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4-23

IN THE SUPREME COURT OF FLORIDA

ST. ELMO CASH, JR.,

Petitioner,

v. CASE NO. 81-142

STATE OF FLORIDA,

Respondent.

_____/

MERITS BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, St. Elmo Cash, Jr., was the defendant in the trial court and the appellant in the First District Court of Appeal. He will be referred to here by his last name. Respondent, State of Florida, the prosecuting authority in the trial court and the appellee in the First District, will be referred to here as "State."

The record on appeal, consisting of one volume of pleadings, etc. and two volumes of trial and sentencing transcript, will be referred to as "R" and "T" respectively, followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

With respect to the issues presented to this Court, the State accepts Cash's statement of the case and facts with the following clarifications and additions.

CLARIFICATIONS. 1. Cash states, "Under section 336.025, the tax levied via the county ordinance was to be paid by a retail dealer with a monthly return filed with the state Department of Revenue. (State Ex. 3)." (e. s.) (M.B. 6) This statement makes it appear that the tax was imposed on the retailer, but the tax law makes it clear that the retailer's customer is the taxpayer, and the retailer is the tax collector. Section 336.025(2)(a), Florida Statutes (1986) provides, "The tax shall be collected and remitted by any person engaged in selling at retail motor fuel...."

ADDITIONS. 1. The charging document stated:

> [T]hat SAINT ELMO CASH, JR., on or between January 1, 1987 and August 31, 1987 in the County of Alachua and the State of Florida did then and there knowingly obtain or use or endeavor to obtain or use certain property of the State of Florida, to-wit: approximately $37,305.59 U.S. currency, of the value of more than $20,000.00, with the intent to deprive the said State of Florida of a right to the property or a benefit therefrom, or to appropriate the property to his own use or to the use of any person not entitled thereto, contrary to Section 812.014, Florida Statutes.

(R. 1) In his summary of the case, Cash omitted the above highlighted portion of the information. (M.B. 3)

2. In June 1987, the Department of Revenue demanded by telephone that Cash remit the delinquent taxes, and in August the Department's "numerous" efforts to contact Cash were to no avail. Cash did not file the delinquent tax returns until November, and he never remitted the taxes collected. (T. 31, 41, 45-47; SE 1)

3. Cash paid the local option gas taxes for the year 1986. (T. 43) Cash's personal reasons for not remitting the taxes collected in 1987 were that he had children in college, he purchased a car for his children, his children obtained gas on a regular basis at the service station, his children used his credit cards, and he had other bills to pay. (T. 88)

4. Cash was a licensed retail dealer. (T. 22)

5. Cash admitted at trial that (1) he was aware that certain taxes were imposed on the sale of gasoline (T. 101); that "he took it in and wr[o]te a check for it after the accountants gave [him] the amount at the end of the month" (T. 102); that he never segregated the taxes collected from the proceeds of his business (T. 102).

SUMMARY OF ARGUMENT

I. The answer to the first certified question is "Yes." The taxes collected under section 336.025 belonged to the government, whose relationship with Cash was primarily that of principal and agent. When Cash, the tax collector, failed to remit the taxes as required by statute, he became a thief, subject to prosecution for the offense of grand theft in violation of section 812.014.

II. The answer to the second certified question is "No." This Court has repeatedly held that a challenge to the sufficiency of the evidence will not be entertained unless the trial court has ruled on the issue, in particular the specific legal argument that is being advanced on appeal. The reason for this requirement is that "the appellate court sits in review of the rulings of the trial judge, and not directly upon the findings of the jury." Johnson v. State, infra. The only time an appellate court is justified in reviewing an unpreserved issue is when the trial court had an affirmative duty to act and failed to do so. With respect to a motion for judgment of acquittal, the burden is on defense counsel, not the judge.

III. This issue is beyond the scope of the certified questions, and the State respectfully asks this Honorable Court to decline to review it.

Turning to the merits of the issue, the trial court correctly denied Cash's motion for judgment of acquittal on the ground that the State failed to prove the requisite culpable

mental state. The State's evidence proved that Cash collected local option taxes from his customers, that he knew the collected taxes belonged to the government, and that he refused to remit the collected taxes on a monthly basis as required by the government. Cash admitted spending the money for both business and personal reasons.

Since Cash voluntarily commingled the collected taxes with the proceeds of his business, he was under an obligation to maintain a balance in his account with which to remit the taxes when demanded by the government. The State was under no obligation to show at what point Cash squandered the government's money that he had commingled with his own. It was enough to show that Cash knew the money was not his and that he deliberately spent it to meet his own business and personal needs.

ARGUMENT

ISSUE I (CERTIFIED QUESTION)

> DOES THE STATE HAVE A POSSESSORY INTEREST IN LOCAL OPTION GASOLINE TAXES COLLECTED BY A RETAIL SELLER UNDER SECTION 336.025 SUCH THAT THE TAXPAYER'S FAILURE TO PAY SUCH TAXES WHEN DUE CONSTITUTES THE OFFENSE OF GRAND THEFT UNDER SECTION 812.014, FLORIDA STATUTES?

The answer to the certified question is "Yes." Cash's argument on this issue in its entirety consists of the following:

> [P]etitioner simply urges this Court to answer the first certified question in the negative for the reasons expressed by Judge Zehmer at pages 10-21 of the opinion below.

(PIB. 11)

Prior to addressing the merits of this issue, the State has two procedural comments to make. First, this issue was raised sua sponte by the First District Court of Appeal, not by Cash at trial or on appeal. In doing so, the First District lost sight of its function as an appellate court and became an advocate for a party to the action. Second, not only is the practice of incorporating arguments by reference, as was done here by Cash, not authorized, but it defeats the purpose of requiring appellate briefs.

The offense of grand theft includes "embezzlement; misapplication; misappropriation; conversion." Section 812.012(2)(d), Florida Statutes (1985).

The essence of the dissenting judge's (Judge Zehmer's) argument is that the State did not prove, and could not prove, that Cash appropriated property "of another" because the property

belonged to Cash, whose relationship with the government was that of debtor and creditor. The State's response is that the property belonged to the government, whose relationship with Cash was primarily that of principal and agent.

Throughout the dissenting opinion, Judge Zehmer refers to the person who has the duty to remit collected taxes as a "taxpayer." (S.O. 15, 16, 27, 28) The State's response is that this person is a "tax collector," and it is the customer who is the "taxpayer." The tax is imposed on the person who buys gas to operate his motor vehicle on the public streets and highways. This tax is included in the purchase price of the gasoline. The tax is not imposed on the retail dealer; if it were, then obviously he would be a taxpayer for the purpose of paying the tax. The retail dealer is a "tax collector" because he has the duty of collecting, safekeeping, and transferring the sales tax to the government. See, e.g., Commonwealth v. Shafer, 202 A.2d 308, 309-311 (Pa. 1964).

There are numerous state and local taxes imposed on the sale of each gallon of motor fuel and special (diesel) fuel. See generally Chapters 206, 212 (Part II), and 336, Fla. Stat., all of which are to a certain extent interrelated.

Chapter 206 is the primary fuel tax chapter. Part I deals with motor fuels and Part II with special (diesel) fuels. The primary responsible parties under Part I are refiners, importers, and wholesalers, and under Part II, the primary responsible party is the special fuel dealer. Naturally these statutes in many instances refer to these particular classifications.

Sections 206.404 and 206.56 are located in Part I of Chapter 206. Section 206.404 (1986 Supp.) requires every retail dealer to pay an annual license fee and by the twentieth of each month to file a report detailing his purchases and sales of motor fuel for the previous month and to remit the local option taxes collected. Section 206.56 (1985) provides, "If any refiner, importer, or wholesaler collects, from another, upon an invoice rendered, the tax in this part contemplated, and fails to report and pay the same to the department as provided, he shall be deemed guilty of embezzlement of funds, the property of the state, and upon conviction shall be punished as if convicted of larceny of a like sum."[1]

Part II of Chapter 206, as previously stated, deals with the sale of special (diesel) fuel. Many of the provisions of Part I apply to Part II, even though the licensees are different. Section 206.97, Florida Statutes (1985) incorporates by reference specific provisions in Part I, including section 206.56, and further defines "refiner, importer, or wholesaler" to mean "dealer" and "motor fuel" to mean "special fuel." The obvious effect of these provisions is to make a special fuel "dealer" who

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[1] This section currently reads, "Any person who knowingly obtains or uses, or endeavors to obtain or use, taxes collected pursuant to this chapter, part II of chapter 212, s. 336.021, s. 336.025, or s. 336.026 with the intent, either temporarily or permanently, to deprive the state of a right to the funds or a benefit therefrom, or appropriate the funds to his own use or to the use of any person not entitled thereto, commits theft of state funds," ranging from a misdemeanor to a first-degree felony, depending on the amount of money involved. Section 206.56, Florida Statutes (1992).

collects but fails to remit special fuel taxes liable for theft of those funds even though he may not be a motor fuel "refiner, importer, or wholesaler."

Chapter 212, Part II, imposes a sales tax on motor and diesel fuel which automatically increases as the Consumer Price Index increases. Section 212.62(1), Florida Statutes (1985) provides that it is a "privilege" to sell motor fuel and special (diesel) fuel at retail in Florida. Section 212.62(2), Florida Statutes (1985) provides that the sales tax on fuel imposed by this section is "upon the ultimate retail consumer," but that for "administrative convenience," the tax is to be "paid upon the first sale or transfer of title within the state, whether by a refiner, importer, wholesaler, dealer, or retail dealer, who shall act as agent for the state in the collection of the tax whether or not he is the ultimate retail seller." (e.s.) Section 212.62(5), Florida Statutes (1985) provides that "[e]very retailer shall conspicuously display on the outside housing of each pump or other dispensing device a notice that the price stated on the pump includes the applicable state sales taxes."

Chapter 336, specifically sections 336.021, 336.025, and 336.026, imposes the local option fuel taxes. Out of this group, section 336.025 is the primary taxing statute, although each of the two other taxing statutes have most of the same provisions. Section 336.025(2), Florida Statutes (1986) provides:

> (a) The tax shall be collected and remitted by any person engaged in selling at retail motor fuel or using or selling at retail

special fuel within a county in which the tax is authorized and shall be distributed monthly by the Department of Revenue to the county where collected. The tax remitted to the Department of Revenue pursuant to this section shall be transferred to the Local Option Gas Tax Trust Fund, which fund is created for distribution to the county and eligible municipal governments within the county in which the tax was collected and which fund is subject to the service charge imposed in chapter 215. The Department of Revenue has the authority to prescribe and publish all forms upon which reports shall be made to it and other forms and records deemed to be necessary for proper administration and collection of the tax and shall promulgate such rules as may be necessary for the enforcement of this section. The sections of chapter 206, including, but not limited to those sections relating to timely filing of reports and tax collected, suits for collection of unpaid taxes, department warrants for collection of unpaid taxes, penalties, interest, retention of records, inspection of records, liens on property, foreclosure, and enforcement and collection also apply to the tax authorized in this section.

(b) The provisions for refund provided in ss. 206.625 and 206.64 are not applicable to such tax levied by any county. Any retail dealer licensed under s. 206.404 or jobber licensed under s. 206.021 shall deduct from the amount of tax shown by the report to be payable an amount equivalent to 3 percent of the tax on motor or special fuels imposed by this section, which deduction is hereby allowed on account of services and expenses in complying with the provisions of the law. If the amount of taxes due and remitted to the Department of Revenue for the reporting period exceeds $1,000, the 3 percent allowance shall be reduced to 1 percent for all amounts in excess of $1,000. However, this allowance shall not be deductible unless payment of the tax is made on or before the 20th day of the month as required. * * *

(e.s.)

The State's argument based on the above provisions may be summarized as follows:

> A. Under Part I of Chapter 206, specifically section 206.56, a motor fuel refiner, importer, or wholesaler who collected and failed to remit the motor fuel tax could be prosecuted for theft of those funds.
>
> B. Under Part II of Chapter 206, specifically sections 206.97 (in combination with section 206.56), a special fuel dealer who collected but failed to remit the special fuel taxes could be prosecuted for theft of those funds.
>
> C. Under section 336.025, in combination with section 206.56, or sections 206.97 and 206.56, a retail dealer who sold special fuel or motor fuel and collected the local option tax from the public but failed to remit it could be prosecuted for theft of those funds.
>
> Clearly, section 206.56 is one of the sections of Chapter 206 which relates to the timely filing of the tax collected and enforcement of the law.
>
> D. Under section 212.62(2), the retailer is expressly made an agent for the state for the purpose of collecting a specific type of sales tax on motor and diesel fuel under specified circumstances. From this express declaration of legislative intent, it reasonably may be inferred that the Legislature intended for the retailer to be an agent for the state for the purpose of collecting the optional gas tax. Any other conclusion would ascribe irrational conduct to the Legislature, for it would be senseless to make the retailer a state agent for the purpose of collecting one type of sales tax but not another, when both taxes are collected simultaneously

1. The dissenting judge argues that the collected taxes were not funds of the government because the Legislature did not explicitly make the dealer an agent for the government. He

states, "There is no explicit statutory provision making retail dealers collecting the optional gas tax 'agent[s] for the state in the collection of such tax.'" (S.O. 17)

The State's response is that no explicit statutory provision is required to create the relationship of principal and agent, and that the tax law, by implication, unmistakably has made the retail dealer an agent for the state for the purpose of collecting the optional gas tax.

Retail dealers of motor fuel are made agents of the state by the tax statutes which authorize imposition of a tax on the consumer and require the dealers to collect the tax and remit it to the government at a specified time. See sections 206.404, 206.56, 206.97, 212.62(1)(2)(5), and 336.025(2)(a), Florida Statutes (1985 and 1986 Supp.); Anderson v. State, infra; People v. Kopman, infra.

The duty to collect and remit the tax is imposed by law, which duty the licensed dealer automatically accepts by establishing and operating a legitimate business. The amount of the tax is clearly identifiable because it is specified in the law. The dealer knows that he is not free to use this money as his own. He is a mere conduit. The consumer likewise is aware that he has paid the tax, which necessarily is earmarked for the government.

2. The dissenting judge argues that the sales tax is a personal debt of the retailer, rather than of the consumer. He states, "[The local option gas tax] becomes a debt owed by the

retail dealer to the state Department of Revenue when the return is filed or an assessment is made pursuant to section 206.06 and rule 12B-5.11 [now 12B-5.011]." (S.O. 20-21) He emphasizes several facts (S.O. 19-21):

(a) The tax is collected as an unspecified part of the total retail sale price. Presumably the concern here is that this method of collection is one which a retailer as a taxpayer would use. The distinguishing factor, however, is that the customer is told that the sales tax is included in the total price. If this were a tax on the retailer, the customer would not need to know about it, because it would be the retailer's debt. Omitting the exact amount of the sales tax from the sales slip does not transform the consumer tax into a retailer tax. The amount of the tax is easily identifiable because the formula for computing the tax is established by law.

(b) The taxes collected are commingled with other proceeds of the business and thereafter used by the dealer without any separate accounting for the amount of the tax collected. The State's response is that the absence of a bar against commingling funds does not prove that the collected taxes belong to the tax collector. Commingling of funds is permitted with respect to all types of taxes collected. This conduct is tolerated for the convenience of businesses. Requiring the segregation of sales tax funds from other proceeds of the business is deemed to be too burdensome. This also explains why taxes must be remitted monthly, rather than weekly or daily.

(c) The dealer is obligated to pay monthly a percentage of gross sales (calculated on inventory), rather than make payment of the sales tax actually received. Again, presumably the concern here is that this method of remitting collected taxes is one that would be used by a retailer in his capacity as a taxpayer, rather than as a tax collector. The State's response is simply that this procedure was selected for administrative convenience.

(d) If a tax return is not timely filed or the tax due is not timely paid, section 206.06 contemplates that an assessment shall be made by the Department of Revenue to recover the tax and penalty due in accordance with the provisions in section 206.14. ... This tax assessment fixes the amount of the debt for taxes, penalties, and interest owed to the state, and payment thereof may be enforced by the state in a number of ways, such as filing a suit for collection (§ 206.07), issuing a warrant for collection of the tax (§ 206.075); rule 12B-5.10), or enforcing the statutory lien on the taxpayer's property (§ 206.15); rule 12B-5.10), which is not limited to the moneys or currency collected, through a lien foreclosure action (§ 206.174).

The State's response is that civil collection remedies, which are applicable to all of the tax statutes, are not the exclusive remedies available to the government. Criminal and civil remedies are often pursued simultaneously, the civil to recover the stolen money and the criminal to punish the thief and deter others from such conduct.

Cases from other jurisdictions are instructive. In Anderson v. State, 265 N.W. 210 (Wis. 1936), the defendant, a licensed dealer in motor fuel, was convicted of embezzlement of the sales tax that he collected from his customers. On appeal, he argued that the applicable statutes made him "liable to the state for the amount of the tax on the gasoline sold and thus merely created the relation of debtor and creditor." Id., at 212. Wisconsin law imposed a tax on the owners and operators of motor vehicles, and it imposed a duty on gasoline dealers to obtain operating licenses, to collect the sales tax from their customers, to file monthly statements of the number of gallons of gasoline sold, and to pay the taxes collected on the date the monthly statements were filed. Penalties (late fees and automatic revocation of license) were imposed for failing to pay the tax in a timely manner. In addition, any dealer failing to pay the tax was guilty of a misdemeanor punishable by a fine between $100 and $1,000, and he was subject to being sued for nonpayment of the tax, including the appointment of a receiver of his property and business to impound them as security. Furthermore, the state's claim for unpaid taxes was declared to be a preferred claim with respect to any assignment for the benefit of creditors or bankruptcy proceedings. Id., at 212.

The Wisconsin supreme court rejected the defendant's argument that the above statutes created solely a debtor-creditor relationship, stating:

> [G]enerally speaking, taxes are debts due the government. However, the declaration of the statute that the purpose of the Legislature was to impose the tax on the owner or operator of the motor vehicle, clearly indicates that the tax is imposed against the person purchasing it for use in his motor vehicle, and that the dealer is the agent of the state in collecting the tax. We are of opinion that the chapter should be construed as creating the relation of agent for collection rather than that of a mere debtor. Of course any agent who fails to turn over collections by his failure becomes a debtor, but becoming a debtor does not destroy the relation of agency. The point seems sufficiently covered by a statement in Monamotor Oil Co. v. Johnson, 292 U.S. 86 ..., concerning a like statute: "Instead of collecting the tax from the user through its own officers, the state makes the distributor [licensed dealer] its agent for that purpose. This is a common and entirely lawful arrangement." [Internal citations, in part, omitted]

Id., at 212. The Wisconsin court returned to this issue later in its opinion, stating:

> As above pointed out, the relation between the defendant and the state is not merely that of debtor and creditor, but is that of agent and principal. If defendant's position were correct, there could never be a conviction for embezzlement, larceny, or robbery. One committing any of these crimes becomes the debtor of his victim under implied contract in precisely the same sense and for precisely the same reason that the defendant here involved became a debtor of the state. One may waive the tort against him in any of these cases and sue on contract to recover the money or the value of the property taken if he wishes, but this does not relieve the debtor of criminal responsibility.

Id., at 214-215.

The Illinois Supreme Court in People v. Kopman, 193 N.E. 516 (Ill. 1934), also held, based on similar statutory language, that the distributor was made the agent of the government for the purpose of collecting a sales tax on gasoline, stating:

> The statute makes the distributor the agent of the state as a collector of the tax. It comes to his hands while he is acting in a fiduciary capacity as agent of the state for its collection. It in no sense belongs to the distributor but is the property of the state.

Id., at 517.

The Supreme Court of South Dakota in State v. Sankey, 299 N.W. 235 (S.D. 1941) followed the rationale of the Kopman and Anderson courts. It stated:

> The entire act is directed to the devising of means to collect a tax from the purchaser and not from the seller. * * * Thus it is seen that the tax is really collected from the purchaser, and that the dealer is merely an agency through which collection is made. * * * A careful study of this act convinces us that the true object and purpose of this act is to tax users of gasoline in the state 3 cents per gallon through the agency of a dealer's tax. Every provision is to effect this result, ... * * *
>
> The purpose of the legislature was to impose the tax on the user of motor vehicle fuel and not upon the dealer. The act makes the dealer an agent of the state for the purpose of collecting the tax. This is not an uncommon method of collecting motor fuel taxes. Since the statute creates an agency and the taxes come into the possession of a dealer in a fiduciary capacity, the willful omission or refusal to pay over the state taxes collected subjects the dealer to prosecution under [the criminal statute] for embezzlement. [Internal quotations and citations omitted]

Id., at 236. The only significant difference between Sankey and the other two cases was that the Legislature expressly made the dealer an agent of the government in Sankey, and in Kopman and Anderson, as here, the Legislature implicitly made the dealer a government agent for the purpose of collecting the local option gas tax.

The debtor-creditor argument was also advanced and rejected in People v. Felber, 34 N.Y.S.2d 609 (N.Y. S.Ct. App. Div. 1st Dept. 1942), where the court stated:

> It is insisted that no larceny has been proved against this defendant because the officers of Mab Motors, Inc., whom defendant was charged with aiding and abetting, did not themselves appropriate any money from the City; that while they may be penalized for failure to pay over the sales taxes, they may not be charged with embezzling funds because the moneys collected from taxpayers at no time belonged to the City. We find no merit to this contention. Mab Motors, Inc., had in its possession and custody as bailee, agent or trustee for the City, the funds which it had collected from its customers, and when it and its officers applied such sums to their own use, the larceny was complete. The fraudulent conversion, by a vendor, of City sales tax money so collected from purchasers, constitutes larceny.

Id., at 611-612.

3. The dissenting judge argues that the collected taxes were not funds of the government because the Legislature did not explicitly describe them as government funds. He states, "Only when there is a specific statutory provision identifying the money or currency collected for taxes as funds belonging to the state does the failure to remit such taxes constitute the criminal offense of grand theft." (S.O. 28)

Two statutes, sections 206.41 and 206.56, expressly provide that motor fuel taxes collected by refiners, importers, and wholesalers are state funds. The dissenting judge argues that these provisions do not apply to retail dealers of motor fuel, notwithstanding the language in section 336.025(2)(a) that "[t]he sections of chapter 206, including, but not limited to, ... also apply to the tax authorized in this section." (S.O. 13-19) He states that "only those provisions [of Chapter 206] that apply to taxes that are calculated on the basis of gallons sold with the amount thereof being included in total price of the fuel sold are incorporated under [section 336.025(2)(a)]." (S.O. 14)

In response, the State points out that the provisions which the dissenting judge cites in Part I of Chapter 206 only govern refiners, importers, and wholesalers because they, not retailers, are responsible for collection of Chapter 206, Part I, taxes. Obviously, if these requirements are to be made applicable to local option taxes as the Legislature intended, they must be applied to retailers, who are the parties collecting those taxes, rather than to refiners, importers, and wholesalers. Part II of Chapter 206 clearly makes the provisions cited by the dissenting judge, specifically sections 206.23 and 206.49, applicable to certain "retailers," notwithstanding that they would otherwise seem not to apply. See section 206.97. Furthermore, the provisions of Part II of Chapter 206 are as applicable to the provisions of section 336.025 as are the provisions of Part I of Chapter 206.

4. The dissenting judge argues that explicit statutory language declaring the collected taxes to be government funds is required in order to give the taxpayer adequate notice that the funds are not his. He states:

> Nothing on [the tax] form, in the statute, or in the department's regulations places a retail dealer on notice that the moneys or "currency" collected as part of the retail gas sale are funds of the state and must be accounted for accordingly. (S.O. 20)
>
> Without such statutory provision, the taxpayer is not informed that the money or currency so collected is not available for use by the taxpayer and must be accounted for separately. (S.O. 28)

Implicit in this argument is the assumption that the funds do in fact belong to the government. The issue is simply whether the government's ownership of the funds has been adequately communicated to the tax collector.

The State's response is that retail dealers have sufficient statutory notice that the collected funds belong to the government and not to them. Section 336.025(a) plainly states that the retailer is to collect the tax from his customers and remit it to the state. This same provision provides that "[t]he sections of Chapter 206, including but not limited to those sections relating to timely filing of reports and tax collected ... also apply to the tax authorized in this section." Thus, the retailer is on notice that he has to file his report and remit the collections for the previous month on the 20th day of each month. Section 336.025(b) provides that the retailer is to

retain 3% of the collections as compensation for his efforts on behalf of the state. The only rational inference to be drawn from this provision is that the remainder of the funds belongs to the state. Section 212.62(1) expressly makes the retail dealer a state agent to collect one type of sales tax on motor and diesel fuel under certain circumstances, and section 212.62(5) requires the retailer to post a sign on each pump that the price stated on the pump includes applicable state sales taxes.

5. The dissenting judge argues that the Legislature intended the tax law provisions covering criminal and civil penalties to be the exclusive remedy for sales tax violations. (S.O. 23-27) Since Cash has not pursued this issue before this court (PIB. 1-2), the State will not address the merits of the dissenting judge's argument.

6. The dissenting judge argues that the element of intent was not proved by the State. This argument will be addressed under the third point raised by Cash in his merits brief.

ISSUE II (CERTIFIED QUESTION)

> IF THE STATE DOES NOT HAVE A POSSESSORY INTEREST IN THE COLLECTED TAXES, IS A CONVICTION OF GRAND THEFT UNDER THESE CIRCUMSTANCES FUNDAMENTAL ERROR THAT WARRANTS AN APPELLATE COURT TO REVIEW THE ISSUE EVEN THOUGH THE ISSUE HAS NOT BEEN PROPERLY PRESERVED BY THE DEFENDANT?

The answer to the certified question is "No." Cash's argument on this issue in its entirety consists of the following:

> Petitioner also requests that this Court answer the second certified question in the affirmative for the reasons expressed by Judge Zehmer at page 3 of the opinion -- that fundamental error results from conviction of a nonexistent offense. In addition to the opinions cited in the dissent on the second question, see Troyer v. State, 17 Fla. L. Weekly D2721 (Dec. 2, 1991) (conviction of crime that never occurred is fundamentally erroneous).

(PIB. 12)

Appellate courts analyze trial court errors in one of two ways--they apply either the harmless error rule or the fundamental error rule. Since neither rule can be fully understood in isolation, the State necessarily will discuss them both, even though Cash has relied solely on the fundamental error rule. To lay a foundation for understanding this rule, the State first will analyze the harmless error rule followed by a brief discussion of the contemporaneous objection rule and the role of appellate courts in our judicial system.

The harmless error rule applies to errors that were properly raised and preserved at the trial level, and it is the State who has the burden of showing the harmlessness of a properly raised

and preserved error. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).[2] This Court described the harmless error rule as follows:

> [I]t places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively, stated, that there is no reasonable possibility that the error contributed to the conviction. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. [citation omitted]

Id., at 1135.

The harmless error rule goes hand in hand with the contemporaneous objection rule, a comprehensive explanation of which is found in State v. Applegate, 591 P.2d 371 (Ore. App. 1979), where the court stated:

> There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was

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[2] The district court of appeal made it clear that the issue was preserved for appeal. DiGuilio v. State, 451 So.2d 487, 488 (Fla. 5th DCA 1984).

> presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expenses of an appeal.

Id., at 373. See, also, Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

Two factors relating to the contemporaneous objection rule warrant elaboration. First, permitting a defendant to challenge for the first time on appeal the sufficiency of the evidence to sustain the jury's verdict would deprive the State of the opportunity of reopening its case to prove a missing element inadvertently overlooked. The law is well established that "the question of allowing the reopening of cases is one involving sound judicial discretion of the trial court, a discretion rarely interfered with at the appellate level." Pitts v. State, 185 So. 2d 164, 166 (Fla. 1966) (trial judge properly permitted State to reopen its case, apparently after jury deliberations commenced, to clarify a "point that had been confused in the original presentation"), vacated on other grounds, 408 U.S. 941 (1972). The rationale for the trial court's discretion was explained in U. S. v. Montgomery, 620 F. 2d 753 (10th Cir. 1980), cert. denied, 449 U.S. 882 (1980):

> The trial court has some interest in seeing that justice is done and in seeing that all

> of the facts are presented. Where, as here, the judge is simply acting to prevent a manifest injustice brought about by inadvertence on the part of the government, the court's exercise of discretion should not be disturbed.

Id., at 757.

See, also, the following cases holding that the trial court properly exercised its discretion to permit the prosecution to reopen it case for further evidence: Dees v. State, 357 So. 2d 491 (Fla. 1st DCA 1978) (State reopened its case to prove venue after defendant moved for judgment of acquittal on ground that venue was not established); Jones v. State, 392 So. 2d 18 (Fla. 1st DCA 1980) (State reopened its case to introduce copy of agency rule after defendant moved for judgment of acquittal on ground that applicable rule had not been admitted); U.S. v. Blankenship, 775 F. 2d 735, 740-41 (6th Cir. 1985) (Government reopened case to introduce evidence of defendant's prior conviction of a felony after defendant moved for judgment of acquittal on ground that this element of offense had not been established); U.S. v. Shurn, 849 F.2d 1090, 1094-1095 (8th Cir. 1988) (Government reopened case to ask its expert another question about practices of drug traffickers); U.S. v. Bolt, 776 F.2d 1463, 1471-1472 (10th Cir. 1985) (Government reopened case to introduce evidence proving that bank was insured after defendant moved for judgment of acquittal on ground that this element of offense had not been established); U.S. v. Washington, 861 F.2d 350, 353 (2d Cir. 1988) (Government reopened case

immediately after resting to have officer identify defendants as same people he had arrested); and U.S. v. Gomez, 908 F.2d 809, 810-811 (11th Cir. 1990), cert. denied, 111 S.Ct. 699 (1991) (Government reopened case to elicit testimony from confidential informant after defendant moved for judgment of acquittal on ground of per se entrapment).

Second, one of the consequences of permitting defense counsel to stand mute at trial with full knowledge of curable defects in the prosecutor's case is the inadvertent encouragement of the practice of deliberately building reversible error into the case, a problem of particular concern to this Court. See, e.g., State v. Jones, 204 So. 2d 515, 518 (Fla. 1967); Clark v. State, 363 So. 2d 331, 335 (Fla. 1978), receded from on other grounds in DiGuilio, 491 So. 2d 1129 (Fla. 1986); and State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984).

In State v. Jones, the defendant complained that the prosecutor commented on his failure to testify. No objection was made in the trial court. On appeal, the district court reversed the conviction, holding that the trial court, sua sponte, should have declared a mistrial. The supreme court quashed the district court's decision, concluding that the prosecutor's argument was within permissible bounds. The Jones court then proceeded to address the procedural issue and offered the following explanation for why an exception to the contemporaneous objection rule had developed:

Previous decisions of this Court indicate broad liberality in applying the exception to the end that there be no infringement in the trial courts of fundamental rights of persons charged with crime. Such an attitude was appropriate in view of the fact that prior to Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R. 733, it was in the trial of capital cases only that indigent defendants were given the assistance of counsel. This meant that many defendants who were unable to hire an attorney and who were unskilled in court procedure and ignorant of their rights were vulnerable to abuses of over-zealous prosecutors. Under such circumstances this Court could do naught but charge the trial judge with the responsibility of prompt and decisive action by ordering a mistrial in such cases. The exception as thus recognized was intended to have this salutary effect, "As Heaven does it rains, showers, it favors alike on the high and the low, the rich and the poor," the exception had to be applied to those with counsel as well as to those without counsel. This made it possible for defense counsel to stand mute if he chose to do so, knowing all the while that a verdict against his client was thus tainted and could not stand. By such action defendants had nothing to lose and all to gain, for if the verdict be "not guilty" it remained unassailable.

Such procedure is unmindful that an important function of an attorney in a trial is to assist the court. It is the judge's responsibility to supervise the trial. If counsel performs his duty and promptly calls attention to remarks of the prosecutor which he considers prejudicial the court can excuse the jury, hear from both sides and forthwith take appropriate action if the remark in fact is found to be improper. [citation omitted]

Prior to the Gideon case the good resulting from the application of the exception over-shadowed the evil, for trial judges, notwithstanding the absence of objection, were admonished to intervene, sua sponte, and declare a mistrial thus assuring to many uninformed defendants on trial without counsel a fair and impartial trial.

> At the present time all defendants in criminal trials who are unable to engage counsel are furnished counsel without charge. Application of the exception is no longer necessary to protect those charged with crime who may be ignorant of their rights. Their rights are now well guarded by defending counsel. Under these circumstances further application of the exception will contribute nothing to the administration of justice, but rather will tend to provoke censure of the judicial process as permitting "the use of loopholes, technicalities and delays in the law which frequently benefit rogues at the expense of decent members of society."
>
> It has been suggested that some courts today seem to be preoccupied primarily in carefully assuring that the criminal has all his rights while at the same time giving little concern to the victim. Upon the shoulders of our courts rests the obligation to recognize and maintain a middle ground which will secure to the defendant on trial the rights afforded him by law without sacrificing protection of society. As Mr. Justice Cardozo explained in Snyder v. Commonwealth of Mass., 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674, 687:
>
> > "But justice, though due to the accused is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Id., at 518-519. The court then stated that challenges to prosecutorial argument would henceforth be reviewed only when properly raised and preserved for appeal.

Not only does the harmless error rule go hand in hand with the contemporaneous objection rule, but both of these are in close association with the function of appellate courts, which is to review adverse rulings of the trial court. In Johnson v. State, 43 So. 430 (1907), this Court stated:

> The rule is settled here beyond further cavil that an appellate court can pass upon the question of the sufficiency of the evidence to sustain a verdict only by a review of an order made by the trial court granting or denying a motion for new trial including the ground that the verdict is not supported by the evidence or is contrary to the evidence. The reason for the rule is that the appellate court sits in review of the rulings of the trial judge, and not directly upon the findings of the jury. If the claim is made that the findings of the jury are contrary to the evidence, appeal must be made to the trial judge at the proper time by motion for new trial, in order that he may have an opportunity to set aside the erroneous finding. If he declines to do so, and exception to such ruling is duly taken, then the appellate court reviews his ruling, and if found to be erroneous, commands the grant of a new trial.

Id. (e. s.)

Some years later in State v. Barber, 301 So. 2d 7 (Fla. 1974), this Court revisited this issue, once again refusing to review a challenge to the sufficiency of the evidence absent an adverse ruling from the trial court. The defendants in Barber were convicted of two counts of breaking and entering with the intent to commit grand larceny and were sentenced to prison for two years. Their trial counsel never moved for a directed verdict (no judgment of acquittal). On direct appeal from their judgments of conviction, the defendants raised two issues: (1) sufficiency of the evidence to sustain the conviction; and (2) denial of effective assistance of counsel.

The First District Court of Appeal desired to reach the merits of the issues raised because of its opinion that the

evidence was insufficient to prove one of the elements of the offense (value of property involved in larceny). It acknowledged the existence of case law from the Second District and this Court holding that these issues must first be presented to the trial court. It noted the following holding in Chester v. State, 276 So. 2d 76 (Fla. 2d DCA 1973):

> [T]he question of inadequate representation is not one that can properly be raised for the first time on a direct appeal from an adverse judgment because it is a matter that has not previously been ruled upon by the trial Court. Such ground within the restricted orbit of 'State action' must be raised preliminarily during the trial in order to afford a contention upon appeal. An appellate Court may confine itself only to a review of those questions which were before the trial Court and upon which a ruling adverse to the defendant was made.

Barber v. State, 286 So. 2d at 25.

With respect to controlling precedent from this Court, the First District stated:

> The Supreme Court of Florida has consistently held, in construing Florida Appellate Rule 6.16 that unless the sufficiency of the evidence to sustain a verdict in a criminal case is first presented to the trial court via a motion for a directed verdict, motion for a new trial wherein the sufficiency of the evidence is a ground thereof, or such other motions wherein the trial court's attention is directed to the question of the sufficiency of the evidence, and ruled upon, such question is not reviewable by the appellate courts.

286 So. 2d at 25.[3]

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[3] Florida Appellate Rules, Rule 6.-16 provided:

The First District considered that it had three options: (1) dismiss the appeal with instructions to the defendants to file a collateral motion; (2) refuse to follow precedent from the Second District and reverse for a new trial on the ground of ineffective assistance of counsel; or (3) refuse to follow precedent from this Court and reverse for a new trial on the ground that the interests of justice required it. It selected the third option and disposed of the case in the following manner:

> From this evidence, if motion had been made, we think the trial court would have directed a verdict as to the grand larceny phase of the prosecution. The evidence was not sufficient to sustain the verdicts; however, inasmuch as the defendant's counsel made errors in the trial and the State Attorney may not have adduced all the evidence he could have, we reverse the convictions and remand the same for a new trial, although we think the evidence was sufficient to sustain a conviction for the lesser included offense of breaking and entering with intent to commit petit larceny, as to the first count of the information. The evidence was very weak as to the second count of the information.

286 So. 2d at 26-27.

> a. ... The court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appear in the record, ...
>
> b. Sufficiency of Evidence. Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal....

286 So. 2d at 24.

This Court's discretionary jurisdiction was invoked to review the First District's decision. After noting that the district court had exercised poor judgment in the choice of alternatives selected, it proceeded to reject each of the arguments advanced by the district court and by the respondents (convicted criminals), stating:

> The construction placed upon F.A.R. 6.16 by the district court was erroneous. As we have previously stated ..., unless the issue of sufficiency of the evidence to sustain a verdict in a criminal case is first presented to the trial court by way of an appropriate motion, the issue is not reviewable on direct appeal from an adverse judgment. No such appropriate motion having been made in the trial court in this cause, the question of sufficiency of the evidence was not open to appellate review.
>
> As to whether the issue of adequacy of representation by counsel can properly be raised for the first time on a direct appeal, we hold that it cannot properly be raised for the first time on direct appeal, since, as was recognized in Chester, "it is a matter that has not previously been ruled upon by the trial Court." An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made. * * *
>
> Respondents also contend that appellate review of sufficiency of the evidence was proper under F.A.R. 3.7(i) which provides that, in the interests of justice, the appellate court may notice fundamental error apparent in the record even if it has not been made the subject of an assignment of error; their position is that the State failed to prove a prima facie case, and that this constitutes fundamental error. To accept this contention would be to disregard entirely the holdings in [the previously mentioned cases], all standing for the

> proposition that sufficiency of the evidence must be raised by appropriate motion in order to be reviewable on direct appeal. Accordingly, we reject this contention.

301 So. 2d at 9-10.

The Barber court was eminently correct in its decision. It recognized that appellate courts do not directly review the conduct of trial counsel, only that of the trial court. Defense counsel, not the trial court, has a duty to move for judgment of acquittal, and the trial court, not an appellate court, sits directly in judgment of defense counsel's conduct. If defense counsel fails in his duty, the remedy is a post-conviction motion under Rule 3.850, Fla.R.Crm.P. If defense counsel's failure to act resulted in prejudicial error to the defendant, the trial court will correct the error by granting the defendant appropriate relief. Any adverse ruling of the trial court will be subject to appellate review.

As recently as January of this year, this Court, by implication, reaffirmed Barber. In Archer v. State, 18 Fla. L. Weekly S87 (Fla. January 28, 1993), this Court stated:

> As his first point on appeal, Archer argues that his motion for judgment of acquittal should have been granted because the victim's murder was independent of the agreed-upon plan to kill a different clerk. For an issue to be preserved for appeal, however, it "must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985). Archer did not make the instant argument in the trial court, and, therefore, this issue has not been preserved for appellate review.

Id.

The only time an appellate court is justified in reviewing an alleged error absent an adverse ruling is when the trial court failed to meet its affirmative duty to act. See, e.g., Foster v. State, 387 So. 2d 344 (Fla. 1980) (trial court had affirmative duty to appoint separate counsel for indigent co-defendant when actual conflict of interest became apparent to the court during course of trial).[4]

From the above discussion of the harmless error rule and related matters comes an understanding of some of the basic factors of the fundamental error rule itself. This rule applies only to unpreserved errors, which are of such character that the reasons for the contemporaneous objection rule fall to the wayside and the concern over defense counsel deliberately

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[4] The institutional integrity of the trial court is eroded when an appellate court loses sight of its function to directly review only the trial court's conduct and in effect sits as a trial court itself. In O'Bryan v. Estelle, 714 F.2d 365, 392 (5th Cir. 1983), Judge Higginbotham concurring specially stated:

> When an appellate court starts afresh, a trial court's function is reduced to that of collecting data and providing an opportunity for an extrajudicial resolution of the dispute. Even this function would experience a reduction in value as expectation of a judicial decision of consequence shifts wholly away from the trial court. The pyramidal shape of our present court structure rests on the institutional integrity of the trial court as a distinct part of the justice system. As such review is extended upward, only the last "court" in the chain retains full institutional integrity.

building reversible error into the record disappears. It applies to the trial court's conduct; that is, the trial court has an affirmative duty to act, and it failed to do so. If the error is prejudicial, meaning that the defendant is entitled to a new trial, but it was defense counsel who had a duty to act and failed to do so, the error is not fundamental, and it must be addressed in a collateral proceeding.

A lawyer, who is incompetent or unethical, can, and should be, disciplined by The Florida Bar. Justice Scalia recently commented on the remedy for abusive appeals of sentencing errors in his testimony before the House Appropriations Subcommittee on Supreme Court Funding, and what he said there is equally applicable here:

> [W]hat has generally protected the courts from frivolous cases, and a lot of people do not realize how essential the practicing attorney is to our system of justice. We call attorneys "Officers of the Court" and we don't understand what that means. They are a great asset to the system of justice because they screen out the frivolous cases. If they bring a frivolous case, **you can discipline the attorney** but you, there is nothing you can do to the pro se applicant for bringing a frivolous case. So we're without any protection against that kind of appeal.

"America and the Courts," C-Span, 20 February 1993 (e.s.).

Cash relies on the following three cases to support his fundamental error argument: Achin v. State, 436 So. 2d 30 (Fla. 1982); Brown v. State, 550 So. 2d 142 (Fla. 1st DCA 1989); and Troyer v. State, 610 So. 2d 530 (Fla. 2d DCA 1992). The State's response is twofold. First, none of these cases address the

reasons relied on by the State in this brief to demonstrate the absence of fundamental error, and second, the facts are distinguishable. In Achin and Brown, the defendant was convicted of a nonexistent crime (attempted extortion and attempted solicitation respectively), but here Cash was convicted as charged of grand theft, which clearly is a real crime. In Troyer, the charging document was facially defective, but here it was facially valid. A distinction is to be made between a charging document that omits facts essential to prove the elements, and a charging document that includes all of the necessary facts, which, for various reasons, it turns out cannot be proved at trial.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE GROUND THAT THE STATE FAILED TO PROVE THE ELEMENT OF INTENT.

Since this issue is beyond the scope of the certified questions, the State respectfully requests this Honorable Court to refuse to address it.

Turning to the merits of the issue, the State's evidence in the instant case conclusively demonstrates that Cash intended to misappropri te government funds. Cash knew that the sales tax collected belonged to the government and that he was obligated to give it to the government on a monthly basis. He never remitted these funds to the government because he deliberately spent the money to pay business and personal debts. (T. 86-88)

Cash a gues that the State failed to prove the element of intent because it could not establish "a point at which [he] could be said to have converted the taxes collected, or to have intended to deprive the state of their use." (PIB. 13) The State disagrees. Cash voluntarily commingled the sales taxes collected with the proceeds from his business; it, therefore, was his responsibility to maintain a balance in his account to cover the amount owed to the government. This he failed to do. The State was under no obligation to separate out its funds from the retailer's, when it was the retailer who had integrated them. The misappropriation was complete on the date Cash was required to pay over the taxes and could not do so because he had spent

the money on other things. See Wilson v. State, 378 So. 2d 1323 (Fla. 3rd DCA 1980) (defendant guilty of grand larceny when he converted patient's money to the use of nursing home he operated); Gitman v. State, 482 So. 2d 367 (Fla. 4th DCA 1985) (defendants guilty of grand theft where they collected money on behalf of their clients but then refused to give it to them).

Cash also relies on the dissenting judge's argument (S. O. 22) in which he attempts to diminish the significance of Cash's admission that he knew the government owned the taxes he had collected. Contrary to the dissenting judge's assertion, there was nothing ambiguous at all about Cash's answers. The import of his testimony was that he fully intended to spend the sales tax collected, while hoping that more money would materialize before it came time to turn over the tax fund to the government. Cash's knowledge that the government owned the collected taxes also served to negate the defenses of mistake, accident, or other exculpatory circumstances.

Cash's reliance on Szilagyi v. State, 564 So. 2d 644 (Fla. 4th DCA 1990); Stramaglia v. State, 603 So. 2d 536 (Fla. 4th DCA 1992); Brewer v. State, 413 So. 2d 1217 (Fla. 5th DCA 1982), rev. denied, 426 So. 2d 25 (Fla. 1983); and Grover v. State, 581 so. 2d 1379 (Fla. 4th DCA 1991) is misplaced. Szilagyi and Stramaglia involved debtor-creditor relationships, not a fiduciary relationship (agent-principal), which is what we have in the instant case. In Stramaglia, the court stated, "[T]his is not a case involving breach of trust, fiduciary duty or agency,"

and neither "does it involve the fraudulent cashing of two party checks or the misapplication of funds belonging to another." Id., at 537. Brewer also involved a debtor-creditor relationship, but the court affirmed the grand theft conviction anyway. In Brewer, the defendant kept money belonging to him but never rendered the services as promised. Here, Cash kept money that never belonged to him. Grover was a circumstantial evidence case. The instant case is not. Cash admitted collecting the taxes and spending the money. His excuse was that he needed money to pay bills, and he hoped to replace the tax fund before it came time to turn it over to the government.

Cases from other jurisdictions are instructive. In State v. Teutsch, 12' N.W.2d 112 (S.D. 1964), the defendant was convicted of failure and refusal to pay over to the state the motor fuel taxes collected by him and with embezzlement of the money received by him on behalf of the state. On appeal, he argued that the evidence was insufficient to sustain the convictions. In disposing of this issue adversely to the defendant, the South Dakota Supreme Court stated:

> We turn to defendant's assignments of error that the verdicts are not sustained by sufficient evidence. Defendant contends that without a wrongful or felonious intent there could have been no crime committed by him, although there may have been a breach of trust. He argues that cash received for sales of motor fuel including taxes was deposited in his bank account and disbursed in the ordinary course of business; that he had a right to so deposit proceeds from sales of motor fuel; that the law did not prohibit the commingling of taxes collected by him in

> a bank account; and that "because of the $7000 or $8000 on the books, he could not pay the taxes."
>
> *** If in the course of dealing with tax collections a dealer deposits them with other moneys in a business account, the burden is on him of showing that there was a balance at all times in his favor sufficient to pay over the taxes collected and deposited.
>
> The information as we have stated charged that defendant failed and refused to pay over the aggregate amount of taxes collected during a ten month period and also that he appropriated same to his own use. It was not necessary to have the jury find what amounts were embezzled. Proof of the embezzlement of any part of the sum was sufficient. In view or admissions by defendant that moneys from sales of gasoline including taxes paid thereon were deposited in a business account and that withdrawals to pay business and personal obligations had overdrawn the account, a fraudulent intent could be inferred. There was no evidence of mistake, accident or other exculpatory circumstances disproving an intent to defraud. Defendant was fully cognizant of the fact that the tax money in no sense belonged to him, but came into his possession as a licensed agent of the state. ... Those who assume the custodianship of public funds must be presumed to do so with a knowledge of their duties and liabilities as such. Ignorance or failure to appreciate the legal relationship involved may in some cases affect the moral but cannot affect the legal aspects of the conversion. In this case the defendant deliberately and intentionally converted the funds of which he was custodian to his own use. From that the law infers a wrongful and felonious intent. We think the evidence sufficient to sustain the conviction. [Internal quotations and citations omitted]

Id., at 114-115 (e.s.)

In State v. Gates, 394 N.E.2d 247, 249 (Ind. 2d DCA 1979), the court held that the defendant's "use of the tax monies to pay

off creditors, and thus keep the business going, constituted 'deal[ing] with the property obtained as his own.'"

In Anderson v. State, supra, the defendant challenged his conviction for embezzlement on the ground that the evidence failed to show, in pertinent part, that he intended to defraud the government. In disposing of this issue adversely to the defendant, the Wisconsin Supreme Court stated:

> The defendant stated that he did not intend to defraud the state, but it is obvious that the finding of intent to defraud was amply supported. By section 343.21, Stats., the failure to turn over the money on demand was prima facie evidence of embezzlement. The court was not bound to take as true the defendant's bald assertion, uncorroborated by any facts or circumstances tending in any way to support it, that he did not intend to defraud. The evidence shows that during about three months the defendant operated he collected $14,000 in taxes and did not turn over any of it, and that he stated that "if he had a couple more months to operate he would be sitting pretty." The inference of intent to defraud was fully warranted.

265 N.W. at 211.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to affirm the decision of the District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief of respondent has been furnished by U.S. Mail to Glen P. Gifford, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301 this 29th day of March, 1993.

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