



BOOKING REPORT



NAPA COUNTY JUSTICE INFORMATION SYSTEM
DEPARTMENT OF CORRECTIONS
BOOKING INFORMATION

3/18/2008

2:47PM

PID-Event: 198702656 - 13 B **Name:** SCHULTZ, HAROLD DANIEL **Person Status:** InCust
Booking Date/Time: 3/18/2008at 1435 **By:** DUBANM **Arrest Date:** 3/18/2008

Sex: M **Race:** White **DOB:** 7/17/1959 **Age:** 48
Height: 6 ft 0 in **Weight:** 180 lbs **Hair Color:** Brown **Eye Color:** Hazel
DL #: N8472831 CA **SSN #:** ***-**-7955
CII #: A11452325 **FBI #:** 300818DB6 **CDC #:**
Address: 135 HOMEWOOD AVENUE , NAPA
State: CA **ZIP:** 94558 **Telephone:** 7072527859 **Residence:** 1 M 0 D 0 Y

Alias: **Marks:** NONE VISIBLE

Place of Birth: US **Citizenship:** US
Marital Status: Single **Number of Dependents:** 1
Time in County: 0 Y 1 M 0 D **State:** 48 Y 0 M 0 D **USA:** 48 Y 0 M 0 D

Occupation: UNEMPLOYED **Employer:**
Yrs 0 **Months** 0 CA

Next of Kin: SIMMONS, DEBBIE **Relationship:** Sister
Address: SAME AS DEF **City:**
State: CA **Phone:**

Booking Charges

Warrant Number	Charge Code	Violation Description
CR138779	368(d)PC	Theft by Non-Caretaker from Elder Adult
	487(a)PC	GRAND THEFT
	7159(d) B&P	Received an excessive down payment

Comments: **Bail:** \$ 10,000.00 **DDL:** _____
Arrest Agency: Napa Police Dept **HERNANDEW** **Trans:** NPJ **WPS:** _____
Court: NAPA SUPERIOR COURT **Booking Code:** Warrant

PHONE CALLS

Time: 3/18/2008 1447 **Phone Number:** 7076944405 **Phone calls refused per 851.5 PC**
X _____

PROPERTY

Booking Cash Received: \$0.00 **Receipt Number:** F8433

Vehicle Desc: **Vehicle Location:** **Property:** Small Bag #: J642938 Tag #: 901

The above accounts for all of my property and cash.

Prisoner: SCHULTZ, HAROLD DANIEL

Signature: _____ **Date:** 3/18/2008 **CO** _____

I received all my property; and cash totaling \$ _____

Signature: _____ **Date:** _____ **CO** _____



A Tradition of Stewardship
A Commitment to Service

Napa County Probation
Adult Division

1125 Third Street 2nd Floor
Napa, CA 94559
www.co.napa.ca.us/probation

Main: (707) 253-4431
Fax: (707) 253-4178

Mary Butler
Chief Probation Officer

Napa County Probation Department Referral Form

1125 Third Street, 2nd Floor
Napa, California 94559

Phone: (707) 253-4431 Fax: (707) 253-4178

Date: 2/16/10

Referred to: Pacific Seminar – Theft Awareness Class
(or equivalent 8-hour class)

Probationer: Harold Schultz PID/Event: 198702656-
13/CR138779

Offense(s): 484(b) PC, 7159.5(a)(3) B&P

Address: 5861 17th Ave
Sacramento, CA 95820 Phone: (916) 670-3833

Probationer In Custody – scheduled to be released on:
 Probationer is directed to complete the Program by: May 16, 2010
(Date)

Additional Information:

- Failure to register or attend the class as ordered by the Court will result in one or all of the following:
- probation will be revoked
- issuance of a warrant for your arrest
- re-evaluation of your case by the Court

Shannon Bulleri
Signature of Referring Probation Officer


Shannon Bulleri
Printed Name of Probation Officer

DEF: SCHULTZ, HAROLD
PID/CR: 198702656-13/CR138779
ADDITIONAL TERMS AND CONDITIONS

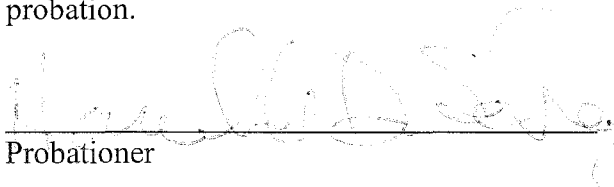
Any violation of the above order will be considered sufficient for your return for further action by the Court. Your probation will expire on 6/03/2012, unless extended or modified by the Court. Provided you have fulfilled the condition of your probation (and provided by law you are entitled), you may have your plea or conviction set aside, enter a plea of not guilty, and have the case dismissed. This motion must be made by you in person, by your attorney, or the Probation Officer to the Court originally granting your probation. The effect of this proceeding is to release you from all penalties and disabilities resulting from the offense or crime of which you have been convicted. Except, that in any subsequent prosecution for any other offense, this conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the case dismissed. (California Penal Code Section 1203.4)

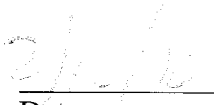
YOU ARE HEREBY NOTIFIED that Title 18 of the United States Code, Section 1202(a)(1) Appendix prohibits any person who has been convicted of a felony from possessing any kind of firearm whatsoever. Possession of any firearm after any felony conviction will subject you to federal prosecution and potential sentences of two (2) years in jail and a \$10,000 fine for each firearm possessed. Possession includes both actual and constructive possessions. "Constructive Possession" includes the right to exercise dominion and control over the firearm.

Termination of probation does not allow you to possess a firearm unless you have been granted a relief from disability from the Federal Bureau of Alcohol, Tobacco & Firearms.

By: 
SHANNON BULLERI
Deputy Probation Officer

I have received a copy of the Minute Order, Court Orders, California Penal Code Section 1203.4, and the Federal Firearms Act. I have agreed to comply with these conditions of my probation.


Probationer


Date



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Adult Probation Division

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Napa, CA 94559
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A Tradition of Stewardship
A Commitment to Service

Mary Butler
Chief Probation Officer

08/28/2009

HAROLD SCHULTZ
3816 36TH STREET
SACRAMENTO CA 95820

PID #: 198702656 - 13/CR138779
Charge #: 484bPC

Dear HAROLD SCHULTZ:

As a condition of probation you were ordered to pay restitution. Restitution has been established in the amount of \$40,320.00.

In accordance, you must abide by the payment instructions set forth by the California Service Bureau. Failure to make regular monthly payments may result in your return to Court for probation violation.

Restitution is separate and apart from any fines or fees that you may have been ordered.

You must keep the Probation Department advised of any change in your address.

Respectfully,

A handwritten signature in cursive script, appearing to read "Shannon Bulleri".

Shannon Bulleri
Deputy Probation Officer

Cc: file

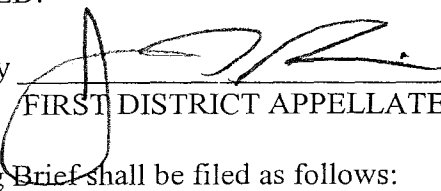
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 1

PEOPLE OF THE STATE OF CALIFORNIA)
)
vs.) Case No. A125019
)
HAROLD D.SCHULTZ) NAPA County
) Superior Court No. CR138779

ORDER APPOINTING COUNSEL ON APPEAL

By the Court:

The attorney named below is hereby appointed counsel for appellant on this appeal. This case is designated ASSISTED.

Submitted by  on the date indicated below.

FIRST DISTRICT APPELLATE PROJECT

Appellant's Opening Brief shall be filed as follows:

____ Assisted Case, record not yet filed: Forty-five (45) days from the expiration of the ten day administrator review period which commences upon filing of the record.

____ Assisted Case, record already filed: Forty-five (45) days from the expiration of the ten-day administrator review period which commences upon the date of this order.

FRANK H. FREE

submitted by FDAP on: June 24, 2009

Appointed Attorney's Address:

FRANK H. FREE (State Bar #92169)
160 Franklin St.
Ste#207
Oakland, CA 94607

cc: Attorney General
First District Appellate Project
Appellant
Appointed Attorney

Appellant's Address:

HAROLD D. SCHULTZ
135 HOMEWOOD AVE
NAPA, CA 94558

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE**

PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
Plaintiff and Respondent,)	Court of Appeal
)	No. A125019
v.)	
)	Napa County Superior Court
HAROLD DANIEL SCHULTZ,)	No. CR138779
Defendant and Appellant.)	
_____)	

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Napa County
Superior Court, the Honorable Diane M. Price, Presiding

FRANK H. FREE, SBN 92169
160 Franklin Street, Suite 207
Oakland, CA 94607
Phone: (510) 834-8364
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E-mail: frank@frankfree.com

Attorney for Appellant Harold Schultz
under the First District Appellate
Project's Assisted-Case System

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE**

PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
Plaintiff and Respondent,)	Court of Appeal
)	No. A125019
v.)	
)	Napa County Superior Court
HAROLD DANIEL SCHULTZ,)	No. CR138779
Defendant and Appellant.)	
_____)	

APPELLANT’S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from orders entered on June 4, 2009, following conviction after a court trial, sentencing Harold Schultz to three years of formal probation.

(ACT 2-3.) /1 It is authorized by Penal Code section 1235. /2

/1 The record consists of a Clerk’s Transcript (CT) and 20 volumes of Reporters’ Transcripts (RT), referenced herein by date. Following a request under California Rules of Court, rule 8.340, the record has been augmented with the minute orders (Augmented Clerk’s Transcript, or “ACT”) and Reporters’ Transcripts (Augmented Reporters’ Transcripts or “ART”) of proceedings held after appellant filed his notice of appeal. This Court also granted appellant’s request to augment the record. The augmented record is denominated “AR.”

2/ All non-specified statutory references herein are to the Penal Code.

STATEMENT OF THE CASE

On September 24, 2008, the Napa County District Attorney filed an information charging appellant with count one, a felony violation of section 368, subd. (d), theft from an elder; count two, a felony violation of section 487, subd. (a), grand theft; count three, a felony violation of section 484b, diversion of construction funds; and count four, a misdemeanor violation of Business and Professions Code section 7159.5, subd. (a) (3), charging an excessive down payment. (CT 35-36.)

Following presentation of the prosecution case in a court trial, the trial court, on March 23, 2009, granted appellant's motion to dismiss counts one and two, pursuant to section 1118. (CT 62-63.) On March 24, 2009, the court found appellant guilty of counts three and four. (CT 64-65.)

Appellant filed a premature notice of appeal on May 21, 2009. (CT 73.)

On June 4, 2009, the trial court sentenced appellant to three years of formal probation, with the conditions including a 30-day county jail commitment and restitution in the amount of \$40,320.00. (ACT 2-3.)

was in violation of the contract because she had not made her payments. (RT 930, 1124-1125.)

In a letter dated March 12, 2006, Petree explained to appellant that she was not refusing to make further payments, but wanted to have a meeting first. She stated that little progress had been made on the remodeling project, and expressed her unhappiness that she was unable to shower in her bathroom because appellant had not completed installing the tub. She asked appellant to contact her so that they could resolve their dispute. (AR 12; RT 933, 1125.) Appellant called her several days later, upset. He called five or six times subsequently, but Petree did not respond. (RT 933, 1125.)

Petree contacted the Contractors State Licensing Board. (RT 968.) Its investigator, Robin Caton, called appellant and asked for receipts and an accounting of what he had spent Petree's money on; she received no response. (RT 971-972.) The Board commissioned David Jackness, one of its industry experts, to review appellant's work, and he inspected the Petree residence in August, 2006. (RT 1029-1030.) He formed the opinion that appellant's work was of acceptable, but not the highest, quality, or "within tolerable limits." (RT 1035.) Dan Kavarian, a senior building inspector for the City of Napa, found no code violations when he inspected appellant's work. (RT 993.)

ARGUMENT:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING APPELLANT GUILTY OF DIVERSION OF CONSTRUCTION FUNDS UNDER PENAL CODE SECTION 484B BECAUSE THAT STATUTE DID NOT APPLY TO HIS CONDUCT

This is a case in which the trial court incorrectly applied a criminal statute to appellant's conduct. Since it raises a pure question of law, it therefore warrants *de novo* review by this Court. (People v. Lawlor (1973) 9 Cal.3d 156, 160; People v. Cromer (2001) 24 Cal.4th 889, 894 n1.)]

“All authorities agree that the major consideration in interpreting a criminal statute is the legislative purpose. Hence the court will usually inquire into the evils which prompted its enactment and the method of elimination or control which the Legislature chose.” (Witkin & Epstein, California Criminal Law, “Introduction to Crimes,” section 18, p. 41, and cases cited therein.) “In the construction of a statute the first cardinal rule is to ascertain, if possible, the intent of the legislature.” (In re Application of Davis (1936) 18 Cal.App.2d 291, 293.)

The trial court found that appellant violated Penal Code section 484b, which states: “Any person who receives money for the purpose of obtaining or paying for services, labor, materials or equipment and willfully fails to apply such money for such purpose by either willfully failing to complete the improvements

for which funds were provided or willfully failing to pay for such services, labor, materials or equipment provided incident to such construction, *and wrongfully diverts the funds to a use other than that for which the funds were received*, shall be guilty of a public offense ...” (Penal Code section 484b; italics added.)

There was no evidence at trial that appellant, a contractor, diverted any funds from the Petree job to another project. His conviction under section 484b therefore must be reversed.

It is well established that, as succinctly stated in People v. Wooten (1996) 44 Cal.App.4th 1834, “Penal Code section 484b criminalizes the diversion of construction funds from one project to another.” (Ibid., at p. 1847.) In the first case interpreting section 484b, the California Supreme Court held that the legislative purpose of the statute “was to punish for fraudulent conversion and not for failure to comply with a contractual obligation.” (People v. Howard (1969) 70 Cal.2d 618, 623.) As summarized in People v. Worrell (1980) 107 Cal.App.3d 50, “The legislative purpose of Penal Code section 484b ... is to prevent any possibility of homeowner harm resulting from the diversion of construction funds. The statute should be read as preventing the use of one construction project’s funds for another project on the grounds that such use leaves open the possibility of harm to the homeowner if the business is short on cash and unable to complete the job at a later date.” (Ibid., at p. 55.)

The trial court did not state its reasoning in finding that appellant was guilty of diversion of construction funds. (RT of March 24, 2009, at p. 1150.) After the close of the prosecution case, appellant's trial lawyer moved to dismiss, pursuant to section 1118, both the count at issue here and the other two felony counts, theft from an elder and grand theft, on the basis that there was not proof beyond a reasonable doubt that appellant intended to deprive Ms. Petree of her property. (RT of March 23, 2009, at pp. 1068-1070.) The court granted the motion as to the other two counts because it could not find that appellant intended to steal from Ms. Petree at the time that they entered into the contract. (RT 1074-1075.) The logical inference is that, in finding guilt as to the section 484b charge, the court believed that appellant's apparent abandonment of the job prior to completion showed culpable intent at that time. However, as demonstrated above, the Legislature has not made abandonment of a construction job a crime. /3 In the absence of evidence that appellant actually diverted Ms. Petree's funds to another project, he should not have been found to have engaged in conduct for which he could be criminally punished.

3/ Some guidance may be found in section 511, which states, "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable." Thus, the Legislature has recognized that not all disputes about money or property should be resolved in the criminal courts, even where a defendant may have acted unreasonably in seizing control of it.

As finder of fact, the court evidently believed that the prosecution witnesses were more credible than appellant. Further, it no doubt was easy for the court to sympathize with the elderly homeowner who retained appellant's services and was upset with the results. However, the appropriate remedy for her to pursue would have been a civil suit. The trial court erred in finding appellant guilty of violating section 484b, and that conviction should be reversed.

CONCLUSION

For the reasons set forth herein, appellant's conviction under section 484b, diversion of construction funds, must be reversed.

DATED: January 8, 2009

Respectfully submitted,

Frank H. Free

Frank H. Free

Attorney for Appellant Harold Schultz

CERTIFICATION OF WORD COUNT

I, Frank H. Free, attorney for appellant Harold Schultz, declare under penalty of perjury that, according to the computer program on which it was produced, this brief contains approximately 1,750 words.

Executed this 8th day of January, 2010, at Oakland, California.

Frank H. Free

Frank H. Free

PROOF OF SERVICE

I am an active member of the State Bar of California. My business address is 160 Franklin Street, Suite 207, Oakland, California 94607. On January 8, 2010, I served copies of the attached "Appellant's Opening Brief" on the following, by placing a true copy thereof, with postage prepaid, in the United States Mail, at Oakland, California, addressed as follows:

Fran Ternus, Staff Attorney
First District Appellate Project
730 Harrison Street, Suite 201
San Francisco, CA 94107

Harold Daniel Schultz
5861 17th Avenue
Sacramento, CA 95820

Attorney General of California
Appellate Department
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

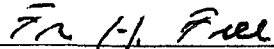
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Jefferson Law Group
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Napa, CA 94559

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 8th day of January, 2010, at Oakland, California.

DATED: January 8, 2010


FRANK H. FREE