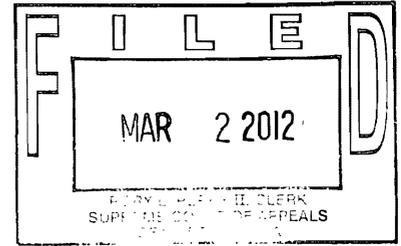


IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA



DOCKET No. 11-1306

STATE OF WEST VIRGINIA, Plaintiff Below,  
Respondent,

v.

Appeal from a final order of  
Case No. 11- F-18  
Ohio County Circuit Court

JOHN J. MOFFIT, Defendant Below,  
Appellant.

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**Appellant's Reply Brief**

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*Introduction.* State's Counsel in the "Summary Response of the State of West Virginia" (hereinafter the "State Response Brief" and "SRB" for citation purposes), asserts that Appellant "argues entirely by...[historical]... analogy and without any direct supporting authority" that a United States twenty dollar bill is not a note or bill of a banking institution. SRB at 2.

In this regard Appellant notes the only substantive reference to West Virginia Code, § 61-4-3 (West 2012), (hereinafter "the Statute") in this jurisdiction is an Attorney General's Opinion issued in the 1960s. This opinion addressed an inquiry of whether plastic trade dollars, specifically Centennial Commemorative coins, could be employed at the West Virginia Pavilion at the World's Fair in New York City, New York, in the purchase of goods. Attorney General C. Donald Robertson reviewed the Statute as West Virginia authority and United States Statutes pertaining to counterfeiting and opined such usage would not violate either law. 50 Op. Attny. Gen. 693, 695 (1964). Interestingly, the Attorney General somehow did not think New York law was relevant to such an inquiry.

Similarly, State's Counsel now believes that courts in Massachusetts, Florida, California and Connecticut interpreting other statutes with different statutory history is "direct supporting authority" that contravene Appellant's careful historical argument that clearly shows how West Virginia and Virginia have treated the Statute. State's Counsel does not contest Appellant's argument so much as offers an easy way

out by focusing on authority from these four other jurisdictions that have dealt with similar arguments and statutes.

*A. What the State Response Brief did not respond to.* As noted in Rule 10(e) of the Revised Rules of Appellate Procedure: "...If a respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue."

1. The State Response Brief does not contest the legislative history cited by Appellant that the 1849 forbearer to the Statute has not changed with regard to key phrases in question since original adoption. Appellant's Brief at 14. It does not explain why bank notes were not considered as legal tender in 1846, with regard to executions of judgment. Appellant's Brief at 15 to 16. Or why the West Virginia Legislature amended the execution statute to specifically provide for "currency which is legal tender in the United States." Appellant's Brief at 16.

2. The State's Response Brief does not explain why the West Virginia Code reference to embezzling separates money from bank notes and then further defines money as money current that can be described as "United States currency." Appellant's Brief 16 to 17. If bank notes are indeed United States currency such amendment would not have been necessary.

3. The State's Response Brief does not explain why the Commonwealth of Virginia found it necessary to amend the same statute to read: "...forge any coin, note

or bill current by law or usage..." Appellant's Brief at 18. If a note or bill in the original forbearer of the Statute is so obviously United States currency why would such an amendment have been necessary?

4. Clearly, State's Counsel has no response to Professor Ronald Bacigal, University of Richmond School of Law, who states that the portion of the same Virginia Statute pertaining to the note or bill of a bank is historical only. "They refer to a time when state (and private) banks issued notes which passed as currency. Those portions of the statute should have no modern meaning." Appellant's Brief at 18. (Note. Professor Bacigal is the author and editor of Volume 7 of the Virginia Practice Series as cited in Appellant's Brief.)

*B. The State Response claims Appellant "argues entirely by analogy" when in fact it is State's Counsel that is arguing by analogy. SRB at 2. "Analogy" is defined as:*

Identity or similarity of proportion, where there is no precedent in point. In cases on the same subject, lawyers have recourse to cases on a different subject matter, but governed by the same general principle. This is reasoning by analogy. The similitude of relations which exist between things compared.

Black's Law Dictionary, Fifth Edition, at page 77 (West 1979).

Using State Counsel's logic of what is "by analogy" and what is direct precedent, this Court in *State v. Corra*, 223 W.Va. 573, 678 S.E.2d 306, (2009), could have ruled, ignoring related West Virginia Statutes, that Appellant in that case gave intoxicating liquor to underage persons based upon authority in Texas that:

The burden resting upon the state to prove that such liquor was capable of producing intoxication was discharged by the proof showing it to be beer, which, within the judicial knowledge of the court, is an intoxicating liquor.

*Fulmer v. State*, 115 Tex. Crim. 239, 240, 29 S.W.2d 789, 789 (1930), *But see, State v. Corra*, 223 W.Va. 573, 578-79, 678 S.E.2d 306, 311-12 (2009), (Citing other West Virginia statutes defining non-intoxicating beer.) In the present case, as in *Corra*, the legislative intent based upon other West Virginia statutes is contrary to convenient out of state authority.

Convenient out of state authority is obviously not controlling because it addresses other statutory schemes and the legislative intent of other legislative bodies. What is controlling, or at least authoritative, is a related West Virginia statute and a syllabus point from this Court in a prior case. Appellant cites three syllabus points used in building his argument. Appellant's Brief at 9 to 10. State's Counsel cites none. Appellant cites two related West Virginia statutes that refer to "bank notes" to show that the legislature did not consider the same to be legal tender. Appellant's Brief at 15 to 17. State's Counsel does not refer to any West Virginia statute as to legislative intent on this pivotal issue.

The only authority Appellant cites out of this State is how the General Assembly of the Commonwealth of Virginia found it necessary to amend the very same statute at issue in the present case because a "note or bill of a banking company" was not a "note or bill current by law or usage in this Commonwealth." The only difference in the

original 1849 statute and the Statute at issue in this case is the words “company” and “institution.” This point is not raised in the State Response. Perhaps, State’s Counsel did not feel compelled to respond to “Appellant’s somewhat remarkable proposition that counterfeiters in West Virginia get a ‘free pass’ under state law...” SRB at 4. (Parenthesis omitted). Again this is similar to the prosecutor in *State v. Corra, supra*, assuring (without looking at West Virginia authority) a busy trial court that beer is the same as intoxicating liquor. *Id.*, 223 W.Va. 573, 578, 678 S.E.2d 306, 311 (2009).

The Fourth Circuit Court of Appeals reversed a conviction of a defendant who used one-sided photo copies of dollar bills to extract change from change machines. The problem for the government was that the Federal statute did not envision machines that could not tell the bills used were not genuine. To any reasonable person they were obviously not genuine. Thus, the bills failed the similitude requirement of the counterfeiting statute. The Court in reversing the conviction reasoned: “Our conclusion is reached solely upon the slips in evidence here and the statute on which the indictment was found.” *United States v. Ross*, 844 F.2d 187, 190 (4th Cir. 1988). This may have been a “free pass” but it is the government, or in this case the State, that runs the risk of charging under the wrong statute. The solution is for the legislature to amend the statute, write a new statute or for the State to charge under a statute that does cover the alleged crime. It does not fall upon this Court to make up for such deficiencies.

C. *The statutes from other states are distinct as to the Statute in the present case and have distinct histories.*

1. *Com. v. Saville*, 353 Mass. 458, 233 N.E.2d 9 (1968), involved a defendant charged with having “certain equipment” for the purpose of making “counterfeits” of notes and bills. He was also charged with having ten or more such bills in his possession. The court refers to a series of statutes that address counterfeiting various instruments as follows:

...counterfeit note, certificate or other bill of credit, purporting to be issued by lawful authority for a debt of the commonwealth, or a false and counterfeit note or bill in the similitude of the notes or bills issued *by any bank or banking company*, or an instrument described as a United States Dollar Traveller’s Check or Cheque, purchased from a bank or other financially responsible institution...

Mass. Gen. Laws Ann. Ch. 267, § 13 (West). (Emphasis added.)

And:

...counterfeits a bank bill or promissory note payable to the bearer thereof or to the order of any person, issued by *any incorporated banking company* or an instrument described as a United States Dollar Traveller's Check or Cheque...

Mass. Gen. Laws Ann. Ch. 267, § 8 (West). (Emphasis added.)

The court in *Saville* only had to address whether “any bank or banking company” included the Federal Reserve Bank and whether the Federal Reserve Bank was an incorporated bank company that issues bank bills. The court did not address any legislative history as is presented in the case at hand.

2. *State v. Davis*, 358 So.2d 887, 888-89 (Fla. Dist. Ct. App. 1978), the court reviewed the conviction of a defendant who had washed a two dollar bill and changed

it to a twenty dollar bill. The court defined its inquiry as follows:

...

There remains the question of whether Section 831.09 includes this two dollar bill because the statute does not refer to currency or money. The statutory wording "issued as aforesaid" clearly refers to the language of Section 831.07, Florida Statutes (1977), which reads "a bank bill or promissory note . . . issued by an incorporated banking company established in this state, *or within the United States.*" These two sections as well as many others in Chapter 831 were originally enacted in 1868 as part of the same legislative act, and the language remains substantially unchanged. It must be remembered that much of the currency then in use consisted of bank notes or bills issued by authorized banks, but that today the bulk of our currency consists of Federal Reserve notes.

...

*State v. Davis*, 358 So.2d 887, 889 (Fla. Dist. Ct. App. 1978). (Note. Emphasis added. Footnote omitted.)

The Court in *Davis* cited *Com. v. Saville, supra*, for the proposition that the Federal Reserve Bank is an incorporated bank company. *State v. Davis*, 358 So.2d at 889. As with *Saville*, *Davis* did not have clear legislative history that showed any contrary meaning.

3. The case of *People v. Ray*, 50 Cal. Rptr.2d 612, 613 (Ct. App. 1996), discusses a statute passed in 1872, (a time after national bank notes became predominant, Vol. 1, AR 206). The statute at issue has some language similar to the Statute at issue in the present case. It speaks of "coin current in this state" and refers to "counterfeiting bank notes or bills." *Id.*, at 613. Of course at the time this language was employed by the California legislature the predominant currency in the United States was national bank notes.

4. The case of *State v. Scarano*, 149 Conn. 34, 175 A.2d 360 (Conn. 1961), very carefully looks at the history of its statute pertaining to counterfeiting from 1750 to the date of its decision.<sup>1</sup> The statute, according to the decision, initially included a colonial currency, then a national paper currency, then was not amended after there was no national paper currency, and was not further amended after a national paper currency came back into existence. The court held that: "This legislation clearly manifested an intention not only to preserve the integrity of the federal currency in the furtherance of trade and commerce but also to protect the state and its citizens from being defrauded by spurious money." *State v. Scarano*, 149 Conn. 34, 37-39, 175 A.2d 360, 361-62 (1961). The statute at issue in *Scarano*, Conn. Gen. Stat. Ann. § 53-348 (West) was later repealed.

It is clear by looking at these decisions of other states that each state has its own history of dealing with counterfeiting through legislation. The legislative intent is determined based upon what happened with the legislature of that particular state with the exception of Florida citing Massachusetts authority for the proposition that the Federal Reserve Bank is an incorporated bank company. *State v. Davis*, 358 So.2d at 889. Similarly, the Statute in the instant case must be looked upon based upon its own legislative history in West Virginia (and Appellant argues how the forbearer of the Statute was treated in the Commonwealth of Virginia) as opposed to the legislative history of other states. Unfortunately, State's Counsel does not undertake this analysis and its Response Brief is only marginally helpful in resolving this issue.

In conclusion, Appellant argues that he has shown the legislative spirit, purposes and objects of the general system of law of which the Statute in question is intended to be a part. *See, Syl. Pt. 6, Mace v. Mylan Pharmaceuticals, Inc., 227 W.Va. 666, 714 S.E.2d 223, 225 (2011)*. The State Response Brief has failed to answer or attack this crucial analysis as set forth in Paragraph A. and its subparts of this Reply Brief, at pages 2 to 3. As to all other points, Appellant refers to his Appellant's Brief previously filed.

### CONCLUSION

The Appellant's conviction should be reversed, and he should be acquitted of the charge as prayed for in Appellant's Brief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I Richard H. Lorensen, counsel of record, hereby certify that on this **2nd** day of **March, 2012**, served true and accurate copies of the foregoing **Appellant's Reply Brief** on counsel and all other parties to this appeal in the manner noted below:

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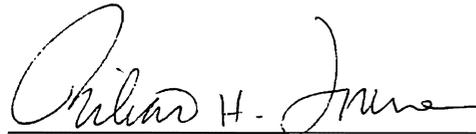
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