

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 7, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**Nos. 96-1884-CR
96-1885-CR
96-1887-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

96-1884-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

THOMAS FAUST,

DEFENDANT-RESPONDENT.

96-1885-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

TAREK GENENA,

DEFENDANT-RESPONDENT.

96-1887-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ROBERT STANNARD,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. The State appeals from orders dismissing its criminal prosecution of Robert Stannard, Thomas Faust, and Tarek Genena. All three were corporate officers of a now defunct business, Precision Technologies, Inc. (PTI). The State charged them with embezzlement, § 943.20(1)(b), STATS., alleging that they converted and used funds belonging to their employees. After the preliminary hearing, the trial court found no probable cause and dismissed the charges. We affirm the trial court's decision.

During 1993-94, PTI offered its employees a self-funded health insurance plan. Under the provisions of 26 U.S.C. § 125, entitled "Cafeteria Plans," the company withheld pre-tax dollars from employee pay checks to pay for health care costs. Under the employee's collective bargaining agreement, PTI agreed to pay 70% of health care costs from its revenues or through health insurance, and 30% of the costs from the employee's contributions.

PTI placed the money withheld from the employees in its general accounts, merging it with monies collected from other sources. When PTI ceased operation and declared bankruptcy, numerous health care claims remained unpaid. The State charged that putting the employee contributions in the general accounts and using them for non-health care related operating costs constituted a nonconsensual conversion of employee-owned funds in violation of § 943.20(1)(b), STATS.

The Department of Labor has excused employers using § 125 Cafeteria Plans from the trust provisions required under Title I of the Employee Retirement Income Security Act (ERISA). *ERISA DOL Announces Revised Enforcement Policy For Cafeteria, Welfare Plans*, ERISA Technical Release 92-01, Pens. Plan Guide (CCH) ¶ 19,963, at 22,475-16 (June 2, 1992). The employer's duty is therefore limited to ensuring that participant contributions are applied only to the payment of benefits and reasonable administrative expenses of the plan. In the trial court's view, PTI satisfied that requirement by showing that the amount of health care claims PTI paid during the existence of the plan substantially exceeded the amount contributed by employees. It did not matter, in the court's view, that contributions by employees were placed in general revenue accounts and that PTI paid health care claims from those general revenue accounts.

The evidence at a preliminary hearing must establish that the defendant probably committed a felony. *See State v. Dunn*, 121 Wis.2d 389, 397-98, 359 N.W.2d 151, 155 (1984). That test is satisfied when the evidence presents a believable or plausible account of the defendant's commission of the felony. *Id.*

On review of a probable cause determination, we review the evidence de novo. *State v. Gerald L.C.*, 194 Wis.2d 548, 564, 535 N.W.2d 777, 782 (Ct. App. 1985).

The trial court properly dismissed the embezzlement charges. Evidence established that PTI's practice was acceptable under existing federal policy as interpreted by the Department of Labor, the agency charged with regulating Cafeteria Plans. Although the State points out that it is not necessarily bound by federal government policy in enforcing its criminal laws, it fails to cite state law supporting its declaration that Cafeteria Plan contributions remain the property of employees, subject to their direction and control, or requiring segregated trust accounts for holding those contributions. The fact remains that PTI's employees contributed certain amounts for payment of health care costs and received back, in the form of paid claims, a greater amount. While that amount did not satisfy PTI's obligation under the collective bargaining agreement, or cover all outstanding claims, that was the risk the employees accepted in choosing a self-funded plan in a business which, all agree, never attained financial stability during its brief period of operation.

The State nevertheless argues that Faust and Stannard bear responsibility for continuing to accept and use contributions in the last month of PTI's operation although no further health claims were paid. Again, that argument depends on the unsupported premise that PTI was required to maintain a separate account for health contributions. The fact that insolvency and bankruptcy

terminated PTI's operations and, necessarily, its payment of health claims, does not give rise to criminal liability where none otherwise exists.¹

By the Court.—Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

¹ Counsel for Stannard submitted a brief that recited a familiar fairy tale, presented a short discussion of the facts and provided no citation to any applicable law. The brief added nothing to our understanding of this case. We disregarded it in reaching our decision. We refer counsel to § 809.19(1)(e), STATS., for the requirements of a proper argument to this court.

