

2005

Utah v. William Thomas Greene : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF THEFT BY DECEPTION, A
THIRD DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT,
SALT LAKE COUNTY, THE HONORABLE TIMOTHY R. HANSON
PRESIDING

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ORAL ARGUMENT REQUESTED

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IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a conviction of theft by deception, a third degree felony in violation of Utah Code Ann. § 76-6-405, in the Third Judicial District, Salt Lake County, the Honorable Timothy R. Hanson presiding.¹ This Court has jurisdiction over the appeal under Utah Code Ann. § 78-2a-3(2)(e).

ISSUE ON APPEAL AND STANDARD OF REVIEW

Defendant sold stolen pipe to a salvage yard, received a company check for \$1080, traveled directly to the bank, and presented the check for payment. Although the account initially contained insufficient funds to cover the check, defendant ascertained later that same day that the check would clear. Defendant, who had been informed of the criminal accusations, did not again present the check, and the company stopped payment the following day. **Was the evidence, viewed in a light most favorable to the jury**

¹ Unless otherwise stated, all citations to the Utah Code are to the West 2004 publication.

verdict, sufficient to support a finding that defendant obtained or exercised control over property having a value of \$1000 or more?

Standard of review. An appellate court “review[s] the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury.” *State v. Shumway*, 2002 UT 124, ¶ 15, 63 P.3d 94. The court “will reverse a jury conviction for insufficient evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.” *Id.* (citation omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant statutes are reproduced in the **Addendum**:

Utah Code Ann. § 70A-3-302;
Utah Code Ann. § 70A-3-414;
Utah Code Ann. § 76-6-101;
Utah Code Ann. § 76-6-405;
Utah Code Ann. § 76-6-408; and
Utah Code Ann. § 76-6-412.

STATEMENT OF THE CASE

Outline of proceedings

Defendant was charged by information with theft by receiving stolen property having a value of \$5000 or more, a second degree felony in violation of Utah Code Ann. § 76-6-408, and theft by deception of property having a value of \$1000 or more, a third degree felony in violation of Utah Code Ann. § 76-6-405. R2-3; *see also* Utah Code

Ann. § 76-6-412 (theft—classification of offenses). Defendant waived his right to a preliminary hearing, and the court bound him over. R42.

The court conducted a jury trial. R71-72, 133-34. Defendant moved for a directed verdict. The court denied the motion. R133. The jury found defendant guilty of theft by deception. R134. The jury returned a not guilty verdict on the theft-by-receiving count.

Id.

Defendant moved to set aside the theft-by-deception verdict, arguing that the evidence was insufficient to support a finding that defendant obtained or exercised control over property with a value of \$1000 or more. R136, 207. The court denied that motion, concluding “that based on the evidence reasonable jurors could have found that the check given to defendant was property with a value exceeding one thousand dollars.” R168, 183.

The court sentenced defendant to an indeterminate prison term not to exceed five years. R186. The court suspended the prison term, placed defendant on probation for three years, ordered that he serve 180 days in jail, and gave him credit for 83 days already served. R186-87.

Defendant timely appealed. R189.

Jury instructions regarding value

The court gave the jury two instructions regarding value. Instruction 23 provided:

You are instructed that value is measured by the value of the property obtained or over which control has been exercised as a result of the deception, rather than the value of any property received by a victim.

Subsequent restoration, restitution or repayment is not a defense to the crime of theft by deception and neither is the fact that a victim received some value for his money.

R123; 206:188-89. Instruction 24 provided:

When the value of property must be determined, the measure of the value is its fair market value at the time and place of the theft.

Market value is the price a well informed buyer would pay to a well informed seller where neither is under compulsion to enter into the transaction.

The owner of an article of property is a competent witness as to its value and any such expression of opinion may be considered by you in determining value.

R124, 206:189.

Prior to giving the instructions, the court asked counsel whether they had any objections. R206:170. Defendant affirmatively approved these instructions. *See* R206:170-72.

***Proceedings on motion for directed verdict
and motion to set aside the verdict***

After the State rested, defense counsel moved for a directed verdict, but agreed to reserve argument on the motion. R206:101, 169. After all testimony had been received, the court returned to the reserved motion. R206:169. Defense counsel argued that the evidence was insufficient to support a guilty verdict on either count, claiming that no testimony had been given regarding the location of the theft. R206:169-70. The trial court denied defendant's motion. R206:170. The record indicates that defense counsel did not request any lesser included offense instructions and did not argue that the judge had improperly applied the statute to the facts at bar. R206:170-72.

Closing arguments followed. During closing remarks, defense counsel expressly pointed out to the jury that “the statute doesn’t say attempted to obtain money, attempted to obtain property or something of value over \$1,000, it says obtained. He got nothing.” R206:213. He also vouched for the validity of the jury instructions, stating that “[i]f it’s not in those instructions [it is] not the law.” R206:205.

The jury acquitted defendant of receiving stolen property having a value of \$5000 or more, but found him guilty of theft by deception of property having a value of \$1000 or more. R131-32, 206:245-46. Defense counsel moved to set aside the guilty verdict, arguing that “in every day commerce and under the UCC a check . . . has no value until it has been honored.” R206:248, 207:3. He conceded that an actor might have committed *attempted* theft by having used deception to obtain a check, but claimed that it was “factually impossible” for him to have committed theft by deception until he had cashed the check and thereby obtained money. R207:5-6. In other words, counsel claimed that the State had not met its burden to produce evidence that defendant had obtained property having a value of \$1000 or more. “[I]t was factually impossible for [defendant] to get the \$1,040 because the check did not [clear].” R207:5-6.

Counsel further observed that he had made a strategic decision not to ask for a lesser included offense instruction:

Everybody knew going into this case that the evidence that was going to come out, if the jury believed everything else, was that [defendant] got a check for \$1,040, and that that check was not honored. Everybody knew that going into the case. We discussed it. We said, That sounds like attempted theft by deception. Should we offer a lesser included? The strategic decision was made: We’re going to trial on what they’re [sic] charged. We’re not going to give the jury a lesser included. If they want to

do that they can. They specifically made that choice not to offer that. They went all or nothing, . . . they went all or nothing with the second degree based on the value.

R207:7.

The Court denied the motion, observing “when you’re given the check it has value, it’s a bearer document and its payable on demand.” R207:9. The Court later issued Findings of Fact and Conclusions of Law, finding that the funds were temporarily insufficient due to an accounting error. R180-85.

STATEMENT OF THE FACTS

Defendant “just bought it from a guy”

On Monday morning, March 22, 2004, Billy Cheung (“Cheung”), who operated a local scrap-yard (“Lucency”), arrived at work to open the business at approximately 9:00 a.m. R206:63. Upon arrival, he found defendant waiting outside his office. *Id.*

Defendant, who was accompanied by a male and a female, had a load of stainless steel pipe he wanted to sell. R206:64-66. Cheung asked him “where it came from,” and defendant said “he just bought it from a guy.” R206:68. Cheung, defendant, the male, and the female unloaded the pipe. R206:65-66. Cheung “cut [defendant] a check” for “over a thousand dollars” to pay for the pipe. R206:69.

Defendant took the check to the bank to cash it, but was told the account had insufficient funds. R206:142. He called Cheung, who told him to come back to the yard. *Id.* Cheung testified that he did not knowingly make the check against insufficient funds. R206:74. Rather, he was surprised to learn that “for some reason” the funds were

insufficient. *Id.* Cheung said he would issue a new smaller check and give defendant cash to cover the difference. *Id.* Defendant returned directly to the salvage yard. *Id.*

Meanwhile, Sanford Osborn (“Osborn”) of Water and Power Technologies, discovered that his workplace had been ransacked over the weekend. R206:14-16. Upon inspection, he determined that all of the three-inch stainless steel piping on site had been stolen. R206:18. After contacting the police, Osborn called Cheung at Lucency to inform him of the theft and warn him that the thief might try to sell the pipes for scrap. R206:20, 23-24. Cheung informed Osborn that a customer, Tom Greene (defendant), had sold him scrap metal of that description earlier that morning. R206:24-27. In exchange for the pipe, Cheung had tendered a check for just over \$1,000. R206:69, 120, 136.

Defendant then arrived at the yard, apparently to exchange the dishonored check for a smaller check and the difference in cash. R206:142. Cheung told defendant about Osborn’s telephone call and said that Osborn was coming to look at the pipes defendant had sold that morning. R206:72, 142. Defendant left because he “had a lot happening that day,” but agreed to return to Lucency to explain to Osborn and the police where he had gotten the pipes. R206:43, 72, 142.

Defendant did not exchange the dishonored check for a smaller check and cash. R206:144. Neither did he did not return that morning. *Id.* Later that day, however, defendant did call the bank and ascertain that the dishonored check would clear. R206:136-37, 146. Because Cheung had informed him of Osborn’s allegations, defendant did not cash the check. R206:136-37, 146.

Cheung informed his partner, who managed Lucency's financial matters, of the problem with the stolen property. R206:86. He testified that "one thing for sure is she did inform the bank to, 'Just void that check,' you know, 'Just cancel the check, void it.'" R206:87. Defendant subsequently discovered that Lucency had stopped payment on the check "on the second day." R206:137.

Three days after the initial incident, defendant finally returned to Lucency. R206:44-45, 73, 75, 144. At that time, he presented Cheung a hand-written receipt for the pipes. R206:75. Cheung wrote down defendant's license plate number and reported it to the police. R206:75-79.

SUMMARY OF ARGUMENT

The evidence sufficed to support a jury finding beyond a reasonable doubt that defendant obtained or exercised control over property of another by deception and that the value of that property was \$1000 or more. In exchange for stolen pipe, defendant received a check having a face value of \$1080. All parties believed, at the time of the exchange, that the check was good, having a market value equivalent to its face value. Defendant's own conduct, in receiving the check for the pipe, evidenced his belief that the check had a value equivalent to its face value. The check maker testified that he did not purposefully make the check against insufficient funds. While the check did not clear when defendant initially presented it, the maker immediately acted to make it good. The maker first offered to exchange the check for a smaller one and the difference in cash. Moreover, the maker almost immediately either cleared up any problem at the bank or deposited funds to cover the check, as defendant himself ascertained later that day that

the check would clear. Based on all of these circumstances, the jury could properly have determined that the value of the check, at the time defendant obtained or exercised control over it by deception, was \$1000 or more.

ARGUMENT

VIEWED IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, THE EVIDENCE WAS SUFFICIENT TO SUPPORT A JURY FINDING BEYOND A REASONABLE DOUBT THAT DEFENDANT OBTAINED OR EXERCISED CONTROL OVER PROPERTY HAVING A VALUE OF \$1000 OR MORE

Defendant claims “the State failed to establish that the value of the dishonored check was \$1,000.00 or more.” Br. Aplt. at 7 (capitalization and underlining omitted). Defendant claims that he “did not actually obtain property worth *any* value.” *Id.* at 12. Defendant’s claim is inconsistent with Utah law.

A. This Court may affirm, without more, on the basis that defendant has failed to marshal the evidence supporting the verdict.

A defendant challenging the sufficiency of the evidence “must marshal all of the evidence in support of the [verdict] and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the [verdict] against attack.” *State v. Larsen*, 2000 UT App 106, ¶ 11, 999 P.2d 1252 (internal quotation marks and citation omitted). A “[d]efendant’s failure to marshal the evidence and demonstrate that the [verdict was] clearly erroneous in light of the evidence allows [this Court] to affirm the [verdict] on that basis alone.” *State v. Widdison*, 2001 UT 60, ¶ 61, 28 P.3d 1278.

Defendant has not marshaled the evidence in support of the verdict. He does not marshal or even acknowledge his own testimony that when Cheung learned that the check was dishonored, Cheung offered to immediately substitute a smaller check and the difference in cash. R206:142. More significantly, defendant does not acknowledge or marshal his own testimony that the check, which the bank refused to cash immediately following the offense, would have cleared later that day. R206:136; *see also* R206:146 (“If I had wanted to I could have cashed the check later that day, you know.”). Rather than marshaling all the evidence, defendant marshals only the evidence that supports his claim. On that basis alone, this Court should affirm. *See Widdison*, 2001 UT 60, ¶ 61; *see also State v. Decorso*, 1999 UT 57, ¶ 41, 993 P.2d 837 (rejecting defendant’s challenge on appeal because he had “argued selected portions of the evidence which he believe[d] support[ed] his own position” instead of marshaling the evidence supporting the trier-of-fact’s finding).

B. The value of stolen property is the market value at the time of the offense, a question of fact to be determined by the jury. Where the stolen property is a check, the measure to be employed by the jury in ascertaining the value is the amount the true owner would expect the check to bring and the amount a willing buyer would expect to pay for the check.

The appropriate test for determining the value of stolen property, unless otherwise provided by statute, is “the market-value test.” *State v. Logan*, 563 P.2d 811, 813 (Utah 1977).² The “measure of the value is [the property’s] fair market value at the time and

² *Logan*, decided in 1977, observed that “there [wa]s no existing statute as to the value of stolen property which [wa]s not ultimately destroyed. . . . [and therefore] look[ed] to the common law and existing case law to determine the proper test of value.”

place where the alleged crime was committed.” *Id.* (citation omitted). It is “a measure of what the owner could expect to receive, and the amount a willing buyer would pay to the true owner for the stolen item.” *Id.* (citations omitted).

Applying this test, the Utah Supreme Court has 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.” *State v. Pacheco*, 636 P.2d 489, 490 (Utah 1981) (per curiam). The value “is not limited to what the thief could realize on the instrument.” *Id.* at 491 (quoting *People v. Marques*, 520 P.2d 113 (Colo. 1974)). Thus, a jury may properly find that a stolen check has a market value equivalent to its face value, even though the check may be “worthless” to a defendant because it has not been endorsed. *Id.*

Here, the true owner of the check was Lucency. The evidence sufficed to show that at the time the crime was committed, Cheung, acting for Lucency, could have expected that a willing buyer, the drawee bank, would pay and that defendant would receive \$1080 for it. The face value of the check was \$1080.³ Moreover, Cheung

563 P.2d at 813. The current criminal code also defines the value of “property, if totally destroyed,” but does not address the value of other stolen property. *See* Utah Code Ann. § 76-6-101(4).

³ All parties agreed the check was for something more than \$1000. R206:71 (Cheung stating that the check was for “just over a thousand dollars”), 136 (defendant testifying that Lucency’s check was for “just barely a little over eleven hundred bucks”). In his motion to set aside the verdict, defendant alludes to a face value of \$1040. R207:6-7. In its findings of fact on that motion, the court found that the check to be payable in the amount of \$1080. R181. For convenience, the State uses the \$1080 figure when referring to the face value of the check.

believed the account to have sufficient funds to cover the check. R206:74; *see also* R180-85.

Thus, under Utah law, the evidence sufficed to support a jury finding that the check's face value was its fair market value at the time and place of the theft.

C. A check obtained by deception is not worthless merely because it is drawn on an account with insufficient funds to pay it. Evidence that a check has been drawn against an account having insufficient funds does not, of itself, preclude a jury finding that the face value of the check is its market value.

Defendant claims that he “established that the market value of the check was worthless when he presented [the check] . . . and it was dishonored due to insufficient funds.” Br. Aplt. at 9. Again, defendant's claim is inconsistent with Utah law.

The drawer of a check is liable for the amount of the check regardless of whether there are sufficient funds in the account to pay for it. Utah Code Ann. § 70A-3-414. A drawer is liable to a bank or to any other person or entity to whom a check has been negotiated, who takes the instrument for value and in good faith. *See id.*; *see also* Utah Code Ann. § 70A-3-302 (“holder in due course”). “If someone could be liable, the jury is free to find that the amount involved in the theft is the face amount of the instrument.” *State v. Burks*, 455 A.2d 1148, 1151 (N.J. Super. 1983) (reversing conviction because judge, not jury, determined the value of check obtained by deception). Further, as noted by one court, “[i]n the overwhelming majority of ordinary commercial transactions, the drawee bank will pay the face amount of the instrument, or the drawer will make good the instrument.” *State v. Evans*, 669 S.W.2d 708, 711-12 (Tenn. Crim. App. 1984). Thus, the insufficiency of funds to cover a check does not, as a matter of law, foreclose a

jury's finding that the check has a market value equivalent to its face value. *See, e.g., Forrest v. State*, 721 A.2d 1271, 1280 (Del. 1999); *Burks*, 455 A.2d at 1151.

In fact, when addressing the question of how to value a stolen check or a check obtained by deception, “many jurisdictions apparently find the issue of sufficiency of funds irrelevant.” *Forrest*, 721 at 1280 (citations omitted) (holding that the fact that a transfer of funds from the drawer's savings account to his checking account would have been required to cover the check did not make the check worthless); *cf. State v. Harris*, 708 So.2d 387, 390 n.4 (La. 1998) (stating “it seems nonsensical to mete out punishment for the exact same conduct based on a factor totally extraneous to defendant's behavior”); *State v. Long*, 516 N.W.2d 273, 276 (Neb. App. 1994) (stating that “the face amount of a stolen check received in commerce, whether or not endorsed, is sufficient proof of its value, without regard to the sufficiency of funds”).

In any event, even if relevant, the sufficiency of funds in the account at the time a check is stolen or obtained by deception is only one of a number of factors to be considered in valuing the check. The objective of the theft statutes and their classification provisions “is to have the trier of fact make a knowing appraisal of the seriousness of the theft measured by the amount involved at the time of the theft and expressed in terms of the appropriate grading range.” *Burks*, 455 A.2d at 1151. Accordingly, a jury may reasonably consider all factors that bear on the value of the check. For instance, in addition to the face value of the check and the sufficiency of funds to cover the check at the time it was made, the jury may consider whether the check was exchanged for goods of equivalent value, whether the drawer intentionally or

inadvertently made the check against insufficient funds, and whether the drawer was likely to make good on the check.⁴ *See Evans*, 669 S.W.2d at 712; *Simmons v. State*, 109 S.W.3d 469, 478 (Tex. Crim. App. 2003).

D. The evidence sufficed to support a jury finding that defendant obtained or exercised control over property having a value of \$1000 or more.

Here, the evidence was sufficient to support a jury finding that the check had a value of \$1000 or more at the time the offense was committed. The face value of the check was \$1080. *See* Point B, footnote 3, above. All parties understood at the time defendant acquired the check, that its value was \$1080. *See id.* Although it was discovered that funds in the account were at one point insufficient to cover the check, no testimony established that the account actually had insufficient funds when defendant obtained the check.⁵ R206:74; *see* R207:21. In any event, the evidence showed that the

⁴ Defendant's reliance on *State v. Lakey*, 659 P.2d 1061 (Utah 1983), and *State v. Trogstad*, 100 P.2d 564 (Utah 1940), is misplaced. *Lakey* addressed a theft by deception conviction based on a defendant's having given a personal check to a seller of goods with the request that he not cash it on that day so that the defendant would have time to make a deposit. 659 P.2d at 1062. The deposit was not made because the expected income was not received, the check bounced, and the defendant was prosecuted for theft by deception. *Id.* The issue in this case was not the value of the check, but the question of deception. *Id.* The court ruled, "Commercial misfortune is not a crime, and there is no theft by deception without deception." *Id.* at 1064. In *Trogstad*, the court reversed a conviction for uttering a check with an intent to defraud. The court held that the receiver of a check received it not in payment, but "as evidence of a loan," knowing that the account had no funds. Again, the issue was not the value of the check, but a question of whether the defendant had an "intent to defraud." 100 P.2d at 566.

⁵ The trial judge accurately observed that no testimony established that the account actually had insufficient funds when defendant obtained the check. R207:21. As the judge noted, "Maybe some other checks didn't go through until the last—until just a few seconds before [defendant] walked through [the door to present the \$1080 check], we don't know that. That check may have been good at the time it was written." R207:21.

shortfall was both temporary and inadvertent. R206: 136-37. Lucency was and remained liable to cover it. *See* Utah Code Ann. § 70A-3-414. Moreover, the evidence showed not only that Lucency would likely make good on the check, but that Lucency, upon notification of the deficiency, immediately undertook to make good. Defendant himself testified that Lucency immediately moved to make good on the check—first offering to exchange the dishonored check for a smaller check and the difference in cash and then depositing later that same day funds sufficient to cover the dishonored check.

R206:136,142, 146.

Further, defendant's own conduct constituted evidence of the value of the checks. The evidence presented showed that defendant willingly accepted the check in exchange for the stolen pipe. R206:131, 136. "By accepting [Lucency's check]" in exchange for the piping, defendant's "unspoken message was that [the check] had the equivalent value of cash in payment" for the pipes. *Simmons*, 109 S.W.3d at 478.

Thus, even assuming that defendant's evidence that the account contained insufficient funds might rebut a presumption that the market value of the check was the face value, additional evidence rebutted the rebuttal. Based on all the evidence presented, the jury was free to find that the value of the check was \$1080. Viewing the evidence and all inferences that could reasonably have been drawn from it in a light most favorable to the verdict, the evidence was not so "inconclusive or inherently improbable that

reasonable minds must have entertained a reasonable doubt” about the check’s having a value of \$1000 or more.⁶ *Shumway*, 2002 UT 124, ¶ 15.

E. A check obtained by deception is not worthless merely because the drawer stops payment.

Defendant also suggests that the check was worthless because “the drawer had issued a stop payment on the check [and] was not obligated to make good the instrument.” Br. Aplt. at 8. Defendant cannot succeed on this claim.

As explained above, the value of property taken for purposes of the theft statutes is the market value *at the time of the offense*. *Logan*, 563 P.2d at 813. The victim’s attempt to mitigate his losses by later stopping payment on the check does not change its value as measured at the time of the offense. *See, e.g., Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C. 1988) (per curiam); *Long*, 516 N.W.2d at 276. This makes sense as a matter

⁶ There may, in fact, be some instances where a trier-of-fact could not find that the prosecution had proved beyond a reasonable doubt the requisite element of value based on the face value alone. For instance, “a pickpocket who purloins a personal check written out for 50 million dollars, payable to the order of the Pink Panther, has not committed theft of 50 million dollars because a reasonable trier of fact could not assume that such a check is, in fact, worth its face amount.” *Simmons*, 109 S.W.3d at 476 n.28. Similarly, in a case where an elderly man with poor eyesight and no money in the bank tenders a \$165 check to a “doctor” with a miracle cure *and* where no additional evidence establishes that the check has any market value, the evidence may not show that the check has a market value equivalent to its face value. *See id.* at 476-77.

In the instant case, however, the check was not a clear hoax, as a 50 million dollar check to the Pink Panther would be. More significantly, in this case, there was additional testimony that helped establish that Lucency’s check had a market value equivalent to its face value, including evidence that Lucency was a going concern, evidence of defendant’s established course of business with Lucency, Lucency’s willingness to exchange the check for a smaller check and the difference in cash, and Lucency’s depositing funds sufficient to cover the check within the day.

of policy. To hold otherwise would be to force the victim to either take a chance on an unnecessary financial loss or forego prosecution on the crime as it would be classified, absent a stop payment order. Consequently, most jurisdictions hold that obtaining a stop payment order does not transform the value of a check obtained by theft into a worthless or less valuable property. *See Jeffcoat*, 551 A.2d at 1303 (“The fact that [Jeffcoat] never received the check’s cash equivalent because of the stop-payment order does not affect [a conclusion that the check had value]. The value of property is determined at the time the crime through which it is acquired occurs.”) (citations omitted); *Long*, 516 N.W.2d at 276 (noting that “courts elsewhere have further held that the face amount of a check at the time of the theft is its value, notwithstanding a subsequent stop-payment order imposed by the bank at the victim’s direction”).

Moreover, a maker may remain liable to a party who takes the check in good faith, even if the maker places a stop-payment order with the bank. *See Utah Code Ann.* § 70A-3-414(2).

ORAL ARGUMENT REQUESTED

The State requests oral argument. “[O]ral argument is a tool for assisting the appellate court in its decision making process,” *Perez-Llamas v. Utah Court of Appeals*, 2005 UT 18, ¶ 10, 110 P.3d 706, and “the only opportunity for a dialogue between the litigant and the bench.” *Moles v. Regents of Univ. of Cal.*, 654 P.2d 740, 743 (Cal. 1982). In the case at bar, the decisional process would “be significantly aided by oral argument.” Utah R. App. P. 29(a)(3). Moreover, because the value of a stolen check drawn on an account with insufficient funds is a matter of first impression, the Court should issue its

decision in a published opinion. *See Grand County v. Rogers*, 2002 UT 25, ¶ 14, 44 P.3d 734 (“A memorandum decision may not be used to render a decision in any matter not clearly and unequivocally disposed of on the basis of well-established Utah case law or Utah statute.”).

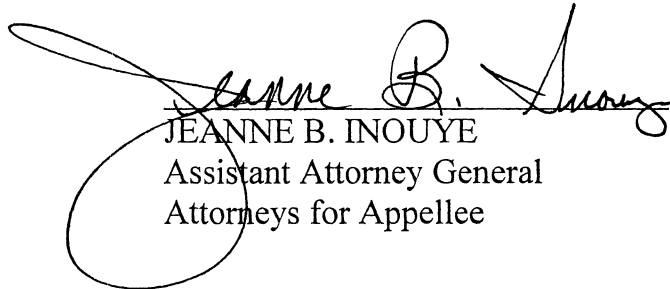
CONCLUSION

Defendant has not shown that the evidence was insufficient to support a finding that he received property, i.e., Lucency’s check, with a value of \$1000 or more.

Defendant’s conviction should therefore be affirmed.

Respectfully submitted this 27th day of February, 2006.

MARK L. SHURTLEFF
Attorney General

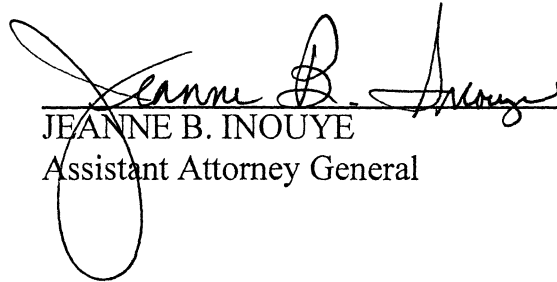

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February, 2006, I either mailed first-class postage prepaid or hand-delivered two copies of the foregoing Brief of Appellee to appellant's counsel of record, as follows:

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Addendum

70A-3-302. Holder in due course.

(1) Subject to Subsection (3) and Subsection **70A-3-106** (4), "holder in due course" means the holder of an instrument if:

(a) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(b) the holder took the instrument for value, in good faith, without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, without notice that the instrument contains an unauthorized signature or has been altered, without notice of any claim to the instrument described in Section **70A-3-306**, and without notice that any party has a defense or claim in recoupment described in Subsection **70A-3-305** (1).

(2) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under Subsection (1), but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

(3) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken:

(a) by legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding;

(b) by purchase as part of a bulk transaction not in ordinary course of business of the transferor; or

(c) as the successor in interest to an estate or other organization.

(4) If, under Subsection **70A-3-303** (1)(a), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

(5) If the person entitled to enforce an instrument has only a security interest in the instrument, and the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured.

(6) To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.

(7) This section is subject to any law limiting status as a holder in due course in particular classes of transactions.

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Last revised: Wednesday, December 14, 2005

70A-3-414. Obligation of drawer.

(1) This section does not apply to cashier's checks or other drafts drawn on the drawer.

(2) If an unaccepted draft is dishonored, the drawer is obliged to pay the draft according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in Sections **70A-3-115** and **70A-3-407**. The obligation is owed to a person entitled to enforce the draft or to an indorser who paid the draft under Section **70A-3-415**.

(3) If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained.

(4) If a draft is accepted and the acceptor is not a bank, the obligation of the drawer to pay the draft if the draft is dishonored by the acceptor is the same as the obligation of an indorser under Subsections **70A-3-415** (1) and (3).

(5) If a draft states that it is drawn "without recourse" or otherwise disclaims liability of the drawer to pay the draft, the drawer is not liable under Subsection (2) to pay the draft if the draft is not a check. A disclaimer of the liability stated in Subsection (2) is not effective if the draft is a check.

(6) If a check is not presented for payment or given to a depository bank for collection within 30 days after its date, the drawee suspends payments after expiration of the 30-day period without paying the check, and because of the suspension of payments, the drawer is deprived of funds maintained with the drawee to cover payment of the check, the drawer to the extent deprived of funds may discharge its obligation to pay the check by assigning to the person entitled to enforce the check the rights of the drawer against the drawee with respect to the funds.

Repealed and Re-enacted by Chapter 237, 1993 General Session

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76-6-101. Definitions.

For purposes of this chapter:

(1) "Property" means any form of real property or tangible personal property which is capable of being damaged or destroyed and includes a habitable structure.

(2) "Habitable structure" means any building, vehicle, trailer, railway car, aircraft, or watercraft used for lodging or assembling persons or conducting business whether a person is actually present or not.

(3) "Property" is that of another, if anyone other than the actor has a possessory or proprietary interest in any portion thereof.

(4) "Value" means:

(a) The market value of the property, if totally destroyed, at the time and place of the offense, or where cost of replacement exceeds the market value; or

(b) Where the market value cannot be ascertained, the cost of repairing or replacing the property within a reasonable time following the offense.

(5) If the property damaged has a value that cannot be ascertained by the criteria set forth in Subsections (a) and (b) above, the property shall be deemed to have a value less than \$300.

Amended by Chapter 291, 1995 General Session

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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.

Enacted by Chapter 196, 1973 General Session

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Last revised: Wednesday, December 14, 2005

- 85 - 012

76-6-408. Receiving stolen property -- Duties of pawnbrokers.

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

(2) The knowledge or belief required for Subsection (1) is presumed in the case of an actor who:

(a) is found in possession or control of other property stolen on a separate occasion;

(b) has received other stolen property within the year preceding the receiving offense charged; or

(c) is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or an agent, employee, or representative of a pawnbroker or person who buys, receives, or obtains property and fails to require the seller or person delivering the property to:

(i) certify, in writing, that he has the legal rights to sell the property;

(ii) provide a legible print, preferably the right thumb, at the bottom of the certificate next to his signature; and

(iii) provide at least one positive form of identification.

(3) Every pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee, or representative of a pawnbroker or person who fails to comply with the requirements of Subsection (2)(c) is presumed to have bought, received, or obtained the property knowing it to have been stolen or unlawfully obtained. This presumption may be rebutted by proof.

(4) When, in a prosecution under this section, it appears from the evidence that the defendant was a pawnbroker or a person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or was an agent, employee, or representative of a pawnbroker or person, that the defendant bought, received, concealed, or withheld the property without obtaining the information required in Subsection (2)(d), then the burden shall be upon the defendant to show that the property bought, received, or obtained was not stolen.

(5) Subsections (2)(c), (3), and (4) do not apply to scrap metal processors as defined in Section 76-10-901.

(6) As used in this section:

(a) "Dealer" means a person in the business of buying or selling goods.

(b) "Pawnbroker" means a person who:

(i) loans money on deposit of personal property, or deals in the purchase, exchange, or possession of personal property on condition of selling the same property back again to the pledge or depositor;

(ii) loans or advances money on personal property by taking chattel mortgage security on the property and takes or receives the personal property into his possession and who sells the unredeemed pledges; or

(iii) receives personal property in exchange for money or in trade for other personal property.

(c) "Receives" means acquiring possession, control, or title or lending on the security of the property.

Amended by Chapter 299, 2004 General Session
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Last revised: Wednesday, December 14, 2005

76-6-412. Theft -- Classification of offenses -- Action for treble damages.

- (1) Theft of property and services as provided in this chapter shall be punishable:
- (a) as a felony of the second degree if the:
 - (i) value of the property or services is or exceeds \$5,000;
 - (ii) property stolen is a firearm or an operable motor vehicle;
 - (iii) actor is armed with a dangerous weapon, as defined in Section **76-1-601**, at the time of the theft; or
 - (iv) property is stolen from the person of another;
 - (b) as a felony of the third degree if:
 - (i) the value of the property or services is or exceeds \$1,000 but is less than \$5,000;
 - (ii) the actor has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft; or
 - (iii) in a case not amounting to a second-degree felony, the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, poultry, or a fur-bearing animal raised for commercial purposes;
 - (c) as a class A misdemeanor if the value of the property stolen is or exceeds \$300 but is less than \$1,000; or
 - (d) as a class B misdemeanor if the value of the property stolen is less than \$300.
- (2) Any person who violates Subsection **76-6-408(1)** or Section **76-6-413**, or commits theft of property described in Subsection **76-6-412(1)(b)(iii)**, is civilly liable for three times the amount of actual damages, if any sustained by the plaintiff, and for costs of suit and reasonable attorneys' fees.

Amended by Chapter 289, 1997 General Session

Amended by Chapter 119, 1997 General Session

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