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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002196-MR

THOMAS DEASON II — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 09-CR-00142

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Thomas Gary Deason II, appeals the November 2, 2009, Judgment and Final Sentencing of the Muhlenberg Circuit Court convicting him of second-degree possession of a forged instrument and sentencing him to one year, and $2,960.00 in restitution. On appeal, Deason challenges the sufficiency of the evidence allegedly establishing that he knew the

check at issue was counterfeit. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

On July 17, 2009, Deason was indicted by the Muhlenberg Grand Jury for one count of second-degree criminal possession of a forged instrument. That indictment charged that on June 15, 2009, Deason "knowingly possessed a check which had been falsely made drawn on the alleged account of Weaver's Store, Inc., with Susquehanna Bank, in the amount of $2,960.00 and passing same at Old National Bank while knowing same was forged." This matter went to trial on October 22, 2009. During the course of the trial, evidence was presented to establish that Deason and his ex-wife, Kimberly Roby, divorced in November of 2005. They have two children together and maintain an amicable relationship. Roby is the director of the Learning Ladder, a day care facility. Deason was incarcerated in the local jail toward the end of May 2009, and on June 3, 2009, Roby filled out an application stating that Deason was working at the Learning Ladder in order for Deason to be permitted work release. Apparently, however, Deason was not actually employed by the Learning Ladder.[1]

Roby testified that prior to June 3, 2009, Deason had painted two small rooms at the Learning Ladder, although he was not paid for that work, and was performing the work because he owed Roby some money and wanted to work off the debt. Deason did receive gas money and cigarettes in exchange for the

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[1] As a result of Deason's *motion in limine*, the jury was only informed during the guilt phase that Roby filled out the application stating that Deason was working at the Learning Ladder. The jury was not informed until the penalty phase that Deason was in jail seeking work release.

work but was not paid otherwise. Deason stated that he had more work planned for the Learning Ladder but had not gotten around to it yet. Roby further testified that she had somewhat regular telephone conversations with Deason in June of 2009. Roby recalled that during one of those conversations, Deason informed her that he had received a check in the mail. Roby stated that Deason received a letter with the check and read the letter to Roby. Deason apparently told Roby that the letter stated that he was to cash the check and mail portions of the money to someone.

The check at issue was from "Weaver's Store" in Denver, Pennsylvania. It purported to be drawn from an account at Susquehanna Bank, also in Pennsylvania. Deason states that the check informed him that he would be employed by Weaver's for the transactions instructed in the letter. He stated that the letter instructed him to cash the check, send $2,000.00 back to the sender, keep the $960.00 balance, and go to four or five sites on his computer. Deason states that he called a phone number on the letter to see about the check and got an answering service that told him to send a money order.

Deason acknowledged that he had never heard of Weaver's Store, and knew no one in Pennsylvania. Roby informed Deason over the phone that to receive such a check was "odd." Roby also testified that it was possible that she told Deputy Eddie Brown, during the course of their interview together, that Deason had no business cashing the check. Roby stated that during her telephone conversation with Deason he did not indicate who sent the check. She stated that

she never gave Deason the impression that the check was for services rendered at the Learning Ladder. Deputy Brown recalled that Roby informed him that she told Deason, “You know this check is not any good. You don’t need to cash it.” Brown acknowledged that he hadn’t included this in his report but stated that he recalled Roby making this statement.

Deason apparently also called Beverly Shelton, whom he has known since childhood. Shelton agreed to take him to the bank and help him cash the check. Deason had no bank account but Shelton had a bank account at Old National Bank. Shelton testified that once, prior to June 15, 2009, she had helped Deason cash a check. Shelton testified that in doing so, she knew that she would be liable for the amount if the check bounced. Shelton stated that Deason gave her twenty dollars for her assistance.

Shelton testified that the second time she assisted Deason in cashing a check was on June 15, 2009. On that date, she gave Deason a ride to the Old National Bank. Shelton stated that Deason informed her that he was working for his ex-wife’s daycare, and that the check was in exchange for his work there. Shelton stated that she went into the bank alone and attempted to cash the check, but was informed by the teller, Lisa Wells, that Deason would need to open a checking account to cash the check. Shelton further stated that the teller informed her that if she signed the check, she would be liable for the money if it was not valid. Shelton then went to her vehicle to get Deason.

Shelton testified that when she and Deason entered the bank, they were directed to Linda Williams, a customer service representative who opens checking accounts. Williams took personal information from Deason and entered it into a computer program. Williams recalled that Deason described the check to be cashed as a payroll check. She further recalled that Wells, Shelton, and Deason all indicated that the check was a payroll check. According to Shelton, Deason stated that he was working for his ex-wife at a daycare. Williams then checked online to see if the company listed on the check, Weaver's, was a valid company. She also checked to see if the bank routing numbers on the check matched the bank and the company.

All of the information matched and it was confirmed that the company existed, the routing numbers matched, and that there was a Susquehanna Bank in Pennsylvania. Williams stated that she did not check as to whether the check was "good," because banks would not always provide that information.

According to Williams, the Old National Bank normally does not issue funds on an out-of-state check but instead would place a hold on the account and release the funds at a later date. Nevertheless, after Deason's account was created he was allowed to endorse and cash the check, and to withdraw $2,460.00 in cash on one day, and $490.00 the following day. Deason then made two debit card purchases, one on June 22, 2009, for $5.04, and one for $5.00, which left the account overdrawn by four cents. Thereafter, on June 19, 2009, the check was returned as altered and fictitious and was stamped counterfeit. On July 3, 2009,

after the bank had processed the returned check, the funds were charged back to Deason's account. The aforementioned bank teller, Lisa Wells, then went to Deason's house and informed him that the check was fraudulent and that he needed to return the money or she would be in trouble with her employers.

Deason testified in his own defense below. Deason claimed that he received the check in the mail, and further claimed that the check was accompanied by a letter that stated he would be employed by the sender. Deason explained that the letter stated that he was to cash it, mail a $2,000.00 money order back to the sender, keep the remainder, and perform some actions on internet websites. Deason claimed that he examined the check with a magnifying glass and did not see the words "do not cash" on the check. Deason nevertheless admitted that receipt of such a check did seem odd. Deason stated that approximately two hours later, he called Shelton to get the check cashed. He denied telling Shelton that it was a payroll check. Instead, he told Shelton that he had done some work for the Learning Ladder but did not say that the check was for that work. Deason denied knowing that the check was not real.

On cross-examination, Deason admitted that he was not expecting to be paid for his work at the Learning Ladder because he was paying off a personal debt he owed to Roby. He also conceded that he performed no work at the Learning Ladder after June 3, 2009. Deason conceded that he had never before heard of Weaver's store, nor Susquehanna Bank, nor did he know anyone in Pennsylvania. Deason conceded that he knew Shelton would be liable if she

cashed the check and it bounced. Further, Deason acknowledged that he did not send any money back to the mailer of the check, and instead just “took the money.” Deason further states that in closing, the prosecutor argued to the jury that not only did Deason know the check was counterfeit, but also the bare fact that he disobeyed the instructions to send back $2,000.00 was proof “in and of itself” that he committed the crime charged.[2]

Following the close of evidence, instructions were given to the jury, which stated as follows:

> INSTRUCTION NO. 1: SECOND-DEGREE CRIMINAL POSSESSION OF A FORGED INSTRUMENT:
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> You will find Defendant guilty of Second-degree Criminal Possession of a Forged Instrument under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about June 15, 2009, and before the finding of the Indictment herein, he uttered a written instrument purporting to be a check issued by Weaver’s Store, Inc., in the amount of Two-Thousand-Nine-Hundred-Sixty-Dollars ($2,960.00);
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> B. That such instrument was not and the Defendant knew it was not an authentic check issued by Weaver’s Store, Inc.;

[2] In fact, our review of the record indicates that the prosecution stated, in closing, as follows: “He says he got it in the mail. He says he got it in the mail with instructions. And he was supposed to do what? Return by money order $2,000.00. That’s his, that’s his testimony. Nobody else knows that. But, by his own testimony, he didn’t even do that. He kept all the money. It was gone. Not only was the $2,400 (coughing, inaudible), the $490.00 was cashed in the very next day. That in and of itself shows his intent and knowledge to grab the dough, get the cash, before it hits the fan. And that’s what he did ladies and gentlemen. Thomas Deason presented the check he knew there was great question with, and he knew if he told the truth – he got it in the mailbox (inaudible) – he never would have told anybody that.” (VR 10/22/09, 2:14:27-2:16:20).

AND

C. That he uttered it with the intent to defraud, deceive, or injure Old National Bank or another person or persons.

The jury ultimately returned a guilty verdict on the single count of second-degree possession of a forged instrument, a Class D felony, in violation of Kentucky Revised Statutes (KRS) 516.060. The jury recommended a one-year sentence of imprisonment, and that judgment and sentence were imposed by the trial court on November 2, 2009. As noted, the trial court also ordered restitution in the amount of $2,960.00. It is from that judgment and sentence that Deason now appeals to this Court. Deason appeals the conviction only and does not contest his liability for the restitution.

As his first and only basis for appeal, Deason argues that he should have been granted a directed verdict due to the lack of evidence that he knew the check was counterfeit, or that he had the requisite fraudulent mental state necessary for conviction. At the close of the Commonwealth's case, and again at the close of evidence, Deason moved for a directed verdict and was twice overruled. Deason asserts that in order to secure a conviction under KRS 516.060, the Commonwealth was required to establish the existence of each element necessary for conviction beyond a reasonable doubt. That provision provides as follows:

> (1) A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in KRS 516.030.

(2) Criminal possession of a forged instrument in the second degree is a Class D felony.

Deason essentially argues that his motion for directed verdict should have been granted because the Commonwealth failed to establish the elements necessary for conviction under this provision. In support of that assertion Deason argues that, pursuant to 39 U.S.C. § 3009,[3] he was legally entitled to cash and spend the check at issue, which came to him unsolicited, and which he did not know was counterfeit. Thus, Deason asserts that in doing so, he was not in violation of the law. He argues that in order to secure a conviction under KRS 516.060, the Commonwealth was required to establish that he knew the check was counterfeit, and that he knew, in cashing it, that he was defrauding Old National Bank, as well as those who assisted him in cashing the check and obtaining the funds. Deason

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[3] 39 U.S.C. §3009 provides that:

(a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15.

(b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. All such merchandise shall have attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.

(c) No mailer of any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, shall mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.

(d) For the purposes of this section, "unordered merchandise" means merchandise mailed without the prior expressed request or consent of the recipient.

argues that there was insufficient proof that he knew the check was counterfeit, and insufficient proof that he knew cashing it could harm anyone aside from the sender. He therefore asserts that a directed verdict should have been granted in his favor because the prosecution failed to establish the essential elements of second-degree possession of a forged instrument beyond a reasonable doubt.

As a corollary argument Deason asserts that, even if the jury could conclude from the evidence that he knew the check was a forgery and that he had the intent to defraud, the jury instructions provided allowed for the possibility that the jury could have convicted him on differing theories: that he intended only to defraud the sender of the check, or that he intended to defraud the sender of the check as well as the Old National Bank and his friends who assisted him in cashing it. Thus, the instruction, as provided, created the potential for a non-unanimous verdict and that, accordingly, the verdict cannot stand.[4]

In response to Deason's argument concerning whether sufficient evidence was submitted to establish the requisite indicia of fraud, the Commonwealth argues first that Deason failed to preserve this argument. To that end, the Commonwealth acknowledges that Deason moved for a directed verdict, and in doing so, argued that the indicia of fraud necessary to sustain a conviction for second-degree possession of a forged instrument had not been proven.

[4] In reviewing this argument, we note that this issue was not preserved for review. Interestingly, both the Commonwealth and Deason acknowledge this, and Deason specifically states that he asks this Court to consider the non-unanimous verdict issue "solely as a relevant, collateral matter," and states that there is "no requirement to preserve a non-issue." Accordingly, we do not address the merits of this issue further herein.

However, it notes that he did not make any mention of 39 U.S.C. § 3009 in that motion, and that Deason never argued to the court below that, based on that provision, he could do whatever he wished with the check without ramification.[5] Alternatively, the Commonwealth asserts that if this Court chooses to address Deason's arguments under 39 U.S.C. § 3009, that this provision is inapplicable to the facts of the matter *sub judice.* [6]

Beyond its arguments concerning preservation, however, the Commonwealth asserts that that it never made the argument that the jury could find Deason guilty of forgery for intent to defraud the sender. To the contrary, the Commonwealth states that it specifically informed the jury that it would find Deason guilty if he committed the essential elements of second-degree possession of a forged instrument by defrauding Shelton, Wells, Williams, or Old National Bank. Further, the Commonwealth asserts that a directed verdict would have been inappropriate in any event because the facts of this matter created an issue of

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[5] In response to the Commonwealth's preservation argument, Deason acknowledges that 39 U.S.C. § 3009 was not mentioned below. However, he asserts that his motion below was specific enough to raise an objection to proof concerning his state of mind and intent in cashing the check, and that he does not create a new issue simply by arguing additional authority to that cited below. Alternatively, he argues that if this Court considers the issue to be unpreserved, that we conduct a palpable error review.

[6] We note briefly that we are in agreement with the Commonwealth that the check Deason received was not "merchandise" as he argues. Indeed, the check, even by Deason's own account, was accompanied by a conditional offer of employment, under which he was required to cash the check, mail back a money order, and complete various forms on internet websites. Further, as noted by the Commonwealth, our courts are disinclined to apply the requirements of the Uniform Commercial Code to criminal matters. Indeed, as this Court held in *Berry v. Commonwealth*, 2003 WL 1227552 (Ky. App. 2003)(2001-CA-001889-MR)(unreported and addressing a matter concerning second-degree possession of a forged instrument), "Kentucky law does not require that the subject checks be complete written instruments or be negotiable under the Uniform Commercial Code."

witness credibility to be decided by the jury. It argues, in reliance upon *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999), that when the evidence presented by the parties hinges on issues of witness credibility and weight of the evidence, such determinations are not properly disposed of by directed verdict but are instead matters exclusively within the province of the jury.

In reviewing this issue, we note that the standard of appellate review for the denial of a directed verdict motion is whether "under the evidence as a whole it would be clearly unreasonable for a jury to find guilt." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991); *Dishman v. Commonwealth,* 906 S.W.2d 335, 341 (Ky. 1995). Credibility and weight of the evidence are matters within the exclusive province of the jury. *Estep v. Commonwealth,* 957 S.W.2d 191, 193 (Ky. 1997). We review this matter with these standards in mind.

Having reviewed the record and applicable law, we find that the trial court correctly denied Deason's motion for directed verdict. A review of the record and the testimony of the parties reveal that Deason was informed by his ex-wife that receipt of such a check was odd. Further, there is conflicting testimony as to whether Roby told Deason specifically that the check was no good and he should not cash it. Further, the evidence establishes Deason knew he was not employed by the Learning Ladder at the time that he cashed the check. Testimony from Shelton and Williams indicates that Deason specifically described the check as a payroll check, and that Williams specifically indicated on the application that Deason was employed by the Learning Ladder as a result of his statements in this

regard. This was corroborated by testimony from Wells, who stated that Shelton told her, in the presence of Deason, that the check was from his payroll as a construction worker. Finally, testimony from Williams established that, had she known this check was a foreign check received in the mail, she would not have cashed it.

As Deason has made clear, the only issue he wishes to bring before this Court is whether he should have been granted a directed verdict. He argues that he should have been granted this directed verdict because of insufficient evidence establishing the intent to defraud necessary to sustain a conviction. In addressing the issue isolated by Deason, we agree with Deason and the Commonwealth that it was not necessary to prove that Deason had any intent to defraud the sender in order to secure a conviction.

Considering the evidence as a whole, it is clear that the prosecution submitted more than a mere scintilla of evidence that Deason knew the check was counterfeit, and that he had the intent to deceive others as to its origin and nature. Certainly, Deason testified as to his own alternate version of the events, namely that he did not know the check was a forgery, and that it appeared on its face and by virtue of the bank checking the routing numbers to be a valid check. We have no reason to believe that this testimony was not also considered by the jury.

Ultimately, it was for the jury to determine which version of events it believed to be more credible. And although alternate versions of the events at issue were presented to the jury, it is not within a reviewing court's authority to

disturb the jury's verdict absent an indication that the verdict was clearly unreasonable. *See Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). In the matter *sub judice* the jury could infer, based upon the evidence presented, that Deason had the intent to defraud in light of his repeated attempts to lie and conceal the origins of the check. We believe this was a determination appropriately within the purview of the jury in light of the evidence presented and, accordingly, affirm the trial court's denial of Deason's motion for directed verdict.

Wherefore, for the foregoing reasons, we hereby affirm the November 3, 2009, order of judgment and final sentencing issued by the Muhlenberg Circuit Court, the Honorable David H. Jernigan, presiding.

VANMETER, JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE, DISSENTING: Respectfully, I must dissent. The evidence does not show that Deason knew that the check was forged, as required to obtain a conviction for criminal possession of a forged instrument in the second degree pursuant to KRS 516.060. Even the bank's customer service representative, who assisted Deason in opening an account with the bank, was unable to tell that the check was forged, despite conducting preliminary research on the check, including whether the routing number on the check was proper and whether the business's address was legitimate. The Commonwealth simply did not present evidence to show that Deason knew that it was a forged check, and this knowledge is a required element for proving that a person is guilty of criminal possession of a

forged instrument in the second degree. Moreover, I pause to note that Deason properly agrees with the order of restitution in the amount of $2,960.00, and he agrees to continue making payments to repay this amount, even if his conviction is overturned. Therefore, because the evidence was insufficient to support his conviction, I believe that Deason's conviction should be overturned.

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