To: New Jersey Law Revision Commission
From: Wendy Llewellyn; Laura C. Tharney
Re: Willfully - N.J.S. 9:6-8.10b - *State v. Gross*
Date: February 11, 2019

M E M O R A N D U M

Executive Summary

In *State v. Gross*,[1] the Appellate Division considered whether the trial court's failure to charge the jury with the implied culpability requirement of "knowingly" in N.J.S. 9:6-8.10b was a mistake as a matter of law that warranted a reversal of defendant's conviction.[2]

In this unpublished opinion, the Appellate Division determined that, while the trial court charged the jury with the element of "willfully," which was expressly stated in the statute, it did not charge the jury with the implied culpability element of "knowingly," which would have allowed the defendant to invoke a defense of mistake, negated the culpability requirement of "knowingly", and given defendant grounds for acquittal.[3] The Appellate Court ruled that this was a mistake as a matter of law which warranted reversal.[4]

Background

Defendant, a clerk-typist for the Salem City Police Department whose duties included filing reports of substantiated findings of child abuse that were sent to the police department by what was then called Division of Youth and Family Services (DYFS), complied with a request by the mayor to provide him with confidential DYFS documents regarding his opponent in an upcoming primary election.[5] While it was clear the report was confidential and only to be released in certain circumstances and to certain persons expressly enumerated in N.J.S. 9:6-8.10a(a), those enumerated persons not including the mayor, defendant asserted that the mayor, in response to her protest that she could not provide him with those privileged documents, told her that his position as mayor "entitled" him to the documents, and that "everyone that works down[t]here at the police department works for [him]."[6] Defendant complied with the mayor's request by making a copy of the documents without telling anyone, and then delivering them to the mayor in the parking lot of the police department after hours.[7] The confidential documents, which contained the full name, age, and address of a child as well as the name and address of the "perpetrator," and which detailed abuse and sexual abuse as well as prior abuse and neglect referrals, were mailed to the Salem

[1] *State v. Gross*, 2017 WL 4079018 (App. Div. Sept. 15, 2017), *certif. denied*, 2018 WL 3545296 (2018).
[2] *Id.*, at *9-10.
[3] *Id.* at *1, *10.
[4] *Id*.
[5] *Id.* at *1.
[6] *Id.* at *1, *3.
[7] *Id.* at *3.

County Democratic Party treasurer and members of the public, after which the Chief of Police initiated an investigation.[8] The investigation led to charges against defendant, including a charge for the unlawful release of confidential DYFS records under N.J.S. 9:6-8.10b.[9]

Defendant was convicted of the fourth-degree revealing DYFS records charge under N.J.S. 9:6-8.10b and sentenced to concurrent one-year terms of probation.[10] The Defendant appealed her conviction on grounds that the trial judge failed to instruct the jury that "if defendant believed she was authorized to disclose the DYFS report to [the mayor], the jury could find she lacked the requisite state of mind to be found guilty."[11] The relevant portion of N.J.S. 9:6-8.10b states the following:

> Any person who *willfully* permits or encourages the release of the contents of any record or report in contravention of this act shall be guilty of a misdemeanor and subject to a fine of not more than $1,000.00, or to imprisonment for not more than 3 years, or both. [emphasis added]

The Appellate Division noted that

> [a]side from requiring that an actor "willfully" release the protected documents, *N.J.S.A.* 9:6–8.10b does not specify a culpability requirement. As a result, *N.J.S.A.* 2C:2–2(c)(3) requires the crime defined by the statute must be construed as incorporating "knowingly," *N.J.S.A.* 2C:2–2(b)(2), as its culpability requirement.
>
>> A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence.... "Knowing," "with knowledge" or equivalent terms have the same meaning.
>> [*Ibid.*]
>
> Therefore, the State was required to prove defendant gave the protected documents to the mayor, knowing that doing so was in contravention of the

[8] *Id.* at *1-2.
[9] *Id.*
[10] *Id.* at *4.
[11] *Id.* at *8.

statute. *See N.J.S.A.* 2C:2–2(c)(1)(providing culpability requirement applies to all material elements of an offense). [12], [13]

The Appellate Division found that while there was evidence that defendant was aware that she was violating the statute when she released the confidential records to the mayor, there was also "some evidence" that she released the documents to the mayor under the mistaken belief that the release was "authorized because he was the head of the police department."[14] Because acting under such "mistake of law" would negate the requisite culpable mental state of "knowingly," the State would then have had the burden of disproving that defense beyond a reasonable doubt.[15] Had the jury accepted that defendant acted under the mistaken belief that the mayor was entitled to the documents, thereby negating the required culpability of "knowingly," the Appellate Division determined that "the omission of an instruction on the legal significance of a mistake of law had the clear capacity to bring about an unjust result, R. 2:10-2, which was exacerbated by the failure to charge the jury on 'knowingly,' and requires the reversal of defendant's conviction."[16]

Since the culpability requirement of "knowingly" is not expressly stated in N.J.S. 9:6-8.10b itself, but rather is implied through N.J.S. 2C:2-2(c)(3) and N.J.S. 2C:2-2(b)(2), which in this case resulted in the omission of jury instructions as to the culpability requirement of "knowingly" altogether and a subsequent reversal by the Appellate Division, it seems that expressly stating the culpability standard in N.J.S. 9:6-8.10b may provide clarity.

It is noted that the terms "willful" or "willfully" appear nine times in statutory language in Title 2C.[17] The term is not defined in the Criminal Code. The term appears a total of 571 times in

---

[12] *Gross*, 2017 WL 4079018, at *9.

[13] "A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime with the culpability defined in paragraph b.(2) of this section. This provision applies to offenses defined both within and outside of this code." N.J.S. 2C:2-2(c)(3).

[14] *Gross*, 2017 WL 4079018, at *9.

[15] *Id.* at *9-10 (quoting *State v. Cross*, 330 N.J. Super. 516, 523 (App. Div. 2000)).

[16] *Id.* at *10; R. 2:10-2 states: "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court."

[17] The terms appear in the following statutes: (1) 2C:7-9. Immunity from civil and criminal liability for providing or failing to provide relevant information; (2) 2C:20-11. Shoplifting; (3) 2C:20-14. Taking person into custody for probable cause for belief of willfully concealing library material; arrest without warrant; probable cause for belief of theft; immunity from liability; (4) 2C:24-5. Willful nonsupport; (5) 2C:24-8. Endangering welfare of elderly or disabled; (6) 2C:45-3. Summons or arrest of defendant under suspended sentence or on probation; commitment without bail; revocation and resentence; (7) 2C:46-2. Consequences of nonpayment; summary collection; (8) 2C:52-2. Indictable offenses; and (9) 2C:52-23.1. Collection of outstanding court-ordered financial assessments; use of expunged records by comprehensive enforcement program; nullification of expungement for failure to comply or cooperate.

the text of New Jersey's statutes (60 times in Title 2A, once in Title 2B, nine times in Title 2C, and the remaining uses of the term are spread throughout the statutory titles).

Staff has not reviewed each instance in which the term appears in the various titles, but a quick skim of the statutory provisions made it appear as though the term is, at least generally, used without being defined. There are exceptions. N.J.S. 17B:32A-15 concerning "immunity from liability; actions against certain non-profit corporations restricted to willful or wanton conduct", states that "[f]or purposes of this subsection, 'willful or wanton conduct' means a course of action which shows the actual or deliberate intent to cause harm." N.J.S. 34:15-36, in the context of workers compensation, defines "willful negligence" as consisting "of (1) deliberate act or deliberate failure to act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication, operating as the proximate cause of injury, or (4) unlawful use of a controlled dangerous substance as defined in the "New Jersey Controlled Dangerous Substances Act," P.L.1970, c. 226 (C.24:21-1 et seq.)." And N.J.S. 49:3-49, pertaining to the sale of securities, defines "[w]illful" or "willfully" to mean "a person who acts intentionally in the sense that the person is aware of what he is doing".

The case law has, in some instances, found willfully to be akin to knowingly, but this interpretation is not applied in all cases.

The Court in *State v. N.I*,[18] for example, considered the meaning of willfully in conjunction with "forsaking" in the context of Title 9. The *N.I.* Court noted that in the earlier case of *State v. Burden*[19]*,* a pre-code case, the defendant asserted on appeal that "willfully" required "proof of an evil intent and knowledge on the part of defendant that harm would result from her action" but the Court disagreed, finding that "evil intent or bad motive is not required to prove child neglect [under the statutes]. The word 'willfully' in the context of this statute means intentionally or purposely *as distinguished from inadvertently or accidentally.*"[20] The *N.I.* Court observed that

> if the *Burden* definition were carried forward into the Code offense, the trial judge would have been obliged to charge "purposely" as the applicable mental state, which requires a "conscious object to engage in conduct of that nature or to cause such a result." *N.J.S.A.* 2C:2–2b(1). However, *State v. Demarest*…held that "knowing" is the appropriate mental state for the offense charged here.
>
> "Knowing" is a less onerous burden than "purposely" because it only requires awareness of what one is doing rather than it being the actor's "conscious object" to engage in prohibited conduct. Thus, we have the potentially untenable situation of a knowing offense subsuming conduct which is purposeful.[21]

---

[18] *State v. N.I*, 349 N.J. Super. 299 (App. Div. 2002).
[19] 126 N.J. Super. 424 (App. Div.), *certif. denied,* 65 N.J. 282 (1974)
[20] *Id.* at 312-313.
[21] *Id*. at 313.

The Court in *N.I.* added that it did not believe that the term "willfully," as used in Title 9, "was intended to describe the applicable mental state for criminal conviction."[22] Instead, the Court said that " 'willfully' as used in 'willfully forsaking' does not set forth a culpable mental state and is, therefore, not in conflict with the knowing culpability requirement for *N.J.S.A.* 2C:24–4 established by *State v. Demarest.* Thus, the potentially untenable situation alluded to earlier, of having a knowing offense subsume a purposeful offense, would not exist."[23] It noted, however, that

> the fact remains that willful, even if used in the lay sense, does describe a type of mind-set and is not so well understood that the jury can be left without a definition…the *Oxford American Dictionary…*defines willful as "1. done with deliberate intention and not as an accident, *willful murder.* 2. self-willed, obstinate, *a willful child.*" We believe that the emphasis should be on the absence of inadvertent or accidental conduct as the *Burden* court held. However, that state of mind is already sufficiently described by "knowingly." *N.J.S.A.* 2C:2–2b(2). As a result, willful becomes essentially superfluous. The only way to deal with this dilemma, other than judicially excising willful from the statute, is simply to make clear to the jury that the terms knowingly and willfully are generally synonymous in this context.[24]

In the Title 39 motor vehicle context, however, the Court in *State v. Moran*[25] explained that in

> the reckless-driving statute, the word "willful" bespeaks a *deliberate* or *intentional* disregard of the lives and property of others in the manner in which a driver operates a vehicle. In *N.J.S.A.* 39:5–31, the term "willful" suggests a *deliberate* violation of certain motor-vehicle statutes. A willful violation of the reckless-driving statute necessarily involves a state of mind and conduct that exceed reckless driving itself. Thus, to trigger the license suspension provisions of *N.J.S.A.* 39:5–31, a driver must engage in an aggravated form of reckless driving.
>
> The paradigm for distinguishing between reckless driving and a willful violation of the reckless-driving statute can be found in the New Jersey Code of Criminal Justice…Reckless manslaughter involves the possible risk of causing death, whereas aggravated manslaughter involves the probable risk of causing death…
>
> We perceive the following demarcation: reckless drivers act in a way "likely to endanger[ ] a person or property," *N.J.S.A.* 39:4–96, and those willfully violating

[22] *Id.*
[23] *Id.* at 314.
[24] *Id.* at 314-315.
[25] *State v. Moran*, 202 N.J. 311 (2010).

> the reckless-driving statute engage in conduct that is *highly* "likely to endanger[ ] a person or property," *see N.J.S.A.* 39:4–96, 39:5–31. Thus, the difference between reckless driving and a willful violation of the reckless-driving statute is a matter of degree.[26]

As concerns the actions of public employees in the Title 59 context, the Court in *Mantz v. Chain* found that

> the provisions of the TCA strip a public employee of any immunity if that employee is found to have engaged in "willful misconduct." N.J.S.A. § 59:3–14(a). Willful misconduct is " 'the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden' ... [I]t requires much more than an absence of good faith and 'much more' than negligence." *PBA Local No. 38 v. Woodbridge Police Dep't,* 832 F.Supp. 808, 830 (D.N.J.1993) (quotations omitted).[27]

Conclusion

Staff seeks authorization to conduct research and additional outreach regarding this issue to determine whether a statutory modification would be of assistance in avoiding litigation over issues regarding "willfully" moving forward.

[2626] *Id*. at 323-324.
[27] *Mantz v. Chain*, 239 F. Supp. 2d 486, 508 (D.N.J. 2002).