1982

State of Utah v. Thomas Dean Lakey : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff and Respondent, vs. THOMAS DEAN LAKEY, Defendant and Appellant.	Case No. 18,250

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE FOURTH JUDICIAL DISTRICT
COURT IN AND FOR UTAH COUNTY

HONORABLE GEROGE E. BALLIF, JUDGE

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NATURE OF THE CASE

Appellant was charged by Information with the crime of Theft by Deception, a second degree felony, in that on or about the 31st day of January, 1981, in violation of Sections 76-6-405 and 76-6-412, Utah Code Annotated, 1953, as amended, the Appellant obtained or exercised control over the property of Richard Ryan by deception with the purpose to deprive the owner thereof, and that the value of the property exceeded $1,000.00.

DISPOSITION IN THE LOWER COURT

Appellant was tried by a jury in the Fourth Judicial District Court of Utah County, with the Honorable George E. Ballif, Judge, presiding, on the 29th day of October, 1981. Following the trial, the jury found the Appellant guilty as

charged. Appellant was sentenced on the 22nd day of January, 1982, to an indeterminate term in the Utah State Prison of not less than one year nor more than fifteen years. Notice of Appeal in this matter was filed in the Utah County Clerk's Office, on February 16, 1982.

NATURE OF THE RELIEF SOUGHT ON APPEAL

Appellant respectfully requests the Court to reverse the judgment of guilt entered in the District Court.

STATEMENT OF FACTS

During January of 1981, Appellant was operating a gift and toy store in Provo, Utah. At some time during that month, he had occasion to view samples of clothing owned by one Richard Ryan which were being offered for sale to various businesses. Appellant expressed to Mr. Ryan some interest in purchasing some of the items to be sold in his gift and toy store. At Appellant's request, Mr. Ryan brought some merchandise to Appellant's store on January 30, 1981. Mr. Ryan testified that the price of the merchandise which was delivered was $2,763.18. Following delivery of the merchandise, a discussion was had between Appellant and Mr. Ryan regarding payment. Appellant tendered a personal check to Mr. Ryan for the purchase price of the merchandise and asked Mr. Ryan to not cash the check that day but to merely deposit the check into his checking account.

Mr. Ryan understood that Appellant intended to make some deposits and he agreed to not cash the check that day. Appellant testified that he was negotiating with four individuals to invest merchandise and capital into his business and that he expected to deposit enough cash into his account to cover the check by the time the check reached his bank for payment.

The money expected by the Appellant did not materialize and the check written to Mr. Ryan was returned unpaid due to insufficient funds in Appellant's account. There was contradictory testimony regarding whether or not Appellant offered to return all or part of the merchandise to Mr. Ryan. Testimony from both sides, however, indicated that Appellant offered to pay Mr. Ryan in installments of 10% per month and that Mr. Ryan refused the offer on the advice of the police in order to avoid jeopardizing the case against Appellant.

ARGUMENT

POINT I

THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE JURY'S VERDICT.

A. There was insufficient evidence presented at trial to show that the property was obtained by deception.

Section 76-6-405(1), Utah Code Annotated, 1953, as amended, provides as follows:

> A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

This Section sets forth two basic elements of the crime of Theft by Deception: (1) Obtaining control of property by deception, and (2) having a purpose to deprive the owner of the property. The first element of this crime will be dealt with in this section of Appellant's brief. The second section will deal with the element of purpose to deprive.

"Deception" is defined in Section 76-6-401(5), Utah Code Annoated, 1953, as amended with five separate definitions, only one of which must be proven. Those five definitions are as follows:

> (a) Creates or confims by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or
> (b) Fails to correct a false impression of law or fact that the actor peviously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or
> (c) Prevents another fm acquiring information likely to affect his judgment in the transaction; or
> (d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official records; or
> (e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

One of the five alternatives must be shown to exist as of the time possession is obtained and that possession was obtained

as a result of that deception. In Jury Instruction No. 9, the Court listed three of those five alternatives as the definition of "deception"; those being paragraphs (5)(a), (b) and (e).

Each of the three definitions relates to a false impression of fact which the defendant either creates or fails to correct at the time possession is transferred.

The State apparently asserts that Appellant created in impression of fact that the check was good as of the time it was given to Mr. Ryan. Mr. Ryan's testimony, however, reveals that Appellant never represented that the check was then good, but rather that it would be good in the future. He testified that Appellant asked him not to cash the check that day (T. page 15, Lines 29-30)(all references to the transcript of trial in this brief will be designated in this manner); that there was no conversation as to whether or not the check would clear the bank (T. page 16, lines 10-12); and that he understood Appellant intended to make some deposits and didn't want to mess up his bank account (T. page 16, lines 16-20). At no time did the Appellant represent that the check was good at that time. The only impression of that which was shown by the State to have been created by the Appellant was that the check would clear the bank if deposited in Mr. Ryan's account, because the Appellant had some deposits he intended to make. That impression of fact later turned out to be false. The check did not later clear the bank. This portion of the definition of deception was proven by the

State. The Appellant never contested the fact that the check did not actually clear the bank.

The portion of the definition of "deception" which Appellant asserts was not proven revolves around the words "that the actor does not believe to be true". Did the Appellant, at the time he told Mr. Ryan that he intended to make some deposits before the check reached the bank, not believe that impression of fact to be true? Or, did the Appellant actually believe the check would clear the bank if deposited in Mr. Ryan's account. Did the Appellant actually believe he would deposit enough money to cover the check by the time it reached his bank?

The Appellant contends that there was insufficient evidence produced by the State to prove beyond a reasonable doubt that the Appellant knew the check would not clear his bank. The State's evidence through bank employee, Rick Anderson, showed that there were not enough funds in Appellant's account on the date the check was written, to cover the check. The State further produced testimony of Richard Ryan which showed the following:

1. Appellant asked him to not cash the check, but to deposit the check in his bank account (T. page 15, lines 29-30).

2. Appellant told him that if he wanted cash rather than a check, that he could come back to the store the following Monday and bring the merchandise at that time (T. page 20, lines 14-15).

3. He understood that Appellant had some deposits he was going to make so that his account would not be messed up (T. page 16, lines 16-20).

At the conclusion of the State's case, the jury had before it testimony that the check was written on January 30, 1981; that on that date there were not sufficient funds to cover the check; that Appellant asked Mr. Ryan not to cash the check that day, but to deposit the check; that Appellant had some deposits he intended to make to cover the check before it reached his bank for payment; and that when the check reached Appellant's bank for payment, those expected deposits had not been made.

The impression of fact created by Appellant was that Appellant intended to make some deposits and that the check would clear the bank if deposited in Mr. Ryan's account and allowed to run through the normal banking channels. In the evidence presented by the State, there was nothing to indicate or allow the jury to infer that Appellant did not actually believe the deposits would be made. There is likewise nothing in the evidence to indicate or from which the jury could infer that the Appellant did not actually believe the check would clear his bank after being deposited in Mr. Ryan's account.

The State presented ample evidence on the nature of the impression of fact and that the impression of fact later turned out to be false. However, the State presented no evidence at all from which the jury could infer that on January 30, 1981,

Appellant did not believe he would make sufficient deposits to cover the check by the time it reached his bank.

In the case of State v. Forshee, 588 P.2d 181 (Utah, 1978), the Court considered, for the first time, the elements of the statute under which Appellant was convicted. In that case, the Court affirmed the finding of deception where the defendant had represented that a car's mileage was 33,000 when he knew that representation to be false. The Court also likened Section 76-6-405, Utah Code Annotated, to its predecessor, the crime of obtaining property by false pretenses. Cases considering the crime of obtaining property by false pretenses have uniformly required a false representation which the defendant knew to be false. The representation made by Appellant in this case was that he intended to make deposits so that the check would be good by the time it reached the bank and that Mr. Ryan could not get cash for the check on that date. Those representations were not false and were not believed by the Defendant to be false. Appellant actually intended to make deposits and Mr. Ryan could not cash the check that day. The Appellant never represented that the check was good on the date of January 30, 1981, and he made sure Mr. Ryan knew that he couldn't get cash that day.

We are subjected to false impressions of fact every day of our lives. The essential difference between a false impression of fact and deception is the state of mind of the person creating the impression of fact. Anytime a check is written, an impression of fact is created that the check will clear the bank. It is

not uncommon for checks to be written with the belief that deposits will be made before the check reaches the bank. It is not uncommon for those expected deposits to fall through, resulting in dishonor of checks. Without some evidence upon which the jury could find that Appellant knew the check would not clear the bank when it was presented to the bank for payment, the jury's verdict of guilt is unsupported by evidence and must be reversed.

Appellant's testimony presented at trial was to the effect that he had contacted a number of individuals to invest money and merchandise in his store. He further testified that he wrote checks to various individuals during the month of January, 1981, wih the belief that the money would be there to cover the checks before the checks reached his bank (T. page 54, lines 19-21). He further testified that the money he expected did not arrive, that some of the potential investors ended up supplying merchandise around the time that he wrote the check to Mr. Ryan.

The only evidence relating to Appellant's belief was presented by Appellant and was uncontroverted by the State. The only evidence before the jury regarding the Appellant's belief was that Appellant actually believed he would receive enough money to cover the check before it reached his bank. The State presented no evidence to show that Appellant did not believe the money would be received and presented no evidence to contradict Appellant's testimony that he actually believed he would receive enough money to cover the check before it reached his bank.

Without some evidence that Appellant knew his representation to be false, there is no deception as defined by the law. The only thing the State showed was poor business judgment, not actual deception. Proof of deception required some evidence to show that Appellant knew the check would not be covered. The Appellant made no representation which he knew to be false. The State presented no evidence to the contrary and the jury's verdict is not supported by the evidence.

B. There was insufficient evidence presented at trial to show that Appellant had a purpose to deprive the owner of the property.

The second element of Section 76-6-405, Utah Code Annotated, 1953, as amended, is that the Defendant have a purpose to deprive the owner of the property. Appellant contends that the evidence presented at trial on this issue was insufficient to justify the jury's verdict. The Appellant's intentions regarding the property can only be learned from what the Appellant may have said or done.

In 50 Am Jur 2d Larceny, Section 36, Page 195, the general rule is stated that:

> ...it is not larceny to take a thing for a temporary purpose with a bona fide intention of returning it, or or paying for it or otherwise accounting therefor to the owner, even though such intention is not carried out.

The State produced no evidence of the Appellant's intent to

deprive the owner of the property. The State produced no evidence from which the jury could infer or assume that the Appellant intended to deprive the owner of the property.

The following uncontroverted evidence was produced at trial to show what the Appellant did and said:

1. The Appellant had instructed his clerk to return merchandise to those who wanted it (T. page 44, lines 15-16).

2. Mr. Ryan went to Appellant's business on Feburary 28, 1981 and saw some of his merchandise (T. page 71, lines 12-17).

3. One supplier went to Appellant's business on February 28, 1981 and picked up his merchandise (T. page 48, lines 29-30).

4. Appellant offered to pay Mr. Ryan a certain sum each month to pay for the goods, but Mr. Ryan would not accept partial payments due to his conversations with the police regarding jeopardizing the case against Appellant.

There was a conflict in the testimony regarding whether or not Appellant had offered Mr. Ryan the return of all or part of the merchandise. The evidence is clear that after the check was dishonored, Mr. Ryan went to Appellant's business and at least one-third of the merchandise was there at that time. There is no evidence that Appellant ever tried to hide the merchandise or that he did not intend to pay for the merchandise. Even based upon the State's evidence, Appellant offered to pay for the goods at the rate of 10% per month, but Mr. Ryan would not accept partial payment.

CONCLUSION

Looking at the evidence as a whole, this case involves a merchant who bought merchandise by way of a check, expecting to deposit enough money to cover the check by the time it got to his bank. When his expected deposits fell through, he tried to return the merchandise and/or pay monthly payments to pay the supplier for the goods. There is nothing in the record to show any intent on the Appellant's part to not pay for the goods. The evidence shows he tried to pay for the goods on an installment basis, but the victim refused.

There is no evidence that Appellant had any intent to deprive the owner of the property, either at the time of sale or later. All evidence shows that he intended to pay for the property or to allow the owner to take the merchandise back. There is nothing to support the jury's verdict and it must be reversed.

Respectfully submitted this 13th day of August, 1982.

ALDRICH, NELSON, WEIGHT & ESPLIN

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Attorney for Appellant

DELIVERY CERTIFICATE

I hereby certify that I delivered two true and correct copies of the foregoing Brief of Appellant to DAVID L. WILKENSON, Utah Attorney General, at 236 State Capitol Building, Salt Lake City, Utah, 84111 this 13th day of August, 1982.

Kent O. Willis