Filed 12/31/13 P. v. Hubbard CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY HUBBARD, Defendant and Appellant.	B239519 (Los Angeles County Super. Ct. Nos. SA075027, BA382926)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Reversed.

Hillel Chodos and Philip Kaufler for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jeffrey Hubbard of two counts of misappropriation of public funds in violation of Penal Code section 424, subdivision (a)(1).[1] On appeal, he argues that his convictions must be reversed because, as superintendent of the Beverly Hills Unified School District (the District), he was not "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of section 424. We agree and accordingly reverse his convictions and direct the superior court to dismiss the charges.

BACKGROUND

The operative consolidated information and indictment, filed on January 3, 2012, charged Hubbard with three counts of misappropriation of public funds in violation of section 424. The consolidated information and indictment further alleged, pursuant to subdivision (c) of section 803, that although the alleged crimes took place in 2005 and 2006 they were not discovered and could not reasonably have been discovered before September 2009. Hubbard pleaded not guilty and denied all special allegations.

The charges were tried to a jury, which found Hubbard guilty on two counts but not guilty on the third. As to the counts on which Hubbard was convicted, the jury also found true the allegation that the crimes were not and could not reasonably have been discovered before September 2009.

The court suspended imposition of sentence and placed Hubbard on probation for three years subject to various terms and conditions, including that he serve 60 days in jail and perform 280 hours of community service. The court also ordered Hubbard to pay various fines and fees, including $23,500 in restitution. Hubbard timely appealed.

The evidence introduced at trial showed the following facts: Hubbard was the superintendent of the District from July 1, 2003, through June 30, 2006. At that time, Karen Christiansen was employed by the District as the director of planning and

[1] All subsequent statutory references are to the Penal Code.

facilities, under a contract providing for a base salary of $113,000 per year and a car allowance of $150 per month.[2]

In a memorandum dated September 29, 2005, Hubbard stated that effective September 1, 2005, Christiansen was to receive a $500 car allowance per month. Hubbard testified that the reason for the increase (from $150 per month under Christiansen's contract) was that the travel requirements for Christiansen's position had dramatically increased after Christiansen took on the duties of a contractor that had been managing various construction projects for the District but was terminated by the District in the fall of 2005. Hubbard's September 29 memorandum was addressed to Melody Voyles (the payroll benefit specialist) and copied to both Sal Gumina (the assistant superintendent for human resources) and Nora Roque (the human resources coordinator). Gumina testified that the entire human resources department, which he supervised, consisted of himself, Roque, and Claudia Grover, a secretary.

In a memorandum dated February 6, 2006, Hubbard stated that Christiansen was to receive a $20,000 stipend. Christiansen's contract did not provide for such a stipend. Hubbard testified that the stipend, like the increased car allowance, was meant to compensate Christiansen for the increase in her workload when she took on the duties of the contractor that had been terminated. Hubbard's February 6 memorandum was addressed to Roque and copied to Voyles.

At trial it was undisputed that both the increased car allowance and the stipend required approval by the District's board of education—Hubbard did not have the legal authority to order them unilaterally. The board held regular meetings twice each month. The board discussed personnel matters, including changes in pay, in closed session, but anything requiring board approval had to be put to a vote of the board in open session. In order for a change in pay to come before the board for an official vote, it had to be

---

[2] In a previous appeal, we reversed Christiansen's convictions on four counts of conflict of interest in violation of Government Code section 1090, and we directed the superior court to dismiss all charges against her. (*People v. Christiansen* (2013) 216 Cal.App.4th 1181, 1183.) At all times relevant to the present appeal, Christiansen was an employee of the District, but she later became an independent contractor.

listed on either a certificated personnel report (for employees who hold teaching certificates) or a classified personnel report (for other employees). Those reports were prepared by the human resources department, which provided them to the superintendent, who would sign them and include them in the packet of materials that the board received before a regular meeting.

Voyles, the payroll benefit specialist, was called as a witness by the prosecution. She testified that when an employee's salary or other recurring payments (such as monthly car allowances) were changed, the change had to be entered into the computer system by the human resources department. In contrast, Voyles could process a one-time payment such as a stipend without human resources first making an entry to that effect in the computer. In either case (recurring payments or one-time payments), the District itself did not issue the checks. Rather, the District submitted payment requests that were transmitted to the County of Los Angeles (the County), which would issue the checks to the employees. The County did not "blindly pay things" requested by the District, but rather would "ask for verification," conduct "audits," and generally provide some measure of "oversight" to try to ensure that all payments were properly authorized.

Voyles testified that when she received the February 6 memorandum (concerning the stipend), she brought it to the attention of her supervisor, Cheryl Plotkin, who was then the assistant superintendent of business for the District. Voyles did not recall "any red flags that went off in [her] mind" concerning the February 6 memorandum; rather, she told Plotkin about the memorandum because that was what Voyles routinely did "for anything that [she] thought was going to affect budget." Plotkin, called as a witness by the defense, testified that when Voyles brought the February 6 memorandum to her attention, she told Voyles "[t]o make sure she had all the documentation."

Gumina (head of the human resources department), called as a witness for the prosecution, testified that upon receipt of the September 29 memorandum or the February 6 memorandum, the human resources department "normally would request backup material . . . to make sure the proper approvals [by the board] were in place," and

it "would not be correct procedure if they did not go back to the superintendent's office to make sure the necessary backup paperwork was attached."[3]

It is undisputed that Christiansen ended up receiving both the increased car allowance and the $20,000 stipend. But two board members testified that the board never discussed or approved the increased car allowance and never discussed or approved the $20,000 stipend. In addition, the District's assistant superintendent of business services (at the time of trial) testified that the District conducted a search of the minutes of the board's meetings "in and around the time of the auto allowance" and "in and around the time of the stipend," and the stipend and increased auto allowance "were not listed" on the personnel reports. The prosecution also introduced exhibits consisting of the agendas, minutes, and personnel reports from certain board meetings around the times of Hubbard's memoranda, but the exhibits did not cover all of the meetings from the relevant period,[4] and some of the personnel reports were missing.[5]

Hubbard testified that the board briefly discussed the increased car allowance and the $20,000 stipend in closed session, that there were no objections, and that he wrote the September 29 and February 6 memoranda in order to initiate the process for securing official approval by the board at a subsequent open session—the memoranda were addressed or copied to the human resources department, which undisputedly was the sole party responsible for creating the necessary personnel reports. Apart from Hubbard's

---

[3] Gumina initially testified on direct examination that because the September 29 memorandum was merely copied to him, he "would not have acted on it," but he later admitted on cross-examination that "[t]he procedure should be the same" regardless of whether the memorandum was copied to him or "sent directly" to him.

[4] For example, the exhibits included the documents from the two meetings in September 2005, which preceded Hubbard's September 29 memorandum, as well as the documents from the two meetings in October 2005, which immediately followed that memorandum. But the exhibits did not include the documents from the next two meetings, in November 2005.

[5] For example, the exhibits included the agendas and minutes from the meetings of January 10 and 23, 2006, which state that classified personnel reports and certificated personnel reports were approved at those meetings, but the exhibits did not include those reports for those meetings.

own testimony that he raised both the stipend and the increased car allowance in closed session (where they were approved without objection), there is no evidence that Hubbard did anything to secure those payments to Christiansen beyond writing those two memoranda.

In addition, Hubbard subpoenaed the District to produce copies of his email exchanges with board members around the time of the memoranda, which he believed would show that he had indeed discussed both the stipend and the increased car allowance with members of the board. The board moved to quash the subpoena on the ground that compliance would be too burdensome and expensive. The superior court granted the motion, concluding that Hubbard had not carried his burden of showing good cause for enforcing the subpoena.

DISCUSSION

Under section 424, subdivision (a), "[e]ach officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys" who "[w]ithout authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another," "[i]s punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this state."

Hubbard argues that he is not a person "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of section 424, so he cannot have violated it. We agree and accordingly reverse his convictions and direct the superior court to dismiss the charges against him.

People v. Aldana (2012) 206 Cal.App.4th 1247 (*Aldana*) is controlling. In *Aldana*, the defendants were the administrator of a public hospital and a physician whom the administrator had hired to perform various administrative functions. (*Id.* at pp. 1250-1251.) The physician was paid by the hour for his administrative work. The government program that provided the physician's compensation "required employees to report their actual hours worked during each pay period, and required supervisors to certify the hours the employees worked." (*Id.* at p. 1251.) The physician

signed blank timesheets and provided them to the administrator, who filled in the number of hours worked each day and "signed them to indicate her approval." (*Ibid.*) Both the physician and the administrator acknowledged, however, that "the timesheets did not accurately reflect the actual hours [the physician] worked on any particular day." (*Ibid.*) Indeed, the administrator "did not keep track of the actual hours [the physician] worked," but rather "estimated and averaged the number of hours she recorded on [the physician's] timesheets." (*Ibid.*)

The physician was convicted of keeping a false account under subdivision (a)(3) of section 424, but the Court of Appeal reversed. (*Aldana, supra,* 206 Cal.App.4th at pp. 1252-1253.) The court reasoned that because the physician "was not able to authorize his own pay," he was not a person "'charged with the receipt, safekeeping, transfer, or disbursement of public moneys'" within the meaning of section 424. (*Id.* at pp. 1253-1254.) Rather, the administrator "was the person entitled to authorize" the physician's pay, and the payments to the physician "would not have been processed without [the administrator's] signature on his timesheets." (*Id.* at p. 1254.) More broadly, the court observed that no case "has held that being only the first step in a process that results in the expenditure of public funds is sufficient to establish criminal liability under section 424 absent approval authority. . . . [I]t is the ability to control the public moneys that is key." (*Ibid.*)

Aldana applies straightforwardly to the case before us. It is undisputed that Hubbard "was not able to authorize" the stipend and increased car allowance for Christiansen. (*Aldana, supra*, 206 Cal.App.4th at p. 1254.) Rather, only the District's board was "entitled to authorize" those payments. (*Ibid.*) By sending memoranda to payroll and the human resources department (which undisputedly was the sole party responsible for creating the necessary documents for securing board approval), Hubbard was merely "the first step in a process that results in the expenditure of public funds," but that is not "sufficient to establish criminal liability under section 424 absent approval authority," which Hubbard undisputedly did not have. (*Ibid.*) "[I]t is the ability to

control the public moneys that is key" (*ibid.*), and Hubbard undisputedly did not have that ability. He therefore cannot be criminally liable under section 424.

Respondent presents two arguments against that reasoning, but we conclude that both lack merit. First, respondent argues that because Hubbard "was an officer" of the District, "on that basis alone" he "fell within the class of persons subject to prosecution under section 424." Thus, according to respondent, because Hubbard was an officer of the District, he can be criminally liable under section 424 even if he is *not* a person "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of that statute.

We disagree for two reasons. First, we note that no case has adopted respondent's construction of the statute—no case has held that a defendant may be criminally liable under section 424 if the defendant was a public officer but was not "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of the statute.

Second, the Supreme Court long ago explained that section 424 "has to do solely with the protection and safekeeping of public moneys . . . and with the duties of the public officer *charged with its custody or control . . . .*" (*People v. Dillon* (1926) 199 Cal. 1, 5, italics added (*Dillon*).) The Court traced the origin of the statute to a provision of the California Constitution concerning the misuse of public funds "'by any officer having the possession or control thereof'" and observed that the statutory language addresses "the single subject of the duties of an officer *charged with the receipt, safekeeping, transfer, and disbursement of public moneys*." (*Ibid.*, italics added.) Similarly, the Court stated that "the subject matter and the language of section 424 clearly indicate that the legislative mind was intently concerned with the single, specific subject of the safekeeping and protection of public moneys and the duties of public officers *in charge of the same*." (*Id.* at p. 6, italics added.) "To again state the situation more succinctly, section 424 has to do solely with the receipt, safekeeping, transfer, and disbursement of *public moneys* by official custodians." (*Id.* at p. 10.)

Dillon was decided nearly 100 years ago, but the relevant provisions of section 424 have remained unchanged. No intervening case law casts any doubt on *Dillon*'s continuing validity. We are consequently bound by the Court's construction of section 424. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Because section 424 concerns only the misuse of public funds *by the official custodians of those funds*, we must reject respondent's first argument.[6]

Respondent's second argument is that Hubbard was "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of section 424 because he had "some degree of control over the disbursement of [D]istrict funds." (Italics omitted.) Respondent's reference to "some degree of control" comes from *People v. Groat* (1993) 19 Cal.App.4th 1228, 1232 (*Groat*), which stated that section 424 "requires only that the defendant have some degree of control over public funds."

We conclude that respondent's argument lacks merit. *Aldana* helpfully summarized *Groat* as follows: "In *Groat*, the defendant prepared and signed her own timecards, and no other signature on the timecards was required for the defendant to be paid. (*Groat*, *supra*, 19 Cal.App.4th at p. 1230.) The defendant's timecards reflected she had been at work or been sick when, in fact, she was teaching at a local college. (*Id.* at pp. 1230-1231.) The court concluded the ability of a public employee to authorize his or her own pay charges that employee with the disbursement of public moneys, and therefore subjects him or her to liability under section 424. (*Groat*, *supra*, at pp. 1233-1234.)" (*Aldana, supra*, 206 Cal.App.4th at pp. 1253-1254.) Thus, insofar as *Groat*'s broad reference to "some degree of control over public funds" (*Groat*, *supra*,

---

[6] We also note that the allegations of the operative consolidated information and indictment mirror the language of the statute in a manner that conforms to our interpretation of section 424. The charging document alleges that Hubbard was "a person described in Penal Code section 424 charged with the receipt, safekeeping, transfer, and distribution of public moneys" and that he misappropriated "the same" (i.e., the public moneys of which he was custodian). The charging document does not allege that Hubbard was an officer. Rather, it predicates his criminal liability on his status as a custodian of public funds, which he allegedly misappropriated.

19 Cal.App.4th at p. 1232) suggests that a defendant who lacks approval authority can nonetheless possess the requisite degree of control, it is dicta, because the defendant in *Groat* had approval authority. Again, as stated in *Aldana*, "[n]o case, including *Groat*, has held that being only the first step in a process that results in the expenditure of public funds is sufficient to establish criminal liability under section 424 absent approval authority. As the *Groat* court explained, it is the ability to control the public moneys that is key." (*Aldana*, *supra*, 206 Cal.App.4th at p. 1254.)

For the reasons we have already given, that key is missing here. It is undisputed that Hubbard was not able to authorize the stipend and increased car allowance for Christiansen. That approval authority rested solely with the District's board. Hubbard therefore cannot be criminally liable for those payments under section 424. Our resolution of this issue makes it unnecessary for us to address the remaining arguments raised by the parties.

DISPOSITION

Hubbard's convictions are reversed, all penalties imposed on him, including restitution, are vacated, and the superior court is directed to enter an order dismissing all charges against him.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

MILLER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.