

IMPORTANT NOTICE
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RENDERED: SEPTEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2001-SC-0462-MR

DATE 10-9-03 ELLA GREVITT, D.C.

RONALD CRAWLEY

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURENCE VANMETER, JUDGE
2000-CR-0214

COMMONWEALTH OF KENTUCKY

APPELLANT

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

A Fayette Circuit Court jury found Appellant guilty of one (1) count of Speeding and two (2) counts of Felony Theft by Deception and found him to be a First-Degree Persistent Felony Offender ("PFO"). The jury fixed Appellant's punishment at a fine for the Speeding offense and PFO-enhanced sentences of eighteen (18) years for each count of Theft by Deception. At final sentencing, the trial court sentenced Appellant to three (3) days in lieu of the Speeding fine and reduced Appellant's sentence for each Theft by Deception conviction to ten (10) years, but ordered the felony sentences to run consecutively for a total sentence of twenty (20) years. Appellant thus appeals to this Court as a matter of right¹ and argues that he was entitled to directed verdicts of acquittal on the Theft by Deception charges because the Commonwealth failed to

¹ KY. CONST. § 110(2)(b).

introduce sufficient evidence of his criminal intent. After a review of the record, we affirm the judgment of the Fayette Circuit Court.

II. BACKGROUND

The evidence for the Commonwealth was fairly straightforward. On August 23, 1999, Appellant wrote two (2) checks. The first check, check # 108 in the amount of \$876.73, was presented to Meijer at 3:00 a.m. for merchandise that Appellant purchased at that location. Similarly, the second check, check # 109 in the amount of \$637.38, was given to Intimate Apparel in exchange for merchandise that Appellant purchased. Each check was subsequently dishonored by its issuing bank and returned to the respective merchant with the notation "INSUFFICIENT FUNDS" stamped on its face. On three (3) occasions, Meijer mailed letters to Appellant at the address shown on the check in attempts to notify Appellant that his check had been returned for insufficient funds. Intimate Apparel did not attempt to notify Appellant that the check had been dishonored by the bank, but it submitted the check for collection twice and then turned the unpaid check over to the Fayette County Attorney.

On September 9, 1999 (check # 109) and October 5, 1999 (check # 108), the Fayette County Attorney's office notified Appellant by letters, which, like the letters that had been sent by Meijer's, were sent to the address on the check itself, that he had ten (10) days to make payment on the checks or face criminal prosecution. Appellant did not make payment for the checks. Accordingly, the Fayette County Attorney's office sought process and on November 13, 1999 Appellant was arrested on a Theft by Deception warrant that arose from the Meijer check, and on December 1, 1999 was served with a criminal summons for Theft by Deception as a result of the Intimate Apparel check. A Fayette County Grand Jury returned an indictment charging him with

felony Theft by Deception for both checks.² At the time of trial, Appellant still had not paid the checks.

In his defense, Appellant testified that while boating on Lake Cumberland, he discovered that he had lost his wallet and that he immediately called the credit card company to request a replacement card. Since he did not have a checking account, he asked if he may continue to use the "courtesy checks"³ issued with his credit card account. He testified that the credit card company representative assured him that he could do so.

After learning of the problems with the checks from the Fayette County Attorney's office, Appellant testified that he contacted the bank and got the "run around." He explained that he has never paid the outstanding amounts to the named retailers because he believed that his responsibility for payment runs only to his bank, not the merchants.

² Appellant had also been indicted for Second-Degree Criminal Possession of a Forged Instrument, but the jury acquitted him of that count of the indictment.

³ A "courtesy check," which is also known as a "credit card" or "convenient" check, serves the same function as a traditional check. A courtesy check allows the maker to pay bills by mail or make a purchase from merchants that do not accept credit cards. A traditional check is drawn on the maker's bank account; whereas, a courtesy check is charged against the maker's credit card and thereby allows the maker to access his or her credit line. If the maker has exceeded his or her credit card limit, however, the check will not be honored by the bank; just like a traditional check is dishonored when the maker person does not have sufficient funds in the bank. On the face of the checks used by Appellant, it was printed, "PAYABLE THROUGH CROSS COUNTRY BANK WILIMINGTON, DE"; otherwise, their appearance are the same as traditional checks. The fact that Appellant obtained the merchandise with courtesy checks, rather than traditional checks, is not a relevant consideration in this case.

III. ANALYSIS

A. PRESERVATION

Appellant's sole argument is that the evidence was insufficient to support his Theft by Deception convictions. He admits, however, that he did not properly preserve this issue for our review because his trial counsel failed to renew his motion for directed verdict at the close of all of the evidence.⁴ Nonetheless, Appellant asks this Court to review the issue as palpable error under RCr 10.26.⁵ We will do so, of course, because a conviction based on insufficient evidence would deprive Appellant of substantial due process rights.⁶

⁴ Failure to renew a motion for directed verdict at the close of all evidence is fatal to preserving an insufficiency of the evidence argument on appeal. Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836 (2003) (citing Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998) (citation omitted)).

⁵ RCr 10.26 provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from error.

⁶ Schoenbachler v. Commonwealth, *supra* note 4 at 836-837 ("We recognize not only that 'the burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude,' but also that the nature of the error alleged here is such that, if the trial court did, in fact, err by failing to direct a verdict of acquittal, that failure would undoubt[edly] have affected Appellant's substantial rights. And, we likewise observe that the trial result necessarily would have been different if the trial court had directed a verdict in Appellant's favor. Accordingly, we examine the merits of Appellant's allegation.") (footnotes omitted); Perkins v. Commonwealth, Ky.App., 694 S.W.2d 721, 722 (1985) ("Appellee argues that these [insufficiency of the evidence] errors are not preserved for our review since appellant made no motion for a directed verdict at any point during the trial. Ordinarily, we would agree with appellee, but a conviction in violation of due process constitutes '[a] palpable error which affects the substantial rights of a party' which we may consider and relieve though it was insufficiently raised or preserved for our review.").

B. SUFFICIENCY OF THE EVIDENCE

Appellant alleges that there was insufficient evidence of intent presented at trial for a reasonable jury to find him guilty of Theft by Deception. We disagree.

This Court reviews insufficiency-of the-evidence allegations under the standard articulated in Commonwealth v. Benham:⁷

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.⁸

Appellant contends that, in order to prove his guilt of Theft by Deception, the Commonwealth was required to show that he had the intent to deprive the merchants of their property without paying for it. We agree. KRS 514.040 provides in relevant part:

- (1) A person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally:
 -
 - (e) Issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

⁷ Ky., 816 S.W.2d 186 (1991).

⁸ Id. at 187.

Appellant argues that the Commonwealth failed to prove (1) that Appellant knew that the bank would not honor the checks and (2) that he intended to deprive the merchants of their property. We disagree.

First, we would note that KRS 514.040 creates a presumption of such knowledge on the part of a maker when a bank refuses to pay a check:

- (4) For purposes of subsection (1) of this section, a maker of a check or similar sight order for the payment of money is presumed to know that the check or order, other than a postdated check or order, would not be paid, if:
 -
 - (b) Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after issue, and the maker failed to make good within ten (10) days after receiving notice of that refusal. A maker makes good on a check or similar sight order for the payment of money by paying to the holder the face amount of the instrument, together with any fee imposed pursuant to subsection (4)(c) of this section[.]

In the present case, payment was refused by the banks for “INSUFFICIENT FUNDS”; Appellant acknowledged during his testimony that he received the ten-day letters from the county attorney, and he failed to make good within ten (10) days after receipt of the notices. Therefore, as a result of KRS 514.040(4)(b)’s rebuttable presumption,⁹ Appellant was presumed to have known that the checks would not be paid upon presentation by the merchants for payment.

And, second, we would note that “[t]his imputed knowledge in turn meets the requirements of subsection (1) concerning ‘intent to deprive.’”¹⁰ Accordingly, we hold

⁹ Patterson v. Commonwealth, Ky.App., 556 S.W.2d 909, 911 (1977) (describing the presumption under KRS 514.040(4) as a “rebuttable presumption.”).

¹⁰ Id.

that the Commonwealth's proof of the facts that implicate the presumption was sufficient to establish a prima facie case of Appellant's intent to deprive the merchants of their property and thereby avoid direct verdicts of acquittal.¹¹

Appellant postulates that the trial court's failure to inform the jury of the presumption presents a problem. We would simply point out that the law is well-settled in Kentucky that presumptions shall not be included in instructions.¹²

Finally, relying on Martin v. Commonwealth,¹³ Appellant argues that the Commonwealth "proved nothing more than an inability to pay, which . . . is not sufficient to establish theft by deception." We disagree both with Appellant's summary of the evidence and with his reading of Martin. The check involved in that case did not come within the purview of the Theft by Deception statute because it had been issued for

¹¹ Commonwealth v. Collins, Ky., 821 S.W.2d 488, 490 (1991) (Although referring to another presumption, the Court stated, "We agree with the Court of Appeals that the legal effect of the statutory presumption referred to above is to provide a guide for the trial court in evaluating a motion for directed verdict. When the presumption applies, there is a prima facie case of an intent to sell, thus constituting a question of fact for the jury based upon all the evidence."); Patterson v. Commonwealth, Ky.App., 556 S.W.2d 909, 911 (1977) ("[M]ost state statutes on worthless checks require the intent to defraud as an essential element. These statutes commonly contain the 'prima facie' presumption or inference provision of intent to defraud. Of course these are rebuttable presumptions and conviction will not be had where the accused can satisfactorily explain otherwise."); 1 COOPER, KENTUCKY INSTRUCTIONS TO JURIES (CRIMINAL), Chapter 1, Part 1, § 1.07 and Chapter 6, Part 3, § 6.25 commentary at 324 (4th ed. Anderson 1993).

¹² Commonwealth v. Miller, Ky., 575 S.W.2d 467, 468 (1978) ("It is the traditional Kentucky view that [presumptions] should not be included in the instructions to the jury because to do so invades their province to weigh the evidence and draw their own conclusions."); R. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK 10.20 IV, Jury Instructions, at 578-79 (3d ed. Michie 1993); 1 COOPER, KENTUCKY INSTRUCTIONS TO JURIES (CRIMINAL), Chapter 1, Part 1, § 1.07 (4th ed. Anderson 1993).

¹³ Ky.App., 821 S.W.2d 95 (1991).

services already rendered.¹⁴ Consequently, the rebuttable presumption that we find dispositive to the allegation in the case at bar was not germane to the analysis in Martin because there was no “parting with property or services based upon the intent to deprive the owner thereof.”¹⁵ Here, the merchants parted with property simultaneously with the giving of the checks, and the trial court properly denied Appellant’s motions for directed verdict.

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

Graves, Johnstone, Keller, Stumbo and Wintersheimer, JJ., concur. Lambert, C.J. and Cooper, J., concur in result only.

¹⁴ Id. at 97 (“In view of the foregoing authorities, we are constrained to believe that the issuance of the check in question by appellant in payment for the services already rendered by Meredith, as was customary, did not come within purview of the statute.”).

¹⁵ Id. (“The obvious interpretation of the foregoing statute is that there must be a parting with property or services based upon the deceptive intent to deprive the owner thereof.”).

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