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IN THE SUPERIOR COURT OF WALKER COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,)
)
 vs.)
)
 TOMMY RAY-BRENT MARSH,)
 Defendant)

CASE #

03-CR-20887

FILED IN OFFICE

SEP 23 2003

SPECIAL DEMURRER

Alic Marshall
Clark

The defendant submits himself to the jurisdiction of this Court and files the following special demurrer to indictment number 03CR20887 "Theft by Taking" (437 counts), "Criminal Attempt - Theft by Taking" (2 counts):

1.

All counts fail to adequately charge the defendant with any offense against the laws of the State of Georgia.

2.

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 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

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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.

3.

The remaining counts of the indictment allege theft of United States Currency (the "currency" counts), also while the accused was acting in a "fiduciary" relationship, this time with the funeral homes contracting for cremation services. All counts of the indictment fail to sufficiently set out a charge of violating OCGA 16-8-12(a)(2) (theft by

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fiduciary) against the defendant. This issue has been exhaustively researched and there is no supporting case law that provides that the relationship as alleged in the indictment between the accused and various funeral home businesses (the "currency" counts), or that relationship as inferred between the accused and the purported "owners" of the dead bodies (the "body" counts), could be a "fiduciary" or "confidential" relationship.


Again, 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.

WHEREFORE, the defendant prays that the Court sustain this special demurrer and dismiss any and all indicted counts of the indictment with prejudice.

Respectfully submitted, this 23rd day of Sept., 2003.



McCracken Poston
Attorney for Tommy Ray-Brent Marsh
GB 585606



Ron Cordova

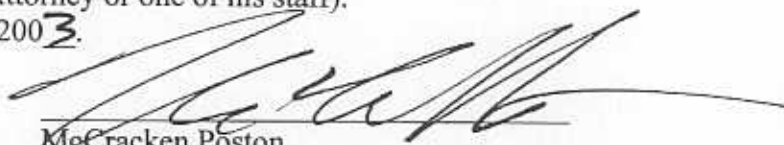
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CERTIFICATE OF SERVICE

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 Sept, 2003.



McCracken Poston