

SUPREME COURT OF LOUISIANA

No. 98-K-1599

STATE OF LOUISIANA

Versus

JERRY SCHWEHM

LEMMON, J., Dissenting

When a public official is charged with and convicted of theft of public funds, the betrayal of his public trust should be reflected in the harshness of the sentence. However, defendant was not charged with theft, apparently because of the difficulty of proving the intent element of the crime. Therefore, defendant was charged with the easier-to-prove crime of malfeasance.

Malfeasance requires proof that a clear duty was violated. State v. Perez, 464 So. 2d 737 (La. 1985). Here, there was clearly a duty to remit litter fines, but the time for performing that duty was not expressed in either La. Rev. Stat. 25:1112 (redesignated as La. Rev. Stat. 30:2532 by Act No. 1019 of 1995), or the parish ordinance. If the revised statutes or the ordinance are to be used for criminal purposes under the charge of malfeasance, they must specify the time limitation for performance of the duty. Otherwise, someone charged with failure to remit for one week might be found guilty by one jury, whereas another jury might find someone who failed to remit for one month not guilty. This example illustrates the problem inherent in leaving a jury without a clear standard on which to decide the case. Given the lack of any clear standard in effect at the time the alleged offense occurred, I dissent from the majority's opinion reinstating the jury conviction on this count.

