

STATE OF MAINE)	
)	
v.)	STATE'S MEMORANDUM IN
)	OPPOSITION TO DEFENDANT'S
KAILE R. WARREN, JR.)	MOTION TO DISMISS

Defendant Kaile R. Warren, Jr.'s Motion to Dismiss should be denied. Warren's Motion improperly invites the Court to sit in review of the grand jury's determination. Under well-established law, the Court is prohibited from accepting this invitation. Furthermore, Warren's Motion does not even attempt to identify any defect in Counts I or II of the Superseding Indictment, and the claimed defect in Count III is in fact fully consistent with the law.

I. The Grand Jury's Determination Is Not Reviewable.

Warren's Motion focuses entirely on the information presented to the grand jury. He claims that the grand jury did not have any evidence that Warren knew the instruments he sold were securities.¹ (Motion to Dismiss ¶ 5.) He claims that the grand jury did not have any evidence that Warren knew the securities were not exempt from registration requirements.² (*Id.*) He argues that the grand jury's determination was based on alleged "misinformation" presented by the State's attorney pertaining to Count III, sale of unregistered securities. (*Id.* ¶¶ 4-7.) On this basis, Warren moves to dismiss the Superseding Indictment in its entirety. (*Id.* ¶ 7.)

¹ In fact, there is ample evidence that Warren knew the instruments were securities and unregistered. Warren gave almost all of his victims notes and subscription agreements that expressly stated that the investments were "restricted securities" and that they had not been registered with any state. Because of grand jury secrecy and the inappropriateness of reviewing the evidence received by the grand jury, the State in this Memorandum will not address whether this evidence was presented to the grand jury.

² Warren is plainly wrong in asserting that the State must prove knowledge that the securities were not exempt from registration. The existence of an exemption is an affirmative defense. 32 M.R.S. § 16503(2).

Tellingly, Warren does not cite a single case where a court has dismissed an indictment on the basis of the information presented to the grand jury. (*See, generally*, Motion to Dismiss.)

The well-established law in Maine is that courts are not authorized to inquire into the sufficiency or correctness of the information on which a grand jury made its determination. *State v. Rizzo*, 1997 ME 215, ¶ 8; *State v. Marshall*, 491 A.2d 554, 557 (Me.), *cert. denied*, 474 U.S. 908 (1985); *State v. Perkins*, 275 A.2d 586, 587 (Me. 1971); *State v. Douglas*, 114 A.2d 253, 256 (Me. 1955). The indictment must either be sufficient or deficient on its own; the law does not permit the Court to go behind the indictment to second-guess the grand jury. *Douglas*, 114 A.2d at 256.

Because the Court cannot review the grand jury's determination, Warren's Motion to Dismiss should be denied.

II. The Indictment Contains No Defects.

Even if the Court were permitted to accept Warren's invitation, the Motion should be denied because it is baseless on the merits. First, Warren does not even attempt to identify any defect in Counts I (Theft) or II (Securities Fraud) or in the information considered by the grand jury on these counts. Warren merely speculates that these counts must be tainted because, in his view, Count III was improperly based. (*See* Motion to Dismiss ¶¶ 4, 7.) Accordingly, there is absolutely no basis for dismissing either Counts I or II.

As to Count III, the language of the charge (and the explanation given to the grand jury by the State's attorney) is legally correct. The State is not required to prove that Warren knew that the instruments he sold were securities or that he knew they were unregistered.

Warren's Motion cites 17-A M.R.S. § 34, but fails to reference subsection (4) of that statute:

Unless otherwise expressly provided, a culpable mental state need not be proved with respect to . . . (a)ny element of the crime as to which a legislative intent to impose liability without a culpable state of mind as to that element otherwise appears

17-A M.R.S. § 34(4)(D).

In enacting the Maine Uniform Securities Act, the legislature expressed a clear intent that the State need only prove that a defendant acted intentionally or knowingly “in the sense that [he] was aware of what he . . . was doing.” 32 M.R.S. § 16508 (Official Comment 2); *accord* Uniform Securities Act § 212 (Comment 4) (1985) (giving same explanation for predecessor uniform act).³ “Proof of evil motive or intent to violate the law or knowledge that the law was being violated is not required.” 32 M.R.S. § 16508 (Official Comment 2). Therefore, with respect to Count III, the State needs to prove intent or knowledge only to the effect that the defendant intended to sell the instruments or knew that he was selling the instruments – not that he knew that the instruments were unregistered securities.

Whether or not the instruments are securities is a question of law, not fact. The Maine Uniform Securities Act, like the predecessor act, defines “security” in some depth. 32 M.R.S. § 16102(28); 32 M.R.S. § 10501(18). Requiring the State to prove that the defendant knew the instruments being sold fit this definition would require the State to prove the defendant’s knowledge of the law. This would be contrary to the legislative intent expressed in Comment 2 to § 16508.

Similarly, the State is not required to prove that the defendant knew or intended the instruments to be unregistered. Again, knowledge or intent with respect to registration would require knowledge of the law or intent to violate the law because whether an instrument is

³ Warren again is plainly wrong in asserting that the predecessor act refers only to “knowing” violations. (Motion to Dismiss ¶ 2 n.1.) Both the current act and the predecessor act provide for criminal liability for persons who act “intentionally or knowingly.” 32 M.R.S. §§ 10604 (1), 16508(1).

registered depends upon whether it meets several requirements set forth in the Maine Uniform Securities Act. *See* 32 M.R.S. §§ 16303 – 16305. Because this would be contrary to the legislative intent expressed in Comment 2 to § 16508, the State need not prove intent or knowledge as to whether the instruments were registered.

Although this appears to be an issue of first impression for Maine courts, courts in other jurisdictions have long interpreted the *mens rea* requirements for criminal securities violations in this same manner. *See, e.g., Mueller v. Sullivan*, 141 F.3d 1232, 1234 (7th Cir. 1998) (interpreting Wisconsin securities law as not requiring proof that defendant knew instruments were securities); *State v. Irons*, 574 N.W.2d 144, 14-50 (Neb. 1998) (same); *State v. Wallace*, 124 P.3d 259, 262 (Utah App. 2005) (same), *affirmed*, 150 P.3d 530 (Utah 2006); *People v. Rivera*, 56 P.3d 1155, 1163 (Colo. App. 2002) (same); *State v. Andresen*, 773 A.2d 328, 341-42 (Conn. 2001) (rejecting defendant’s reliance on advice of counsel defense to sale of unregistered securities because state need only prove intent to do the act); *Commonwealth v. Allen*, 441 S.W.2d 424, 427 (Ky. App. 1969) (holding prosecution need not prove defendant knew securities were unregistered).

Because Count III correctly reflects the *mens rea* requirement,⁴ and because Warren has claimed no other defects in the Superseding Indictment, Warren’s Motion to Dismiss should be denied.

Respectfully submitted,



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⁴ As did the explanation from the State’s attorney quoted in Paragraph 4 of the Motion to Dismiss.