

2005

Utah v. William Thomas Greene : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
WILLIAM THOMAS GREENE, : Case No. 20050891-CA
Defendant/Appellant. :

BRIEF OF APPELLANT
TO THE UTAH COURT OF APPEALS

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UTAH APPELLATE COURT
DEC 09 2005

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, : APPELLANT’S OPENING BRIEF
Plaintiff/Appellee, :
v. :
WILLIAM THOMAS GREENE, : Case No. 20050891-CA
Defendant/Appellant. : Defendant is not incarcerated.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e)(2005). The Honorable Judge, Timothy R. Hanson, Third District Court, Salt Lake County, Utah entered judgment of conviction for Theft By Deception, a third degree felony, in violation of Utah Code Ann. § 76-6-405(2003) on September 16, 2005. A copy of the judgment is in Addendum A.

**STATEMENT OF THE ISSUES, STANDARDS OF REVIEW,
PRESERVATION**

Issue 1: Whether the trial court erred when it ruled that receiving a check for \$1080.00 that is dishonored due to insufficient funds meets the element of Utah Code Annotated Section 76-6-405(2003), that the defendant obtain property with a value exceeding \$1,000.00?

Standard of Review: Matters of statutory interpretation are questions of law an appellate court reviews for correctness. State v. Schofield, 2002 UT 132, ¶ 6, 63 P.3d 667. “[T]he proper interpretation of a statute is a question of law. Therefore, when

reviewing an order . . . involving the interpretation of a statute, we accord no deference to the legal conclusions of the district court but review them for correctness.” State v. Mast, 2001 UT App 402, ¶ 7, 40 P.3d 1143 (internal citations omitted).

Preservation: This issue is preserved. See R. 206:248; R.207; R.136-142.

TEXT OF RELEVANT STATUTE

The text of the following statute is in Addendum B:

Utah Code Ann. § 76-6-405 (2003)¹

STATEMENT OF THE CASE

On April 26, 2004 Mr. Greene was charged by information with one count of Theft By Receiving Stolen Property, a second degree felony, in violation of Utah Code Ann. § 76-6-408 (2003) and one count of Theft By Deception, a third degree felony, in violation of Utah Code Ann. § 76-6-405 (2003). R.2. Following a jury trial, on April 6, 2005, Mr. Greene was acquitted of count one, but found guilty of the Theft By Deception Count. R. 131-132; R. 206: 245-246.

During the trial, it was established through witness testimony that on the morning of March 22, 2004, Sanford Osborn arrived at his employment at Water and Power Technologies, a water purification company. R.206:13-14. Upon arrival, Mr. Osborn noticed that two bundles, about 35 to 45 pieces, of three inch schedule forty pipe were missing from a storing area in the parking lot. Id. at 17-19. Mr. Osborn called and reported the missing pipe to the police and then called around scrap yards in order to locate the missing pieces. Id. at 19-20. Mr. Osborn testified that he called Luceny Corporation and spoke with the owner named Billy Cheung. Id. at 23. Mr. Cheung had just purchased some pipe and described it to Mr. Osborn. Id. Mr. Osborn responded to Luceny Corporation where he found “a whole bunch of 3-inch Schedule 40 pipe.” Id. at 26. The pipe was not the same length as the pipe taken from Water and Power

¹ A copy of 2005 rule added as addendum B. No changes have been made.

Technologies. Id. at 38. Mr. Osborn testified that the pipe at Luceny Corporation was cut into all different sizes. Id. However, Mr. Osborn testified that he could identify the pipe as that missing from Water and Power Technologies based off the condition it was in. Id. at 51.

Mr. Cheung testified that on the morning of March 22, 2004, Mr. Greene was at Mr. Cheung's company, Lucency Corporation, waiting in a pick up truck. Id. at 63. Mr. Cheung testified that Mr. Greene, a regular customer, had about thirty pieces of stainless pipe in the back of his truck to sell to the corporation as scrap. R. 60,64-65. Mr. Cheung weighed the pipe and paid Mr. Greene 45 cents per pound for the pipes, which was just "over a thousand dollars." Id. at 69. Mr. Cheung testified that Mr. Greene stated he had purchased the pipe from a guy. Id. at 67. Mr. Cheung issued Mr. Greene a check for a little over a thousand dollars and then Mr. Greene left. Id. at 69. Later that day, Mr. Osborn contacted Mr. Cheung about the missing pipe. Id.

Immediately upon leaving Luceny Corporation, Mr. Greene went to redeem the check at the bank but payment was denied for insufficient funds. Id. at 74, 86, 121, 136. Later, but the state did not show when, Luceny Corporation ordered that the bank stop payment on the check. Id. at 87. Thus, Mr. Greene never received the payment from Luceny Corporation in the value of a little over one thousand dollars. Id. at 161. The state also failed to prove whether Mr. Cheung alleviated the deficiency at the bank in order to cover the check. Id. at 74, 87-88. It was also not shown why the account had insufficient funds to pay the check. Id. Following the trial, the jury found Mr. Greene guilty of Theft by Deception. Id. at 245-246. At this time, defense counsel made an oral motion to set aside the judgment on the basis that Mr. Greene never obtained property with a value of \$ 1,000.00 as required by the statute because the check was never honored. Id. at 248. The trial judge allowed defense counsel time in order to brief the issue. Id.

On June 1, 2005, the trial court heard arguments on the Motion to Set Aside Verdict. R.207. Defense counsel argued that the general rule under commercial law and

the UCC is that a check does not contain value until it has been honored. Id. at 3. The trial court questioned whether that meant that “any time you take a check then you haven’t committed a crime unless you cash it.” Id. at 5. In response, defense counsel noted that rather than absolving all criminal responsibility, when no value is obtained from the check, then the proper crime for which a defendant should be charged is an attempt crime. Id. The trial court assumed that Luceny Corporation’s account was deficient because of a simple accounting error and that they could and would have made the check good. Id. at 20. The trial court also acknowledged that the check was shown not to be worth the face value on the check, but articulated it had some intrinsic value. Id. at 10. The trial court denied Mr. Greene’s motion and ruled that the crime was complete when Mr. Greene gave the stolen property to the victim and the victim gave him a check. Id. at 23.

On September 16, 2005, the trial court sentenced Mr. Greene to an indeterminate term of not to exceed five years in the Utah State Prison, with the prison term suspended. R. 186. The trial court placed Mr. Greene on probation for 36 months and ordered a fine of \$ 950.00. R. 187. This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion when it ruled that the check had a value of \$1,080.00 when the check was dishonored due to insufficient funds. Every element of the crime charged must be proven beyond a reasonable doubt. To affirm the jury’s verdict, Utah courts must be sure the state has introduced evidence sufficient to support *all* elements of the charged crime. Utah courts will not make speculative leaps across gaps in the evidence. The state did not sufficiently prove the value of the check as required by statute in order to grade this offense as a third degree felony. Mr. Greene had rebutted the prima facie evidence that the check was worth the face value of \$ 1,080.00 by presenting it to the drawer bank to redeem payment, but payment was denied due to insufficient funds. Furthermore, Luceny Corporation was not consequently liable for any amount on the check. Thus, the defendant obtained no value for the dishonored check.

Utah courts determine value based on market place standards and, in this case, Mr. Greene had shown that when he presented his check for payment in the marketplace, the check was worthless. The state did not present any evidence, despite the face value of the check to show the actual value of the check. The trial court acknowledged that the check was not worth the face value, but ruled that it had some intrinsic value. Moreover, the trial court assumed facts not found in the record, nor proved by the state, to determine that the insufficient funds were the result of a mere accounting error and would have been corrected in order for the check to be cashed. If the law will not sustain the conviction based on the facts, the conviction must be reversed. The facts of this case do not prove that Mr. Greene obtained a check that is or exceeds \$ 1,000.00 but is less than \$ 5,000.00, but rather show that the check was worthless. The state presented insufficient evidence to show the actual value of the check, if any. Thus, the facts of this case do not support the felony conviction, but support an attempt charge. Consequently, the conviction must be reversed.

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN DETERMINING THAT THE STATE PROVED ALL THE ELEMENTS OF THIRD DEGREE FELONY THEFT BY DECEPTION BECAUSE THE CHECK FOR \$ 1,080.00 WAS DISHONORED DUE TO INSUFFICIENT FUNDS, THUS MR. GREENE DID NOT OBTAIN PROPERTY FOR \$ 1,000.00.

Mr. Greene was convicted of Theft By Deception, a third degree felony, in violation of Utah Code Ann. § 76-6-405 (2003). The theft charge was graded at a third degree felony based on “the value of the property . . . is or exceeds \$ 1,000.00 but is less than \$ 5,000.00.” Utah Code Ann. § 76-6-412(b)(i)(2003). The trial court erred when it found that the state had proved each element of the statute in order to support a third degree felony conviction. “[T]he proper interpretation of a statute is a question of law. Therefore, when reviewing an order . . . involving the interpretation of a statute, we accord

no deference to the legal conclusions of the district court but review them for correctness.” State v. Mast, 2001 UT App 402, ¶ 7, 40 P.3d 1143 (internal citations omitted). The evidence at trial was insufficient to establish that he obtained property for \$ 1,000.00 as required by the statute.

“We reverse the jury’s verdict in a criminal case when we conclude as a matter of law that the evidence was insufficient to warrant conviction.” *State v. Smith*, 927 P.2d 649, 651 (Utah Ct. App. 1996)(quoting *State v. Harman*, 767 P.2d 567, 568 (Utah Ct. App. 1989)). The defendant must overcome a heavy burden in challenging the sufficiency of the evidence for a jury verdict. *See id.*; *State v. Vessey*, 967 P.2d 960, 966 (Utah Ct. App. 1998). “We view the evidence in a light most favorable to the jury verdict,” *State v. Bradley*, 752 P.2d 874, 876 (Utah 1985), and “will reverse only if the evidence is so ‘inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.’” *Smith*, 927 P.2d at 651 (quoting *Harman*, 767 P.2d at 568)(quoting *State v. Petree*, 659 P.2d 443, 444 (Utah 1983))). However, though the burden is high, it is not impossible. *See id.* “We will not make speculative leaps across gaps in the evidence.” *Id.* (internal quotations and alterations omitted). “Every element of the crime charged must be proven beyond a reasonable doubt.” *Harman*, 767 P.2d at 568. “To affirm the jury’s verdict, we must be sure the State has introduced evidence sufficient to support all elements of the charged crime.” *Smith*, 927 P.2d at 651.

State v. Gonzalez, 2000 UT App 136, ¶ 10, 2 P.3d 954; see also State v. Holgate, 2000 UT 74, ¶ 18, 10 P.3d 346; State v. Lealeae, 1999 UT App 368, ¶ 17, 993 P.2d 232.

To succeed on a claim of insufficient evidence, the defendant “must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.” State v. Boyd, 2001 UT 30, ¶ 13, 25 P.3d 985 (quoting State v. Hopkins, 1999 UT 98, ¶ 14, 989 P.2d 1065; Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 (Utah 1991)). If the verdict “is based solely on inferences that give rise to only remote or speculative possibilities of guilt,” it is not legally valid. State v. Brown, 948 P.2d 337, 344 (Utah 1997) (quoting State v. Workman, 852 P.2d 981, 985 (Utah 1993)). Likewise, if the law will not sustain the conviction based

on the facts, the conviction must be reversed. State v. Merila, 966 P.2d 270, 272 (Utah Ct. App. 1998). With that in mind, the function of a reviewing court is to ensure “that there is sufficient competent evidence as to each element of the charge to enable a jury to find, beyond a reasonable doubt, that the defendant committed the crime.” Id. at 272 (internal emphasis omitted)(quoting State v. James, 819 P.2d 781, 784 (Utah 1981); State v. Warden, 813 P.2d 1146, 1150 (Utah 1991)).

As set forth below, in this matter the state failed to present evidence sufficient to establish that Mr. Greene obtained property in the amount of \$ 1, 000.00 in order to sustain the third-degree felony. The conviction must be reversed.

A. THE JURY FOUND THAT MR. GREENE OBTAINED A CHECK IN THE AMOUNT OF \$ 1080.00 WHICH WAS DISHONORED DUE TO INSUFFICIENT FUNDS, YET THE STATE FAILED TO ESTABLISH THAT THE VALUE OF THE DISHONORED CHECK WAS \$ 1,000.00 OR MORE.

To establish theft by deception, the state was required to prove the following:

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

Utah Code Ann. § 76-6-405 (2003). In addition, in order for the theft offense to be graded as a third degree felony, the state is required to prove that “the value of the property or services is or exceeds \$ 1,000.00 but is less than \$ 5,000.” Utah Code Ann. § 76-6-412(b)(i)(2003). While Mr. Greene was paid a check in the amount of \$ 1,080.00 in this case, it was dishonored due to insufficient funds at the bank, thus Mr. Greene did not obtain property with a value of \$ 1,000.00 or more. If the law will not sustain the conviction based on the facts, the conviction must be reversed. State v. Merila, 966 P.2d 270, 272 (Utah Ct. App. 1998).

The question of how the state is to establish value on a check *that is dishonored because of insufficient funds* is an issue of first impression to Utah courts. While the Utah Supreme Court held that the face value of a check, “whether endorsed or not, is prima

facie evidence of the value that determines the degree and penalty relevant in a theft case” in State v. Pacheco, 636 P.2d 489, 490 (Utah 1981), that case is distinguishable from Mr. Greene’s case. In Pacheco, the defendant stole two unendorsed checks with an aggregate face value of \$ 405.76. Id. The defendant was convicted of theft and appealed, arguing that because the checks were unendorsed they were worthless and thus his charge should be reduced. Id. The defendant introduced testimony from a bank employee who testified that the checks were worthless and had no “market value” unless endorsed. Id. The Utah Supreme Court held that in theft cases, value is to be determined by the “market value” of the stolen property. Id. The Court cited to a Colorado case, People v. Marques, 520 P.2d 113 (Colo. 1974) in order to support its holding:

The prima facie value of a check is its *face value*. This rule comports with the general rule that value in a theft case is market value. . .Where a check is the thing to be valued, *the willing buyer is normally the drawer bank [who] will pay the face amount of the instrument, or the drawer will make good the instrument* . . .The value of the thing lost is not limited to what the thief could realize on the instrument.

Id. (emphasis in original and emphasis added). Such a presumption operates in the law when, as in Pacheco, the defendant could not prove or show that the market value of the checks were a different value from the face value beyond mere speculation or in cases in which the defendant in fact obtained the face value amount of the check. See State v. Burnett, 712 P.2d 260, 262 (Utah 1985).

However, in this case, Mr. Greene had actually presented the check to the “willing buyer . . .normally the drawer bank,” which rather than paid the “face amount of the instrument,” dishonored the check due to insufficient funds. Id. Moreover, the drawer had issued a stop payment on the check was not obligated to make good the instrument. Mr. Greene did not steal unendorsed checks, rather he was paid for selling pipe by Luceny Corporation with a check. At the time the check was made out and delivered to Mr.

Greene, it was worthless because there were insufficient funds in the bank in order to pay the face value of the check. Thus, this case presents a different situation than the situation in Pacheco in which there is a presumption that the face value of the check is the value thereof. In this case, Mr. Greene had overcome the legal presumption that the prima facie value of the check was the face value, because Mr. Greene had indeed established that the market value of the check was worthless when he presented it to the “willing buyer” and the drawer in the market value analysis and it was dishonored due to insufficient funds. In addition, the drawer was not obligated to make the good the instrument.

While the issue of what the value of a check that is dishonored due to insufficient funds has not been resolved in Utah, other jurisdictions and commercial law support that such a check is worthless. The state must prove beyond a reasonable doubt the value of a check that has been dishonored due to insufficient funds, rather than relying on the face value of the check. For instance, in State v. Garza, 487 N.W.2d 551 (Neb. 1992)(superseded on other grounds in State v. Paul, 1996 Neb. App. LEXIS 77), the Nebraska Supreme Court held that “[a]lthough value is not an element of theft, the State must prove, by *evidence beyond a reasonable doubt*, the value of the property that is the subject of the theft charge.” *Id.* at 556 (emphasis added). Nebraska courts also use the “market value” analysis to determine value, just as Utah does in theft cases. *Id.* In Garza, the state attempted to prove value by presenting the face value of the price tags. *Id.* at 557. The Nebraska Supreme Court held that this was an insufficient means to establish value because price indicates an acceptable payment for an article of sale, while value is the price actually obtainable of the article offered for sale in the market. *Id.*

Moreover, Nebraska courts have held the standard announced in Garza to apply to value checks. In State v. Long, 516 N.W.2d 273 (Neb. Ct. App. 1994), the Nebraska Court of Appeals cited to the Utah Pacheco case favorably and held that the face value of a check operates as a presumption of the market place value of the check. *Id.* at 276. However, the court noted that the state complied with the mandates of Garza in that case

in proving that the face value of the checks was the market value because the defendant had actually presented the checks in commerce and received the face value of the checks either in goods or services, unlike the situation in our case. *Id.* at 277. In this case the state presented insufficient evidence because the face value of the check was not the market value of the check because the check had been presented to the “willing buyer” in the market, but the check was rejected and the drawer was not liable on the check. Thus, the state needed to establish value when the facts presented indicated a worthless value.

Similarly in *State v. Burks*, 455 A.2d 1148 (N.J. Super. Ct. App. Div. 1983), the defendant was convicted of theft by obtaining a \$ 3,000.00 check by deception. *Id.* at 1149. However, the defendant argued that the check was worthless because it was drawn on an account with insufficient funds to pay it. *Id.* The court acknowledged that a check that is drawn on an account with insufficient funds to pay it may not have a market value, but still constitute an appreciable loss to the victim. *Id.* at 1150. The court held that rather than accepting the face value of a check *drawn on insufficient funds* as the value in a theft case, the state must present evidence as to who is still liable on the check, the drawer, and under what circumstances that liability would occur. *Id.* In *Burks*, the defendant did gain some money from the check before the bank discovered the insufficiency, so there was a liability to the drawer in that amount. *Id.* However, in this case, Mr. Greene never obtained any funds from the check and the drawer ultimately stopped payment on the check. Thus, there is no outstanding liability on the check.

Thus, while many jurisdictions apply the same rule as Utah and hold that in theft cases the face value of the check is presumptively the market value, that presumption only operates if there is no proof that the check’s market place value is less than the face value. For instance, in *State v. Wilkes*, 688 P.2d 748 (Kan. Ct. App. 1984)(memorandum decision), the court held the presumption to operate because there was sufficient evidence that the face value was the market place value of the stolen checks because the defendant in that case actually cashed them and received value in the same amount as the face value

of the checks. Id. In State v. Harris, 708 So.2d 387 (La. 1998), the court upheld such a presumption “*in the absence of proof to show a lesser value.*” Id. at 389 (emphasis added). See also State v. Evans, 669 S.W.2d 708 (Tenn. Crim. App. 1984)(the face value of check represents the true value *in the absence of proof to show a lesser value*). Thus, while the general rule is that the face value of a check is the actual value, some cases will not fit under this rule. “[T]he value of a check is usually held to be the amount for which it is drawn, but, *if the check is worth less than the amount, its actual or market value seems to be the determinative factor.*” 50 AM. Jur. 2d Larceny § 50 (1995) (emphasis added). Mr. Greene’s case does not fit under the general rule because the check was shown in trial to be worth less than the face value of the check, thus the state should have presented evidence in order to prove the actual value of the check in the market place in the condition of being dishonored due to insufficient funds.

There is an appreciable difference between the facts of these cases that announce the general rule, such as Pacheco, and Mr. Greene’s case. First, as established *supra*, the state failed to prove at trial that the value of the check after Mr. Greene demonstrated it was worth less than the face value, thus overcoming the presumption announced in the general rule. But also, the policy behind the general rule is for factually different scenarios than Mr. Greene’s. Mr. Greene’s case is a theft by deception case. For instance, these cases deal with instances where the defendant actually stole the check from a victim who had right to payment from the check. However, in our case, Mr. Greene did not steal the check, rather the check was made out to him in payment for steel pipe that was allegedly stolen, but there was no connection to establish Mr. Greene stole the pipe. Thus, the court in Harris, articulated the policy behind the general rule as follows: “[t]he courts in these cases reason that the instruments were valued by their rightful owners in the face amount of the checks, thus establishing value.” Harris, 708 So.2d at 389. See also State v. Lee, 904 P.2d 1143 (Wash. 1995)(reversed on separate grounds)(the key in determining value is the loss to the victim rather than benefit to the defendant); State v. Evans, 669

S.W.2d 708 (Tenn. Crim. App. 1984)(general rule applies because the victim was entitled to receive the face value of the check); State v. McClellan, 73 A. 993 (Vt. 1909) (the value of a stolen check is the face value because that is what it is worth to the victim). In this case Mr. Cheung was not entitled to payment under the check because the check was not stolen, but rather issued to Mr. Greene.

The facts of this case support an attempted theft by deception charge, rather than a theft by deception charge because if the jury believed that Mr. Greene obtained or exercised control over property of another by deception and with a purpose to deprive him thereof, the facts show that Mr. Greene did not actually obtain property worth *any* value. R. 206: 74, 86, 121, 136, 161. For instance, in Wilson v. State, 939 S.W.2d 313 (Ark. Ct. App. 1997), in a case very similar to this case, where the defendant obtained payment in form of a check from the victims *that was drawn on insufficient funds*, the trial court found that these facts supported an *attempted* theft by deception. Id. at 315.

In Wilson, the defendant engaged in a scheme to get a \$ 5,000.00 from the victims whose son had criminal charges pending. Id. at 314. The defendant claimed that he was the director of an organization that helps keep juveniles out of criminal trouble and jail. Id. The defendant claimed to have worked a deal under the table with the prosecutors and judges in order to keep the victim's son out of jail, but it would cost \$ 5,000.00. Id. The victims contacted the police and set up a sting operation whereby the victims agreed to pay part of the amount, \$ 3,000.00 now and the remainder later. Id. The police were on location when the victims wrote out a check in the amount of \$ 3,000.00 to the defendant, but advised him to wait fifteen minutes in order to cash it so that proper funds could be transferred to cover the check. Id. at 315. Upon exiting the building, the police arrested the defendant with the check in his possession. Id.

The defendant argued on appeal that he did not obtain anything of value because the check was "hot." Id. The court stated that "[w]hile the appellant cites several cases for his argument that there must be value and deception, the cases cited deal with theft and

theft by deception that were *actually consummated*. The appellant in this case was convicted only of attempted theft by deception which makes only his state of mind and what he believed the facts to be the issue, not whether the check had some actual value, or whether he actually “deceived” the victims.” *Id.* Likewise, this case involves a case where the defendant was issued a check without value. The facts of this case similarly only support an attempted theft by deception. Utah law seems to support this proposition. In State v. Lakey, 659 P.2d 1061 (Utah 1983), the Utah Supreme Court held that a charge of theft by deception was not supported by a check that both parties knew to be postdated or if a party was to hold the check for some time before cashing it. *Id.* at 1062. These situations negate the deception prong of the theft by deception statute. In our case, the fact that the funds were actually insufficient to support the face value of the check negates the value needed to be obtained for the statute. As the court in Wilson acknowledged the facts of a theft by deception case must both support value and deception. In Lakey, the deception element was not met, in this case, the value element was not proved by the state.

In Burks, when the court was analyzing how to determine the value of a check in theft cases, the court noted that “[m]ethods for establishing value in civil cases are to be considered in determining the amount involved in theft.” Burks, 455 A.2d at 1151 (citation omitted). Thus, the court stated it was appropriate to look to certain provisions of the UCC and commercial law. *Id.* The long-standing general rule is that a debtor’s giving a check for an obligation is “merely conditional payment” for the obligation and is not treated as cash or its equivalent. 60 Am. Jur. 2d Payment § 39. See also Vonk v. Dunn, 775 P.2d 1088, 1091 (Ariz. 1989)(A check constitutes only conditional payment of the underlying obligation unless the parties agree otherwise.); Cornwell v. Bank of America, 274 Cal. Rptr. 322, 325 (Cal. Ct. App. 1990) ([S]ince a check of itself is not payment until cashed the party attempting to prove payment by mere delivery or acceptance must go further and in addition prove that such delivery and acceptance was in accordance with an agreement that it was to be accepted as payment.); Scalise v. American Employers Ins.

Co., 789 A.2d 1066, 1070 (Conn. App. Ct. 2002) (The giving of a draft by a debtor to his creditor does not discharge the debt itself until the draft is paid, it being a means adopted to enable the creditor to obtain payment of the debt and remaining, until honored or paid, *but evidence of the indebtedness. . .*").

This proposition can be reconciled with the criminal general rule that a presumption exists in theft cases that the face value of a check is the value unless proven otherwise in theft cases. While there is a policy argument that the presumption should not apply in theft by deception cases where the defendant is issued a check, rather than steals a check issued to another, even if this Court holds that presumption to apply, the propositions of the commercial law should take effect once a defendant has shown the check to be worthless, for instance, in this case where the check was dishonored due to insufficient funds, the commercial law should operate to determine value. Accord State v. Burks, 455 A.2d 1148 (N.J. Super. Ct. App. Div. 1983). Thus, the state should show value by determining the liability to the drawer. Examining commercial law is necessary to engage in this analysis. See id. Utah Code Ann. § 70A-3-104(6)(2003), defines a check as a “draft. . . payable on demand and drawn on a bank.” Thus a check is a negotiable instrument which means “an unconditional promise or order to pay a fixed amount of money with or without interest or other charges described in the promise or order.” Id. at § 1. Thus a check is a promise to pay on demand without interest and for a fixed sum. Further, Utah Code Ann. § 70A-3-310(2)(a)(2003) provides that “in the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in the discharge of the obligation to the extent of the amount of the check.”

In Utah, the Supreme Court held that if a check is accepted with knowledge that funds would not be available until a later date, the check is not treated as a usual check, but as a promise to pay in the future. State v. Trogstad, 100 P.2d 564 (Utah 1940). In this case, the check for \$ 1,080.00 was a promise to pay on demand for a fixed amount of

money. However, the check was not honored because of insufficient funds and under the rules of commercial law minimal to no liability arose to Luceny Corporation to make the instrument good because no value was ever paid or received. Hence, the defendant did not receive property that exceeded the value of one thousand dollars, nor did the victim lose property valued at one thousand dollars.

Moreover, the case law from other jurisdictions with similar statutory framework illuminates the value of a check in everyday commerce and as treated by the UCC. A check is not the equivalent of a cash transaction which immediately transfers value. Instead, “the standard commercial practice” is that a “check transfers no rights until it is honored.” In re Bristol, 1989 U.S. Dist. LEXIS 17038 (D. Conn. 1989).

In everyday commerce and under the Uniform Commercial Code, an ordinary check does not create an interest in the possessor until it is honored. Until a check has been honored, several events can prevent the payee from ever receiving his money. The drawer may stop payment on the check [as eventually occurred in this case], there may be insufficient funds in the account to cover it [as occurred in this case], or the account may be garnished. In any of these cases the check creates no new rights in the payee which he would not have without the check; it is merely an order to pay a sum to a designated person [or a promise to pay as indicated in the Utah statute].

Id. at **6-7. See also Klein v. Tabatchnick, 610 F.2d 1043, 1049 (2d. Cir. 1979) (a check is merely a request to the drawee bank and did not operate as an assignment of funds). It is standard commercial practice that a “check or other draft does not of itself operate as an assignment of funds in the hands of the drawee which are available for its payment, and the drawee is not liable on the instrument until the drawee accepts it.” 12 Am. Jur. 2d Bills and Notes § 445. The defendant in this case was paid with a check which merely signified an outstanding debt until it was cashed because “the tender of a mere check does not constitute payment of cash or its equivalent and it thus makes such a tender of payment merely conditional.” Enriquillo Export & Imports, Inc. v. M.B.R. Industries,

Inc., 733 So. 2d 1124, 1126 (Fla. Dist. Ct. App. 1999).

In fact,”[t]here is a presumption that a check is only conditional payment; thus the underlying debt remains until such time as the check is paid.” Goblirsch v. Heikes, 547 N.W.2d 89, 93 (Minn. Ct. App. 1996). Only “[u]pon payment of the check, [is] the debt is considered to have been paid when the check was given. Thus, payment by check merely suspends the underlying contract obligation until the holder of the check has received payment for the goods that were sold.” Id. See Kelley v. R S & H of North Carolina, Inc., 398 S.E.2d 213, 239 (Ga. Ct. App. 1990) (“Bank checks and promissory notes are not payment for a debt incurred until themselves paid, absent some express agreement or compelling circumstances which clearly indicates a contrary intention of the parties.”).

This is how a majority of jurisdictions treat payment by check and Utah’s statutory framework supports such an interpretation:

With the exception of a few jurisdictions the authorities are unanimous in supporting the rule that the giving of a bank check by a debtor for the amount of his indebtedness to the payee is not, in the absence of an express or implied agreement to that effect, a payment or discharge of the debt, the presumption being that the check is accepted on condition that it shall be paid; and the debt is not discharged until the check is paid, or the check is accepted at the bank at which it is made payable. This has often been held true even where the person entitled to receive the money expresses a preference for its payment by check, but does not agree to assume the risk of its being honored.

Wriggelsworth v. Lott, 11 N.W.2d 843, 844 (Mich. 1943). Likewise, in this case the defendant was paid with a check that wasn’t honored at the bank and thus he never received the value of the check. Thus, the presumption in theft cases that the face value of the check is the value was negated. In order to determine the actual value of the check, the state must look to commercial law to establish the value of any liability left on the check and to whom that liability extends. Accord State v. Burks, 455 A.2d 1148, 1151 (N.J. Super. Ct. App. Div. 1983)(in order to show value on a check drawn on insufficient funds the state should show who could be liable on the instrument and under what

circumstances that liability would occur.).

B. THE MARSHALED FACTS ONLY SUPPORT THAT MR. GREENE ATTEMPTED TO OBTAIN PROPERTY IN THE AMOUNT OF \$ 1,000.00 OR OVER

At the close of the state's case and the announcement of verdict, the defense made a motion to set aside the verdict on the grounds that the state failed to establish that Mr. Greene obtained property in the value of \$ 1,000.00 or more. R. 206:248. According to the evidence, Mr. Greene sold about 30 pieces of steel pipe to Luceny Corporation on the morning of March 22, 2004. Id. at 60-65. Luceny Corporations issued a check in the amount of \$ 1,080.00 to Mr. Greene in exchange for the pipe. Id. at 60-65. That same morning, Sanford Osborn arrived at his employment at Water and Power Technologies and noticed that two bundles, about 35 to 45 pieces, of three inch schedule forty pipe was missing from a storing area in the parking lot. Id. at 17-19. Mr. Osborn contacted the police and notified them that his company's pipe was missing. Id. at 19-20. Upon making phone calls to local scrap yards, Mr. Osborn found out that Luceny Corporation had just purchased three inch schedule forty pipe. Id. Mr Osborn responded to Luceny Corporations and identified the pipe as belonging to his company from its condition and notified the police. Id. at 51.

Meanwhile, Mr. Greene attempted to cash the check he was issued from Luceny Corporation at the drawer bank, but it was dishonored due to insufficient funds. Id. at 74, 86, 121, 136. Thus, Mr. Greene contacted Luceny about the check and Mr. Cheung advised Mr. Greene of the report of stolen pipe. Id. Luceny Corporation later placed a stop payment on the check issued to Mr. Greene. Id. at 87. Mr. Greene was never able to cash the check or enforce any financial obligation with Luceny Corporation. Id. at 161. Luceny Corporation did not pay any value on the check. Id. at 161.

The marshaling standard requires the defense to identify the evidence to support that Mr. Greene received property in the value of \$ 1,000.00 or more. See West Valley

City v. Majestic Inv.Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991). Here, Mr. Greene received a check with a face value of \$ 1,080.00 but proved that once he presented it to the willing buyer in the market place analysis, the value of the check was worthless.

The fatal flaw in this case is that the evidence fails to support the presumption that the check was worth the face value and fails to establish any actual or market value of the check. This is not a case where a defendant stole a check that belonged to someone else and thus could not cash it because it was unendorsed. This is a case where Mr. Greene was issued a check for payment and at the time the check was issued it was valueless because the account it was drawn on had insufficient funds in order to pay the check. The evidence does not support that Luceny Corporation could have made the check good or would have made the check good. R. 206. There is no evidence as to why the account was insufficient of funds, whether attributable to a simple accounting error or mere deficiency. Id. For instance, the state questioned Mr. Cheung about the value of the check at trial:

State: Was there a problem with the check you had given him [Mr. Greene]?

Mr. Cheung: Yes. For some reason we don't have enough money in the bank so he won't be able to cash the check.

State: Okay. Now, did you purposely give him a check that didn't have - -

Mr. Cheung: No.

State: - - sufficient funds.

Mr. Cheung: No.

State: Or was it just an oversight?

Mr. Cheung: I don't know. For some reason we just don't have enough money, yeah.

Id. at 74. Later defense counsel questioned Mr. Cheung about the value of the dishonored check again:

Defense: Did you - - when you were made aware of the fact that your check had bounced, did you correct the situation that same day? In other words, if he

had tried to cash the check later that day would it have cleared?

Mr. Cheung: What do you mean correct the situation?

Defense: At the bank. Did you make a deposit to cover the check that day?

Mr. Cheung: I just told my partner to - - the situation and she's the one who take care of accounting, the accounting stuff. So I don't know what she did.

Defense: And when did you speak with her; what time was that, do you remember?

Mr. Cheung: I think it's right after the incident has happened.

Defense: Okay. So you made your partner who does the books, you made her aware of the situation at the bank that morning?

Mr. Cheung: Yeah.

Defense: And she may or may not have corrected it or covered it?

Mr. Cheung: I think one thing for sure is she did inform the bank to, "Just void that check," you know, "Just cancel the check, void it."

Defense: Okay. Do you know if she did it that day or you don't know?

Mr. Cheung: I don't know.

Id. at 86-87.

However, when the trial court denied the defense motion to set aside the verdict, he assumed facts not established in the record and in direct contravention of the record. For instance the trial court states to defense counsel at the motion hearing:

You don't understand the question. The only reason that this check didn't get paid is because there had been an accounting error in the victim's accounting. That's the only evidence we have. That's the only evidence we have and but for the fact that they found out right away that your client sold them stolen property, there's no reasons to suspect that they wouldn't have paid the check, made it good. That day.

R.207:20. Despite the trial court's exclamation of "evidence" received that the deficiency was merely an accounting error and that the check would have been made good later that day, the record at most establishes that the co-owner of Luceny Corporation, Mr. Cheung,

who was authorized to issue checks in order to pay for items people brought to his company did not know why there was a deficiency in the company account and did not know whether they did or could remedy the deficiency. R. 206. 74, 86-87. The trial court assumed that the state proved or issued evidence that it in fact made no attempt to establish.

Moreover, the trial court finds that the defendant had overcome the presumption that the check was worth the face value, and that there was no evidence presented by the state of actual value, but still allowed the verdict to stand:

Trial Court: The reason they have didn't guilty of a second degree felony is because the State didn't prove value.

Defense: That's correct.

Trial Court: But here you're saying that there is no value to a check that openly doesn't cash. And I'm not - - I just - - I don't buy that.

Defense: All we can point to, there certainly hasn't been anything pointed on the contrary in the State's brief, There are the civil cases in the UCC that say a check is not cash and has no value until it's been honored.

Trial Court: Well, but has some intrinsic value, otherwise, nobody would ever take a check. It's a promise to pay . . .

R.207:8. Later the trial court and the defense continued this line of thought:

Defense: But it doesn't change the fact that the victim lost nothing.

Trial Court: Only because it didn't cash.

Defense: Because the victim didn't have any money in the bank. The check itself was worthless.

Trial Court: Yeah. I understand.


Id. at 10. The trial court had difficulty accepting that the check was worthless even though he admitted it was not worth the face value of the check. It is the state's burden, rather than the defense's to prove the value of the stolen property. The trial court

acknowledges that the state did not put on any evidence to establish the actual value, yet allowed the verdict to stand because it believed the check to have some unknown “intrinsic value.” The case supports only attempted theft by deception. R. 207:5,7. The facts of this case demonstrate how that misdemeanor provision applies. Mr. Greene respectfully requests that this Court reverse the felony conviction and remand the case to the trial court with orders to enter the conviction as a misdemeanor attempt.

CONCLUSION

Defendant/Appellant William Thomas Greene respectfully requests that this Court reverse this case and remand to the trial court to enter a misdemeanor attempt.

SUBMITTED this 9th day of December, 2005.



JOSIE E. BRUMFIELD
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOSIE E. BRUMFIELD, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 9th day of December, 2005.


JOSIE E. BRUMFIELD

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of December, 2005.

ADDENDA

ADDENDUM A

JDH

miniclose

RECEIVED

SEP 19 2005

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
	:	
vs.	:	Case No: 041902689 FS
	:	
WILLIAM THOMAS GREENE,	:	Judge: TIMOTHY R. HANSON
Defendant..	:	Date: September 16, 2005

PRESENT

Clerk: kathrygw

Prosecutor: CASSELL, PATRICIA S

Defendant

Defendant's Attorney(s): MISNER, MICHAEL D

DEFENDANT INFORMATION

Date of birth: October 6, 1953

Video

Tape Number: 9/16/05 Tape Count: 12:44/12:57

CHARGES

2. THEFT BY DECEPTION - 3rd Degree Felony

Plea: Guilty - Disposition: 04/06/2005 Guilty

SENTENCE PRISON

Based on the defendant's conviction of THEFT BY DECEPTION a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison. The prison term is suspended.

Case No: 041902689
Date: Sep 16, 2005

SENTENCE FINE

Charge # 2 Fine: \$5000.00
 Suspended: \$4500.00
 Surcharge: \$450.00
 Due: \$950.00

 Total Fine: \$5000.00
 Total Suspended: \$4500.00
 Total Surcharge: \$450.00
Total Principal Due: \$950.00
 Plus Interest

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant is to pay a fine of 950.00 where the surcharge has been
added to the fine. Interest may increase the final amount due.

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult
Probation & Parole.

Violate no laws.

Enter, participate in, and complete any program, counseling, or
treatment as directed by the Department of Adult Probation and
Parole.

The defendant to enter into and complete the Cognitive
Restructuring classes approved by the Court or Probation Officer.

Star
fail
Serve 180 days in jail with credit for 83 days served, commitment
forthwith.

Pay recoupment of \$600 during probation period.

Report to APP within 48 hours of release from jail.

Community service may be served in lieu of fine as determined by
APP.

Case No: 041902689
Date: Sep 16, 2005

No restitution is ordered at this time. The district attorney's office may submit a request for restitution within 45 days if appropriate. Defense counsel will have 10 days to file objection. Copy to counsel/APP

Dated this 14 day of Sept, 2005



TIMOTHY R. HANSON
District Court Judge

ADDENDUM B

Utah Code Ann. § 76-6-405 (2005)

§ 76-6-405. Theft by deception

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

(2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

HISTORY: C. 1953, 76-6-405, enacted by L. 1973, ch. 196, § 76-6-405.