



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 20, 2016

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Re: *Commonwealth of Virginia v. Emmanuel Hart*; MI-2015-1410

Dear Counsel,

This matter came for trial on December 3, 2015, as a misdemeanor appeal on the charge of embezzlement under Virginia Code § 18.2-111. The defense made a motion to strike at the close of the government's case-in-chief, which was renewed at the close of the evidence. The Court took the motion under advisement. For the reasons set forth below, the motion to strike is denied.

"A motion to strike challenges whether the evidence is sufficient to submit the case to the jury. . . . Whether the evidence adduced is sufficient to prove each of [the] elements [of the offense] is a factual finding . . . In reviewing that factual finding, [the Court] consider[s] the evidence in the light most favorable to the Commonwealth and give[s] it the benefit of all reasonable inferences fairly deducible therefrom." *Lawlor v. Commonwealth*, 285 Va. 187, 223-24 (2013) (citing *Commonwealth v. McNeal*, 282 Va. 16, 20 (2011); *Muhammad v. Commonwealth*, 269 Va. 451, 479 (2006); *George v. Commonwealth*, 242 Va. 264, 278 (1992); *Culpeper Nat'l Bank v. Morris*, 168 Va. 379, 384 (1937)).

The Court views the evidence presented at trial as follows. On March 18, 2015, an undercover officer arranged through a confidential informant to purchase cocaine from the Defendant at a set time and place. The officer arrived at the designated location—tower three of an apartment building complex—and the Defendant approached the officer’s unmarked vehicle at the passenger side window. The Defendant asked how much cocaine the officer wanted to purchase after she asked how much it would cost to purchase the drug. The Defendant stated that he usually sells one gram of cocaine for \$100, but he would sell to her for \$80. The officer agreed to the sale price of \$80, and then handed the Defendant that amount in prerecorded Fairfax County Buy Funds. The Defendant said that the cocaine was in an upstairs apartment, that he did not want to take a stranger to the apartment, and that he would be right back. He then entered an apartment building. After thirty minutes, the Defendant had not returned. Detectives searched the surrounding area, but were unable to locate him.

On March 21, 2015, the Defendant was arrested and waived his *Miranda* rights after being properly advised of those rights. The Defendant initially said that when he received the money, he became scared that he was being chased by the police and threw the money in a dumpster. The undercover officer interrogating the Defendant responded by saying, “You thought you could get greedy and thought you could get away with it.” The Defendant responded by nodding his head, and then said that he knew it was dumb.

The salient parts of the Defendant’s motion to strike made in oral argument and in brief are as follows. First, the Defendant contends that the Commonwealth failed to prove that he had the specific intent to deprive the County of the buy funds given to him. Second, the Defendant argues that the Commonwealth cannot enforce an illegal contract. Third, the Defendant asserts that he cannot hold in trust or be entrusted with proceeds for an illicit venture, namely drug distribution.

Regarding the Defendant’s first point, under Virginia’s embezzlement statute, Virginia Code § 18.2-111, the Commonwealth must establish that the Defendant wrongfully appropriated for his own benefit money which had been entrusted to him, with the intent to permanently deprive the owner of the money. At the motion to strike stage, there is ample evidence to support the government’s position that the Defendant intended to permanently deprive the owner of money for his own personal benefit.

The Defendant approached the vehicle to negotiate a sale price for the cocaine, appeared to present the undercover officer with “a deal” by reducing the price by \$20, explained why she could not accompany him to obtain the cocaine, and stated that he would be right back. No officer appeared in the area for the next thirty minutes, so the Defendant’s purported concern about being chased by police lacks any foundational support. During his *Miranda* interview, the undercover officer scoffed at the Defendant’s explanation for why he did not return and offered an alternative explanation of what transpired—accusing him of being greedy and thinking he

could get away with taking the money. The Defendant then gave a tacit admission to the officer's statement by nodding his head, and proceeded to say that his conduct was dumb.

The facts of this case are distinguishable from the facts set forth in *Zoretic v. Commonwealth*, 13 Va. App. 241 (1991), which is cited in the Defendant's brief. In that case, Zoretic met with an undercover police officer and agreed to purchase one ounce of cocaine on his behalf for \$1,250. *Id.* at 243. While Zoretic also failed to return the officer's money or procure the cocaine, the similarities between *Zoretic* and the present case end there. Unlike the facts of this case, the evidence in *Zoretic* demonstrated that the defendant had, in fact, met with his drug supplier regarding the purchase, and repeatedly acknowledged the debt to the undercover officer, promising to repay him when he could. *Id.* at 243-44. As a result, the Virginia Court of Appeals held that the evidence was insufficient to prove that the defendant had the specific intent to deprive the undercover officer of his money. *Id.* at 245. The latter facts are simply absent from the fact pattern in this case.

In support of his second point, the Defendant argues that he cannot be prosecuted for failure to complete an illegal and unenforceable contract between himself and the purchaser of drugs. The crime of embezzlement, however, is not premised on the enforceability of a contract to engage in a criminal venture, *i.e.*, a contract to sell illicit drugs. As the Court of Appeals stated in *Zoretic*, the crime of embezzlement occurs when the accused "wrongfully appropriate[s] to his or her own use or benefit, with the intent to deprive the owner thereof, the property entrusted or delivered to the accused." *Id.* at 241 (citing *Waymack v. Commonwealth*, 4 Va. App. 547, 549 (1987)). The elements of the crime of embezzlement simply do not involve proving that the venture was legal or that the parties had a meeting of the minds to carry out the venture.

On the third point, the Defendant contends that he can neither hold in trust nor be entrusted with funds intended to be used for an illegal purpose. The Court of Appeals in *Zoretic* specifically declined to consider this argument since the case was decided on other grounds. *Id.* at 245.

Embezzlement is a statutory crime in Virginia. To violate the statute, a person must, *inter alia*, obtain money or other personal property from another by virtue of the property being entrusted to him. Va. Code § 18.2-111. The statute prohibits the conversion of such property for personal gain. *Id.* The Virginia General Assembly has not assigned a special meaning to the term "entrusted," so it will be given its common meaning. Black's Law Dictionary defines "entrust" as "[t]o give over to another something after a relation of confidence has been established." Based on the language of the statute, the intended purpose of the money or property from the perspective of the giver of such property is not a relevant factor. Absent a constitutional consideration or clear direction from the Virginia General Assembly, courts must decline to limit the scope of this criminal statute by reading into it such a limitation.

Therefore, as a result of the foregoing, the motion to strike is denied.

Sincerely,



Stephen C. Shannon  
Circuit Court Judge