

IN THE SUPERIOR COURT OF WALKER COUNTY
STATE OF GEORGIA

443

STATE OF GEORGIA,

FILED IN OFFICE

vs.

CASE # 03-CR-20884

SEP 23 2003

03-CR-20887

TOMMY RAY-BRENT MARSH,

Defendant
Clerk

MOTION TO DISMISS INDICTMENTS

COMES NOW the Defendant, through counsel, and files this motion to dismiss the above indictments and in support thereof states the following grounds:

1.

The indictment numbered 03CV20884 charges as follows:

"The GRAND JURORS selected, chosen and sworn for said county, to-wit (names omitted) in the name and behalf of the citizens of Georgia, charge and accuse TOMMY RAY-BRENT MARSH with the offense of Burial Service Fraud [O.C.G.A. § 10-14-17(b)(1)] for that the said accused, on the (date omitted), did unlawfully, in connection with the sale of the burial service of cremation to (funeral home name omitted), regarding the body of (name omitted), willfully employ a scheme to defraud in that the accused did obtain said body but did not perform the cremation and did provide what purported to be the cremains of the deceased, contrary to the laws of said State, the good order, peace and dignity thereof." (COUNTS 1-122)

Defendant moves the Court for an order dismissing the above indictment (all 122 counts) on the grounds that it fails adequately to charge him with any offense against the laws of the State of Georgia.

444
2.

Notwithstanding the foregoing, it appears that the indictment reflects an attempt to charge Defendant with a violation of O.C.G.A. § 10-14-17(b)(1), which in pertinent part, reads as follows:

(b) It shall be unlawful for any person in connection with the ownership, offer, sale, or purchase of any burial rights, burial or funeral services, or burial or funeral merchandise, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud

3.

One of the relevant definitions limiting the foregoing code section is found in the definitions section, to wit: O.C.G.A. § 10-14-3(5):

(5) "Burial service" means any service other than a funeral service offered or provided by any person in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains.

In the event that the Court should find that the indictment as drawn sufficiently charges him with a violation of O.C.G.A. § 10-14-17(b)(1), as defined by O.C.G.A. § 10-14-3, he moves that the same be dismissed on the following constitutional grounds:

The above statute is vague and ambiguous in that it fails to adequately define what a "burial service" is. The definition of "burial service" specifically *excludes* the alleged activity of the defendant as outlined in the indictment.

The principles of the due process doctrine of vagueness are well developed in the case law. A criminal statute is void for vagueness if its prohibitions are not clearly defined. See, Grayned v. City of Rockford, 408 U.S. 104 (1972). It is fundamental that due process requires that a statute furnish a person of ordinary intelligence with fair notice or warning of the conduct which is proscribed, and the statute must provide reasonably clear standards by which enforcement officials and triers of fact may act. Otherwise there is a potential for arbitrary and discriminatory enforcement. E.g., Gregg v. Georgia, 428 U.S. 153 (1976).

445

The statute, by failing to clearly define the category of illegal business behavior, violates the Due Process Clauses of the Fifth and Sixth Amendments of the United States Constitution made applicable to the States through the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

4.

Indictment number 03-CR-20887, in part, alleges theft of dead bodies. The counts that constitute the "body" counts each allege the former name that was associated with the dead body, when living, and assigns an "owner" as to each dead body, as "next of kin". Defendant shows that the counts of the said indictment that are "body" counts should be dismissed.

Counts 1, 2, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 115, 117, 119, 121, 123, 125, 127, 129, 131, 133, 135, 137, 139, 141, 143, 145, 147, 149, 151, 153, 155, 157, 159, 161, 163, 165, 167, 169, 171, 173, 175, 177, 179, 181, 183, 185, 187, 189, 191, 193, 194, 196, 198, 200, 202, 204, 206, 208, 210, 212, 214, 216, 218, 220, 222, 224, 226, 228, 230, 232, 234, 236, 238, 240, 242, 244, 246, 248, 250, 252, 254, 256, 258, 260, 262, 264, 266, 268, 270, 272, 274, 276, 278, 280, 282, 284, 286, 288, 290, 292, 294, 296, 298, 300, 302, 304, 306, 308, 310, 312, 314, 316, 318, 320, 322, 324, 326, 328, 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, 408, 410, 412, 414, 416, 418, 420, 422, 424, 426, 428, 430, 432, 434, 435 and 437 (hereinafter referred to herein as the "body" counts) each allege that the accused "*did unlawfully take the body of (the name of a person is inserted in each count), the property of (a name of one*

4.46

or more persons are inserted in each count)". These counts allege a "fiduciary" relationship between the accused and the "owners" of the dead bodies. These counts, as charged, fail to adequately charge the defendant with any offense against the laws of the State of Georgia.

Defendant shows that a dead human body cannot be considered "property" that could be the subject of a theft. The "body" counts of this indictment allege ownership of the dead bodies by various individuals. The quasi-property rights vested in individuals by the courts in Georgia were to effectively give civil plaintiffs grounds for action civil suits. The criminal law demands much greater notice of what constitutes an offense in the State of Georgia. Furthermore, the scramble of the General Assembly to enact new law immediately after the facts of this controversy arose is indicative of the prior absence of any appropriate criminal law to address the facts as alleged in this case.

The most recent exhaustive treatment of this most narrow issue in the jurisprudence of Georgia is found in Bauer, et al, v. North Fulton Medical Center, Inc., 241 Ga. App 578 (1999). After quoting Justice Lumpkin on the history of the development of a "quasi" property right in the corpse by the next of kin, the Court of Appeals dashes the notion that the ownership goes beyond a very narrow allowance:

"The quasi-property right in a corpse is not pecuniary in nature, nor should it be. The right encompasses only the power to ensure that the corpse is orderly handled and laid to rest, nothing more. One need only imagine the absurd and morbid process of determining the replacement value of body parts to understand the wisdom behind this rule. While it may be true that our laws must govern the funeral procession of a corpse, it will not impose a pecuniary value on the flesh itself. To do so would make the strangest thing on earth that much stranger." Bauer.

The Court then consulted Prosser to explain the natural limitations of this unusual property right:

"In most [cases involving the mishandling of dead bodies], the courts have talked of a somewhat dubious "property right" to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such "property" is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer." Prosser, The Law of Torts, 58-59 (4th ed. 1971).

These most unusual provisions for the most unusual of subject matter cannot withstand the scrutiny required of the criminal law. The fact that a corpse has no pecuniary value leaves the only conclusion that it cannot be the subject matter in a prosecution under the theft statute.

5.

The above statute is also vague and ambiguous in that it fails to define what the pecuniary value of the stolen item is. The case law specifically *excludes* the alleged stolen property from having any pecuniary value beyond that of providing a right to sue in civil cases. Furthermore, the "ownership" interest in the listed "owners" of the dead bodies is tenuous.

The principles of the due process doctrine of vagueness are well developed in the case law. A criminal statute is void for vagueness if its prohibitions are not clearly defined. See, Grayned v. City of Rockford, 408 U.S. 104 (1972). It is fundamental that due process requires that a statute furnish a person of ordinary intelligence with fair notice or warning of the conduct which is proscribed, and the statute must provide reasonably clear standards by which enforcement officials and triers of fact may act. Otherwise there is a potential for arbitrary and discriminatory enforcement. E.g., Gregg v. Georgia, 428 U.S. 153 (1976).

The statute violates the Due Process Clauses of the Fifth and Sixth Amendments of the United States Constitution made applicable to the States through the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Furthermore, there is not definition of "fiduciary" in the Code of Georgia. To have such vast

448

consequences resting upon a critical, yet undefined, term gives no notice to the citizens of Georgia as to what behavior is prohibited.

6.

Finally, Defendant requests that the Court hold an evidentiary hearing on this motion and that he be permitted to file a brief on these issues within a reasonable time after the conclusion of the hearing.

Respectfully submitted, this 23 day of September 2003.



McCracken Poston
Attorney for Tommy Ray-Brent Marsh
GB 585606

P. O. Box 1130
Ringgold, Georgia 30736
(706) 965-8300



Ron Cordova

CERTIFICATE OF SERVICE

Now comes McCracken Poston, counsel for Defendant, and hereby certifies that a true and accurate copy of the foregoing pleading has been served upon the District Attorney ~~(by posting said copy in the U.S. Mail with sufficient postage attached thereto)~~ (by hand delivery to the District Attorney or one of his staff).

This 23 day of September 2003.



McCracken Poston