

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001335-MR

WAYNE HOLLAND

APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 13-CR-00501

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KRAMER, AND STUMBO, JUDGES.

KRAMER, JUDGE: Wayne Holland appeals the McCracken Circuit Court's judgment convicting him of theft of property lost, mislaid, or delivered by mistake over \$500.00, but less than \$10,000.00. After a careful review of the record, we affirm because the circuit court did not abuse its discretion in denying the admission of emails into evidence.

I. FACTUAL AND PROCEDURAL BACKGROUND

Holland was indicted on the charge of theft of property lost, mislaid or delivered by mistake over \$500.00, but less than \$10,000.00. It was alleged that the Signet Federal Credit Union mistakenly deposited approximately \$64,000.00 into Holland's account at the credit union, when it was supposed to deposit the money into the account of another credit union member who had a similar name. The following day, Holland noticed that the money was in his account and he proceeded to withdraw \$9,000.00 of it.

A day or two later, Signet's Vice President, Jim Stroud, became aware of the error and attempted to telephone Holland multiple times. He even went to Holland's residence with another employee in an attempt to contact him. Stroud was unable to find Holland that day, so he contacted the Paducah Police Department and spoke with Officer Paul Stevenson. Officer Stevenson went to Holland's home and spoke with him about the deposit error, Holland's withdrawal of funds, and whether Holland was willing to return the money. Holland informed Officer Stevenson that the money was his and that it was not unusual for him to have large amounts of money in his account.

The next day, Stroud spoke with Holland and another Vice President of Signet. Stroud and his co-worker explained to Holland what had happened, but Holland insisted it was his money. Holland claimed that the money was from a relative. Nevertheless, Holland agreed to try to pay the money back to Signet. However, Holland and Signet could not reach an agreement about paying back the

money. Holland did not pay the money back. Therefore, Stroud spoke with the police about beginning criminal proceedings.

A jury trial was conducted, and Holland was convicted of the crime with which he had been indicted. He was sentenced to five years of imprisonment and to pay restitution in the amount of \$7,418.76, plus a 5% restitution fee, to the McCracken Circuit Clerk payable to Signet Federal Credit Union.

On appeal, Holland alleges that the circuit court erred in failing to allow him to introduce as an exhibit at trial the email correspondence between Stroud and Officer Stevenson.

II. STANDARD OF REVIEW

“The standard of review on evidentiary issues is abuse of discretion. The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Burchett v. Commonwealth*, 314 S.W.3d 756, 758 (Ky. App. 2010) (internal quotation marks and citations omitted).

III. ANALYSIS

Holland contends that the circuit court erred in failing to allow him to introduce as an exhibit at trial the email correspondence between Stroud and Officer Stevenson. Holland alleges that the emails would have shown the jury that he believed he had received the money as an inheritance from a wealthy aunt who had died and that Signet acted aggressively in trying to get the money from Holland.

There were six emails in question. The August 29, 2013 email from Stroud to Officer Stevenson stated:

I have spoken and [am] in the process of filing a claim with our insurance carrier Cuna Mutual. They will have an underwriter contact me within 24 hours to determine if this is [a] valid claim under our bond agreement with them. Again, right now I would like to get this money back through this process and let them follow up on any type of litigation against Holland. Any kind of restitution or agreement with him from what I know looks very doubtful. If unsuccessful then I think I will go ahead and seek criminal action! Just need a little time to see how this plays out but will stay in contact with you. Thanks for your efforts and hard work in regards to this matter.

The August 30, 2013 email from Stroud to Officer Stevenson provided:

Officer Stevenson[, I] hope your day has gone well. Just an attempt to keep you updated. Holland was in this morning believe it or not. He said all he had left was \$1500.00 and would bring it back by this afternoon and sign an agreement to repay even though it was his money. Geeeeeze [g]o [f]igure. It's 5 P.M. and still no sign. Anyway am proceeding with the insurance filing and will not know the outcome for a few weeks. Right now I plan to keep all records available and probably end up filing criminal charges. Thanks so much for your assistance and have a great weekend.

The September 16, 2013 email from Stroud to Officer Stevenson said "Still have that claim pending with our insurance carrier. I'm on hold. Thanks so much." Stroud also sent an email to Officer Stevenson on September 23, 2013. It stated: "Hope your day [is] going well. If you could contact me at some point. Claim was denied with our insurance carrier and [I] think we would like to proceed with filing charges on Holland. Thanks."

On October 17, 2013, Stroud sent an email to Officer Stevenson that said: “Hope you are doing well! Just wondered how we were coming on charges filed against Wayne Holland? May be out of your hands at this point.” Finally, Stroud sent Officer Stevenson an email on October 25, 2013, stating: “Thanks so much. Sorry it all happened.”

Holland attempted to get the emails admitted into evidence in the circuit court under the business records exception to the hearsay rule, KRE¹ 803(6), which provides:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

“Business records . . . must be authenticated by a live foundation witness or meet one of the foundation exceptions listed in KRE 803(6), namely . . . KRE 902(11).” *Matthews v. Commonwealth*, 163 S.W.3d 11, 27 (Ky. 2005).

KRE 902(11)(A) states that business records fall under the self-authentication exception so long as there is no indication of a lack of trustworthiness in the sources of the information and the custodian of the record certifies that the record:

¹ Kentucky Rule of Evidence.

(i) Was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(ii) Is kept in the course of the regularly conducted activity; and

(iii) Was made by the regularly conducted activity as a regular practice.

Id. (discussing KRE 902(11)(A)).

After hearing Stroud's testimony concerning the emails, the circuit court held that they were not business records because they were not made in the regular course of business. Stroud testified that Signet had no policy about sending such emails, but that he sent the emails in this case in efforts to protect the interests of Signet regarding the money at issue. The circuit court did not abuse its discretion in finding that the emails were not admissible as business records because emails to law enforcement were not part of Stroud's regularly conducted activities.

Accordingly, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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