STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: DECEMBER 5, 2012)

STATE OF RHODE ISLAND	:	
	:	
V.	:	**P1/12-1218 A, B**
	:	
GERARD DONLEY (A)	:	
DONNA UHLMANN (B)	:	

DECISION DENYING DEFENDANTS'
MOTION TO DISMISS THE INDICTMENT

KRAUSE, J. Defendants Donley and Uhlmann contend that R.I.G.L. § 11-7-11, Rhode Island's "Bribery Statute," is unconstitutionally vague and violates the due process requirements of the Fifth and Fourteenth Amendments of the United States Constitution, requiring dismissal of the indictment. The Court disagrees.

Enacted in 1989, that statute has not been reviewed by the Rhode Island Supreme Court. It provides as follows:

> "Any person who shall corruptly give or offer to give any sum of money or any bribe, present, or reward, or any promise or security to obtain or influence the testimony of any witness to any crime or to induce the witness to absent himself or herself from, or otherwise avoid or seek to avoid appearing or testifying at, any hearing shall be guilty of a felony....Nothing in this section shall be construed to make an agreement between the victim and the defendant to dismiss a criminal charge unlawful." (Emph. added; penalties omitted.)

Essentially, the first sentence of the Bribery Statute proscribes providing money or a bribe in order to influence the testimony of a witness in a criminal case, or to induce a witness to avoid appearing or testifying at a court hearing. The corrupt conduct condemned is typically a *quid pro quo* whereby an individual influences a witness to alter his testimony or induces the

witness to abstain from testifying in exchange for money. United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978). In order to convict, the conduct must be "corruptly" done. In defining "corruptly" as used in the federal bribery statute (18 U.S.C. § 201), the Strand Court said, "An act is 'corruptly' done, if done voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." 574 F.2d at 996. That definition of "corruptly" has been recommended as a jury instruction in federal trials. O'Malley, Grenig and Lee, Federal Jury Practice and Instructions (6th ed. 2008), § 27:09, pp. 155-157. Cf., Arthur Anderson LLP v. United States, 544 U.S. 696, 705 (2005) (associating "corrupt and corruptly" with "wrongful, immoral, depraved, or evil" conduct in the context of a federal obstruction statute). See Black's Law Dictionary (9th ed. 2009) ("Corruptly," when used in criminal statutes, indicates "a wrongful desire for pecuniary gain or other advantage."); Eric J. Tamashasky, "The Lewis Carroll Offense: The Ever-Changing Meaning of 'Corruptly' within the Federal Criminal Law", 31 J. Legis. 129, 148 (2004); 62 A.L.R. Fed. 303 (1983) (generally addressing the meaning of the term "corruptly" for purposes of the federal bribery statute, 18 U.S.C. § 1503).

Regardless of how the term "corruptly" may be explained, there is nothing vague about the proscription contemplated in the first sentence of the statute, and the defendants make no complaint about its clarity. Instead, they argue that the last sentence of § 11-7-11 renders the statute unconstitutionally vague in its entirety. That sentence provides: "Nothing in this section shall be construed to make an agreement between the victim and the defendant to dismiss a criminal charge unlawful." The defendants suggest that this portion of the statute, regardless of the clarity of the introductory sentence, can effectively shield from criminal liability *any* payments to a witness in exchange for the witness's agreement to drop criminal charges. When the concluding sentence is juxtaposed against the initial sentence,

they argue, § 11-7-11 is perforce unconstitutionally vague because persons of ordinary intelligence cannot determine what types of agreements to dismiss are permitted or prohibited.[1] The defendants are mistaken.

The Rhode Island Supreme Court has made clear that courts must use "the greatest possible caution when reviewing a constitutional challenge to a statute." State v. Germane, 971 A.2d 555, 573 (R.I. 2009). Accordingly, when the Court considers a challenge to the constitutionality of a statute, it begins its analysis presuming that the statute is constitutional. State v. Russell, 890 A.2d 453, 458 (R.I. 2006); 3 Sutherland Statutory Construction § 59:8 (7th ed. 2008) ("When reviewing the constitutionality of a penal statute, courts presume the statute is valid and that the legislature has not acted unreasonably or arbitrarily in enacting it."). The party challenging the statute bears the burden of proving the provision's unconstitutionality beyond a reasonable doubt, and the court must "attach 'every reasonable intendment in favor of...constitutionality' in order to preserve the statute." Russell, 890 A.2d at 458 (quoting Gem Plumbing & Heating Co. v. Rossi, 867 A.2d 796, 808 (R.I. 1980)).

"A penal statute may be unconstitutionally void for vagueness in violation of the Fourteenth Amendment Due Process Clause if it fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits...or authorize[s] and even

[1] During oral argument the defendants suggested that the second sentence of § 11-7-11 was simply a legislative afterthought and was appended in 1989 to a bribery law that had originally been followed since 1908. To the contrary, the legislation as passed reflects that both sentences in the statute were newly created and simultaneously enacted, and that the second sentence was not merely engrafted to the first, as the defense posits. Both sentences in the 1989 enactment are completely underscored, signaling that all of the language was new. P.L. 1989 ch. 430, § 1 (No. 89-H 7007A).

The defendants' reference to a student Comment which listed some thirty states' bribery and tampering statutes, including R.I.G.L. § 11-7-11, is puzzling. Hubbard, "Civil Settlement During Rape Prosecutions," 66 Chi. L. Rev. 1231 (Fall 1999). Indeed, the Comment is generally antithetical to the defendants' position, as it urges courts to *prohibit* civil settlements that are intended to influence a victim of a serious felony, such as sexual assault, to drop the charges. Inducing such settlements, the author argues, will undermine the prosecution of criminal conduct and fail to deter bribery. That concept does not at all comport with the contentions of these defendants.

encourage[s] arbitrary and discriminatory enforcement.'" Id. at 459 (quoting City of Chicago v. Morales, 527 U.S. 41, 56 (1999)). Accordingly, due process requires that a criminal statute provide sufficient notice to allow an ordinary citizen to conform his or her conduct to the law. Id.

The defendants' unnaturally expansive analysis of the statute does scant justice to the plain meaning and clear intent of the Legislature, which did not condemn all payments, just the ones infected by corruption. The modifier "corruptly" is not tethered to the second sentence of the statute, and any effort to insert it by inference or nuance is misguided. Put plainly, not even a casual reader of the statute would conclude that the Legislature somehow intended to condone improperly bribing a witness, but that appears to be precisely the conclusion that the defendants encourage this Court to accept. Bribery is, after all, inherently corrupt conduct. Black's Law Dictionary (9th ed. 2009) defines the adjective "corrupt" as "[h]aving an unlawful or depraved motive; *esp., influenced by bribery*." (Emph. added.) See United States v. Aguilar, 515 U.S. 593, 616 (1995) ("[A] 'corrupt' act…includes bribery." Scalia, J., dissenting in part and concurring in part.).

The strained reading that defendants attach to the second sentence of § 11-7-11 would effectively render the first sentence a nullity, thereby capriciously excusing all manner of corrupt payments to a witness, including, say, bargaining with the witness for perjury, or for the witness's flat refusal to testify at all even if subpoenaed. Courts do not subscribe to formulas that yield such absurd results. Oladapo v. Charlesgate Nursing Corp., 590 A.2d 405, 407 (R.I. 1991) ("[W]e must interpret the statute to give it effect and avoid making it a nullity."); State v. DeMagistris, 714 A.2d. 567, 593 (R.I. 1998) ("[N]o construction of a statute should be adopted that would demote any significant phrase or clause to mere surplusage."); Russell, 890 A.2d at 458 ("We will not indulge in hypothetical situations that

would lead to absurd results."); 3 Sutherland Statutory Construction § 59:8 (7th ed. 2008) ("[C]ourts do not read penal statutes to provide an unreasonable or an absurd result.").

Where the language of a statute is clear and not ambiguous, courts are expected to give the words of the statute their plain and ordinary meanings. State v. Graff, 17 A.3d 1005, 1010 (R.I. 2011); State v. Santos, 870 A.2d 1029, 1032 (R.I. 2005) ("The plain statutory language is the best indicator of legislative intent."). The instant statute is not ambiguous. Giving its words their obvious and plain meaning results in the rational conclusion that what is proscribed are not all agreements between a defendant and a witness; only the corrupt ones. Mere offers of restitution, for example, standing alone are not necessarily proscribed; but when coupled with an attempt to improperly influence a victim-witness's testimony to testify falsely, or to induce the witness to avoid attending any trial or hearing, such agreements are criminal. Such a reading of the Rhode Island Bribery Statute is consistent with the way in which other jurisdictions have interpreted similar bribery statutes.

In People v. Harper, 75 N.Y.2d 313 (1990), the victim of an alleged assault sought payment in exchange for dropping criminal assault charges and executed a written "release" agreement to that effect with the defendant's mother.[2] The relevant bribery statute in New York provided that "[a] witness...is guilty of bribery...when he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that (a) his testimony will be influenced, or (b) he will absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding." Penal Law § 215.05. Interpreting the statute, the New York Court of Appeals reasoned that the "gist of the crime

[2] The purported release agreement read in relevant part: "I, Montey Harper, promise to drop charges against James A. Johnson, Jr...for a cash reimbursement in the sum of $5000.00 (five thousand and no/100 dollars). This sum represents my reimbursement for medical expenses that concurred [sic] due to a scuffle at the 2001 Night Club in Amherst, New York on June 1, 1984." 75 N.Y.2d. at 315.

[prohibited] is not the payment of money, but rather the 'agreement or understanding' under which a witness accepts or agrees to accept a benefit." Id. at 317. In particular, the understanding between the defendant and the witness must be one whereby the "witness... agrees to accept a benefit in exchange for a promise either that his testimony will be affected or that he will absent himself from or otherwise avoid appearing at action or proceeding." Id. The court held that Harper's conduct was not proscribed by the bribery statute:

> "As common sense and experience suggest, agreeing to 'drop' charges is certainly not the same as agreeing to alter testimony or absent oneself entirely from a proceeding. Consequently, evidence that someone has agreed to do the former cannot alone be used as a basis to infer the existence of an agreement to do the latter. To the contrary, an agreement to 'drop' criminal charges says nothing about the promisor's intention to appear and testify truthfully in the event that the prosecutor decides to proceed despite the promisor's wishes to the contrary. At worst, it suggests a fundamental misunderstanding by one or both parties of the power that private citizen-complainants have over the conduct of criminal proceedings." Id. at 318.

In Lichens v. Superior Court of Siskiyou County, 181 Cal. App. 2d 573, 576 (Cal. Dist. Ct. App. 1960), a defendant was indicted under California Penal Code § 136-1/2 which criminalized the conduct of any person who "gives or offers or promises to give to any witness...any bribe upon any understanding or agreement that such person shall not attend upon any trial" or who "attempts by means of any offer of a bribe to dissuade any such person from attending upon any trial." Applying accepted statutory construction principles, the California court noted that the statute must be construed "according to the fair import of its terms, with a view to effect its object and promote justice…and give to its words and phrases the approved usage of the language…." Id. at 576. Accordingly, the court found that the "essential elements of the bribery defined is an 'understanding or agreement' that the person about to be called as a witness 'shall not attend upon any trial,'" but that the statute did not render an agreement "to drop a charge" unlawful. Id. "The evidence clearly shows

that the only purpose of the bribe was to induce [the witness] 'to drop the case' (an act which would have required the consent of the district attorney), not that she would not attend upon the trial and hearing of said action." Id.[3]

Other state courts have similarly looked to the plain language of their respective bribery statutes to distinguish between lawful agreements to dismiss criminal charges and otherwise prohibited conduct. People v. Scribner, 440 N.E.2d 160, 164 (Ill. App. Ct. 1982) ("[D]efendant's offer to pay [the witness] was made contingent upon [the witness's] agreement to ask the State's Attorney to drop charges....There is no evidence of any specific request by defendant that [the witness] refused to testify or testify other than freely, fully and truthfully.").[4]

In State v. Halleck, 308 N.W.2d 56 (Iowa 1981), a defendant's attorney offered restitution for stolen goods in exchange for telling the district attorney that the witness was not interested in prosecuting the matter. The Iowa court held:

> "An offer of restitution, standing alone, is not a crime....We believe the legislature intended to make it a crime to offer restitution where the person making the offer attempts to improperly influence a victim-witness's testimony."[5] Id. At 59.

See Law v. Commonwealth, 571 S.E.2d 893, 895-96 (Va. Ct. App. 2002) (holding that defendant's offering a witness $500 to dismiss the case was not unlawful where the "plain

[3] See People v. Cribas, 231 Cal. App. 3d 596, 608-610 (Cal. Ct. App. 1991). The California bribery statute in effect at the time Cribas was decided differed slightly from the statute considered by the Lichens court. The bribery statute in Cribas provided that any person who "gives or offers, or promises to give, to any witness...any bribe, upon any understanding or agreement that the testimony of such witness or information given by such person shall be thereby influenced is guilty of a felony." Cal. Penal Code § 137(a).

[4] The relevant statute provided in pertinent part that a person may not "with intent to deter any...witness from testifying freely, fully and truthfully to any matters pending in any court…offer[] or deliver[] money…to such… witness...." Ill. Rev. Stat. Ch. 38 par. 32-4(b).

[5] The Iowa statute provided in relevant part: "A person who offers any bribe to any person who he or she believes has been or may be summoned as a witness...in any judicial...proceeding...with the intent to improperly influence such witness...with respect to his or her testimony...in such case commits an aggravated misdemeanor." I. C. A. § 720.4.

language of [Virginia's bribery statute] prohibits only two specific forms of conduct ... 1) offering money...to a person with the intent to prevent that person from 'testifying as witness'...and 2) offering money...with the intent to influence that person to testify falsely.").

Thus, other states, based on the plain language of bribery statutes not dissimilar to ours, have consistently and without awkward reasoning distinguished lawful payments from those intended impermissibly to influence a witness. No sound or compelling reason exists to believe that Rhode Island courts - and ordinary people, much less these defendants - are not equally capable of doing the same.[6] The vagueness of the Rhode Island statute which the defendants allege is groundless.[7]

During oral argument defense counsel insisted that the facts of the instant case do not matter and are not relevant to the Court's decision. That contention is untenable. Where, as here, the Court has determined that the legislative enactment passes constitutional scrutiny,

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[6] The defendants' reliance on Arthur Anderson L.L.P. v. United States, 544 U.S. 696 (2005) is misplaced. There the United States Supreme Court held that the required element of proof under the Federal Obstruction Statute, 18 U.S.C. § 1512(b)(2) - that destruction of records was done "corruptly," meant that the defendants could not be convicted merely for shredding documents, when the documents were shredded as part of a document retention policy. The Court expressed concern over a criminal statute reaching protected or innocuous conduct. Id. at 704. Arthur Anderson, however, provides no support for the defendants' position. The Rhode Island Bribery Statute does not simply punish lawful payments to a victim of an offense. It expressly criminalizes tainted payments that are intended to subvert the criminal justice system by influencing a witness's testimony or deterring the witness from testifying or appearing in court.

The defendants' invocation of the rule of lenity in the instant case is also inapplicable. The rule of lenity applies where there is ambiguity in a criminal statute. It comes into play, if at all, at the end of the process of construing what the Legislature has expressed, "not at the beginning as an overriding consideration of being lenient to wrongdoers." 3 Sutherland Statutory Construction § 59:4 (7th ed. 2008) (citing Rewis v. United States, 401 U.S. 808 (1971)). Since this Court finds no ambiguity in Section 11-7-11, the rule of lenity has no application here.

[7] To the extent that § 11-7-11 purports to sanction an agreement between a defendant and a victim "to dismiss" a criminal charge which has *already* been instituted by the State, no such authority can be properly conferred by the Legislature. Only the Attorney General, not a complaining witness or a defendant, can exercise prosecutorial discretion. State v. Rollins, 116 R.I. 528, 533, 359 A.2d 315, 318 (1976). See Super. R. Crim. P. 48(a). See Rogers v. Hill, 22 R.I. 496, 48 A. 670, 671 (1901) ("In this state the attorney general has exercised the power of entering a nolle prosequi in criminal cases long anterior to the adoption of the [state] constitution."). See People v. Harper, supra, and the concluding sentence of its quoted language at page 6 herein.

there is no need to speculate how the statute might be applied to hypothetical offenders. Russell, 890 A.2d at 461.[8]

* * * * *

Although not at all necessary to this Court's having determined that the Rhode Island Bribery Statute is not constitutionally infirm, attention must be directed to the inexpiable representations by all counsel that only Massachusetts has codified an "accord and satisfaction" or "civil compromise statute." Such statutes generally outline the manner and means by which parties may eschew some types of criminal charges based upon, e.g., restitution or other permissible compromises after criminal action has been instituted.

Contrary to the attorneys' assertions, several states have, in fact, enacted such legislation. E.g., Alaska Stat. §§ 12.45.120-12.45.130; Ariz. Rev. Stat. Ann. § 13-3981; Cal. Penal Code §§ 1377-1378; Idaho Code Ann. §§ 19-3401 - 19-3402; 15 M.R.S.A. § 891; Mass. Gen. Laws Ch. 276 § 55; Miss. Code. Ann. § 99-15-51; Nev. Rev. Stat. §§ 178.564 & 178.566; N.D. Cent. Code

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[8] The "facts" of this case, certainly at this stage, are unresolved and will be closely contested at any trial. What is fact or fiction is a matter quintessentially entrusted to the province of a jury. State v. DiCarlo, 987 A.2d 867, 871 (R.I. 2010); State v. Lyons, 924 A.2d 756, 765-66 (R.I. 2007).

While not explicitly articulated by the defendants, there nonetheless appears in their arguments a flawed reliance on the "overbreadth doctrine." Application of that standard may be invited if a statute ranges impermissibly into the constitutionally protected First Amendment arena. State v. Russell, 890 A.2d 453, 458-459 (R.I. 2006); Schall v. Martin, 467 U.S. 253, 268 n. 18 (1984) ("[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad." (Citing New York v. Ferber, 458 U.S. 747 (1982)). To the extent that the defendants offer such a premise for their contentions, it is "erroneous as a matter of law." Russell, 890 A.2d at 459. In rejecting such an incorrect application of the overbreadth doctrine in a due process vagueness case, the Russell Court said:

> "The overbreadth doctrine arises when a statutory enactment is so broad in its sweep that it is capable of reaching constitutionally protected conduct….[It] generally applies in the context of First Amendment freedoms and is intended to prevent the imposition of criminal penalties for the exercise of one's constitutional rights….The question of whether a statute is overly broad is separate and distinct from the issues raised by a vagueness challenge." Id. at 459 (cit. omitted).

§§ 29-01-16 – 29-01-17; Or. Rev. Stat. §§ 135.703 & 135.705; Pa. R. Crim. P. 586; Va. Code Ann. § 19.2-151; Wash. Rev. Stat. §§ 10.22.010 - 10.22.020. Most of those statutes provide the court with the discretion to dismiss the case. Mississippi and Idaho require the involvement of the prosecutor. Miss. Code. Ann. § 99-15-51; Idaho Code Ann. §§ 19-3401 - 19-3402. See generally, Adam J. Macleod, "All for One: A Review of Victim-Centric Justifications for Criminal Punishment," 13 Berkeley J. Crim. L. 31, 45-50 (Spring 2008) (discussing the history and evolution of civil compromise statutes); see State v. Garoutte, 388 P.2d 809, 811 (Ariz. 1964) (tracing the history of state civil compromise statutes back to a New York provision).

States which have enacted civil compromise statutes have occasionally parsed their respective bribery statutes with reference to those ancillary enactments.[9] A limited class of criminal charges may thus be dismissed if the victim assures the court that he has received satisfaction for the injury or harm and has requested that the charges be dropped, thus barring any subsequent civil suits based on the same conduct. Garoutte, 388 A.2d at 811. Cf., Commonwealth v. Henderson, 747 N.E.2d 659 (Mass. 2001) (defendant's conduct in "encourag[ing] a witness to lie, and to keep [a] proffered payment a secret" violated the bribery statute and was "a far cry from...[the] publicly approved, judicially sanctioned arrangement" codified in M.G.L. ch. 276 § 55); see State v. Pinette, 679 A.2d 1083, 1083-84 (Me. 1996).

[9] See 1A Sutherland Statutory Construction § 21:16 (7th ed. 2008) ("A statute is not unconstitutionally vague if its meaning is fairly ascertainable by reference to…similar statutes, common law" or "judicial determinations."); 3 Sutherland Statutory Construction § 59:8 (7th ed. 2008) ("Penal laws are assumed to be passed with full knowledge of all existing laws on the same subject.").

Also inexplicably overlooked by all parties is Rhode Island's own statute, R.I.G.L. § 12-10-8, enacted on 1905, which expressly addresses a defendant's alleged assaultive conduct if remedial measures have been taken:

> "Discharge of accused on acknowledgement of satisfaction by complainant. Whenever any person shall be committed to a correctional institution, or shall be under recognizance, to answer to a charge of assault or battery, or both, or for any threat of committing an offense against the person or property of another, if the person injured or threatened shall appear before the judge of the district court who issued the warrant of commitment or took the recognizance, and acknowledge in writing that he or she has received satisfaction of the injury, or has ceased to fear the execution of the threat, the judge may, in his or her discretion, upon payment of all costs that may have accrued, including the board of the prisoner in the institution, if committed, discharge the recognizance, or supersede the commitment, by an order under his or her hand, which order shall be filed with the recognizance, or recorded in the records of the institution, as the case may require. That order shall forever bar all remedy by civil action for the injury."

It is not expressly clear that the Rhode Island statute invites outright dismissal of the charges, but it plainly includes the issuance of an order releasing the defendant from any commitment, as well as extinguishing the victim's right of pursuing a civil action. The Rhode Island statute, like so many of the other states' compromise enactments, at least assists in identifying, in some modicum, the nature of some judicially sanctioned payments. In any event, the statute does offer some guidance and direction, and it belies the defendants' complaints during oral argument and in their pleadings that no such guidance exists in Rhode Island at all. (Uhlmann brief at page 7.)

Indeed, during oral argument, defense counsel conceded that if Rhode Island had a statute that was even somewhat in any way akin to the one in Massachusetts, the defendants would not be making the vagueness arguments they now press. In fact, Rhode Island does have a cousin of the Massachusetts legislation. And, about a dozen others, too.

The defendants' motion to dismiss the indictment is denied.