

IN THE SUPERIOR COURT OF WALKER COUNTY

661

STATE OF GEORGIA

STATE OF GEORGIA,

*

-VS-

*

CASE NOS. 03-CR-20884; 03-CR-20885;
03-CR-20886; 03-CR-20887

TOMMY RAY-BRENT MARSH,

*

FILED IN OFFICE

DEFENDANT.

*

NOV 06 2003

**STATE'S RESPONSE TO DEFENDANT'S
"MOTION TO DISMISS INDICTMENTS"**

Line, M. Johnson
Clerk

Now Comes the State of Georgia, by and through the District Attorney, and responds to said motion as follows:

1.

The State opposes this motion. The defendant simply misinterprets and misreads the statutory language and the indictment. The language of the Burial Service Fraud indictment tracks the statutory language. Contrary to the defendant's claim in his motion, the section which defines "burial service" does include cremation as it is a service offered or provided in connection with the final disposition of human remains. O.C.G.A. § 10-14-3 (5). "Cremation" is defined as the reduction of the dead human body to residue by intense heat. O.C.G.A. § 43-18-1 (5). The only specifically excluded "burial service" is a "funeral service" as defined in O.C.G.A. § 10-14-3 (17). See Op. Att. Gen. 81-45.

2.


The defendant once again cites inapposite law. The law as to the civil application of the term fiduciary is not conclusive as to the disposition of this case. The only case on the issue of theft by a fiduciary is Hanson v. State, 232 Ga.App. 352 (1998) which held that the issue is a jury

662
question and that an assistant manager at a pizza parlor could be determined by a jury to be a fiduciary. Similarly, the fact that no pecuniary value is placed upon human remains is a matter of public policy but isn't applicable here. Not every theft of property depends upon its pecuniary value to make it a crime or a felony. A felony theft occurs if the subject of the theft is a motor vehicle, a firearm or "any ornamentation, flower, tree, or shrub placed on, adjacent to, or within any enclosure of a memorial to the dead". O.C.G.A. § 16-8-12. It is likewise clear that despite the public policy which prohibits the placement of a *monetary* value on human remains, the law criminalizes the sale of human remains or body parts. See O.C.G.A. 16-12-160.

3.

The State also objects to an evidentiary hearing. It is the essence of demurrer (which is what defendant's motion is but for his choice of nomenclature) that a defendant may admit to the allegations of the indictment and yet be guilty of no crime. Lowe v. State, 276 Ga. 538, 539 (2003). To go beyond the four corners of the indictment by presenting evidence transforms the demurrer into a pre-trial test of the evidence in the nature of a motion for a directed verdict. A defendant has no right to present evidence of a substantive nature to determine the validity of a demurrer.

This 6th day of November, 2003.



Herbert E. Franklin
District Attorney
State Bar No. 273325

District Attorney's Office
P.O. Box 1025
LaFayette, GA 30728
706-638-2121

663

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing State's Response to Defendant's Motion to Dismiss Indictments upon the lead attorney for the Defendant by mailing a true and correct copy of same with sufficient postage thereon to ensure delivery to its destination:

McCracken Poston
Attorney At Law
P.O. Box 1130
Ringgold, GA 30736

A copy of this pleading is being directed to Leanne Dolin, law clerk to the Honorable James G. Bodiford, at Superior Court Building, 30 Waddell Street, Marietta, Georgia 30090-1822.

This 6th day of November, 2003.

Debra S. Jull
District Attorney
Lookout Mountain Judicial Circuit

P. O. Box 1025
LaFayette, GA 30728
(706) 638-2121