

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,

Plaintiff-Appellant,

vs.

ANN CABRERA PEREZ,

Defendant-Appellee.

Supreme Court Case No. CRA03-007

Superior Court Case No. CF0066-03

AMENDED OPINION¹

Filed: May 6, 2004

Cite as: 2004 Guam 4

Appeal from the Superior Court of Guam
Argued and submitted on October 21, 2003
Hagåtña, Guam

¹ Subsequent to the issuance of the Opinion in this case filed on May 5, 2004, the court *sua sponte* discovered errors in the cover page of the Opinion. This Amended Opinion is issued to correct the designation of the parties and aside from the addition of this footnote does not otherwise alter the substance of the Opinion filed on May 5, 2004. This Amended Opinion shall supercede the Opinion filed on May 5, 2004.

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; Alexandro C. Castro, Justice *Pro Tempore*

TYDINGCO-GATEWOOD, J.:

[1] The People of Guam appeal from the trial court’s Decision and Order dismissing the prosecution of Ann Cabrera Perez on *de minimis* grounds. We find no abuse of discretion in the trial court’s dismissal pursuant to Title 9 GCA § 7.67(b), and accordingly, we **AFFIRM** the trial court’s Decision and Order.

I.

[2] On February 19, 2003, Ann Cabrera Perez (“Perez”) was indicted on the charges of Improper Influence Over Notary (As a 3rd Degree Felony), in violation of Title 5 GCA §§ 33522, 33104(1) and (11), and Official Misconduct (As a Misdemeanor), in violation of Title 9 GCA § 49.90(a).² The charges stem from allegations that Perez, along with Therese Hart (“Hart”), improperly solicited, coerced and/or influenced Deborah Alicto (“Alicto”), a notary, to perform a notarial act of acknowledgment, without the signatories being physically present.

[3] On March 14, 2003, Perez filed a Motion to Dismiss: *De Minimis* Infraction/Inappropriate Prosecution, which the People opposed. The trial court granted Perez’s motion, holding that a dismissal of Perez’s prosecution was warranted under Title 9 GCA §§ 7.67(a), (b) and (c). The People appealed.

II.

[4] This court has jurisdiction of this appeal from a final order pursuant to Title 7 GCA § 3107(b) (repealed and re-enacted by P.L. 24-139, Feb. 7, 1998).

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² See Appellant’s Excerpts of Record, pp. 1-2 (Superceding Indictment).

III.

[5] The People raise two issues on appeal: first, whether the trial court erred in dismissing, as a *de minimis* infraction, the prosecution against Perez for Improper Influence Over a Notary; and second, whether the trial court erred in dismissing, as a *de minimis* infraction, the prosecution against Perez for Official Misconduct.

[6] In determining whether a prosecution requires dismissal on *de minimis* grounds, a trial court “must first make factual determinations with respect to the conduct charged and the attendant circumstances,” which are reviewed for clear error. *See State v. Carmichael*, 53 P.3d 214, 218 (Haw. 2002) (as amended) (citation omitted). “A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake.” *Yang v. Hong*, 1998 Guam 9, ¶ 7 (citation omitted).

[7] A trial court’s decision to dismiss a prosecution on *de minimis* grounds is reviewed for an abuse of discretion. *See Commonwealth v. Przybyla*, 722 A.2d 183 (Pa. Super. Ct. 1998); *Carmichael*, 795 P.2d at 219. An abuse of discretion occurs where the trial court exercises its discretion “to an end not justified by the evidence. . . .” *See People v. Tuncap*, 1998 Guam 13, ¶ 12. Under this standard, we do not substitute our judgment for that of the trial court. *See id.* Rather, we review the trial court’s decision to determine whether it was “based on an erroneous conclusion of law or whether ‘the record contains no evidence on which the [trial court] could have rationally based the decision.’” *Lujan v. Lujan*, 2002 Guam 11, ¶ 7 (*quoting Midsea Indus., Inc. v. HK Eng’g, Ltd.*, 1998 Guam 14, ¶ 4).

[8] Title 9 GCA § 7.67 is Guam’s *de minimis* prosecution statute. It states, in relevant part:

The court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant’s conduct:

(a) Was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;

(b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense.

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Title 9 GCA § 7.67 (1994).

[9] The statute directs the trial court to dismiss a prosecution if it finds that the defendant's conduct falls within *at least one* of three distinct circumstances. Therefore, should we find that the trial court's factual findings are without clear error, and further, that it committed no abuse of discretion in dismissing Perez's prosecution with respect to at least one subsection of 9 GCA § 7.67, then it is our duty to affirm the trial court's decision and order. We find that the trial court committed no clear error in its factual findings, and did not abuse its discretion in dismissing Perez's prosecution pursuant to subsection (b) of section 7.67, and therefore, we affirm.

[10] The trial court found that under subsection (b), Perez's conduct "[d]id not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction." *Id.* (emphasis added). Guam's statute recognizes that "[i]t would be unrealistic to believe that judges never enter a finding of not guilty even though guilt is proven where a conviction is considered to be inappropriate," and therefore authorizes the trial court "to mitigate the general provisions of the criminal law to prevent absurd applications." 9 GCA § 7.67 cmt. We agree.

[11] Section 7.67 is modeled after the Model Penal Code § 2.12 and a similar New Jersey.³ *Id.* Because we have not previously addressed the powers and duties of the trial court pursuant to section 7.67, we look to case law from New Jersey for guidance in determining whether the trial court erred in its dismissal of Perez's prosecution based on the inappropriateness of prosecution.

[12] In *State v. Zarrilli*, the New Jersey appellate court articulated an approach which focused primarily on objective factors directly related to the defendant's conduct and, in particular, the consequences for the societal interests involved. *State v. Zarrilli*, 523 A.2d 284 (N.J. Super. Ct. Law Div. 1987), *aff'd*, 532 A.2d 1131 (N.J. Super. Ct. App. Div. 1987). The court stated:

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³ New Jersey, Maine, Hawaii and Pennsylvania are the only other jurisdictions aside from Guam which have adopted a version of the Model Penal Code § 2.12. *See* N.J. STAT. ANN. § 2C:2-11 (West 1995); ME. REV. STAT. ANN. tit. 17-A, § 12 (West 1983); HAW. REV. STAT. ANN. § 702-236 (Michie 1994); 18 PA. CONS. STAT. ANN. § 312 (West 1983). The statutes in New Jersey, Maine and Hawaii, however, have substituted the term "may" for the term "shall" in the first sentence of the provision, whereas Guam and Pennsylvania follow the Model Penal Code, and use the mandatory term "shall."

The protection to which society is entitled is provided by a dismissal only when the offense is truly ‘trivial.’ Consequently, it is public risk that determines what is trivial. The one question to be asked and answered in response to a *de minimis* motion is therefore:

What is the risk of harm to which society is exposed by defendant's conduct?

Id. at 288. To answer the question concerning the risk of harm to which society is exposed, the *Zarrilli* court proffered the following factors relevant to an analysis of section 7.67(b): (a) the circumstances surrounding the commission of the offense;⁴ (b) the existence of contraband; (c) the amount and value of property involved; (d) the use or threat of violence; and (e) the use of weapons. *Id.* at 288.

[13] In the instant case, Perez was charged with Improper Influence Over Notary (As a 3rd Degree Felony), in violation of Title 5 GCA §§ 33522, 33104(1) and (11).⁵ Perez was also charged with Official Misconduct (As a Misdemeanor), in violation of Title 9 GCA § 49.90(a).⁶

⁴ We note that the *Zarrilli* court excluded speculation, deterrence and the defendant’s background as irrelevant factors in considering dismissal under the similar New Jersey statute. *Id.* at 287-88. We agree with *Zarrilli* that such factors do not aid us in determining the appropriateness of a dismissal under section 7.67(b) and should be excluded. First, “[e]very trivial offense can be seen as the first step toward serious misconduct,” and, therefore, “[s]peculation is not appropriate.” *Id.* at 287. Second, deterrence is a sentencing concern and should not be considered during this phase of a criminal case. *Id.* at 287. (recognizing that deterrence “is one of the purposes of punishment” and “does not measure triviality”). Finally, a defendant’s “background and character are sentencing considerations and doubtful indicators of the trivial.” *Id.*

⁵ Section 33522, entitled “Improper influence,” provides that “[a]ny person who knowingly solicits, coerces, or in any way influences a notary to commit official misconduct is guilty of a third degree felony. Title 5 GCA § 33522. Section 33104 states in relevant part that:

(1) *Acknowledgment* means a notarial act in which a notary certifies that a signer, whose identity is proven on the basis of satisfactory evidence, has admitted, in the notary's presence, having signed a document voluntarily for its stated purpose [and]

...

(11) *Official misconduct* means: (i) a notary's performance of or failure to perform any act prohibited or mandated, respectively, by this Chapter or by any other law in connection with a notarization; or (ii) a notary's performance of a notarial act in a manner found by the Attorney General to be negligent or against the public interest.

Title 5 GCA § 33104 (1), (11) (1994).

⁶ This offense is defined as follows:

A public servant commits a misdemeanor if, with intent to benefit himself or another person or to harm another person or to deprive another person of a benefit;

(a) he commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized

Title 9 GCA § 49.90 (1994).

[14] The record before us reveals that Perez’s involvement was confined to the following three actions: First, Perez called Alico to Hart’s office and asked Alico to notarize a document. Second, when Alico indicated that the signatories were not present to sign her journal, Perez stated that “the document really needs to be notarized.” Appellant’s Excerpts of Record, p. 28 (Decision and Order). Third, Perez allegedly told Alico to give the notary journal to Elaine Leon Guerrero and Leon Guerrero would have the journal signed at a board meeting. Appellant’s Excerpts of Record, p. 6 (Perez’s Motion to Dismiss).

[15] Based on these alleged facts, Perez was charged with Improper Influence Over a Notary, by knowingly soliciting, coercing and/or influencing Alico to commit official misconduct, by performing the act of acknowledgment, without the signatories in her presence. The same alleged facts support the charge of Official Misconduct, in that, with the intent to benefit herself and harm the Government of Guam, Perez knowingly and unlawfully influenced Alico to commit an unauthorized act.

[16] For purposes of a motion to dismiss on *de minimis* grounds, and viewing as true all the factual allegations made against Perez, we find that Perez’s conduct constitutes the offense of Improper Influence of a Notary. *See Zarrilli*, 523 A.2d at 286 (stating that in determining whether a dismissal under section 7.67(b) is appropriate, “it must be assumed that the conduct charged actually occurred” because “[t]he motion does not provide a setting for a determination of guilt or innocence.”). Perez knowingly solicited Alico to commit official misconduct when she asked her to notarize a document, even after she was told by Alico that the signatories must be present. Moreover, again taking all the factual allegations as true, Perez’s conduct constitutes an offense of Official Misconduct. Specifically, Perez, while employed by the government, intended to benefit herself or another, namely Hart, or to harm the government, by soliciting Alico to commit official misconduct.

[17] Despite the fact that Perez’s alleged conduct constituted a chargeable crime, the trial court found, in applying section 7.67(b) to both charges, that “there is no evidence that any of Perez’s actions caused any harm. . . . [t]he evidence presented by Defendant Perez, which was not

contradicted by the Government, is that Alicto was hesitant to notarize the document until Defendant Hart became involved.” Appellant’s Excerpts of Record, p. 28 (Decision and Order). According to the trial court, the extent of Perez’s involvement was the relaying of a message from her boss to Alicto that a document needed to be notarized. Perez had no knowledge of the contents of the document. Further, Alicto hesitated to sign the document without the signatories present until Hart asked her a question to the effect, “Are you happy where you are at?” Thereafter, Alicto’s “heart began beating” and she “was afraid something might happen to her” if she did not notarize the document. For this reason, the court found that *Perez’s actions* did not *cause* the harm or evil sought to be prevented by the statutes criminalizing the improper influence of a notary or official misconduct. Upon our review of the trial court’s factual findings with respect to subsection (b), we are unable to find that “the entire record produces the definite and firm conviction that the court below committed a mistake,” and thus, we hold that the trial court’s findings in this regard are not clearly erroneous. *Yang*, 1998 Guam 9 at ¶ 7.

[18] Turning now to the trial court’s decision to dismiss the prosecution, which we review for abuse of discretion, the question to be asked and answered in the context of a motion to dismiss for a *de minimis* infraction is, “what is the risk of harm to which society is exposed *by defendant’s* conduct?” *Zarrilli*, 523 A.2d at 288 (emphasis added).

[19] Applying the factors set out in *Zarrilli* to determine the risk of harm exposed by Perez, we consider the trial court’s factual findings of the conduct charged and the attendant circumstances surrounding the commission of the offense as discussed above, specifically, that *it was not Perez’s actions that caused or threatened the harm or evil which the statute protects*. In so doing, we do not sidestep the fact that harm has occurred in this case, assuming the facts as alleged are true. While Perez’s conduct falls within the reach of the statutes which criminalize the improper influence of a notary and official misconduct, her conduct did not expose society to the risk of harm which resulted in this case - which is a \$150,000.00 settlement paid out by the Guam Memorial Hospital, pursuant to a document which was unlawfully notarized by Alicto. Because Perez’s actions did not cause or threaten this harm, the first factor weighs in favor of Perez. Considering the second *Zarrilli*

factor, there was no contraband in this case. Third, the value of property involved was about \$150,000. Fourth, there was no use or threat of violence by Perez. Fifth, there were no weapons involved.

[20] While the value of the property involved is significant, we balance such factor along with the other factors, which weigh in favor of dismissal. Based on our view of the specific facts of this case, a balancing of these factors leads us to conclude that a dismissal was appropriate pursuant to subsection 7.67(b).

[21] We find no abuse of discretion in the trial court's decision to dismiss Perez's prosecution pursuant to 9 GCA § 7.67(b). Perez's actions "did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction." 9 GCA § 7.67(b).

IV.

[22] We hold that the trial court committed no clear error in its factual findings and committed no abuse of discretion in its dismissal of Perez's prosecution pursuant to Title 9 GCA § 7.67(b). For this reason, and based on the specific facts of this case, we **AFFIRM** the trial court decision and order dismissing Perez's prosecution.