" caused further investigation. The State Auditor's Office became involved. In the course of its investigation, it found that the Appellant had players cards with casinos in Philadelphia, Tunica and Robinsonville. By comparing dates and places of fuel purchases with the fuelman card to dates of known visits by the Appellant to casinos, the Auditor's Office determined that many instances of usage of the county vehicle assigned to the Appellant and the fuelman card assigned to that vehicle were for

personal and unauthorized purposes in 2004 and 2005. During that time frame, the Appellant purchased a total of 1,369.1 gallons of fuel for his personal trips, which cost Lowndes County the sum of $2,227.29. (R. Vol. 3, pp. 196 - 267; State's exhibits 9A and B).

STATEMENT OF ISSUES

1. WAS THE INDICTMENT EXHIBITED AGAINST THE APPELLANT SUFFICIENT TO APPRISE HIM OF THE NATURE OF THE CHARGE AGAINST HIM?

SUMMARY OF ARGUMENT

THAT THE INDICTMENT WAS SUFFICIENT TO NOTICE THE APPELLANT OF THE CHARGE AGAINST HIM

ARGUMENT

THAT THE INDICTMENT WAS SUFFICIENT TO NOTICE THE APPELLANT OF THE CHARGE AGAINST HIM

The Appellant alleges that the indictment returned against him, one in which one charge of embezzlement under Miss. Code Ann. Section 97-11-31 (Rev. 2006) was alleged, was insufficient to notice him of the specific dates that he committed embezzlement. The indictment alleged that the Appellant committed embezzlement "on or about or between January 1, 2004 through 31 December 2005. (R. Vol. 1, pg. 3).

The Appellant alleges that he filed a motion to dismiss the indictment but claims that his motion to dismiss is not a part of the record here on account of clerical error. He says that he intends to supplement the record with the motion. (Brief for the Appellant at 1, fn 1). However, at this time there does not appear to be any supplementation of the record with any such motion. Nonetheless, there was a hearing on a motion to dismiss. (R. Vol. 2, pp. 7 - 22).

In the hearing on the motion, the Appellant's ground for dismissal of the indictment was that the indictment was defective because it alleged, in the disjunctive, that the Appellant

committed fraud or embezzlement. The claim was that such pleading was defective because it would not be possible to determine whether the jury acquitted or convicted the Appellant of fraud or embezzlement. (R. Vol. 2, pp. 9 - 12). It appears that the State conceded that the indictment should have alleged fraud and embezzlement in the conjunctive. (R. Vol. 2, pp. 17 - 18). The argument then focused on whether the indictment could be amended on motion by the State. (R. Vol. 2, pp. 19 - 22). However, the specific argument raised here was not raised in the hearing on the motion to dismiss, and the trial court did not rule, prior to the point at which the jury was empaneled, on that argument.

The issues argued on the motion to dismiss have not been renewed here. They are thus abandoned on this appeal. *Sherron v. State*, 959 So.2d 30 (Miss. Ct. App. 2006). Since they have not been renewed here, it is unnecessary to address them here. What the Appellant does allege here is that the indictment did not sufficiently allege the particular dates on which he committed his acts of embezzlement. This argument, though, was not raised in the argument on the motion to dismiss. It is true that the Appellant alleged this in support of his motions for a directed verdict and for judgment notwithstanding the verdict, but those motions did not seek dismissal of the indictment for an alleged lack of sufficient notice. When the Appellant did make the claim that the indictment should have alleged specific dates, he made it too late.

The trial court considered the Appellant's motion to dismiss as a demurrer to the indictment. (R. Vol. 2, pg. 7). The trial court's assessment of the nature of the Appellant's motion was correct since the motion alleged at least one defect appearing on the face of the indictment. Miss. Code Ann. 99-7-21 (Rev. 2007). Under Section 99-7-21, a claim such as the one made here, as well as the one actually made in the trial court prior to trial, must be made in a non-capital case before the jury is empaneled. *Frei v. State*, 934 So.2d 318 (Miss. Ct. App.

2006)(Claim of insufficiency of dates alleged in an indictment must be raised by way of demurrer) In the case at bar, the argument advanced here was not made prior to that time; it may not be considered here.[1] *Baker v. State*, 930 So.2d 399, 404 - 405 (Miss. Ct. App. 2005); *Gray v. State*, 728 So.2d 36, 69 - 70 (Miss. 1998).

The Appellant, it seems, would have this Court believe that he only learned of the particular dates involved within the time span alleged in the indictment at trial. While he does not explicitly say that his failure to raise this issue prior to trial should be excused on account of when he claims he learned of the specific dates, much of his brief is written in such a way that it appears that that is what he is getting at.

First of all, to the extent that the Appellant believed that the indictment was too vague in terms of the dates alleged, it makes no logical sense to allege that this alleged vagueness did not suggest itself to the Appellant prior to trial, but only in the course of trial. Secondly, the Appellant's representation of what he learned and when he learned about specific dates would seem to suggest a discovery violation. Yet no such violation was alleged at trial, and none here. On the other hand, it seems clear, by the admission of the defense, that the State provided all of the raw data concerning fuel purchases and casino trips. (R. Vol. 5, pg. 581). The "big chart" that the Appellant refers to in his brief appears to have been a spreadsheet that was put together from that data. The Appellant, though, surely knew of the dates on which he used the fuelman card to purchase gasoline and the dates the State would prove that he was at a casino. The

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[1] Should it be that the record before the Court will be supplemented with the motion filed by the Appellant, and should it appear that the claim made here was contained in it, this will make no difference. The Appellant did not advance any such claim in the hearing on his motion. Since he did not pursue any such allegation to a ruling prior to the empaneling of the jury, he abandoned it. *Evans v. State*, 725 So.2d 613, 708 (Miss. 1997).

Appellant's claim that he did not know until trial what particular dates were involved, that even the State did not know, is at best highly misleading and is simply not true. Were this so, it is inconceivable that the defense would have gone to trial in such a posture.

Assuming for argument that the Appellant's Assignment of Error is before the Court – in other words, that the argument was raised in a timely fashion in the trial court – there is no merit in it.

In *Salts v. State*, 984 So.2d 1050 (Miss. Ct. App. 2008) the indictment for embezzlement there charged acts of embezzlement in ranges of dates. There was no indication in the opinion that to so charge embezzlement was worked a deficiency in the indictment. There is nothing about the case at bar to suggest that time was the essence of the offense, or that the lack of particular allegations of precise dates stuck a critical blow against the defense, and certainly the Appellant does not suggest this, much less demonstrate it. The Appellant could easily have divined from the State's discovery, and no doubt did, particular dates within the range set out in the indictment. In any event, since time was not of essence in the case at bar, it was not necessary to precisely allege the date of commission. *Baker, supra.* On the other hand, since the State did actually allege a precise range of dates, the Appellant was surely on notice of the date of the alleged offense.

The Appellant relies on *Moses v. State,*795 So.2d 569 (Miss. Ct. App. 2001) in support of his position that the indictment in the case at bar was insufficient to put him on notice of the dates of his acts of embezzlement. *Moses*, though, is distinguishable from the facts of the case at bar.

In *Moses*, the defendant in that case was charged in a single indictment with twenty - two separate acts of rape, sexual battery, and fondling against two victims. It appears that the rape

and sexual battery counts were alleged to have been committed over a thirty - nine month period; the fondling counts did not allege a date or a range of dates of commission. Although the prosecution was in possession of information that would have significantly narrowed the time frames involved, it did not seek to amend the indictment for that purpose. Because the counts of the indictment used identical language and used identical time frames, the Court found that the indictment was insufficient to notice that defendant of the charges against him. This is hardly the situation in the case at bar.

Here, there was but one count of embezzlement in the indictment, and one time frame in which it was alleged to have been committed. The State was not in possession of information that would have shortened the time frame alleged. The State's proof demonstrated the accuracy of the time frame alleged.

The indictment charged one act of embezzlement, the many specific instances being offered in evidence in support of that one charge. The Appellant was not being prosecuted for however many of these specific instances in themselves; those instances were evidence of the one charge. It was, as the trial court put it, a "continuing type of offense." (R. Vol. 5, pg. 586). In *Moses*, that defendant was charged and was tried on each of the counts of the indictment. We are aware of no rule of law, and the Appellant cites no rule of law, in which it is required of the State to charge in the indictment each and every item of evidence upon which it will rely to prove its case against the accused. Rule 7.06 URCCC includes no requirement.

The Appellant also complains that the indictment does not indicate whether the Appellant was conducting official business on the same occasions when he gambled. (Brief for the Appellant, at 13). Perhaps the indictment does not so allege, but then the Appellant presents no authority or argument that the lack of such an allegation amounted to a defect on the face of the

indictment. Nor did he raise this issue prior to the empaneling of the jury. This complaint is not properly before the Court. *Puckett v. State*, 879 So.2d 920 (Miss. 2004). Since he did not raise this in the hearing on the motion, he waived any complaint about the matter.

Throughout the Appellant's brief he sets out various quibbles and questions about what the jury might or might not have believed. These various points were not raised at the hearing on his motion to dismiss, and thus may not be considered here. Beyond this, though, these quibbles appear to us to more in the nature of complaint about the evidence, rather than a complaint against the indictment. Yet no issue has been raised on this appeal concerning the weight or the sufficiency of the evidence of the Appellant's guilt.

The Appellant then cites *Tran v. State*, 962 So.2d 1237 (Miss. 2007). It is true that the Court in that decision held that an indictment for money laundering must set out specifically what "illegal activity" produced the money, but it also held in that case that the failure of the indictment to allege this was harmless under the facts of the case, the defendant having been clearly informed of what the particular illegal activity was. Nonetheless, the Appellant thinks this decision is analogous to the case at bar. It is not.

The indictment in the case at bar clearly alleged that the Appellant committed fraud and embezzlement by "fraudulently obtaining gasoline and the use of a county owned vehicle for his personal activities". (R. Vol. 1, pg. 3). In other words, unlike the defendant in *Tran* who, from the face of the indictment, was left to wonder what "illegal activity" he had committed, the Appellant was not left to wonder what he embezzled. He was informed specifically of what he embezzled. The particular instances relied upon by the State were not, it is true, alleged in the indictment, but these were items of proof. Again, we know of no case in which it has been held that the State must set out in detail the items of proof it will rely upon to prove the charge of the

indictment. Beyond this, the Appellant knew from the "raw data" of the individual items of evidence that the State would likely offer in proof, as did the defendant in *Tran*.

The indictment at bar was sufficiently to notice the Appellant of the charge against him. The State's discovery responses revealed the particular items of evidence that would or might be put into evidence in support of the charge. It may be that some items of evidence were not used by the State, but there is nothing to show that some item of evidence not disclosed by the State was used. There is certainly no claim of a discovery violation.

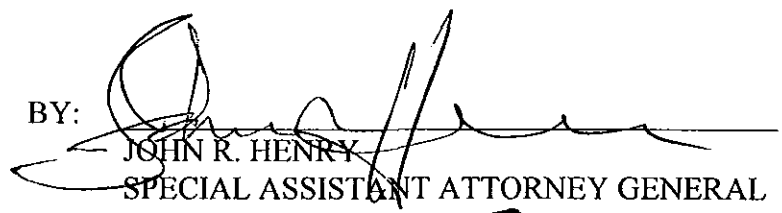
The Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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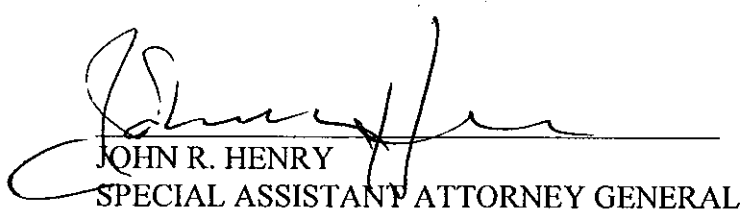
This the 12th day of September, 2008.



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