IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED
June 27, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30247

RELEASED
June 27, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff below, Appellee

v.

WILLIAM BRAHAM,
Defendant below, Appellant

Appeal from the Circuit Court of Monongalia County
Hon. Russell M. Clawges, Jr., Judge
Felony No. 00-F-139

REVERSED

Submitted: June 5, 2002
Filed: June 27, 2002

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JUSTICE STARCHER delivered the Opinion of the Court.

JUSTICE MAYNARD concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

SYLLABUS

The uttering of a post-dated check may be evidence in support of a charge of violating *W.Va. Code*, 61-3-24d [1995], where the post-dated check was used for fraudulent scheme purposes and with criminal intent.

Starcher, Justice:

In the instant case, we reverse the appellant's conviction on a charge of fraudulent schemes because the State's evidence did not show beyond a reasonable doubt that the appellant had the requisite criminal intent.

I.
Facts & Background

The appellant William Braham appeals his May 8, 2001 conviction in the Circuit Court of Monongalia County for violating *W.Va. Code*, 61-3-24d [1995], the offense of "fraudulent schemes." This statute reads in pertinent part as follows:

> (a) Any person who willfully deprives another of any money, goods, property or services by means of fraudulent pretenses, representations or promises shall be guilty of the larceny thereof.

The appellant was charged with violating this statute by cashing a number of checks at a bar in Morgantown. Most of the checks were post-dated. When the checks were presented to the bank, before and after the dates on the checks, there were no funds in the account to cover the checks. The appellant asserts a number of grounds for the reversal of his conviction. We discuss several of these grounds hereinafter and include in our discussion the relevant facts.

II.
Standard of Review

All of the issues raised by the appellant are purely legal determinations that we address *de novo*.

III.
Discussion
A.
Admission of Deposition

Approximately a month before the appellant's trial, the prosecutor indicated to the defendant's counsel that a prosecution witness, an employee of the bar where the appellant had cashed the checks in question, would be out of town on the scheduled trial date. The prosecutor asked the defendant's counsel if he would agree to an evidentiary deposition. The defendant's counsel did agree, but just before the deposition began, the appellant said that he personally would not agree to the deposition. After an emergency hearing before the circuit judge, the judge ordered the deposition to go forward.

At trial, the witness' deposition was played to the jury, over the appellant's objection. That objection was based in part on the fact that shortly before the trial, the prosecutor had turned over to the appellant documents showing that the witness who had been deposed had lied in her deposition. Specifically, the witness had denied that the bar had a practice of making illegal payoffs on video game machines; but the document showed that the bar did have such a practice. The appellant had claimed to the officer who arrested him that his not "making good" on the checks was connected to the bar's refusal to pay the appellant for his winnings on the illegal video game machines. (As we discuss in part III.C. *infra*, the trial court

also prohibited the appellant from raising the issue of illegal video game payoffs.)

The appellant's counsel argued that the use of the deposition violated the appellant's right to confront the witness and challenge her credibility by pointing out that she was willing to lie under oath about the conduct of the bar's business.

While disputing the relevance of the illegal gambling evidence, the State concedes that the circuit judge erred in admitting the deposition testimony of the witness; and moreover, the State concedes that this error was not harmless. We agree. The credibility of this witness, as with all witnesses, was at issue. Because of the timing of the document's disclosure, the appellant did not have the basis for challenging the witness' credibility in cross-examination at the deposition. The State concedes that this error constitutes grounds for reversal of the appellant's conviction, and we agree.

B.
Post-dated Checks

The appellant also argues that a conviction under *W.Va. Code*, 61-3-24d [1995] may not be based on post-dated checks. Five of the six checks relied upon by the State to prove its case were post-dated.

A separate statute criminalizes the uttering of worthless or insufficient funds checks, *W.Va. Code*, 61-3-39 [1994]. That statute specifies that a worthless check conviction cannot be had if "the payee or holder knows or has been expressly notified prior to the acceptance of same or has reason to believe that the drawer did not have . . . sufficient funds to insure payment . . . nor shall this section apply to any postdated check . . . ." *Id.*

While the fact that a check was post-dated is by statute an absolute defense to a charge of violating *W.Va. Code*, 61-3-39 [1994], such an absolute defense is not provided for in *W.Va. Code*, 61-3-24d [1995]. We perceive that a person could commit larceny by fraudulent scheme by obtaining money with a post-dated check -- if the person had the definite and criminal intention at the time he/she uttered the post-dated check not to deposit funds to cover the check by the time it "came due," and if a jury concluded that this conduct constituted "willfully depriv[ing] another of any money, goods, property or services by means of fraudulent pretenses." *Id.*

We hold, therefore, that the uttering of a post-dated check may be evidence in support of a charge of violating *W.Va. Code*, 61-3-24d [1995], where the post-dated check was used for fraudulent scheme purposes and with criminal intent.

In the instant case, however, we have carefully examined the record, and we find that there was insufficient evidence to establish beyond a reasonable doubt that the appellant had a criminal intent with respect to the checks in question. The appellant was a regular customer who used the proceeds of the checks to gamble on video lottery "Keno" machines at the establishment to whom he issued the checks in question. The prosecution's evidence, which was basically the fact of the checks' issuance, did not permit the inference beyond a reasonable doubt that the appellant had the intention at the time he issued the checks that they would not be honored. As we discuss briefly *infra*, the appellant was precluded from offering or eliciting certain evidence relating to why he issued the checks, but even without that evidence being put before the jury, we conclude that the State's evidence of the appellant's

criminal intention to defraud using post-dated checks was insufficient to establish a criminal violation of *W.Va. Code*, 61-3-24d [1995].

C.
Evidence of the Entire Transaction

The appellant sought to introduce evidence tending to show that the appellant had not made good on the checks because the bar where the appellant cashed the checks had not paid him his winnings on illegal gambling machines. The State opposed this as *West Virginia Rules of Evidence*, Rule 404(b) "other bad acts" evidence of wrongs committed by the alleged victim, and as irrelevant to the charges against the appellant.

We disagree. The appellant had a right under the circumstances to show the scope of his dealings with the alleged victim, including to elicit evidence circumstantially tending to show that his issuance of and/or failure to make good on the checks was related to the fact that the bar would not pay him his winnings on illegal machines. A jury might find that in such a situation the appellant did not have the requisite criminal or fraudulent intent to support a conviction.

V.
Conclusion

The appellant's conviction must be reversed, and our finding of the insufficiency of the evidence for conviction prohibits a retrial.[1]

Reversed.

[1]We observe that the appellant "paid the checks off" a few days before trial, but the prosecution went forward with a trial on the charge of a felony. While the briefs and argument in the instant case by the appellant's counsel and the Attorney General's Office were helpful, our review of the record suggests that in the lower court, prosecutorial zeal may have gotten in the way of common sense. In *State v. Orth*, 178 W.Va. 303, 359 S.E.2d 136 (1987), we reversed a conviction of a compulsive gambler on a worthless check charge. Our decision in that case reflected a common-sense appreciation that the State should be hesitant to treat a customer of a gambling business who "gets in too deep" in the same fashion as a professional car thief or con artist.