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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0483-16T4
A-0484-16T4

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

CARLIA M. BRADY,

Defendant-Respondent.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARLIA M. BRADY,

Defendant-Appellant.

APPROVED FOR PUBLICATION

September 11, 2017

APPELLATE DIVISION

Argued May 23, 2017 – Decided September 11, 2017

Before Judges Messano, Espinosa and Suter.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 15-05-0240.

W. Brian Stack, Assistant Prosecutor, argued the cause for appellant in A-0483-16 and respondent in A-0484-16 (Michael H. Robertson, Somerset County Prosecutor, attorney; Mr. Stack, on the briefs).

Timothy R. Smith argued the cause for respondent in A-0483-16 and appellant in A-

0484-16 (Caruso, Smith, Picini, PC, attorneys; Mr. Smith, of counsel and on the brief; Steven J. Kaflowitz, on the brief).

The opinion of the court was delivered by

MESSANO, P.J.A.D.

These appeals require us to consider the inherent duties of a judge of the Superior Court of New Jersey, whether those duties include an obligation to take whatever steps necessary at any time to "enforce an arrest warrant," and if such a duty exists, what must a judge do to perform, and not refrain from performing, that duty. A Somerset County grand jury indicted Carlia M. Brady, a judge assigned to the Middlesex Vicinage, charging her with second-degree official misconduct, N.J.S.A. 2C:30-2b (count one); and two counts of third-degree hindering the apprehension or prosecution of Jason Prontnicki, N.J.S.A. 2C:29-3a(1) and a(2) (counts two and three). The Law Division judge granted defendant's motion to dismiss count one of the indictment but denied the motion as to counts two and three. The judge subsequently denied motions for reconsideration filed by defendant and the State of New Jersey.

We granted the State's motion for leave to appeal (A-0483-16), as well as defendant's motion for leave to appeal (A-0484-16), and consolidated both appeals to issue a single opinion. We now affirm.

I.

We summarize the evidence produced by the State before the grand jury, then consider the legal instructions the prosecutor gave to the panel and the judge's reasoning in deciding defendant's motion.

A.

The Woodbridge Police Department initially commenced the investigation, which was transferred subsequently to the Somerset County Prosecutor's Office.[1] Prontnicki and defendant started dating in late 2012 and began living together in defendant's home in Woodbridge by March 2013. Defendant took the oath of office as a Superior Court judge on April 5, 2013. On April 29, 2013, the Old Bridge municipal court issued a warrant for Prontincki's arrest, charging him with robbery of a pharmacy, possession of a weapon — a crowbar — for an unlawful purpose and unlawful possession of a weapon.

Shortly after 10:00 a.m. on the morning of June 10, 2013, while on vacation, defendant went to the Woodbridge Police Department to report one of her cars was missing. Woodbridge Police Officer Walter Bukowski, along with Officer Robert Bartko, interviewed defendant.

[1] Because defendant was a sitting judge in Middlesex County, where the crimes allegedly occurred, venue for the prosecution was transferred to Somerset County.

She advised police that Prontnicki originally told her he had loaned the car to his brother in Bayonne. However, when the brother failed to return the car by 2:00 a.m., she and Prontnicki drove to Bayonne to recover the car. On the way, Prontnicki changed his story and told defendant that he lent the car to a friend. Together, defendant and Prontnicki drove around Hudson County for two hours, were unable to locate the car and returned to Woodbridge. Prontnicki returned to Hudson County at 6:00 a.m. to continue the search, and defendant told him she would report the car stolen if she did not hear from him by 10:00 a.m.

Utilizing various databases, police located the outstanding warrant for Prontnicki's arrest for the Old Bridge robbery, as well as another outstanding arrest warrant. They also determined Prontnicki's driver's license was suspended. Bukowski testified that he and Bartko told defendant

> [Y]ou're an officer of the court, you have an obligation or it would be in your best interest to let us know if [Prontnicki] is somewhere . . . now or if once we left, if she came back that . . . it would be her duty to call us and let us know if [Prontnicki] came home.

Police tried unsuccessfully to locate Prontnicki's friend who allegedly had the car. Defendant wanted to sign a complaint against the friend, but police told her she could only sign a

complaint against Prontnicki, who actually took the car. Defendant declined until she spoke to her family and attorney, and then left the police station. Police periodically rode by defendant's home afterwards and saw the missing car parked in her driveway at 9:35 p.m. They knocked on her door, but no one answered.

Investigators secured defendant's cellphone records as part of the investigation. Between 12:36 p.m. and 12:43 p.m. on June 10, defendant sent text messages to friends, in which she acknowledged police told her of the robbery, which occurred after Prontnicki moved in with her and after defendant became a judge. In one text, defendant wrote, "I can't have [Prontnicki] in my house [because] I [would] now be harboring a criminal. I [would] have to report him."

Shortly thereafter, Prontnicki called defendant's cellphone. Defendant recounted the conversation in a text message she sent to a friend at 1:37 p.m. on June 10:

> [Prontnicki] just called to tell me he got the car and will bring it home. I told him he can't stay with me [because] he has a warrant out for his arrest and I am required to notify authorities when I know someone has a warrant. So I told him he must leave after he drops the car off as I must go to the police.

Prontnicki corroborated these events in a statement to police after his arrest. He arrived at defendant's home with

the car, and defendant's father let him into the house. He and defendant went into the garage and spoke for approximately one hour. She told him she was "supposed to call the Woodbridge Police when he arrived," and Prontnicki told her to "do what you have to do." Prontnicki refused defendant's offer of money for cab fare and left for his brother's house in Woodbridge.

Defendant called Woodbridge police at 4:36 p.m. and asked to speak to Officer Bartko; he was unavailable, but defendant left the following voice mail:

> [T]his is Carlia Brady. . . . I sat with you to fill out [an] incident report . . . with regard to the unlawful taking of my car . . . . I just wanted to report . . . that . . . Prontnicki, the suspect . . . actually returned it just now. . . . [I]t is in my driveway. I haven't inspected it yet cause it's raining and I didn't bring it into my house because I didn't want it in my house unless I can inspect it. . . . I just wanted to let that be known. Also, to let you know since there's a warrant out for his arrest, he is not with me, but he is in Woodbridge cause he left . . . my property so please give me a call back. I, we need to know whether an amended report needs to be redone . . . or added, whatever I needed to do. Please give me a call back . . . .

Defendant was also on vacation the next day, June 11. That morning, she and Prontnicki had a two-hour and twenty-three minute phone conversation. Prontnicki told police he asked defendant when she would be home because he needed to pick up some clothing; defendant told him she would be at the house

between 3:00 p.m. and 4:00 p.m. Police, meanwhile, decided to surveil defendant's home.

At 1:49 p.m., Prontnicki called defendant to confirm she would be in her house as planned. At 2:14 p.m., defendant sent a text message to a friend, in which she repeated Prontnicki's denials of involvement in the robbery. She also wrote:

> He . . . will turn himself in . . . when his lawyer is able to come with him and cooperate fully with the cops by giving them everything he knows. He can't stay in my house cos (sic) he has an arrest warrant right now and I have a duty as a judge to report all crimes and anyone with an arrest warrant. So he is at his brother's house.

At 3:31 p.m., defendant again called police and left a voicemail, advising that Prontnicki had returned her car and she wanted to know when she could obtain an amended report. She did not tell police about her conversations with Prontnicki, or that she expected him at her home shortly.

At 3:48 p.m., Prontnicki called defendant as he drove to defendant's home with his brother. Undercover police stationed outside defendant's home observed Prontnicki exit the passenger side of his brother's car. The garage door opened and defendant was standing on the threshold. Prontnicki entered the garage, the door shut, and he stayed for approximately one hour. Police then saw the garage door open, and defendant and Prontnicki appeared. Holding a duffel bag, Prontnicki returned to his

brother's car, entered and drove away. Police stopped the car some distance from defendant's home and arrested Prontnicki. In the bag were multiple items of clothing and miscellaneous papers. In his statement to police, Prontnicki said defendant prepared a bag of his clothing before he arrived, and he transferred the clothing to a duffel bag.

In text messages to friends sent immediately after Prontnicki left, defendant described his claims that there was no outstanding warrant for robbery, he was only wanted for questioning, police arrested someone else for the crime and his driver's license was not suspended. Minutes later, police arrived and arrested defendant at her home.

The grand jurors heard a recording of defendant's conversation with Bartko in the police vehicle as he took her to headquarters. Among other things, defendant told the officer she was not trying to break the law and was only helping her boyfriend, who denied there was an outstanding warrant for his arrest.

Defendant testified at length before the grand jury and confirmed many of these events. However, defendant claimed that during her visit to the police station on the morning of June 10, police told her to call them only when she knew Prontnicki's exact whereabouts. She told them he might be at her home as

they spoke, because he had keys to the house, and offered police her keys. She suggested they surveil her home, but they refused her offers. Defendant was concerned for her safety and told police she did not want "to be in the middle." She would only call them when it was safe, i.e., when Prontnicki was not present, which was why she waited until Prontnicki left before calling police after he returned her car.

Defendant asked police to see a copy of the arrest warrant, but they refused. She offered them photographs of the Hudson County street where she and Prontnicki searched for her car, but the officers were not interested. Defendant did not want to return to her home once she knew about the robbery warrant, but police would not let her stay at the police station.

Defendant described in detail Prontnicki's return of the car and the one-hour long conversation she had with him in the garage. Her father offered Prontnicki cab fare.

Defendant insisted that the recordings of both her calls to the Woodbridge Police Department lacked critical information she had provided to the police. The prosecutor instructed the grand jurors that both the State and defense had experts evaluate the accuracy and authenticity of the recordings, and there was a dispute between those experts. Defendant said that during the first call on June 10, she told police Prontnicki was in

Woodbridge, staying at his brother's house, and described its location. Defendant specifically remembered telling police she was "attempting to discharge any reporting obligations per [their] instructions."

She again challenged the accuracy of the recorded conversation of her second phone call to police headquarters. Defendant claimed the recording omitted her statement that she wanted to confirm that police had received the update of Prontnicki's whereabouts she had provided the day before.

Defendant testified that on June 11, Prontnicki told her his brother would come over to pick up his things. Instead, Prontnicki opened the garage door with a remote control that he had. He gathered some things, but defendant kept her distance and urged him to turn himself in to police. Defendant said Prontnicki left through the garage door, and, after she closed the door, she intended to go to the police station. Police arrived and arrested her, however, before she could leave.

Other witnesses who testified after defendant directly contradicted portions of her testimony, specifically, the interactions with police at headquarters on June 10, and the events at defendant's home on June 11 when Prontnicki arrived and retrieved his clothing.

B.

Before any testimony, the prosecutor advised the grand jurors that defendant was charged in two complaints with hindering by harboring Prontnicki, knowing he was a fugitive charged with robbery, N.J.S.A. 2C:29-3a(1), and by "deceiving law enforcement by not immediately notifying law enforcement of . . . Prontnicki's . . . whereabouts." N.J.S.A. 2C:29-3a(5). The prosecutor further advised that he would make a "direct presentation" on the charge of official misconduct, in that defendant "failed to perform a duty . . . inherent in the office of [S]uperior [C]ourt judge, that is to enforce an arrest warrant for . . . Prontnicki by failing to adequately notify the . . . Police Department of . . . Prontnicki['s] intended appearance or presence at [defendant's] house." He explained, the State contended defendant refrained from performing this duty for her own benefit — to avoid the embarrassment of having her boyfriend arrested — and for Prontnicki's benefit — "avoiding jail."

The prosecutor provided written instructions to the grand jury, including the elements of N.J.S.A. 2C:29-3a(1) and (2),[2] and criminal attempt, N.J.S.A. 2C:5-1. As to official

[2] The prosecutor never charged the grand jury with respect to N.J.S.A. 2C:29-3a(5).

misconduct, N.J.S.A. 2C:30-2b, the prosecutor began by generally following Model Jury Charge (Criminal), "Official Misconduct (N.J.S.A. 2C:30-2)" (Sept. 11, 2006). He then described "one of the central issues in this case."

> Is there a duty clearly inherent in the office of [S]uperior [C]ourt judge? The first question is does a . . . judge have an inherent duty to enforce an arrest warrant? The second question would be what does that duty entail? And, third, did . . . defendant refrain from performing that duty in this case? These are all . . . issues for you to decide.
>
> [(Emphasis added).]

The prosecutor told the grand jury "there is no statute, decision or rule of law which expressly states a judge must enforce an arrest warrant." However, he continued, "a [c]ourt may take judicial notice of [a judge's obligation]" if it is "inherent in the office of judge of the [S]uperior [C]ourt."

The prosecutor discussed "arrest warrants." He said a police officer "has a non-discretionary expressed obligation to arrest where he or she is aware of the existence of an arrest warrant." However, referencing the Court's decision in In Re P.L. 2001, Chapter 362, 186 N.J. 368 (2006), the prosecutor said, "it is not the job of a judge to execute an arrest warrant." The prosecutor cited provisions of the Code of Judicial Conduct (the Code), but cautioned, "these are general,

general obligations. For you to find official misconduct here[,] you must find a duty to enforce, . . . clearly inherent in the office of [S]uperior [C]ourt judge, not just a general duty to obey the law." The prosecutor stated, "a judge may, and I emphasize may, have a duty to see that a warrant is executed if such a duty is clearly inherent in the office of [S]uperior [C]ourt judge." (Emphasis added). He repeated it was for the grand jurors to decide if a judge had "an inherent duty to enforce an arrest warrant[.]"

After all testimony ended, the prosecutor again provided instructions on the hindering complaints. As to official misconduct, he told the grand jurors there were three elements: whether defendant was a public servant; whether "she refrained from performing a duty imposed upon her by law, or clearly inherent in the nature of her office"; and, whether "her purpose in refraining from acting was to benefit herself or another or injure another."

He continued,

> [W]ith regard to that duty, that duty must be official and nondiscretionary. It's imposed upon a public servant by law such as a statute, municipal charter or ordinance or clearly inherent in the nature of her office. The duty to act must be so clear that the public servant is on notice as to the standards she must meet. In other words, the failure to act must be more than a failure to exhibit good judgment.

> The State has to prove that there's a clear duty of defendant to act as alleged, that is to say, there must have been a body of knowledge such as applicable law by which defendant could regulate the legality of her conduct. She can't be convicted of . . . official misconduct[] if the official duties imposed upon her are themselves unclear.
>
> So that brings us to the question of, is there a duty clearly inherent in the nature of a [S]uperior [C]ourt judge, does she have an inherent duty to enforce an arrest warrant, what does that duty entail and, if so, did she refrain from performing that duty in this case for the purpose of a benefit herself or detriment of another.
>
> Again, . . . you have to remember, if you find a duty to enforce, it must be clear. In this case, it must be clearly inherent in the office of a [S]uperior [C]ourt judge.

During deliberations, the grand jurors asked several times for clarification regarding the law as to hindering apprehension but asked for no further instructions on the recommended official misconduct count.

The indictment charged defendant with official misconduct in that, with the purpose to benefit herself "and/or another," she "refrain[ed] from performing a duty clearly inherent in the nature of her office . . . , that is, . . . [she] knowingly . . . fail[ed] to enforce an arrest warrant . . . by failing to adequately notify the Woodbridge Police Department of . . . [Prontnicki's] intended appearance or presence at her

residence." N.J.S.A. 2C:30-2b. Count two charged defendant with purposely "hinder[ing] the detention, apprehension, investigation, prosecution, conviction or punishment of . . . Prontnicki," by "harbor[ing] or conceal[ing]" him. N.J.S.A. 2C:29-3a(1). The third count charged defendant with hindering by "offer[ing] to provide to or aid . . . Prontnicki in obtaining money, transportation and/or clothing as a means of avoiding discovery or apprehension or effecting escape." N.J.S.A. 2C:29-3a(2).

C.

In her written decision, the motion judge rejected the State's argument that a judge has "a duty inherent in her office to enforce an arrest warrant, or that there is a specifically required time limit in which [d]efendant was required to act." The judge also concluded that defendant was not "acting in her official capacity. There is no connection between the duties inherent in the office of Judge and the . . . conduct here."

The judge denied defendant's motion as to counts two and three. Giving the State the benefit of all reasonable inferences, she reasoned there was some evidence that defendant admitted Prontnicki into her home knowing there was an outstanding warrant for his arrest, permitted him to stay there "for a significant period of time, and did not inform the

police." As to the second hindering count, the judge concluded there was some evidence that defendant aided Prontnicki by allowing him into her home to "get his clothes and be offered cab fare."

The judge found no reason to reconsider her earlier decision in denying the State's and defendant's motions for reconsideration.

II.

We review the trial court's decision on defendant's motion to dismiss the indictment for an abuse of discretion. State v. Saavedra, 222 N.J. 39, 55 (2015). "A trial court's exercise of this discretionary power will not be disturbed on appeal 'unless it has been clearly abused.'" Id. at 55-56 (quoting State v. Warmbrun, 277 N.J. Super. 51, 60 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995)).

"A trial court deciding a motion to dismiss an indictment determines 'whether, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it.'" Id. at 56-57 (quoting State v. Morrison, 188 N.J. 2, 13 (2006)). "A trial court . . . should not disturb an indictment if there is some evidence establishing each element of the crime to make out a

prima facie case." Morrison, supra, 188 N.J. at 12 (citations omitted). However, "[t]he absence of any evidence to support the charges would render the indictment 'palpably defective' and subject to dismissal." Ibid. (citing State v. Hogan, 144 N.J. 216, 228-29 (1996)). "[O]ur review of a trial judge's legal interpretations is de novo." State v. Eldakroury, 439 N.J. Super. 304, 309 (App. Div.) (citing State v. Grate, 220 N.J. 317, 329-30 (2015); State v. Drury, 190 N.J. 197, 209 (2007)), certif. denied, 222 N.J. 16 (2015).

A.

In A-0484-16, defendant argues that, even if she allowed Prontnicki into her home with knowledge of the outstanding warrant, such "passive" conduct does not support an indictment for harboring or concealing a fugitive under N.J.S.A. 2C:29-3a(1). She also argues that the State failed to demonstrate she acted with the purpose of hindering Prontnicki's apprehension because the overwhelming evidence was to the contrary. Regarding count three, defendant essentially argues that even if she offered Prontnicki aid, whether in the form of money, transportation or clothing, it was insufficient to prove a violation of N.J.S.A. 2C:29-3a(2). We reject these arguments and affirm the judge's order denying defendant's motion to dismiss counts two and three of the indictment.

The statute provides:

> a. A person commits an offense if, with purpose to hinder the detention, apprehension, investigation, prosecution, conviction or punishment of another for an offense . . . he:
>
> (1) Harbors or conceals the other;
>
> (2) Provides or aids in providing a weapon, money, transportation, disguise or other means of avoiding discovery or apprehension or effecting escape . . . .
>
> [N.J.S.A. 2C:29-3a(1) and (2).]

As to subsection (1), the State must produce some evidence that defendant knew Prontnicki could or might be charged with an offense; that she harbored or concealed him; and her purpose in doing so was to hinder Prontnicki's detention, apprehension, investigation, prosecution, conviction or punishment. Model Jury Charge (Criminal), "Hindering Apprehension or Prosecution of Another (N.J.S.A. 2C:29-3a)" (May 12, 2014) (Hindering Charge). Defendant "harbored or concealed" Prontnicki if she "hid, or protected, or sheltered or secreted [him] from the authorities." Id. at 2.

Because of the lack of decisions construing subsection a(1), both sides rely on precedent interpreting an analogous provision of the United States Code, 18 U.S.C.A. § 1071, which provides:

> Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined under this title or imprisoned not more than one year, or both . . . .

In construing a predecessor provision, the court in United States v. Shapiro, said, "To conceal . . . means to hide, secrete, or keep out of sight. To harbor . . . means to lodge, to care for, after secreting the [fugitive]." 113 F.2d 891, 893 (2d Cir. 1940) (quoting Firpo v. United States, 261 F. 850, 853 (2d Cir. 1919)).

Defendant argues the analogous federal statute requires "[s]ome affirmative, physical action" to "harbor or conceal," United States v. Lockhart, 956 F.2d 1418, 1423 (7th Cir. 1992), and allowing Prontnicki to enter her home was insufficient. However, the Fifth Circuit held that the defendant's physical act of closing and locking the door where a fugitive was hiding after she saw federal marshals was sufficient to convict her of violating the statute. United States v. Stacey, 896 F.2d 75, 77 (5th Cir. 1990).

Defendant ignores the basic proposition that "[i]n the grand jury setting, our law sharply distinguishes between evidence sufficient to support an indictment and the evidence

necessary to establish guilt beyond a reasonable doubt." State ex rel. A.D., 212 N.J. 200, 219 (2012). "At the indictment stage, the State need not present evidence necessary to sustain a conviction, but only a showing sufficient for the grand jury to 'determine that there is prima facie evidence to establish that a crime has been committed.'" Id. at 220 (quoting Stave v. N.J. Trade Waste Ass'n, 96 N.J. 8, 27 (1984)).

According the State all favorable and reasonable inferences, the evidence established that defendant knew Prontnicki was wanted for armed robbery and permitted him to enter her home on two occasions for significant periods of time. On June 11, she specifically told him when she would be home, knowing he intended to gather some of his belongings and leave. Nonetheless, she never told police he would be arriving. The grand jurors were entitled to reject defendant's version of the events on June 11, and accept that defendant affirmatively opened the garage door, closed it after Prontnicki entered the home, provided him with some of his belongings, including more clothing than was necessary for a short stay at his brother's house, and escorted him out through the garage until he left.

Defendant argues she did not know police were looking for Prontnicki. This ignores the reasonable inference to be drawn from defendant's own call to police the day earlier, in which

she told police Prontnicki had returned the car and, although not with her at that moment, was somewhere in Woodbridge. Defendant also contends that, since much of the interaction occurred in the garage, she did not secrete Prontnicki from public observation. That argument lacks any merit, since it is undisputed that on both June 10 and 11, Prontnicki spent more than one hour inside the house, where he was shielded from observation, or in the garage with the door shut.

The grand jurors were also free to reject defendant's explanation of why she acted as she did, and conclude, based on reasonable inferences, that her purpose was to hinder Prontnicki's apprehension. See, e.g., Hindering Charge, supra, at 4 (explaining purpose is a "condition[] of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts"). We affirm the denial of the motion to dismiss count two of the indictment.

As to count three charging defendant with harboring under subsection a(2), the critical issue is whether there was sufficient prima facie evidence that, with a similar purpose, defendant "provided (or aided in providing) . . . money, transportation, [and/or clothing as a] means of avoiding

discovery or apprehension or affecting escape) to" Prontnicki.[3] Id. at 2.

Defendant appropriately points to a footnote to the Hindering Charge which provides:

> Providing a fugitive with funds is an act of equivocal significance. He may use it to escape or hide, to pay debts or go into business, or to support himself or his dependents, or to hire a lawyer. Paragraph b [now 3a(2)] is intended to require proof that money was furnished not merely pursuant to a general desire to promote the offender's plan to remain at large, but specifically to facilitate escape efforts.
>
> [Ibid. n.3 (quoting Final Report of the New Jersey Criminal Law Revision Commission, Vol. II at 284-85 (1971)).]

The Model Penal Code (MPC) § 242.3 was a source for N.J.S.A. 2C:29-3. Cannel, New Jersey Criminal Code Annotated, comment 1 on N.J.S.A. 2C:29-3 (2017). Specifically, the commentary to the MPC includes nearly verbatim language to that which we just quoted. See MPC, supra, comment on 4 § 242.3 (Am. Law Inst. 1980). However, the MPC omitted providing money to a fugitive as one means by which the actor may hinder apprehension. MPC, supra, § 242.3. Our Legislature rejected that course and included money in N.J.S.A. 2C:29-3(a)(2). The Revision Commission recognized that in providing money to a fugitive, the

[3] We modify the language of the Model Charge to include only the specific items contained in count three of the indictment.

actor's "motivation[] may be mixed and permit conviction where the obstructive purpose was present." Final Report, supra, at 284.

Here, the evidence taken in the best light for the State indicates defendant offered Prontnicki money for cab fare, which he refused. The State concedes that at most, this was an attempt to hinder Prontnicki's apprehension, and it charged the grand jury with the law regarding attempt. We conclude that under all circumstances presented, the State adduced some evidence that defendant's offer was an attempt to facilitate Prontnicki's escape. The grand jury was free to reject Prontnicki's claim that he intended only to return to his brother's home, hire a lawyer and turn himself in, i.e., to remain "at large," as opposed to avoid prosecution. There was no independent proof that was his intention, and a reasonable inference can be drawn otherwise, particularly since the bag of clothing provided Prontnicki with numerous changes of clothing.

The grand jurors could reasonably conclude the packed bag provided Prontnicki with a "means of avoiding discovery or apprehension or effecting escape." N.J.S.A. 2C:29-3a(2). Moreover, as already noted, defendant's purpose may be determined from all the circumstances presented, including taking these actions without calling police, despite knowing

beforehand that Prontnicki was coming to her home. We affirm the denial of defendant's motion to dismiss count three of the indictment.

B.

The State's appeal presents issues of significant importance beyond this case. We tread cautiously, with an express desire that our decision be limited only to the facts presented by this appeal and the arguments made by the State.

N.J.S.A. 2C:30-2 is based upon New York Penal Law § 195.00. Cannel, supra, comment 1 on N.J.S.A. 2C:30-2. "Misconduct in office or official misconduct has been defined as 'unlawful behavior in relation to official duties by an officer entrusted with the administration of justice or who is in breach of a duty of public concern in a public office.'" State v. Kueny, 411 N.J. Super. 392, 404 (App. Div. 2010) (quoting State v. Mason, 355 N.J. Super. 296, 301 (App. Div. 2002)).

N.J.S.A. 2C:30-2b provides:

> A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit[,] . . . [h]e knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.[4]

[4] Few states have adopted the "clearly inherent" language found in subsection (b) of our statute. See Alaska Stat. § 11.56.850 (continued)

As we said in Kueny,

> The three elements required to establish a violation of N.J.S.A. 2C:30-2(b) are that "(1) the defendant was a public servant; (2) the defendant knowingly refrained from performing a duty which is imposed upon him or her by law or which is clearly inherent in the nature of the office; and (3) the defendant's purpose in so refraining was to benefit himself or herself or to injure or deprive another of a benefit."
>
> [411 N.J. Super. at 404 (quoting State v. Thompson, 402 N.J. Super. 177, 195-96 (App. Div. 2008)).]

There is no dispute as to the first and third elements. Defendant is a public servant. See N.J.S.A. 2C:27-1g (defining "[p]ublic servant" to include "judges"). A "'[b]enefit' means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including a pecuniary benefit or a benefit to any other person or entity in whose welfare he is interested."

(continued)
(2017); Ark. Code Ann. § 5-52-107 (1987); Del. Code Ann. tit. 11, § 1211 (2017); Ky. Rev. Stat. Ann § 522.030 (2017); Or. Rev. Stat. Ann. § 162.415 (2017); Tenn. Code Ann. 39-16-402 (2017); Utah Code Ann. § 76-8-201 (2017). Others limit the crime only to the actor's failure to perform a duty required by law. See Colo. Rev. Stat. § 18-8-405 (1973); 720 Ill. Comp. Stat. 5/33-3 (2017); Iowa Code § 721.2 (2017); Mont. Code Ann. 45-7-401 (2017); Wis. Stat. 946.12 (2017); Wyo. Stat. Ann. 6-5-107 (2017). In People v. Beruman, 638 P.2d 789, 793 (Colo. 1982), the court held the predecessor statute, which included the language "a duty . . . clearly inherent in the nature of his office," was unconstitutionally vague.

N.J.S.A. 2C:27-1a. Although defendant disputes whether her conduct benefitted herself or Prontnicki, the argument lacks sufficient merit to warrant discussion. R. 2:11-3(e)(2); see, e.g., State v. Quezada, 402 N.J. Super. 277, 285 (App. Div. 2008) (concluding "joy of responding to fires as a volunteer firefighter" was sufficient). Only the second element is at issue in this case.

We must consider the duties of a Superior Court judge, not as "imposed by law," i.e., expressed in a statute, the Code or administrative policy or directive applicable to judges of the Superior Court. See Schochet v. Schochet, 435 N.J. Super. 542, 545 n.3 (App. Div. 2014) (noting policies adopted by the Administrative Office of the Courts have the force of law). The State concedes none of those sources impose a duty upon a judge to "enforce an arrest warrant." It argues instead that decisional law, the Code, policies directed to other judiciary employees and common sense provide guidance regarding duties "clearly inherent in the nature of [a judge's] office,'" N.J.S.A. 2C:30-2b, one of which is to enforce an arrest warrant. We therefore consider whether such a duty is inherent in the office based upon these other sources.

"[N.J.S.A. 2C:30-2b] criminalizes the knowing failure to perform a duty. The duty must be 'one that is unmistakably

inherent in the nature of the public servant's office, i.e., the duty to act is so clear that the public servant is on notice as to the standards that he must meet.'" Thompson, supra, 402 N.J. Super. at 198 (quoting State v. Hinds, 143 N.J. 540, 545-46 (1996)). "[T]he failure to act must be more than a mere breach of good judgment. In the absence of a duty to act, there can be no conviction." Kueny, supra, 411 N.J. Super. at 406 (quoting Final Report, supra, at 291).

"Whether a statutory duty is imposed upon a public officer is a legal issue." State v. Deegan, 126 N.J. Super. 475, 482 (App. Div.), certif. denied, 65 N.J. 283 (1974). Yet, because it is practically impossible to spell out every duty imposed upon a public official, "[i]t is within the province of the court to 'take judicial notice of the duties which are inherent in the very nature of the office.'" Thompson, supra, 402 N.J. Super. at 198 (quoting Deegan, supra, 126 N.J. Super. at 492). Regardless from where the duty emanates, it is a question of law whether one actually exists. State v. Grimes, 235 N.J. Super. 75, 79 (App. Div.), certif. denied, 118 N.J. 222 (1989).

1.

In opposing the State's motion for reconsideration, defendant argued alternatively that the first count of the indictment should be dismissed because the prosecutor let the

grand jury decide whether a Superior Court judge has an inherent duty to "enforce an arrest warrant." The motion judge agreed that whether such a duty existed was a "question of law," and stated the grand jury "cannot make such a finding." Although, she did not specifically adopt defendant's argument, we do, and therefore affirm dismissal of the indictment on these grounds alone.

"A prosecutor must charge the grand jury 'as to the elements of specific offenses.'" Eldakroury, supra, 439 N.J. Super. at 309 (quoting State v. Triestman, 416 N.J. Super. 195, 205 (App. Div. 2010)). "[A]n indictment will fail where a prosecutor's instructions to the grand jury were misleading or an incorrect statement of law." Ibid. (quoting Triestman, supra, 416 N.J. Super. at 205). In Eldakroury, we affirmed the trial court's dismissal of an indictment, concluding "the State's instruction to the jury was 'blatantly wrong' and, in effect, relieved the State from having to establish defendant's mens rea as to a material element of the offense." Id. at 310.

Here, it was incumbent on the prosecutor to specifically define the duty that defendant "refrain[ed] from performing" and which was "clearly inherent" in the office of a Superior Court judge. N.J.S.A. 2C:30-2b. Yet, on multiple occasions in his instructions, the prosecutor invited the grand jury to decide

whether or not the obligation to "enforce an arrest warrant" was clearly inherent in the duties of a Superior Court judge. In Grimes, we reversed the defendant's conviction and dismissed the indictment, because, in part, the "law" as to the duties of the defendant's office as constable were "so uncertain that it was presented to the jury as a matter of disputed fact." 235 N.J. Super. at 90.

The grand jury is, of course, "an accusatory and not an adjudicative body." Hogan, supra, 144 N.J. at 235. We might assume the return of defendant's indictment implicitly reflects the grand jurors' conclusions that a duty existed and defendant refrained from performing it. Nevertheless, in the first instance, the prosecutor must clearly and accurately explain the law to the grand jurors and not leave purely legal issues open to speculation by lay people who are simply performing their civic duty.

Our conclusion is not a criticism of the prosecutor's presentation. He attempted in good faith and in substantial detail to synthesize the law. However, the prosecutor demurred in telling the grand jury a duty existed. That hesitation reflects the exquisitely difficult task of trying to define the duty in the first instance, and what actions a judge must take

to perform that duty, the avoidance of which could result in criminal culpability.

The prosecutor's quandary demonstrates why we are required to do more in this opinion. Avoiding the question of whether it is the duty of a Superior Court judge to "enforce an arrest warrant," or face conviction for a second-degree crime if he or she refrains from performing that "duty," does a disservice to this defendant, other judges and the public-at-large. We will not avoid deciding the merits of the State's case, because the issue will only arise again should the State simply present the same evidence with more definitive instructions to a new grand jury.

2.

The State argues that a judge has a non-discretionary duty, inherent in her office, to enforce an arrest warrant, and, because a judge is always "on duty," defendant was criminally culpable for not notifying police when Prontnicki was either at, or on his way to, her home. It further argues defendant's own statements make clear she was aware of this duty.[5]

[5] The State also pre-emptively argues that imposing such a duty on a judge does not violate the constitutional separation of powers, discussed in In Re P.L. 2001. There, the Court held the Probation Officer Community Safety Unit Act, N.J.S.A. 2B:10A-1 (continued)

This second point lacks sufficient merit to warrant discussion. R. 2:11-3(e)(2). While defendant told friends it was her duty as a judge to notify police about Prontnicki's whereabouts, those statements followed her interaction with members of the Woodbridge Police Department, who told her that was her judicial "duty." Obviously, defendant's subjective belief that a duty exists, if none exists at law, cannot support an essential element of the crime of official misconduct.

The State cites various decisions to support the proposition that defendant refrained from performing an official duty inherent in her office; however, none of them are

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to -3; N.J.S.A. 2C:39-6(c)(17), which created a unit of probation officers authorized to carry firearms and arrest probation violators, breached the constitutional separation of powers. In re P.L. 2001, supra, 186 N.J. at 372-73, 394. The Court stated, "[I]t is the duty of the many municipal, county, and state law enforcement agencies to execute arrest warrants, including those of probation violators. Those are executive, not judicial, branch functions." Id. at 391 (emphasis added). While "the principle of separation of powers is not inconsistent with the notion of cooperation among the several branches toward the common goal of achieving responsible government[,]" id. at 383, "the special role of the judiciary in our constitutional scheme requires that there be no entangling alliances between law enforcement and judiciary employees." Id. at 388.

The State argues that as a judge, defendant had an inherent duty to enforce an arrest warrant, not execute the warrant by actually arresting Prontnicki. Because we are affirming for other reasons, we need not decide whether this is a meaningful distinction that renders In re P.L. 2001 unpersuasive authority for defendant's position.

persuasive under the facts of this case. For example, Deegan, supra, 126 N.J. Super. at 480, predates enactment of our Criminal Code, and so does not address the very precise language of N.J.S.A. 2C:30-2b.[6] Our opinion in Deegan supports the proposition that the duties of a public office need not be expressed in any statute, and "[t]he power to act imports a duty to act when the public interests suggest to the public officials that something should be done." Id. at 490 (citing McDonough v. Roach, 35 N.J. 153, 157 (1961)). However, in Deegan, the defendants' duties, although not expressed in a statute, were the very duties of the position, i.e., approving the award of disability pensions to only qualified candidates. Id. at 480. Defendants' actions or omissions involved the only essential tasks they were empowered to perform.

The same principle is at the core of State v. Weleck, 10 N.J. 355 (1952), another pre-Code case. There, the defendant, a borough attorney, was charged with extorting payments from a citizen in return for agreeing to use his influence to secure

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[6] The defendants in Deegan were charged with violating N.J.S.A. 2A:85-1 (repealed 1979), which read:

> Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statute, are misdemeanors.

the passage of a favorable zoning amendment. Id. at 364-65. Once again, the Court held that some duties are inherent in the office of a public attorney. Id. at 368-69. Those duties — to render uncorrupted legal advice and refrain from extortion in return for rendering that advice — are inseparable from properly performing the tasks of the office. See, e.g., State v. Green, 376 A.2d 424, 428 (Del. Super. Ct. 1977) ("The phrase 'a duty which . . . is clearly inherent in the nature of his office' means those unspecified duties that are so essential to the accomplishment of the purposes for which the office was created that they are clearly inherent in the nature of the office.") (quoting Del. Code Ann. tit. 11, § 1211(2)). Neither Deegan nor Weleck support the State's position that defendant's official duties included a non-discretionary duty, while at home on vacation, to notify police of Prontnicki's whereabouts. It is only "unlawful behavior in relation to official duties" that give rise to the charge of official misconduct. Mason, supra, 355 N.J. Super. at 301 (emphasis added) (citing State v. Winne, 12 N.J. 152, 176 (1953)).

In Sheridan v. Sheridan, 247 N.J. Super. 552, 565 (Ch. Div. 1990), while recognizing the absence of any controlling court rule or administrative directive, the Family Part observed that most judges report "illegal or improper activities . . . because

it is the right thing to do and because it is repugnant to their oath that judges sit mute in the face of acknowledged, demonstrated or potential wrongdoing." Notably, in Sheridan, the judge became aware of criminal wrongdoing during sworn testimony in a case over which he was presiding, i.e., while the judge was performing an official duty. Id. at 563. More importantly, Sheridan was firmly rooted in a judge's ethical responsibilities, see id. at 563-66, and the court never suggested that the judge's failure to make such a report would subject him or her to criminal culpability.

The State next turns to Canons One and Two of the Code for support. Canon One provides, "An independent and honorable judiciary is indispensable to justice. A judge therefore shall uphold and should promote the independence, integrity and impartiality of the judiciary." Canon Two states, "[a] judge should avoid impropriety and the appearance of impropriety in all activities." The Rules associated with Canon One require a judge to "personally observe[] high standards of conduct" and "respect and comply with the law."[7]

[7] The State has not argued that defendant refrained from performing a duty inherent in her office — complying with the law — because she committed the crime of hindering. We have rejected similar arguments involving other officials. See e.g., Kueny, supra, 411 N.J. Super. at 406-08 (rejecting the proposition that every crime committed by a police officer, (continued)

It is the duty of every judge "to abide by and enforce" the Code. In re DiLeo, 216 N.J. 449, 467 (2014) (citing R. 1:18). In dicta, we recognized that the Code "specifically deal[s] with the duties of judicial office and could readily be used as a basis for describing the duties inherent in that office." Thompson, supra, 402 N.J. Super. at 201. However, the Court characterized an earlier version of the Code as "a general statement of standards and goals, admirably serving the purpose of providing guidance to judges in all matters precisely because of the generality of its provisions." In re Alvino, 100 N.J. 92, 102 (1985) (emphasis added). "While judges are expected to adhere to the Code, every breach 'does not mean . . . that judicial misconduct has occurred, or that discipline . . . is appropriate.'" DiLeo, supra, 216 N.J. at 468 (quoting Alvino, supra, 100 N.J. at 96). It surely follows that not every breach of the Code subjects a judge to criminal prosecution. In the

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including refraining from returning stolen property, was official misconduct); Thompson, supra, 402 N.J. Super. at 201 ("reject[ing] the use of a general 'duty to perform other duties in good faith' as a means to impose criminal liability") (citing People v. Garson, 848 N.E.2d 1264 (N.Y. 2006); see also State v. Imbriani, 291 N.J. Super. 171, 183 (App. Div. 1996) (specifically refusing to consider whether "crimes committed by a Superior Court Judge outside of his official duties constitute a breach of the public trust" under guidelines for the Pre-trial Intervention Program).

absence of any reported New Jersey case holding the Code's "general statements" of ethical conduct are a declaration of inherent judicial duties, we consider some decisions from our sister states.

In People v. La Carrubba, the defendant judge was charged with refraining from performing a duty inherent in her office by improperly dismissing a friend's traffic ticket. 389 N.E.2d 799, 801 (N.Y. 1979). In interpreting a provision identical to N.J.S.A. 2C:30-2b, reversing the defendant's conviction and dismissing the indictment, the court said "the Code of Judicial Conduct and the Penal Law serve discrete, if in some respects complimentary, purposes." Id. at 802. Recognizing the penal code clearly defined acts or omissions that violated the law, the court said:

> Couched in the subjunctive mood, the code is a compilation of ethical objectives and exhortations for the violation of which recourse has traditionally been had to disciplinary rather than criminal proceedings. If in any instance the conduct proscribed by the canons also independently constitutes a criminal offense under the Penal Law (e.g., bribe receiving, [New York] Penal Law, § 200.12) then, of course, the sanctions of the Criminal Law are available and the coexistence of ethical impropriety would stand as no barrier to criminal prosecution. Taken alone, however, instances of ethical impropriety, although unquestionably to be condemned, provide no predicate for the imposition of criminal penalties.

[Ibid.]

In Garson, the court reversed the dismissal of an indictment charging the defendant judge with violating New York Penal Law § 200.25, receiving a reward for official misconduct by violating his duty as a public servant, but affirmed dismissal of the indictment charging a violation of § 195.00(2). 848 N.E.2d at 1265. In that case, the defendant received various gifts from an attorney in return for referring cases, in violation of the Rules of Judicial Conduct enacted in New York following constitutional amendment and pursuant to an express legislative grant of power to the court. Id. at 1268, 1272. The Garson court distinguished La Carrubba in two ways.

First, the court recognized the mandatory nature of New York's Rules of Judicial Conduct, as opposed to the earlier code of conduct. Id. at 1271-74. Second, the court recognized that § 200.25 rested "not on a violation of the Rules alone but on the acceptance of a benefit for violating an official duty defined by the Rules." Id. at 1273. "Had the judge as a public servant violated ethical duties alone -- without accepting a benefit for the violation -- and had the action not otherwise been prohibited by the Penal Law, the public servant would be subject only to discipline in a proceeding brought by the Commission on Judicial Conduct." Ibid. (emphasis added).

Delaware, which also criminalizes the failure to perform a duty inherent in a public office, has limited the use of ethical standards to define criminal conduct. See, e.g., Green, supra, 376 A.2d at 428 (concluding a duty "inherent in the nature of [a public servant's] office . . . does not include the duty of avoiding violation of unspecified conflict-of-interest or other ethical standards").

Some states that criminalize the performance of unauthorized acts or acts in excess of official powers, as does N.J.S.A. 2C:30-2a, have rejected application of ethical guidelines to define the nature and scope of the official duties of an office. See, e.g., State v. Serstock, 402 N.W.2d 514, 516 (Minn. 1987) (concluding the code of professional responsibility and city ethics code could not be used to define the "lawful authority" of a municipal prosecutor accused of official misconduct for dismissing a friend's traffic tickets); Clayton v. Willis, 489 So. 2d 813, 815-16 (Fla. Dist. Ct. App. 1986) (rejecting violations of the state Code of Judicial Conduct as a basis for judge's alleged criminal misconduct in fraudulently abusing and exceeding his powers).

As the motion judge noted, the Code does not expressly include a duty to enforce another court's warrant. The State cites Code of Conduct for Judiciary Employees, Canon 1G (2014),

which provides, "No court employee shall refuse to enforce or otherwise carry out any properly issued rule or order of court." However, that Code, which in this instance directs the ministerial duties of judiciary personnel, does not apply to a judge. Similarly, the State's reliance on Administrative Directive #14-06, "Probation Field Supervision and Safety Standards," (August 3, 2006), is unavailing. That directive, which also does not apply to judges, instructs probation officers to cooperate with law enforcement in the supervision of probationers and in effecting the arrest of violators.

Unequivocally, "[i]t is the judge's obligation to see that justice is done in every case that comes before him [or her]." In re Yaccarino, 101 N.J. 342, 388 (1985) (quoting In re Albano, 75 N.J. 509, 514 (1978)). A judge must live by this humble maxim, one that, as most sitting judges would agree, is more easily stated than realized. The Code codifies this ideal and provides guidance for the conduct of each judge as he or she performs his or her duties. A judge who refrains from performing her official duty in a case that comes before her, coupled with the purpose to bestow a benefit on herself or another, subjects herself to criminal prosecution for official misconduct. This is not such a case.

We do not mean to imply that a judge may only commit official misconduct by refraining from performing a duty while in the courtroom. A judge is exercising her official duties, for example, while "on call" or on "emergent duty," outside of the courtroom and after normal work hours. We have no doubt that if, for example, a judge were to refrain from authorizing a search warrant despite being presented with ample probable cause because it involved a personal friend, she would have committed official misconduct under N.J.S.A. 2C:30-2b. And, certainly a judge may violate N.J.S.A. 2C:30-2a by affirmatively committing acts unauthorized by his office or in an unauthorized manner in many ways outside of the courthouse and at all hours.

N.J.S.A. 2C:30-2b criminalizes only the omissions of "a [judge] who consciously refrains from performing an official non-discretionary duty, which duty is imposed upon him by law or which is clearly inherent in the nature of his office. In addition, the public servant must know of the existence of such non-discretionary duty to act." Kueny, supra, 411 N.J. Super. at 406 (emphasis added) (quoting Final Report, supra, at 291). The State has cited no authority supporting the contention that a judge has a non-discretionary duty to enforce the order of another court, and it certainly has failed to demonstrate such a duty is ever present, obligating the judge to perform the duty

wherever he or she may be, twenty-four hours a day, 365 days per year.

At oral argument, the State adopted the proposition that a judge would commit official misconduct if, knowing an arrest warrant based on a family member's failure to pay outstanding parking tickets had issued, the judge refrained from notifying police of that family member's whereabouts. No provisions of the Code or any other authority, however broadly read, would sustain a charge of official misconduct based on those facts. The facts presented to this grand jury were not much different.

In affirming dismissal of the official misconduct count, we do not condone in any way defendant's alleged conduct, nor does it relieve defendant of the potential serious consequences if convicted of the crime of hindering. The Court has repeatedly exercised its power to discipline judges for their conduct, criminal or unethical, official or otherwise. It has the power to remove a judge from office "for misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence." N.J.S.A. 2B:2A-2. We further note that if defendant were convicted of third-degree hindering Prontnicki's apprehension, she would forfeit her office. N.J.S.A. 2C:51-2a(1).

We affirm the dismissal of count one of the indictment charging defendant with official misconduct.

Affirmed in both appeals. We remand the matter to the Law Division for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION