NO. COA09-1346

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Forsyth County
No. 08 CRS 53233

JAMES MADISON JACKSON

Appeal by defendant from judgment entered 29 April 2009 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 21 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General Ann Stone, for the State.

Don Willey for defendant-appellant.

ERVIN, Judge.

On or about 27 March 2008, a criminal summons was issued charging defendant James Madison Jackson with drawing a worthless check in violation of N.C. Gen. Stat. § 14-107(a). On 7 November 2008, defendant was convicted as charged in Forsyth County District Court. The district court imposed a 45 day suspended sentence, placed defendant on 18 months unsupervised probation, and ordered defendant to pay $1,750.00 in restitution. Defendant appealed his conviction to the superior court for a trial *de novo*. The case against defendant came on for trial at the 27 April 2009 criminal session of Forsyth County Superior Court.

Defendant is the member-manager of Green Pointe Construction, LLC, a general contracting company, which was primarily engaged in the construction of condominiums in Winston-Salem, North Carolina. Green Pointe had two bank accounts with the Bank of Granite, one of which was a checking account from which Green Pointe paid its operating expenses. During the relevant time period, defendant was the only authorized signatory on the account.

In 2007, Green Pointe hired Carolina Garage Doors ("Carolina Garage") to install garage doors and openers on certain structures. Carolina Garage performed work of this nature for Green Pointe on two occasions. Alice Medlin, a bookkeeper at Carolina Garage, testified that Carolina Garage was paid for the first of these two installations, but not the second. Vincent Marino, the general manager for Carolina Garage, identified defendant as the individual from Green Pointe with whom he met.

The second installation that Carolina Garage performed for Green Pointe took place on 16 November 2007. According to Ms. Medlin, Carolina Garage billed Green Pointe for the November 2007 installation, with the invoice for that work totaling $1,750.00. On 14 December 2007, defendant wrote check number 3132 to Carolina Garage in the amount of $1,750.00 to pay for work performed on 16 November 2007. The check in question was drawn on an account maintained by Green Pointe at the Bank of Granite and was made payable to Carolina Garage. However, the account lacked sufficient funds to cover the check at the time that it was presented for

payment, so the Bank of Granite refused to provide payment. The dishonored check was eventually returned to Carolina Garage.

John Williams, a senior auditor with the Bank of Granite, offered testimony based on Green Pointe's account records. According to Mr. Williams, defendant had signed the account's signature card. The signatures on the signature card and the bounced check matched. Mr. Williams testified that the beginning balance in Green Pointe's account for November 2007 was negative $41,103.89 and that the deficit balance had increased to negative $200,675.81 by the end of the month. By the end of December, 2007, the negative balance had climbed to $246,000.09. The account never had a positive balance during December 2007. On 14 December 2007, the balance of Green Pointe's account was negative $225,000.

After Carolina Garage received the returned check, Ms. Medlin sent two certified letters to Green Pointe asking that funds for the bounced check be remitted. Although the letters were received, Green Pointe never responded. Ms. Medlin contacted the Bank of Granite on several occasions in the hope of redepositing the check, but Green Pointe's account never had sufficient funds to permit that to occur.

Defendant testified that he knew what the balance in Green Pointe's account with the Bank of Granite looked like every day. Defendant knew that the account had a negative balance during December 2007, including on 14 December 2007. However, defendant testified that he did not know that the check to Carolina Garage would not be paid, since the Bank had stopped Green Pointe's line

of credit without his knowledge. On the contrary, defendant testified that he expected the check that was written to Carolina Garage to be paid despite the status of Green Pointe's account.

On 29 April 2009, the jury convicted defendant of one count of drawing a worthless check. Based upon the jury's verdict, the trial court imposed a 45 day suspended sentence and placed defendant on supervised probation for 24 months. As a condition of probation, the trial court ordered defendant to pay restitution for the benefit of Carolina Garage in the amount of $1,750.00 within 60 days. Defendant noted an appeal to this Court from the trial court's judgment.

On appeal, defendant raises three issues, two of which relate to the fact that the criminal summons that served as the criminal pleading in this case charged defendant, individually, rather than Green Pointe, with drawing a worthless check. More particularly, defendant argues that the trial court lacked jurisdiction to enter judgment against defendant because there was a fatal variance between the criminal summons and the evidence presented at trial as to the identity of the perpetrator of the alleged offense. Secondly, defendant argues that the trial court erred by denying his motion to dismiss given that the evidence was insufficient to sustain a conviction against defendant in his individual capacity. In response, the State concedes that the proof presented at trial did not conform to the charge set out in the criminal summons and, therefore, agrees with defendant's contention that the judgment entered against defendant should be reversed. For the reasons

stated below, we also agree that there was a fatal variance between the allegations contained in the criminal summons and the proof received at trial so that the trial court should have dismissed the worthless check charge asserted against defendant.

It is well-established that "[a] defendant must be convicted, if at all, of the particular offense charged in the indictment." *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985) (citing *State v. Faircloth*, 297 N.C. 100, 253 S.E.2d 890 (1979)). "The State's proof must conform to the specific allegations contained in the indictment. If the evidence fails to do so, it is insufficient to convict the defendant." *Id.* (citation omitted). "Therefore, a challenge to a fatal variance between indictment and proof may be raised by a motion to dismiss for insufficient evidence." *Id.* (citations omitted).

In this case, defendant was charged with drawing a worthless check in violation of N.C. Gen. Stat. § 14-107(a), which states that:

> [i]t is unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any back or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering the check or draft, that the maker or drawer of it has not sufficient funds on deposit in or credit with the bank or depository with which to pay the check or draft upon presentation.

N.C. Gen. Stat. § 14-107(a). The criminal summons issued in this case alleged that defendant

> unlawfully and willfully did draw, make, utter and issue and deliver to CAROLINA GARAGE DOOR

> a check drawn upon BANK OF GRANITE of GRANITE FALLS, NC for the payment of $1,750.00 in money. The check was made payable to CAROLINA GARAGE DOOR and was dated 12/14/2007. The defendant knew at the time that he[] did not have sufficient funds on deposit or credit with the bank with which to pay the check on presentation.

Thus, given the allegations of the criminal summons, the State proceeded on the theory (1) that defendant issued a check to another, (2) that defendant had insufficient funds on deposit in or lack of credit with the drawee bank with which to pay the check upon presentation, and (3), at the time the check was written, defendant knew that there were insufficient funds or was a lack of credit with which to pay the check upon presentation. *See State v. Mucci*, 163 N.C. App. 615, 619, 594 S.E.2d 411, 414 (2004) (listing the elements that must be proven to establish the offense of issuing a worthless check). However, the undisputed evidence at trial establishes that the check in question was drawn on an account owned by Green Pointe and that Green Pointe issued the check to cover a Green Pointe-related obligation. Although defendant was authorized to write checks as a member-manager of Green Pointe, he did not own the account on which the check was written. The account was a business, rather than an individual, account. As a result, the proof at trial varied from the offense alleged in the criminal summons.

The Supreme Court's decision in *State v. Dowless*, 217 N.C. 589, 9 S.E.2d 18 (1940), is controlling in this instance. In *Dowless*, the indictment returned against the defendant charged that "defendant W.B. Dowless did issue and deliver a worthless check,

knowing that he did not have sufficient funds or credit with the bank with which to pay same." *Id.* at 590, 9 S.E.2d at 18. However, the evidence received at trial showed that the check in question was "issued by a corporation of which defendant Dowless was executive head, together with oral evidence that the corporation did not have sufficient funds or credit with the bank to pay same." *Id.* at 590, 9 S.E.2d at 18-19. The Supreme Court held that the proof varied from the offense charged, because the indictment alleged that Dowless, acting individually, issued the check without having sufficient funds. *Id.* at 590, 9 S.E.2d at 19. Based on the variance between the allegation and the proof, the Court held that judgment of nonsuit should have been allowed. *Id.*

We conclude that the instant case is indistinguishable from *Dowless*. As in *Dowless*, the criminal summons alleged that defendant individually issued the check at a time when he lacked sufficient funds. As in *Dowless*, the only proof at trial showed that the check was issued by Green Pointe, a limited liability company, and that the account was Green Pointe's operating account. Based on the foregoing, we conclude that there was a fatal variance between the allegation and the proof, so that the trial court should have allowed defendant's dismissal motion. As a result, we reverse the trial court's judgment.

Since we have found a fatal variance between the allegations of the criminal summons and the evidence presented at trial, we need not address defendant's remaining arguments.

Reversed.

Judges STEPHENS and BEASLEY concur.

Report per Rule 30(e).