IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert F. Reilly,	:	
Appellant	:	
	:	
v.	:	
	:	No. 2335 C.D. 2013
Luzerne County Retirement Board	:	Argued: June 16, 2014

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: September 29, 2014

Robert F. Reilly (Reilly) appeals the order of the Court of Common Pleas of Luzerne County (common pleas court) that granted the motion for summary judgment of the Luzerne County Retirement Board (Board) and denied Reilly's motion for summary judgment.

Reilly was elected Clerk of Courts for Luzerne County in 1988, and served in that capacity for approximately twenty-two years until his resignation on June 3, 2010. During his tenure as Clerk of Courts, Reilly made contributions to the Luzerne County Employees Retirement System (System) and his pension benefits vested.

On June 24, 2010, Reilly received a criminal information that charged him with violating 18 U.S.C. §1001:

> [I]n a matter within the jurisdiction of the Federal Bureau of Investigation, an agency of the United States, did knowingly and willfully make a false, fraudulent and

> fictitious material statement and representation, that is, the defendant Robert Francis Reilly, represented to FBI Special Agents that he had never received any money from another person other than a one-time campaign contribution of $200 when in truth, as he then well knew, he had received more than three payments of money from that other person. . . .

Criminal Information, June 24, 2010, at 1; Reproduced Record (R.R.) at 59a.

On July 16, 2010, Reilly pled guilty to the criminal information. On November 5, 2010, the United States District Court for the Middle District of Pennsylvania sentenced Reilly to two years probation, fined him $1,000 plus a special assessment fee of $100, and ordered him to perform fifty hours of community service.

As a result of the guilty plea, the Board voted on or about August 2, 2010, to deny Reilly's pension benefits with the System and approved the return of Reilly's pension plan contributions to him with interest.

On December 30, 2010, Reilly commenced an action for declaratory judgment in the common pleas court and alleged:

> 12. Plaintiff [Reilly] has not been found guilty of violating a Pennsylvania State Crimes Code, nor has Plaintiff [Reilly] ever been convicted of any crimes specifically identified in the Public Employee Pension Forfeiture Act, 43 P.S. §1312, in order to forfeit his pension and, therefore, is entitled to immediate payment of his pension benefits, which were wholly earned during the course of his employment by Luzerne County.
>
> 13. The federal crime Plaintiff [Reilly] pled guilty prohibits one from knowingly and willfully making any

> materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the three branches of the federal government. . . .
>
> 14. Of the crimes enumerated in the Pennsylvania State Crimes Code, the most similar of all the crimes listed to the one Plaintiff [Reilly] has pled guilty to is 18 Pa.C.S. § 4906, false reports to law enforcement authorities; however, this statute places false reports to law enforcement authorities into three narrow categories: (1) knowingly giving false information with intent to implicate someone else; (2) reporting an offense or incident which the individual knows did not occur; or (3) pretending to furnish law enforcement with information concerning an offense or incident when the individual has no information relating to the offense or incident. . . .
>
> 15. 18 Pa.C.S. § 4906 does not apply to the facts of the offense which Plaintiff [Reilly] has pled guilty to.
>
> 16. Moreover, the crime Plaintiff [Reilly] was convicted of was not made on county property, nor was it made in the course of Plaintiff's [Reilly] employment with Luzerne County; the plea related to a statement Plaintiff [Reilly] made to FBI agents concerning the number of contributions he received in his campaign for State Representative and Clerk of Courts.
>
> 17. Therefore, because the crime Plaintiff [Reilly] pled guilty to is not substantially the same as any of the state law crimes enumerated in the Public Employee Pension Forfeiture Act, nor was the crime committed related to Plaintiff's [Reilly] public office, Plaintiff [Reilly] is entitled to receive his pension benefits, with interest. (Citations omitted).

Declaratory Judgment Complaint, December 30, 2010, Paragraph Nos. 12-17 at 3-4; R.R. at 6a-7a. Reilly asked the common pleas court to declare that because he was not convicted of a crime related to public office or public employment, he was entitled to receive his retirement benefits.

The Board denied the material allegations and alleged in New Matter that Reilly was barred from receiving any retirement benefit except a return of his contribution without interest pursuant to the Public Employee Pension Forfeiture Act (Act)[1], that Reilly was estopped from asserting any right to recovery, that Reilly's claims were barred, or, at least limited, by the doctrine of laches, that Reilly's claims were barred by the statute of limitations, and that he failed to state a cause of action upon which relief could be granted. Reilly denied the Board's allegations.

On July 19, 2013, Reilly moved for summary judgment and again asserted that he was not convicted of a crime to which the Act applied so that he was entitled to his pension benefits. Reilly also asserted that no genuine issue of material fact existed. The Board answered and denied the allegations.

On August 16, 2013, the Board moved for summary judgment and alleged:

> 18. The crime to which Plaintiff [Reilly] pled guilty is included as a crime related to public office or employment under the federal inclusion language of Section 1312 [Section 2] of the PEPFA [Act].
>
> 19. Plaintiff's [Reilly] public employment placed him in a position to commit the crime in 'representing to FBI Special Agents that he had never received any money from another person other than a one-time campaign contribution of $200 when in truth, as he then well knew, he had received more than three payments of money from that other person.' . . .
>
> . . . .

[1] Act of July 8, 1978, P.L. 752, *as amended*, 43 P.S. §§1311-1315.

> 22. Plaintiff's [Reilly] interview [with the FBI Special Agent] took place during an investigation of crimes associated with public corruption. . . .
>
> 23. It is apparent that Plaintiff's [Reilly] connection to government – his public employment – brought about or was an integral part of the interview/investigation of Plaintiff [Reilly] as a result of allegations made during the investigation as evidenced by the allegations in the Criminal Complaint, especially the crime alleged and the references to Luzerne County and the Clerk of Courts. . . .
>
> 24. In fact, as admitted by Plaintiff [Reilly], the FBI 'received information from an individual that he had provided this Defendant [Reilly] with money on a number of occasions and that the claim of that person was that it was associated with work that person was doing in the Luzerne County area for the County Government.' . . .
>
> 25. Plaintiff's [Reilly] public employment is inextricably tied to the investigation of Plaintiff [Reilly] and interview at which Plaintiff [Reilly] made the false statement.
>
> 26. Plaintiff [Reilly] 'was a public employee at the time [he] committed a crime related to public employment.' . . .
>
> 27. Therefore, Plaintiff [Reilly] has forfeited his pension benefits under the PEPFA, and Defendant's [Board] Motion for Summary Judgment should be granted. . . .
> (Citations omitted).

Defendant's Motion for Summary Judgment, August 16, 2013, Paragraph Nos. 18-19, and 22-27 at 3, 5-6; R.R. at 30a, 32a-33a. Reilly denied the material allegations.

By order dated December 6, 2013, the common pleas court granted the Board's motion for summary judgment and denied Reilly's motion for summary judgment. The common pleas court determined:

> The Court finds that Plaintiff [Reilly] committed a crime related to public office or employment within the meaning of the PEPFA [Act] when those crimes are committed by a public official or public employee through his public office or position or when his public employment places him in a position to commit the crime. . . . Furthermore, the term also includes all criminal offenses listed in federal law that are substantially the same as the crimes listed in the section 1312 [Section 2].
>
> . . . .
>
> The Court disagrees with the Plaintiff [Reilly] and finds that the federal crime to which Plaintiff [Reilly] pleaded guilty is substantially similar to the state crime enumerated under the PEPFA [Act].
>
> Plaintiff [Reilly] pleaded guilty to the federal crime, Title 18 U.S.C. §1101 which prohibits one from knowingly and willfully making **any** materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive, legislative or judicial branch of the federal government. . . . Section 4906(b)(1) states that a person commits a misdemeanor of the third degree if he reports to law enforcement authorities an offense or other incident within their concern knowing that [it] did not occur. . . . [T]his Court finds that Plaintiff's [Reilly] federal crime is substantially similar to the crime of False Reports to Law Enforcement Authorities. As the Superior [sic] Court in Merlino [v. Philadelphia Board of Pensions and Retirement, 916 A.2d 1231 (Pa. Cmwlth. 2007)] stated, the language in section 1001 of the federal law is substantially similar to the language of section 4906 of the state law addressing false statements to law enforcement officials. Both statutes require the *mens rea* of **knowingly** making false statements to law enforcement authorities. . . . (Emphasis in original. Citations omitted).

Common Pleas Court Opinion, February 19, 2014, (Opinion) at 4-6. The trial court also determined that Reilly committed the crime through his public office, or that his public employment placed him in a position to commit the crime.

Reilly contends that the common pleas court erred when it granted the Board's motion for summary judgment and denied his motion because he was not convicted of a crime specifically identified in Section 2 of the Act, 43 P.S. §1312; when it found that the federal offense to which he pled guilty was substantially similar to 18 Pa.C.S. §4906(b)(1); and when it found that Reilly committed the offense through his public office or when his public employment placed him in a position to commit the crime.[2]

Initially, Reilly contends that the common pleas court erred when it granted the Board's motion for summary judgment and denied his motion for summary judgment because he was not convicted of any crime specifically identified in the Act.

Section 3(a) of the Act, 43 P.S. §1313(a), provides:

> Notwithstanding any other provision of law, no public official or public employee nor any beneficiary designated by such public official or public employee shall be entitled to receive any retirement or other benefit

[2] This Court's review of a common pleas court's grant of summary judgment is limited to determining whether the common pleas court made an error of law or abused its discretion. Salerno v. LaBarr, 632 A.2d 1002 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied*, 644 A.2d 740 (Pa. 1994). Summary judgment should only be granted in a clear case and the moving party bears the burden of demonstrating that no material issue of fact remains. The record must be reviewed in the light most favorable to the non-moving party. Id.

> or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment.

Section 2 of the Act, 43 P.S. §1312, defines "Crimes related to public office or public employment" as follows:

> Any of the criminal offenses as set forth in the following provisions of Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes or other enumerated statute when committed by a public official or public employee through his public office or position or when his public employment places him in position or when his public office or position or when his public employment places him in a position to commit the crime:
> . . . .
> Section 4906 (relating to false reports to law enforcement authorities).
> . . . .
> In addition to the foregoing specific crimes, the term also includes all criminal offenses as set forth in Federal law substantially the same as the crimes enumerated herein.

Because Section 2 of the Act does not specifically list the federal crime for which Reilly was convicted and specifically lists more than twenty Pennsylvania offenses, Reilly is technically correct that the crime for which he was convicted was not specifically identified in the Act. However, because Section 2 also provides that all federal offenses substantially the same as the Pennsylvania crimes listed in Section 2 also come under the Act, this Court's inquiry does not stop with a determination that the crime for which Reilly was convicted was not specifically identified in the Act.

Reilly next contends that the common pleas court erred when it found that the federal offense to which Reilly pled guilty was substantially similar to Section 4906(b)(1) of the Pennsylvania Crimes Code, 18 Pa.C.S. §4906(b)(1), and warranted the forfeiture of his pension.

Reilly pled guilty to 18 U.S.C. §1001 which provides in pertinent part:

> **(a)** Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> **(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> **(2)** makes any materially false, fictitious, or fraudulent statement or representation; or
>
> **(3)** makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry. . . .

Section 4906(b) of the Pennsylvania Crimes Code, entitled "False reports to law enforcement authorities", 18 Pa.C.S. §4906, provides:

> A person commits a misdemeanor of the third degree if he:
>
> (1) reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur; or
>
> (2) pretends to furnish such authorities with information relating to an offense or incident when he knows he has no information relating to such offense or incident.

The common pleas court determined that the federal offense to which Reilly pled guilty was substantially the same as the Pennsylvania crime of false reports to law enforcement authorities. Merlino v. Philadelphia Board of Pensions and Retirement, 916 A.2d 1231 (Pa. Cmwlth. 2007).

In Merlino, Salvatore Merlino (Merlino), a City of Philadelphia policeman, was involved in a drug investigation. Relying on a tip, Merlino and another officer seized two boxes from a United Parcel Service truck that were believed to contain drugs. Merlino and the other officer took the boxes to the canine unit where a drug dog responded positively for the presence of drugs. Merlino stated to the officer who prepared an investigative report that the dog had sniffed the boxes on the truck. The federal government then took over the investigation. Merlino told an Assistant United States Attorney that the dog "hit" on the boxes inside the truck, which was not a true statement. This false statement led to the dismissal of the drug indictment. Merlino pled guilty to 18 U.S.C. §1001 for making a false statement to a federal agency and was sentenced to eighteen months probation and fined $500. Merlino, 916 A.2d at 1233.

The Philadelphia Board of Pensions and Retirement determined that Merlino was not entitled to receive his pension under the Act. One of the reasons stated was that the federal crime, 18 U.S.C. §1001, for which he was convicted was substantially similar to the Pennsylvania crime of false reports to law enforcement authorities, 18 Pa.C.S. §4906(b). Merlino appealed to the Court of Common Pleas of Philadelphia which affirmed. Merlino, 916 A.2d at 1233-1234.

Merlino appealed to this Court. One of the issues he raised was that his conviction was not substantially the same as the Pennsylvania crime of false reports to law enforcement authorities. Merlino, 916 A.2d at 1235. This Court affirmed and determined that the two offenses were substantially the same because "[b]oth statutes require a false statement knowingly made to law enforcement authorities." Merlino, 916 A.2d at 1236.

Reilly attempts to distinguish the present case from Merlino. He argues that he was convicted because he made a statement to FBI agents concerning the number of campaign contributions he received from an individual during his campaigns when he ran for State Representative and Clerk of Courts for Luzerne County. He did not try to implicate another individual, did not try to report an offense, and did not furnish information concerning an offense and had no information concerning any offense.

This Court does not examine the particular facts underlying the federal conviction when determining whether a federal crime and state crime are substantially the same. "Rather, when determining whether a state crime and a federal crime are substantially the same for the purposes of the Forfeiture Act, this Court must compare the *elements* of the two crimes including the required *mens rea*." DiLacqua v. City of Philadelphia Board of Pensions and Retirement, 83 A.3d 302, 310 (Pa. Cmwlth. 2014). (Emphasis in original).

This Court has already determined that these two crimes were substantially the same in Merlino. This Court is bound by that precedent. The

common pleas court did not err when it determined the two crimes were substantially the same.

Reilly next contends that the common pleas court erred when it found that he committed the offense "through his public office or position or when his public employment places him in position to commit the crime" as set forth in Section 2 of the Act, 43 P.S. §1312. While Reilly admits that he made a false statement to an FBI agent, he notes that he did not make the statement in the course of his employment with Luzerne County, on County property, or during working hours. He made the false statement in a parking lot of a private company while off duty. Further, Reilly asserts that the false statement had nothing to do with his position as Clerk of Courts but related to the number of campaign contributions he received from a particular individual.

With respect to this issue, the common pleas court determined:

> The Court disagrees with Plaintiff's [Reilly] argument and finds that the Plaintiff's [Reilly] public employment as a Clerk of Courts placed him in a position to commit the crime. . . . As part of his plea in federal court, Mr. Reilly admitted that it was accurate that the FBI received information from a person claiming that he had provided the Plaintiff [Reilly] with money on certain occasions and according to that person, the money provided was associated with work the Plaintiff [Reilly] was doing in the Luzerne County area for the county government. . . . The FBI would not have approached the Plaintiff [Reilly] had he not held a public office and was therefore the subject of a federal investigation into public corruption activities occurring within Luzerne County.
>
> The case is similar to the Gierschick [v. State Employees' Retirement Board, 733 A.2d 29 (Pa.

> Cmwlth. 2002)] case, in which the Appellant committed perjury before the Grand Jury and his public employment as a corrections officer placed him in a position to witness the events that were later the subject of his false testimony. The Plaintiff [Reilly], in the instant case, received money at a car dealership on three occasions and said monies were solely received in association for work the payor was conducting for Luzerne County government. Therefore, the Plaintiff [Reilly], in his position as a public employee for the Clerk of Courts, collected money from the payor on three occasions and later falsely reported to the Federal Bureau of Investigations [sic] that he only collected money on one occasion from the payor. To view this fact pattern in any other way suggests that a public employee need only seek a locale not related to his government employment within which to conduct an illegal act and escape liability and/or loss of pension benefits under the PEPFA.
>
> Furthermore, Plaintiff [Reilly] admits in his Motion for Summary Judgment that his false statement concerned payments he received from a county government contractor. The Court agrees with the Defendant [Board] that Plaintiff's [Reilly] public employment is 'inextricably' tied to Plaintiff's [Reilly] role as a subject of a federal investigation and interview at which Plaintiff [Reilly] made the false statement. The Court finds that Plaintiff's [Reilly] public employment placed him in a position to commit the crime to which he pleaded guilty.

Opinion at 8-9.

This Court agrees with the common pleas court. Reilly would not have been in position to make the false statement to the FBI Agent if he was not a government official and had not accepted money from a county government contractor. Reilly was questioned by the FBI as part of an investigation into public corruption in Luzerne County. Reilly's public employment placed him in position to make the false statement. See Gierschick v. State Employees' Retirement

Board, 733 A.2d 29 (Pa. Cmwlth. 1999), *petition for allowance of appeal denied*, 751 A.2d 194 (Pa. 2000).

Accordingly, this Court has no choice but to affirm.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert F. Reilly,	:	
Appellant	:	
	:	
v.	:	
	:	No. 2335 C.D. 2013
Luzerne County Retirement Board	:	

O R D E R

AND NOW, this 29th day of September, 2014, the order of the Court of Common Pleas of Luzerne County in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert F. Reilly,	:	
Appellant	:	
	:	No. 2335 C.D. 2013
v.	:	
	:	Argued: June 16, 2014
Luzerne County Retirement Board	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

CONCURRING OPINION
BY JUDGE McCULLOUGH FILED: September 29, 2014

I concur in the result reached by the Majority that, based on controlling precedent, *Merlino v. Philadelphia Board of Pensions and Retirement*, 916 A.2d 1231 (Pa. Cmwlth. 2007), this Court must affirm the trial court's order granting summary judgment to the Luzerne County Retirement Board and denying summary judgment to Robert F. Reilly (Reilly). However, I write separately to clarify that, in contrast to the conduct at issue in this case, the conduct in *Merlino* fell squarely within the language of section 4906(b)(1) of the Crimes Code, 18 Pa.C.S. §4906(b)(1).

Section 3 of the Public Employee Pension Forfeiture Act (Act)[1] provides that a public employee shall not be entitled to receive retirement or other benefits if he pleads guilty to "any crime related to public office or public

[1] Act of July 8, 1978, P.L. 752, *as amended*, 43 P.S. §1313.

employment." In relevant part, section 2 of the Act, 43 P.S. §1312, defines the term "crimes related to public office or employment" by referencing specific provisions of Title 18 (Crimes and Offenses) and expressly including all federal criminal offenses that are "substantially the same as the crimes enumerated" in section 2. 43 P.S. §1312. The definition applies to the enumerated crimes when committed by a public official or employee "through his public office or position or when his public employment places him in a position to commit the crime…."

A violation of 18 U.S.C. §1001 occurs if:

> (a) [An individual], in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

I agree with the Majority's conclusion that Reilly's violation of 18 U.S.C. §1001 was committed through his public office as contemplated by section 2 of the Act, 43 P.S. §1312. However, with respect to the holding in *Merlino* that a violation of 18 U.S.C. §1001 is substantially similar to a violation of section 4906(b)(1) of the Crimes Code, 18 Pa.C.S. §4906(b)(1), I would clarify that the conduct at issue in *Merlino* fell squarely within the narrow parameters of Pennsylvania's statutory provision.

By its plain language, section 4906(b)(1) is violated when a person "reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur." *Merlino* involved a police officer who falsely reported to law enforcement authorities that a dog sniffed two boxes on a truck and responded positively for the presence of drugs. In fact, the officer and another policeman had taken the boxes to a canine unit, which is where the dog actually "hit" on the boxes. Thus, the police officer in *Merlino* "reported an incident" to law enforcement authorities "knowing that it did not occur." In affirming the Board's determination that the officer was not entitled to retirement benefits, this Court concluded, among other things, that the officer's conviction under 18 U.S.C. §1001(a)(2) (concerning *any* materially false, fictitious, or fraudulent statement or representation) was substantially the same as the offense set forth in section 4906(b)(1) (reporting a crime knowing that it did not occur) because "[b]oth statutes require a false statement knowingly made to law enforcement authorities." *Merlino*, 916 A.2d at 1236.

In contrast to the facts of *Merlino*, Reilly did not report an offense to law enforcement officers knowing that it had not occurred. In fact, his conduct was quite the opposite; in denying that he received more than one campaign contribution from another person, Reilly denied knowledge of an offense. Section 4906(b)(1) does not on its face apply to an individual who denies committing a crime of which he is accused, nor does it apply to a failure to supply relevant information during an investigation. Rather, section 4906(b)(1) only states that it is a crime to knowingly report an offense that has not taken place.

In defining the term "crimes related to public office" in section 2 of the Act, the legislature's enumeration of only certain, specific offenses and its exclusion of other, closely related crimes must be given significance. For example,

where the legislature specifically identified the offenses in 18 P.S. §3922 (relating to theft by deception), §3923 (relating to theft by extortion), and §3926 (relating to theft of services), *but not* the offenses in §3924 (relating to theft of property lost or mislaid), §3925 (relating receiving stolen property), or §3927 (relating to theft by failure to make required disposition of funds), I believe the legislature did not intend that *any and all federal crimes* generally involving theft or the dishonest acquisition or possession of property would be considered "substantially the same" as any or all of the *enumerated* state offenses in section 2 of the Act.

Similarly, I believe that the legislature's inclusion of §4104 (relating to tampering with records) but *not* §4103 (relating to the fraudulent destruction, removal, or concealment of recordable instruments) reflects that the legislature did not intend to identify all offenses related to the unlawful handling of records as "crimes related to public office" for purposes of disqualification under section 3 of the Act.

For the same reason, I believe that in enacting the specific and limited provisions of section 2 of the Act, the legislature did not reflect an intention that *all* crimes related to providing false information to authorities should be construed as *"substantially the same as*" a violation of 18 Pa.C.S. §4906(b) (reporting an offense or incident within their concern knowing that it did not occur).

The Majority cites *DiLacqua v. City of Philadelphia Board of Pensions and Retirement*, 83 A.3d 302, 310 (Pa. Cmwlth. 2014) (emphasis in original), for the principle that, in determining whether a state crime and a federal crime are substantially the same, this Court "must compare the *elements* of the two crimes including the required *mens rea*." Significantly, we did not hold in *DiLacqua* that a comparison of the *mens rea* element *alone* is sufficient to determine whether two crimes are substantially the same.

At issue in *DiLacqua* were the federal offense of mail fraud, 18 U.S.C. §1341, and the state crime of theft by deception, defined at 18 Pa.C.S. §3922. In determining that the two offenses were not substantially the same, we reasoned as follows:

> To be convicted of theft by deception, an individual must intentionally deprive another of his *property* by deception. In contrast, for a defendant to be found guilty of mail fraud, the government must prove the defendant's knowing and willful participation in a scheme or artifice to defraud another of his property *or the intangible right of honest services*, and (3) the use of the mails or interstate wire communications in furtherance of the scheme. On its face, the federal crime need not involve a deprivation of property. Of critical importance . . . when Appellee was charged and pled guilty, the statute was judicially interpreted to require only a showing of failure to disclose a conflict of interest. Therefore, we cannot say that the crime to which Appellee pled guilty is substantially similar to theft by deception.

83 A.3d at 310-11 (footnote, citations, and internal quotation marks omitted).

Thus, we held in *DiLacqua* that two statutes are not "substantially the same" where the state crime includes a specific element that is not required for a violation of the federal offense. In this case, on its face, the federal crime set forth at 18 U.S.C. §1001(a)(2) need not involve reporting an offense that did not occur; therefore, I would conclude that it is not substantially the same as the crime set forth in section 4906(b)(1).

Accordingly, recognizing that *Merlino* controls the outcome of this case, I concur in the result only.

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PATRICIA A. McCULLOUGH, Judge