IN THE COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
GENERAL TRIAL DIVISION

STATE OF OHIO,	)	CASE NO. 2022 CR 03 0072
	)	
Plaintiff,	)	
	)	
v.	)	JUDGE ELIZABETH LEHIGH THOMAKOS
	)	
RICHARD P. HOMRIGHAUSEN,	)	**DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL**
	)	
Defendant.	)	
	)	

Now comes Defendant Richard P. Homrighausen, by and through undersigned counsel, and respectfully moves this Honorable Court pursuant to Rule 29(C) and Rule 33 of the Ohio Rules of Criminal Procedure, to enter an order setting aside the verdict of guilty as to Counts One and Seven, and to enter a judgment of acquittal on the grounds that those verdicts are mutually exclusive of the verdicts in Counts Three through Six. Or, in the alternative, to order a new trial on all counts of conviction if this Court concludes, as some others have, that mutually exclusive verdicts are void.

Separate and apart from the fact that verdicts in this case are mutually exclusive, the guilty verdicts on Counts One and Seven should be set aside and this Court should order that the defendant be acquitted of those charges because there was insufficient evidence at trial that the defendant received monies he was required to deposit into the City treasury under R.C. 733.40. This motion is made pursuant to the facts and authorities cited in the memorandum of law appended hereto.

Respectfully submitted,

/s/ Mark R. DeVan

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STATE OF OHIO,	)	CASE NO. 2022 CR 03 0072
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Plaintiff,	)	
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v.	)	JUDGE ELIZABETH LEHIGH THOMAKOS
	)	
RICHARD P. HOMRIGHAUSEN,	)	**BRIEF IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL**
	)	
Defendant.	)	
	)	

RELEVANT FACTS

The defendant was convicted at trial of Count One, Theft in Office, in an amount less than $1,000, in violation of R.C. 2921.41(A)(1), a felony of the fifth degree; Counts Three through Six, Soliciting Improper Compensation, in violation of R.C. 2921.43(A)(1), misdemeanors of the first degree; and, Count Seven, Dereliction of Duty, in violation of R.C. 2921.44(E), a misdemeanor of the second degree. Each count of conviction was predicated on allegations that the defendant accepted money for officiating weddings as the Mayor of Dover.

LAW AND ARGUMENT

Rule 29(C) of the Ohio Rules of Criminal Procedure provides that, "If a jury returns a verdict of guilty... a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged...If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal." *Id.* In addition, pursuant to Rule 33 of the Ohio Rules of Criminal Procedure, within that same time frame, a new trial may be granted on motion of the defendant where, among other things, the verdict is contrary to law.

I. THE VERDICTS ON COUNTS ONE AND SEVEN ARE MUTUALLY EXCLUSIVE OF THE VERDICTS ON COUNTS THREE THROUGH SIX.

A. Mutually Exclusive Verdicts Occur Where a Finding as to One Charge Logically Excludes a Finding on Another.

While inconsistent verdicts in a criminal case are generally not subject to review, an exception exists for "mutually exclusive verdicts." *United States v. Ruiz*, 386 Fed. Appx. 530, 531 (6th Cir. 2010) *citing United States v. Powell*, 469 U.S. 57 (1984).

The Supreme Court of the United States crafted this exception for specific situations "in which a defendant receives two guilty verdicts that are logically inconsistent." *Id.* at fn 8. This occurs, for instance, where a finding as to one charge logically excludes a necessary finding on another charge. Such verdicts fly in the face of due process because each offense includes an element that negates an element of the other offense, which means that the prosecution necessarily failed to prove at least one element of each offense beyond a reasonable doubt.

In *Powell*, the Supreme Court cited, with approval, *United States v. Daigle*, 149 F. Supp. 409, 414 (D. D.C. 1957) *aff'd per curiam*, 101 U.S. App. D.C. 286, 248 F.2d 608 (1957), *cert. denied*, 355 U.S. 913, 78 S.Ct. 344, 2 L.Ed.2d 274 (1958), as an example of mutually exclusive verdicts. *See Powell*, at fn. 8.

In *Daigle*, the jury returned verdicts of guilty on charges of both embezzlement and larceny based on the same underlying conduct. A conviction for embezzlement required the jury to find that the defendant had unlawfully converted property owned by another but that was lawfully in the defendant's "possession or custody by virtue of his employment or office." *Id.* at 412. However, in order to convict the defendant of larceny, the jury was required to find that the defendant had unlawfully taken property owned by another that defendant had no right to possess, i.e., the traditional notion of "stealing." *Id.* at 414. Therefore, by finding the defendant guilty of both charges, the jury necessarily made the affirmative and contradictory findings that the defendant

came into his initial possession or custody of the property at issue both lawfully (embezzlement) and unlawfully (larceny). On the defendant's post-verdict motion for acquittal, the district court acquitted the defendant of the crime of larceny, as it carried a more severe penalty than the crime of embezzlement and concluded the defendant would not suffer prejudice as the to the election of that count. *Id.* at 415.

Case law on the subject of mutually exclusive verdicts often concerns convictions of theft and similar offenses that require findings of how the defendant came into the property at issue. For example, in *Middleton v. State,* 309 Ga. 337 (2020), the Supreme Court of Georgia concluded that guilty verdicts on charges of hijacking a motor vehicle and theft by receiving that same motor vehicle were mutually exclusive. The court reasoned that a conviction for hijacking a motor vehicle required a finding that the defendant was the principal thief of the car, whereas a conviction for theft by receiving entailed a finding that someone other than the defendant was the principal thief. *Id.* at 348.

Likewise, in *People v. Delgado,* 450 P.3d 703 (2019), the Colorado Supreme Court held that guilty verdicts for robbery and theft vis-à-vis a single taking were mutually exclusive and could not be upheld. *Id.* at 704. The court noted that it was impossible for the defendant to have unlawfully taken items from the victim by force, as required by the robbery statute, and also without force, as required by the theft statute. *Id.* at 707- 08; *see also State v. Speckman*, 326 N.C. 576, 391 S.E.2d 165, 166–167 (1990) (North Carolina Supreme Court concluding verdicts of guilt for both embezzlement, which requires that a defendant initially obtain property lawfully, and false pretenses, which requires that the property be initially obtained unlawfully were mutually

exclusive).[1]

B. Counts One and Seven Required a Finding that the Wedding Monies Accepted by the Mayor were "Fees" that Belonged to the City Whereas Counts Three Through Six Required a Finding that the Wedding Monies Were "Compensation."

Count One charged the defendant with theft in office under R.C. 2921.41(A)(1). That statute provides, in relevant part: "[n]o public official or party official shall commit any theft offense when...The offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense." *Id.*

In turn, R.C. 2913.02 defines a theft offense, in relevant part, as follows: "No person, with purpose to deprive the *owner of property* or services, shall knowingly obtain or exert control over either the property or services in any of the following ways... (emphasis added). *Id.*

Thus, the State needed to prove beyond a reasonable doubt on Count One that the defendant, as Mayor, deprived the City of monies that belonged to it. To prove that the money belonged to the City, the State advanced the claim that the Mayor was required to remit all fees from weddings collected by him to the treasury of the City of Dover. Indeed, Count Seven of the Indictment charged the mayor with dereliction of duty, R.C. 2921.44, for failing to remit fees into the treasury as purportedly required by R.C. 733.40.[2]

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[1] In each of those cases, the state supreme courts decided that the proper remedy for mutually exclusive verdicts was retrial on those counts. *Middleton, 309* Ga. 337 at 348; *Delgado,* 450 P. 3d at 710; *Speckman*, 326 N.C. at 580.

[2] A motion for acquittal on Count 8 which charged the defendant with Dereliction of Duty for failing to remit "any fee, present, gift or emolument" into the treasury as required by R.C. 705.25 was granted at the close of the State's case as the Court found that the statute had no applicability to City of Dover officials.

By the same token, if the money was not a fee due the City, R.C. 733.40 would have no application to the monies collected by the defendant for officiating weddings. Thus, the defendant would not be required to remit them to the treasury and the City would have no claim to them.

Counts Three through Six of the Indictment charged the defendant with soliciting improper compensation under R.C. 2921.43(A). That statute provides:

> (A) No public servant shall knowingly solicit or accept, and no person shall knowingly promise or give to a public servant, either of the following:
>
> (1) Any *compensation*, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;
>
> (2) *Additional or greater fees* or costs than are allowed by law to perform the public servant's official duties.

Id.

Thus, the State needed to prove beyond a reasonable doubt on Counts Three through Six that the defendant solicited or accepted *compensation* for performing an act in his public capacity, above and beyond what was permitted by law. On that statute's face, it plainly prohibits a public official from soliciting or receiving additional payment for doing his job. In an effort to make its case, the State submitted evidence of the defendant's salary that was established by ordinance and argued that any wedding monies he received above that, amounted to receiving compensation that was prohibited.

But, whether prohibited or not, receiving additional compensation is not theft of funds that belong to the City. Rather, that money is simply additional compensation.

It is equally clear that the statute does *not* prohibit the mayor from collecting fees on behalf of the city. In fact, the law expressly allows him to do so and subsection (2) of that statute proves that point as it only prohibits him from collecting "*additional or greater* fees" than what is otherwise permitted. *See* R.C. 2941.43(A)(2). Of course, there is no allegation in this case that the Mayor accepted "additional or greater fees."[3]

Thus, a conviction under R.C. 2921.43 required a finding that the defendant solicited or received money that was above what the law permitted him to accept as his compensation. In contrast, convictions under R.C. 2921.41 and R.C. 2921.44(E) (premised on a duty imposed under R.C. 733.40) necessarily required a finding that the monies he received were fees that belonged to the City.

Simply put, if the defendant was soliciting or receiving compensation for performing his job then, by definition, he was not accepting fees that belonged to the City and stealing from it by retaining them. Conversely, if the defendant was receiving fees for weddings on behalf of the City, then by definition, he was not receiving compensation.

As a result, those verdicts are mutually exclusive and cannot stand. This Court should enter an order acquitting the defendant of Counts One and Seven, as Count One carries the most severe penalty, *see Daigle*, 149 F. Supp. at 414, or order a new trial as to all counts on these grounds. *See Middleton, 309* Ga. 337 at 348; *Delgado,* 450 P. 3d at 710; *Speckman*, 326 N.C. at 580.

II. THERE IS INSUFFICIENT EVIDENCE ON COUNTS ONE AND SEVEN THAT THE DEFENDANT RECEIVED MONIES THAT HE WAS REQUIRED TO DEPOSIT INTO THE CITY TREASURY PURSUANT TO R.C. 733.40 AND, AS A MATTER OF LAW,

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[3] Rather, it was the state's theory, as it repeatedly argued to the jury, that the Mayor was permitted to charge a fee but he was required to remit the fee to the City.

HE SHOULD BE ACQUITTED.

Separate and apart from the fact that the verdicts in this case are mutually exclusive, the defendant should be acquitted of Counts One and Count Seven because there is insufficient evidence that he was required to deposit the money he received in connection with officiating weddings in the city treasury pursuant to R.C 733.40. Rather, as will be demonstrated, R.C. 733.40 only requires a mayor to deposit monies received in connection with court cases.

Count Seven of the Indictment charged the defendant with dereliction of duty for violating R.C. 733.40, which provides as follows:

> Except as otherwise provided in **section 4511.193 of the Revised Code, all fines forfeitures, and costs in ordinance cases and all fees that are collected by the mayor,** that in any manner come into the mayor's hands, or that are due the mayor or a marshal, chief of police, or other officer of the municipal corporation, any other fees and expenses that have been advanced out of the treasury of the municipal corporation, **and all money received by the mayor for the use of the municipal corporation shall be paid by the mayor into the treasury of the municipal corporation on the first Monday of each month.** At the first regular meeting of the legislative authority each month, the mayor shall submit a full statement of all money received, from whom and for what purposes received, and when paid into the treasury. Except as otherwise provided by **section 307.515 or 4511.19 of the Revised Code, all fines, and forfeitures collected by the mayor in state cases,** together with all fees and expenses collected that have been advanced out of the county treasury, shall be paid by the mayor to the county treasury on the first business day of each month. **Except as otherwise provided by section 307.515 or 4511.19 of the Revised Code, the mayor shall pay all court costs and fees collected by the mayor in state cases into the municipal treasury on the first business day of each month.**
>
> This section does not apply to **fines collected by a mayor's court for violations of division (B) of section 4513.263** of the Revised Code, or for violations of any municipal ordinance that is substantively comparable to that division, all of which shall be forwarded to the treasurer of state as provided in division (E) of section **4513.263 of the Revised Code.**

Id. (emphasis added).

Significantly, a conviction on Count One, theft in office, hinged upon a finding that the

defendant was collecting fees that he was required to give to the City but failed to pay over. Indeed, the Bill of Particulars in this case sets forth that in Count One:

> Defendant used his office in aid of committing the offense through his authority to perform weddings as mayor of the City of Dover pursuant to Ohio Revised Code section 3101.08. **Defendant was required to remit to the City of Dover the fees or emoluments for the weddings be performed pursuant to Ohio Revised Code section 733.40 and Ohio Revised Code section 705.25.**

Id. (emphasis added). Recall again that this Court determined that R.C. 705.25 was inapplicable to a mayor of a non-chartered City such as the City of Dover.

However, the fact that the defendant was accepting monies for officiating weddings does not constitute a "fee" as set forth in R.C. 733.40. The fees and other monies referred to in that section specifically concern those paid in connection with mayor's court cases.

The statute begins by setting forth that all "fines, forfeitures, and costs in ordinance cases and all fees" that are collected by the mayor or that in any manner come into his hands shall be paid into the treasury of the municipal corporation. *Id.* What this statute clearly refers to is monies that are paid in connection with local ordinance cases, regardless of how the mayor ultimately obtains them i.e. whether he collects the money directly or a clerk or representative provides it to him.

Indeed, R.C. 733.40 specifically carves out an exception for R.C. 4511.193(A), which provides that twenty-five dollars of any fine imposed for a violation of a municipal OVI ordinance shall be deposited into a fund for alcohol treatment for indigent drivers. *See* R.C. 4511.193(A). The conclusion that monies required to be deposited refer those paid in connection with court proceedings is fortified by the remainder of the statute that governs monies paid for state statutory

violations and for violations heard in mayor's court cases.[4]

Moreover, Chapter 171 of the City of Dover's Ordinances outlines mayor court procedures. It describes that a person, if convicted, can be fined up to $150.00 and provides a "cross-reference" to the relevant state statute, "Ohio R.C. 733.40."[5] Thus, Dover law also confirms this view.

While a portion of R.C. 733.40 sets forth that "...and all money received by the mayor for the use of the municipal corporation shall be deposited..." that portion must be read in context with the remainder of the statute. Ohio Rev. Code Section 733.40 unambiguously refers to monies paid in connection with mayor's court cases, and it cannot be reasonably read as embracing monies a mayor receives for officiating weddings under his discretionary authority set forth in R.C. 3101.08.

Indeed, there is no reasonable interpretation of R.C. 733.40 that requires a mayor to pay over money he receives outside of that which comes into his hands through court cases. *Compare* R.C. 731.07 ("...all fees pertaining to any office shall be paid into the city treasury"). *See also Ward v. Village of Monroeville*, Ohio, 409 U.S. 57, 58 (1972) (recognizing R.C. 733.40 applied to mayor's court cases and noting that "the fines, forfeitures, costs, and fees" derived from mayoral court proceedings produced a substantial portion of the municipality's funds).

Finally, it is worth mentioning that the Ohio Auditor's Office itself further corroborates that R.C. 733.40 only applies to money received in connection with court proceedings. Each year

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[4] In addition, exceptions for those monies being paid into the treasury are delineated for R.C. 307.515, which provides that certain portions of the money in court cases shall be paid into the county law library, and R.C. 4511.19, which governs where certain money is to go that is paid by defendants in OVI cases, as well as R.C. 4513.262, which requires that certain monies paid in connection with seat belt violations in mayor's court must go to certain emergency medical services and trauma funds.

[5] https://codelibrary.amlegal.com/codes/dover/latest/dover_oh/0-0-0-5322

it publishes an "Ohio Compliance Statement," designed to assist auditors and public offices in understanding the requirements of relevant laws. In the preface of its 2022 version, it states:

> Ohio law requires audits of each public office. These audits help determine whether the government's financial statements are fairly presented and whether management has complied with significant laws and regulations.
>
> The Ohio Compliance Supplement contains certain laws and regulations which are of considerable public interest, or are of the type auditors generally consider direct and material. Though the Ohio Compliance Supplement should not be a substitute for legal advice from your statutory counsel, nor a comprehensive listing of applicable laws and regulations, it is designed to help auditors and public offices identify and familiarize themselves with certain laws and regulations which generally apply to a variety of local governments and colleges and universities.

Id.

Then, in a section entitled "**Courts**" it states with respect to Ohio Revised Code Section 733.40:

> 3-11 Compliance Requirement: Ohio Rev. Code § 1905.21 - Docket; disposition of receipts. **Ohio Rev. Code § 733.40 - Disposition of fines and other moneys for mayor's court.**
>
> Note: As stated on pg. 1 of Chapter 3, this section should be performed ANNUALLY if court activity is material.
>
> Summary of Requirements: **The mayor of a municipal corporation and a mayor's court magistrate shall keep a docket. [Ohio Rev. Code § 1905.21]**
>
> **All moneys collected shall be paid by the mayor into the municipality** on the first Monday of each month. At the first regular meeting of the legislative authority each month, the mayor shall submit a full statement of all money received, from whom and for what purposes received, and when paid into the treasury. **[Ohio Rev. Code § 733.40]**

Id. at page 23.[6] (Emphasis added).

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[6] https://ohioauditor.gov/references/compliancemanuals/2022/2022_OCS_Manual.pdf This provision also appears in every version from 2014-2021 (the years spanning the (continued...)

There was no evidence at trial that the defendant failed to deposit any fees or money with the City Treasury he received from mayor's court as set forth in R.C. 733.40.

Therefore, there is insufficient evidence that he breached such a duty or deprived the City of any money that belonged to it and his convictions on Counts One and Seven should be set aside.

CONCLUSION

For all of the foregoing reasons, the Defendant respectfully requests that this motion be granted.

Respectfully submitted,

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[6](...continued)
Indictment in this matter and are also available online at https://ohioauditor.gov/references/compliancemanuals.html)

CERTIFICATE OF SERVICE

A copy of the foregoing Defendant's Motion for Judgment of Acquittal, or, in the alternative, Motion for a New Trial was served upon Special Prosecutor Robert F. Smith, c/o Auditor of State Office, 88 East Broad St., 10th Floor, Columbus, OH 43215, via email this 30th day of November, 2022.

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