2004

State of Utah v. Wayne A. Mower

Utah Court of Appeals

John T. Caine; Richards, Caine & Allen.
Kris C. Leonard; Mark Shurtleff; Brenda J. Beaton.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH Appellant vs. WAYNE A. MOWER Appellee.	:	Case No. 20040491-CA

Appellant has appealed from the trial court's grant of Appellee's motion to dismiss the charge of issuing a bad check, a Third Degree Felony

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	:	
Appellant	:	
vs.	:	
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	:	
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH	:	
	:	
Appellant	:	
vs.	:	
	:	Case No. 20040491-CA
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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

Appellant has appealed from the trial court's grant of Appellee's motion to dismiss the charge of issuing a bad check, a Third Degree Felony, in violation of Utah Code Section 76-6-50-(2) and this Court has jurisdiction to hear this appeal pursuant to Utah Code Annotated Section 78-2a-3 (2002).

STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW

As conceded by the State in its brief, the sole issue on appeal is whether the trial court erred in granting defendant's timely motion to dismiss for failure to state a claim under the provisions of Utah Code 76-6-505(2). Contrary to the State's misstatement of the facts, the question before the Court is whether a person who conditionally issues a check to an individual

and informs the individual that the check will not be funded until the conditions are met, is criminally liable when a third party credit union cashes the check without verifying with the issuer's bank whether funds were available on the check.

A trial court's ruling on a motion to dismiss is a question of law and is reviewed for correctness, with no particular deference to the trial court's legal conclusions. *State v. Taylor* 884 P.2d 1293, 1296 (Utah App. 1994)

The Appellate courts review questions of statutory interpretation for correctness. *State v. McKinnon*, 51 P.3d 729 (Utah App. 2002).

CONSTUTIONAL PROVISIONS, STATUTES AND RULES

There are no constitutional issues being challenged and no rules.

Utah Code Ann. §76-6-505 **Issuing a bad check or draft -- Presumption.**

(1) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check or draft.

For purposes of this subsection, a person who issues a check or draft for which payment is refused by the drawee is presumed to know the check or draft would not be paid if he had no account with the drawee at the time of issue.

(2) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, payment of which check or draft is legally refused by the drawee, is guilty of issuing a bad check or draft if he fails to make good and actual payment to the payee in the amount of the refused check or draft within 14 days of his receiving actual notice of the check or draft's nonpayment.

(3) An offense of issuing a bad check or draft shall be punished as follows:

(a) If the check or draft or series of checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is less than $300, the offense is a class B misdemeanor.

(b) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is or exceeds $300 but is less than $1,000, the offense is a class A misdemeanor.

(c) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is or exceeds $1,000 but is less than $5,000, the offense is a felony of the third degree.

(d) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is or exceeds $5,000, the offense is a second degree felony.

STATEMENT OF THE CASE

Defendant was charged with one count of issuing a bad check, waived a preliminary hearing and filed a motion to dismiss, arguing that under the principals enunciated in *State v. Green*, 672 P.2d 400 (Utah 1983), a defendant could not be criminally liable for the issuance of a bad check if the defendant did not receive anything for the issuance of the check and therefore the statutory requirement that the check be issued "for the purpose of obtaining . . . a thing of value" was not fulfilled. The trial court granted the motion on the grounds that under UCS 76-5-505(2) defendant possessed no criminal intent and the statute provided no criminal liability where defendant "did not obtain or intend to obtain something of value with a bad

check." (See Findings of Fact Conclusions of Law Re: Defendants Motion to Dismiss page 3-page 6)

STATEMENT OF FACTS

(All references to the Transcript of the Hearing on Motion to Dismiss) Facts were stipulated by the State and Defense.

1. On or about June 12, 2002, defendant, Wayne A. Mower, who operates a title loan business in which persons place the title to automobiles as security for short term loans, was approached by one Nick Kirkman (Kirkman) for a loan of $4,900 secured by an automobile title. (Tp pg 7_

2. Defendant informed Kirkman that he would loan the $4,900.00 provided that Kirkman delivered to him the title to a specific automobile discussed by the parties.(Tp pg 7)

3. Defendant then gave Kirkman a check for $4,900.00 based upon previous business dealings of the parties in which defendant prepared a check for Kirkman and then Kirkman immediately delivered the title to defendant. (Tp pg 7)

4. Defendant informed Kirkham and Kirkman was aware that the check for $4,900.00 would not be funded by defendant and that the check was not to be cashed or otherwise negotiated by Kirkman until the automobile title was delivered to defendant. (Tp pg 7)

5. Kirkman did not deliver the title to defendant that day or at any time thereafter and defendant has never received anything of value from Kirkman regarding the check issued by defendant to Kirkman for $4,900.00. (Tp pg 8)

6. Kirkman took the check for $4,900.00 and deposited the check into his account at Weber State Credit Union without informing defendant that he was undertaking such action. Kirkman received the total amount of the $4,900.00 from the check. (Tp pg. 9)

7. Defendant did not make the check to Kirkman good as he did not receive any automobile title from Kirkman, nor did he receive any loan payments or anything else of value from Kirkman or any other party regarding the check for $4,900.00. (Tp pg 9)

8. The check from defendant to Kirkman was not honored by Mower's bank. (Tp pg 12-13)

SUMMARY OF ARGUMENT

The trial court properly interpreted the provisions of Utah Code 76-6-505 and applied the principles delineated in *State v. Green*, supra. To this case and correctly determined that no crime had been committed. The State laboriously attempts to create a crime in this instance where no criminal intent, act or occurrence is present. The State's fatal flaw is their failure to

note that defendant received nothing of value for the issuance of the check in question.

ARGUMENT

THE DISTRICT PROPERLY INTERPRETED UTAH CODE 76-6-505 AND PROPERLY APPLIED EXISTING LAW WHICH IS CLEAR AND UNAMBIGUOUS.

Defendant issued a conditional check to Kirkham in which it was clearly spelled out to Kirkham, similar to their previous business dealings, that defendant would fund the loan when the title to the subject automobile was delivered to defendant. Defendant issued a check which was purposely not funded and would not be funded until the collateral was received, the collateral was not received and there was no funding of the check.

Defendant never had any intent to deceive. Defendant never received any "money, property or other thing of value" from Kirkham and therefore cannot be guilty of issuing a bad check, there being no intent and no value received.

While the State completely discounts *State vs. Green* supra, it is still good law and is controlling in this case. In *Green*, Mr. and Mrs. Green purchased from United Savings (United) a $10,000 six month money market certificate with a check written on it insufficient funds. On the day following

the Greens returned to the bank and asked to cancel or close the certificate. United refused to cancel the certificate until the Greens paid a six-month penalty on the interest. After some discussion the Greens left the bank without resolving the matter. The check given by the Greens to United did not clear the Greens bank because as Mr. Green testified he did not receive an anticipated payment. Green testified that he had sufficient funds and other accounts to cover the amount, but in the interim decided not to follow through on the purchase of the CD and therefore did not cover the check. United felt otherwise and pursued criminal charges under Utah Code §76-6-505 and the Greens were convicted of passing a bad check.

On appeal the Utah Supreme Court reversed the conviction stating that "the undisputed evidence is that the Defendant did not write the check for the purposes of obtaining from United any money, property or other thing of value belonging to United. It was not intended by either United or the Defendant that United would give him anything for the check "Id. at 401." United did not part with anything of value which it owned when it issued the certificate. It only failed to acquire Defendants account and deposit in its institution. Under these circumstances it can not be said that the Defendant issued its check for the purposes of obtaining any money,

property or thing of value from United and therefore an essential element of the crime was missing "Id. at 402."

This case is significantly similar to *State vs. Green.* supra The Defendant issued a check to Krikman which was in the form of a loan. The Defendant did not issue the check for the purpose of receiving any money from Kirkman, but rather for the purpose of giving the money to Kirkman after Kirkman delivered an automobile title to the Defendant to secure the loan. Kirkman never delivered the title to the loan and therefore Defendant did not fund the loan. Defendant never had any intent or expectation of receiving anything from Kirkman except the repayment of the loan. However, Kirkman was also aware through prior business experience with the Defendant and from Defendants explicit instructions that the loan would not be funded until the condition precedent, that is, the delivery of the automobile title was satisfied. The automobile title was not delivered, the loan was not funded, and the Defendant received nothing from Kirkman. Defendant did not receive the payment of money, property anything of value, services, wages, salary, labor or rent or any other thing of value from Kirkman let alone from the Weber State University Credit Union, the ultimate repository of the check and the institution that actually issued the funds to Kirkman. Thus, as stated in *Green,* an essential element required

for conviction under §76-6-505 is missing and therefore the trial courts' dismissal of the case was appropriate.

CONCLUSION

The decision of the trial court should be upheld and sustained as a correct application of the law to the facts and the trial court's order of dismissal should be affirmed.

DATED this 28th day of February, 2005.

JOHN T. CAINE
Attorney for Appellee

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Appellee's Brief, postage prepaid this 28th day of February, 2005.

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