

IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI

V.

CAUSE NO. 16-0110

BENJAMIN W. ALLEN, III

DEFENDANT

MOTION TO DISMISS INDICTMENT

The Defendant, Benjamin W. Allen, III (hereinafter, "Mr. Allen"), was wrongfully indicted for embezzlement and other crimes arising out of his employment as President of Downtown Jackson Partners (hereinafter, "DJP"). As demonstrated below, Mr. Allen did not commit any crime(s). For the reasons set forth in this motion, the indictment must be dismissed with prejudice.

History of the Downtown Jackson Partners, A Business Improvement District

Downtown Jackson Partners is a not for profit corporation that manages the Business Improvement District (BID) established by the Mississippi Legislature. Around 1995 the Mississippi Legislature passed the *Business Improvement Act* after finding that many of the downtown areas of cities across the state were deteriorated. *Miss. Code Ann.*, Section 21-43-105(d) and 21-43-107, *et seq.* In an effort to halt this deterioration, the Act was to serve as a means to restore prosperity and success to any downtown area that chose to establish a BID. Furthermore, the Act allows the establishment of a private Business Improvement District which would be funded by the voluntary assessment of its members. In order to establish a BID a plan had to be filed with the City Clerk, a public hearing held, and the plan had to be voted on and approved by at least 70% of the property owners in the proposed BID. The Downtown Jackson Business Improvement District has been in existence since 1996. The BID has been renewed multiple times, receiving votes from its members as high as 88.55%. A copy of the BID Plan documents for the years 1996, 2001, 2006, and 2011 are attached hereto as Exhibits "A," "B,"

“C,” and “D,” respectively. A copy of the Business Improvement District Act is attached hereto as Exhibit “E.”

While the funds for the BID are collected by the City, the money collected is clearly not public money but private funds collected from private businesses. The assessments are based on the square footage and are only made on businesses within the BID. Downtown Jackson Partners is a separate legal identity that manages the BID and was established in 1993 under the authority of the Mississippi Nonprofit Laws. DJP was originally known as Capital Center Incorporated, but in 2001 the corporation changed its name to Downtown Jackson Partners. The corporation’s Articles of Incorporation state that it was being organized as a tax exempt nonprofit organization under *Internal Revenue Code Sections* 501(c)(3) (charity) and 501(c)(4) (social welfare). See Exhibit “F” which are the Articles of Incorporation, Name Change and Bylaws which have governed the organization. See Exhibit “G” which is the I.R.S. tax recognition documents.

The history of the Downtown Jackson Partners is set out in an opinion issued by United States District Court Judge Tom S. Lee, in *McGowan v. Capital Ctr.*, 19 F.Supp.2d 642 (S.D. Miss. 1998). Judge Lee details a concise history of DJP and its predecessor, and states unequivocally that the DJP is a private group not a public group and that the funds are private funds which benefit the businesses and not public funds.

The Indictment

Mr. Allen is currently the President of DJP and has held this position since 2007. DJP employs BKD, a nationally recognized accounting firm as its Certified Public Accountant (“CPA”). BKD conducts yearly audits of DJP. The audits were conducted by BKD for the relevant time period in the indictment (2008-2013) and the I.R.S. 990 Forms were all filed. The 990 Forms are attached hereto as “H”. In addition to conducting the audits, BKD handles the large majority of the monthly check payments and reconciles the statements at the end of each

month, and keeps up with receipts for DJP. In February, 2016, Mr. Allen was indicted in a ten (10) count indictment, in which eight (8) counts were allegations of embezzlement under *Mississippi Code Annotated*, § 97-11-25; one (1) count of fraud under § 97-7-10; and one (1) count of making an improper campaign donation to Mayor Tony Yarber's Inaugural Gala. DJP was supposedly the victim of Mr. Allen's embezzlement.

As this Court knows, in order for one to be guilty of embezzlement, the State must prove that he/she "unlawfully convert[ed] to his own use any money or other valuable thing *which comes to his hands or possession by virtue of his office or employment, or shall not, when lawfully required to turn over such money or deliver such thing, immediately do so according to his legal obligation...*" *Miss. Code Ann.* § 97-11-25. (emphasis added). This key element is missing in the case at bar and it cannot at any time be supplied or proven by the State: *Mr. Allen did not improperly receive money from DJP nor did he refuse to turn over money to DJP.*

On May 19, 2016, the DJP Board of Directors met to review the allegations against Mr. Allen. Previously, the Executive Committee of DJP had ordered and directed a thorough examination into the allegations of the Indictment. This investigation was headed by the long-time DJP Board Attorney and former Circuit Court Judge Robert Gibbs, who was assisted by a member of the DJP staff, apart from Mr. Allen. The current DJP Board of Directors consists of the following¹:

Class II Directors (terms expire 10.31.2018)- John Calhoun, CEO of IMS Engineers; Ted J. Duckworth, President of Duckworth Realty; Ben Aldridge, Senior Vice-President of Trustmark National Bank; Sylvia Stewart, owner of Monroe Street Veterinarian Clinic; Louis Wright, Customer Service Representative, Entergy; Sam Begley, attorney; Betsy Bradley, Executive Director of the Mississippi Museum of Art.

¹ The past Board of Directors during the relevant dates in the indictment (2009- present) are listed in composite Exhibit "I".

Class III Directors (terms expire 10.2016)- Ramel Cotton, attorney; Laura Lamar, owner of West Capitol, LLC; Andrew Mattiace, President of Mattiace Properties; Carolyn Meyers, President of Jackson State University; Mike Peters, President of Peters Realty; Mende Alford, Old Capitol Inn; and Debra Griffin, member of Physician Hospice Care.

Class I Directors (terms expire 10.31.2017)- Steve Davis, Partner in CCD Architects; John Ditto, President of State Street Realty Group; Jim Ingram, Vice-President and CIO Hertz Investment Group; Hilda Owen, President, Communication Arts; David Watkins, CEO of Watkins Development Group and Jackson State Professor; Wendy Scott, Dean of Mississippi College School of Law; Jason Goree, Director, Economic Development City of Jackson.

Advisory Council (voted upon annually)- Matt Allen, Partner at Brunini Law Firm; Margaret Barrett-Simon, City of Jackson, Council Woman; Sunny Desai, President & CEO of Desai Hotel Group; Cynthia Buchanan, Executive VP Greater Jackson Chamber Partnership; Brad Franklin, Marketing Specialist, Human & Cultural Services, City of Jackson, and President Our Glass Media Group; Hibbett Neel, President Neel-Schaffer Engineers; David Pharr, Owner Pharr Law Group and developer; Joseph Moss, President BancorpSouth; Michael Rejebian, President Jackson Downtown Neighborhood Association; Joseph Simpson, Owner Iron Horse Grill and Westin Hotel Project; Jack Thomas, Director of Community Development, JMAA; Blake Wallace, Executive Director of Hinds County Economic Development Authority ; Mike Ford, Owner One Block East and President Downtown Business Association of Jackson; David Watkins, Jr., Owner Soul City Hospitality, Up in Farms Food Hub; Jason Watkins, Manager Pix Redevelopment Company, LLC; Clarence Webster, attorney Bradley Arant Boult Cummings, LLP; Malcolm White, Executive Director of the Mississippi Arts Commission; Al Rojas, General Manager, Jackson Convention Complex; Spencer Ritchie, attorney at Watkins & Eager; Harry Walker, President Trustmark National Bank; and Wanda Wilson, President & CEO Jackson Convention and Visitors Bureau;

Executive Committee- Ramel Cotton, Betsy Bradley, David Watkins, Laura Lamar, Hilda Owen, Sylvia Stewart, Mende Alford, Steve Davis and Ted Duckworth; and

Class IV Directors Emeriti- Leland Speed.

After thoroughly reviewing all the results of the detailed investigation and the evidence produced by the Hinds County District Attorney, as well as the Mississippi State Auditor, the DJP Board of Directors issued a unanimous resolution finding that none of the allegations against Mr. Allen constituted a crime against DJP. This conclusion was not difficult to reach

since the actions charged in the Indictment against Mr. Allen had previously been authorized and approved by either the DJP Executive Committee or the DJP Board. However, out of an abundance of caution, the Board instituted the previously discussed investigation to re-examine the allegations in the Indictment. Again, the DJP Board found that each of the alleged criminal actions against Mr. Allen were for purchases or actions specifically approved by the previous Board of Directors or DJP Executive Committee. A copy of DJP's Board Resolution and Minutes is attached as Exhibit "J".

Indictment Counts I-III

For instance, the Board of DJP found that the 1988² Chevy truck (Count 1) was conveyed to Mr. Allen so that he could put the truck in his name to save DJP insurance money. Resolution, Exhibit J, at p. 4. The Executive Committee approved the transfer of the truck to Mr. Allen. It was well known that the truck was still the DJP's truck. In fact, the truck was stored at the same location as all other DJP equipment. Thereafter, Mr. Allen would pay the repair bills (Count 2) and insurance (Count 3) out of his own personal funds and was reimbursed by DJP, or bills for these expenses were paid by a DJP check. *See Ex. J, Resolution, approving expenditures in Count 2 and Count 3. The truck was always kept at DJP and used for DJP business. While both State investigators and the Hinds County District Attorney were clearly informed that DJP approved both the transfer of the truck to Mr. Allen and the reimbursements of the payments, the District Attorney's Office willfully ignored this exculpatory evidence and acted deliberately indifferent and with reckless disregard for the truth by indicting him for these crimes.*

² The Indictment charges it was a 1989 truck but it is actually 1988 as noted on the Title.

Indictment Counts IV, V & VI

The DJP Board specifically addressed each and every other count and again determined that each action was approved and ratified by DJP. *See* Ex “J”, DJP Resolution, approving expenditures in Counts IV, V, and VI. Counts IV, V, and VI allege Mr. Allen embezzled money by paying his wife’s cell phone bill and by using his credit card and paying the bill with DJP funds.

There is no merit to these allegations and a reasonable investigation would have proven such. BKD writes the majority of checks for DJP and keeps monthly receipts. Before DJP had a credit card, Mr. Allen used his own credit card to pay DJP business expenses. Mr. Allen would then turn in receipts with the proper notations on them to DJP and they would be maintained as a business expense. These receipts would then be given to BKD. This practice is customary and an accepted accounting practice in both large and small businesses. A thorough review was made at the direction of the DJP’s Board of Directors of each and every receipt, the majority of which are clearly and unequivocally for re-occurring monthly expenses of DJP. This review has established, without peradventure, that Mr. Allen did not embezzle or convert DJP money. The money spent by Mr. Allen was for the benefit of DJP and any personal expenses on Mr. Allen’s credit cards were paid by him and not DJP. In addition, the DJP Executive Committee approved Mr. Allen adding Susie Allen to the telephone plan with the condition that Mr. Allen reimburse DJP for her expenses, which always occurred. This was always done in a timely manner, and in fact at the time of the Indictment, Mr. Allen had overpaid DJP for Mrs. Allen’s phone charges. There was no embezzlement of funds by Mr. Allen as alleged in counts IV, V, and VI.

Indictment Count VIII

In another bizarre, “Kafka-like”³ charge against Mr. Allen, the Indictment alleges he converted \$40,136.55 of DJP money to his own use by authorizing donations and sponsorships. The avowed purpose of the DJP is to support downtown Jackson. See Exhibit “F”. DJP has a tax exempt status for this purpose. The DJP Board of Directors has authorized in its yearly budget, that a certain amount of money be spent on supporting downtown Jackson through events and sponsorships of events. This money is reflected in the Audited Budget and is voted on each year by the Board. The Indictment appears to have added together the amount of money that DJP spent for the years of 2010-2014, (again, money spent for the very purpose of the organization), and charged Mr. Allen with converting it to *his own use*. DJP is alleged to be the “victim”, yet the Board of DJP authorized and approved the expenditure of money every year; furthermore, it reaffirmed that it authorized and approved the use of the money in its Resolution, Exhibit “J”.

Indictment Count IX

The fictional saga continues in Count IX of the Indictment by alleging Mr. Allen made some type of false representation or trick with the intent to defraud DJP involving the Business Incubator Program (BIP). Leaving aside the fact that DJP is not a public body and this statute does not apply, the facts are that the DJP’s Board of Directors authorized the funding of the Business Incubator Program (BIP). The Business Incubator Program was designed to attract young, smart, or industrious new entrepreneurs to downtown Jackson to start up their businesses. Similar programs are in place in cities across the country. The proposal was presented to the DJP Board and after lengthy discussion the proposal was approved. Attached hereto as Exhibit “K”, are the 2010 Board Minutes which approved the investment into the BIP. There was no false

³ Franz Kafka^[a] (3 July 1883 – 3 June 1924) was a German-language writer of novels and short stories who is widely regarded as one of the major figures of 20th-century literature. His work, which fuses elements of realism and the fantastic,^[3] typically features isolated protagonists faced by bizarre or surrealistic predicaments and incomprehensible social-bureaucratic powers. https://en.wikipedia.org/wiki/Franz_Kafka.

action by Mr. Allen. Rather, as President, Mr. Allen carried out the directives of the DJP Board of Directors. There was no fraudulent Business Incubator Program. In fact, the Business Incubator Program had its own Board which consisted of numerous Jackson Business Leaders. *See* Exhibit "L." Even if we take the State's allegations as true, Mr. Allen did not make any false, fictitious, or fraudulent statement to any state or local government agency. He merely carried out the directives of the DJP Board of Directors.

Indictment Count VII & X

Both of these counts concern Mayor Tony Yarber. After Mayor Yarber was elected, Jackson businesses were asked to assist with the Inaugural Gala. The businesses needed to contribute money so it would be available as needed, without someone having to go and individually collect the money in a difficult and time-consuming fashion. DJP was the best conduit to collect and hold the funds for the Gala. The election was over. The money was not going to a political party or a political race. Board Attorney Robert Gibbs and BKD employees both independently conducted research to determine if DJP could receive and hold those funds for the Gala. Both Robert Gibbs and BKD issued opinions that under both the Mississippi Law and I.R.S. Regulations, DJP could be a conduit for those funds. *See* Exhibits "M" and "N", which are the Gibbs and BKD opinions, respectively. The Funds paid to DJP were never the property of DJP, but were solely intended for and the property of the Gala. The DJP's Board of Directors authorized this procedure and Mr. Allen, together with other DJP employees, transferred money to the Inaugural Gala fund upon presentation of a receipt. A copy of the DJP Minutes authorizing this procedure is attached as Exhibit "O." Count VII of the indictment alleges Mr. Allen embezzled these funds for his own benefit, and on its face this allegation is patently false. These funds were transferred to the Gala Committee only after both an attorney and the accounting firm cleared the procedure. As previously stated, Count X alleges more than

\$1,000.00 was donated by a corporate to a political candidate or party to support someone seeking office. That did not happen. There were no contributions made benefitting one candidate over another, the funds were paid after the election was over and to be used to fund the Gala. As previously stated, all actions were done based on the advice of attorney Robert Gibbs and the BKD accounting firm.

The indictment in essence alleges Mr. Allen embezzled from DJP. However, the alleged “victim,” who is Downtown Jackson Partners, has determined that Mr. Allen neither embezzled nor committed any criminal act against DJP, rather he acted in accordance with his duties as President, with the approval of the DJP’s Board and Executive Committee, who all acted in compliance with the DJP By-Laws and Articles of Incorporation. Is it the position of the Hinds County District Attorney that all members of the DJP’s Executive Committee and Board of Directors are co-conspirators?

The Board members can and will testify consistently with the Resolution at an Evidentiary Hearing on this issue and will so testify at trial. There is simply not one instance in this case where Mr. Allen “converted” money to his own use. Rather, Mr. Allen used money for DJP in his role as President and in accordance with its By-Laws, with the Board or Executive Committee’s authorization, and under yearly audit by BKD. In addition to the fact there was no conversion of DJP money by Mr. Allen, there is also the legal basis that DJP is not a public agency.

DJP is not a public agency, thus DJP funds are not “public funds”, and Ben Allen is not a public official for purposes of § 97-11-25

Section 97-11-25 of the *Mississippi Code Annotated* is titled “Embezzlement- officers, trustees and public employees converting property to own use”. The Mississippi Supreme Court has noted “it is true that Section 97-11-25 applies to public officials generally...” *Hannah v.*

State, 336 So. 2d 1317 (Miss. 1976). The reported cases construing § 97-11-25 all involve public employees charged with embezzling money from their public employer, save one (1) case, which involved a lawyer charged with embezzling money from his client's trust fund. See *Brown v. State*. However, lawyers are specifically mentioned as a class of persons covered by § 97-11-25. Mr. Allen is neither a lawyer, nor was he in charge of a trust fund. He acted as the President of a private corporation, according to the orders of a private corporation's Board of Directors and Executive Committee.

Given the fact that DJP is not a public agency, the fact that Mr. Allen is neither a public employee nor an attorney, and the facts the property in question is not public property, § 97-11-25 simply does not apply. The Mississippi Attorney General's office has specifically addressed entities similar to DJP in its various Attorney General's opinions. "While opinions by the Attorney General are not binding on this Court, they nevertheless provide guidance" on the interpretation of law. *Ball v. Mayor & Bd. of Aldermen*, 983 So. 2d 295 (Miss. 2008). The Attorney General Opinions state:

- Once dues are paid into a private organization, the funds are no longer public funds and are no longer restricted by the laws governing state agencies' investments and expenditures. 1999 WL 1078441 (Miss. A.G.); *CF* 2005 WL 428011 (Miss. A.G.).
- The MSLA is a non-profit organization which assists the Commissioner of Insurance in performing certain duties of that office as provided in Section 83-21-21 of the Mississippi Code of 1972, Annotated, as amended, deemed to be a quasi-public agency. MSLA's officers and employees are not considered public officers or public servants. 2004 WL 1833057 (Miss. A.G.).
- Mississippi Technology Alliance, Inc. ("MTA") is a private, not for profit corporation pursuant to Section 79-11-137 in response to recommendations outlined in a report titled the "Mississippi Science and Technology Action Plan" ("Report"). The Report was prepared by the

Mississippi Science and Technology Commission (“Commission”) which was first established by Executive Order of the Governor and then by Legislative action pursuant to Section 57-81-1. MTA is not a “public agency” as defined by Mississippi state law. Opinion No. 2003-0034, February 28, 2003.

See Exhibit “P”, AG opinions.

As the Court can clearly see, DJP is not a public agency or a state or local governmental agency or board. It is a nonprofit corporation established under the laws of the State of Mississippi. Exhibit F & G. The funds are not public and DJP’s employees are not public servants.

Conclusion

Mr. Ben Allen did not embezzle or convert any of DJP funds to his own use. The governing body of the DJP has conducted a thorough investigation and made this patently and unequivocally clear that all funds were spent with the authorization of either the Board of Directors or the Executive Committee of DJP. There is no criminal offense committed against DJP or the State of Mississippi under any conceivable factual scenario. Mr. Allen moves for an evidentiary hearing on the matter at which time testimony will be provided to the court in support of this motion. In conclusion, it is charged that the District Attorney’s Office acted with deliberate indifference and with reckless disregard for the truth by indicting him for these crimes.

RESPECTFULLY SUBMITTED, THIS the 23rd day of June, 2016.

BENJAMIN W. ALLEN, III, DEFENDANT

BY: /s/ Mérrida “Buddy” Coxwell
MÉRRIDA “BUDDY” COXWELL

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CERTIFICATE OF SERVICE

I, Mérida "Buddy" Coxwell, attorney of record for the Defendant, Benjamin W. Allen, III, do hereby certify that I have this day electronically filed the above and foregoing *Motion to Dismiss Indictment* with the Clerk of Court, using the MEC electronic filing, and provided a copy of same to:

Robert Shuler Smith, Esquire
Hinds County District Attorney
Post Office Box 22747
Jackson, Mississippi 39225-2747

This the 23rd day of June, 2016.

/s/ Mérida "Buddy" Coxwell
MÉRRIDA "BUDDY" COXWELL