

2005

Utah v. William Thomas Greene : Reply Brief

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 :
Appellant is not incarcerated

APPELLANT'S REPLY BRIEF

Appeal from a final judgment of conviction for Theft by Deception, a third degree felony, in violation of Utah Code Ann. § 76-6-405 (2003), entered by the Honorable Timothy R. Hanson, Third District Court, Salt Lake County, Utah.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
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v. :
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Defendant/Petitioner. :

Contrary to the state’s brief, Mr. Greene respectfully requests that this Court reverse this case and remand to the trial court to enter a misdemeanor attempt conviction.

POINT I. MR. GREENE FULFILLED THE MARSHALING REQUIREMENT.

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 (citations omitted). The state maintains that this Court can affirm on the basis that defendant 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.” Appellee’s brief at 10.¹ The state goes on to

¹ At trial, Mr. Greene testified that Mr. Cheung offered to remedy the check that was dishonored due to insufficient funds by giving Mr. Greene some cash and a smaller check, but at the same time advised him that someone was coming to look at the pipe to determine whether it was stolen. Mr. Greene called Mr. Cheung back and was advised by

maintain that the more significant omission was that “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.” *Id.* However, the state then later explains: “[a]s explained above, the value of the property taken for purposes of the theft statutes is the market value *at the time of the offense.*” *Id.* at 16.

Therefore, by the state’s own admission, the state of the bank account later that day is irrelevant to the theft charge. Thus, the omitted evidence is not in support of the theft verdict and the state’s marshaling argument is without force. *See Boyd*, 2001 UT 30, ¶ 13 (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.”(emphasis added)). In fact, the evidence established at trial is that at the time of the offense, the bank account had insufficient funds. Thus, this is the relevant evidence to be marshaled.

POINT II. IF THIS COURT HOLDS THAT THE FACE VALUE OF A CHECK IS PRIMA FACIE EVIDENCE OF ITS VALUE IN THEFT BY DECEPTION CASES, THAT PRESUMPTION ONLY OPERATES IN THE ABSENCE OF PROOF THAT THE CHECK WAS OF LESSER VALUE.

The state cites to *State v. Pacheco*, 636 P.2d 489, 490 (Utah 1981) for the proposition that the face value of a check is *prima facie* evidence of the value of the

Mr. Cheung that someone was asserting the pipe was stolen and then Mr. Cheung put Mr. Osborn on the phone who threatened that he was going to put Mr. Greene in jail for allegedly stealing the pipe. R. 206: 142-43. Additionally, Mr. Greene testified that he called the bank sometime later that day and was told the check would clear. *Id.* at 136. Mr. Greene testified in his own defense. The state did not put on any testimony from Mr. Cheung or the bank that would establish these statements.

check. Appellee's Brief at 11. First, Pacheco rule has been articulated: "[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." State v. Harris, 708 So.2d 387,389 (La. 1998). Thus, while the rule in Pacheco is sound policy for theft cases, it is not necessarily applicable to theft by deception cases and the policy is ill-suited to such charges. See Appellant's Opening Brief at 11-12. The state cites to Pacheco and similar cases to support its propositions, yet the state claims that appellant's reliance on cases such as State v. Lakey, 659 P.2d 1061 (Utah 1983) and State v. Trogstad, 100 P.2d 564 (Utah 1940) are misplaced because they are not directly on point. Appellee's Brief at 14, n 4. However, this is an issue of first impression to Utah courts and as such reliance on case law is merely illustrative as appellant acknowledged in his opening brief. See Appellant's Brief at 7 ("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 state relies on the Pacheco rule to the extent it supports its position, it leaves unanswered the general rule that if a defendant rebuts the presumption then the state must prove the actual value. See, e.g., Wilson v. State, 939 S.W.2d 313 (Ark. Ct. App. 1997); State v. Long, 516 N.W.2d 273 (Neb. Ct. App. 1994); Harris, 708 So.2d 387 (La. 1998); State v. Evans, 669 S.W.2d 708 (Tenn. Crim. App. 1984). See Appellant's Brief at 9-16.

The state maintains that a check is not necessarily worthless merely because it is drawn on an account with insufficient funds to pay it. However, if this Court applies the Pacheco rule to this case, then once the defendant rebuts the prima facie evidence, the state must still prove value. Thus, the state should have put on evidence to show the

value of the check because all evidence presented showed it was worthless. See Appellant's Brief at 9-16. The state's brief relies on a whole line of cases that articulate the Pacheco rule, but then systematically ignores analysis in those cases that supports the appellant's position. For instance, the state cites to Forrest v. State, 721 A.2d 1271, 1280 (Del. 1999) for the proposition that sufficiency of the funds on which a check is drawn is irrelevant to determine value. Appellee's Brief at 13. However, Forrest is inapposite to this case because the court was unwilling to find the check worthless because even though the drawer's checking account was insufficient to cover the entire balance, the bank was willing to cash the check from an "instant access" savings account. Forrest, 721 A.2d at 1280. However, the defendant in Forrest got nervous and told the bank not to cash the check and the bank retained the check because of suspicion of the defendant. Id. These facts do not support an argument that the check was worthless, but show that the face value of the check is the proper value for grading the theft using market value analysis. These facts are unlike the facts in this case where Mr. Greene presented the check to the bank for payment which was properly made out to him and was refused payment because of insufficient funds.

Additionally, the state cites to State v. Harris, 708 So.2d 387, 390 n.4 (La.1998) and State v. Long, 516 N.W.2d 273, 276 (Neb. App. 1994) for this proposition. Appellee's Brief at 13. However, the quotes on which the state relies from these cases are taken out of context. The statement in Harris was made when the court rejected the minority rule which is that the face value of the check is value for grading theft cases so long as the state can show the check was drawn on sufficient funds. This rule is in

opposition to the Pacheco rule that holds that the face value of a check is *prima facie* evidence of its value. The court in Harris was merely responding to this rule when it stated “it seems nonsensical to mete out punishment for the exact same conduct based on a factor totally extraneous to defendant’s behavior.” Harris, 708 So.2d 387, 390 n.4 (La.1998). Nevertheless, the court still states in Harris that the face value of a check is the presumed value “*in the absence of proof to show a lesser value.*” Id. at 389 (emphasis added).

Additionally, as explained in appellant’s opening brief, the face value of the checks in Long was accepted as the value for grading the theft *because the checks had been accepted in commerce at their face amount.* See Appellant’s Brief at 9-10; Long, 516 N.W.2d at 275 (“to the extent that value must be established by a relevant marketplace transaction under State v. Garza, 241 Neb. 256, 487 N.W.2d 551 (1992), the evidence shows that the checks had been tendered and received in the relevant market in an amount equal to their face value.”). Essentially the state wholesale ignores analysis in these cases that is favorable to appellant’s position, instead focusing on two small comments taken out of context. See Appellant’s Brief at 9-11 for analysis of the rules in these cases. The Long decision expressly relies on a case that states: “[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.” State v. Garza, 487 N.W.2d 551, 556 (Neb. 1992).

Likewise the state cites to Simmons v. State, 109 S.W.3d 469 (Tex. Crim. App. 2003) to support its position. Appellee's Brief at 14-15. However, Simmons merely articulates the same rule in Pacheco and in fact, Simmons explicitly states:

Accordingly, we hold that the face amount of a check is presumptive evidence of its value. Of course, there are exceptions and unusual cases in which evidence rebuts that presumption and shows that the bank is, in fact, not solvent, *that the drawer does not have sufficient funds to cover the check*, or that there is some other fact which negates, lessens, or perhaps even increases the face value of the check. Thus, a *prima facie* showing of value by proof of the face amount of a signed check may be rebutted with other evidence. However, assuming that no evidence is produced to rebut the logical inference that the payee was entitled to receive face value of the check, the amount written on the check is sufficient evidence to show its value.

Id. at 475. Thus, the state's own supporting case law lends credibility to the appellant's argument that proof of insufficient funds to cash the check rebuts the Pacheco presumption. Thus, even if this Court applies the Pacheco presumption to theft by deception cases, once a defendant rebuts the presumption, the state must still prove value of the check.

POINT III. THE STATE NEVER PROVED VALUE OF THE CHECK ONCE MR. GREENE REBUTTED FACE VALUE.

As the state conceded, the "value of property taken for purposes of theft statutes is the market value *at the time of the offense*." Appellee's Brief at 16. While the face value of a check is *prima facie evidence* of the value of the check in theft cases, a defendant can rebut that presumption. Once that presumption is rebutted, the state must show the actual value of the check. See Appellant's Brief at 9-16. The state did not prove value in this case. The evidence in this case shows that Mr. Cheung, co-owner of Luceny

Corporation, met Mr. Greene at Luceny Corporation at nine in the morning on March 22, 2004. R. 206: 63. Mr. Cheung purchased several pieces of pipe from Mr. Greene and paid with a check for a little over a thousand dollars. Id. at 69. Immediately thereafter, Mr. Greene took the check to the drawer bank to cash the check, but payment was refused because the account had insufficient funds. Id. at 120-21, 136. This all happened “first thing in the morning.” Id. at 67. Mr. Greene called and advised Mr. Cheung of the insufficient funds. Id. at 71. Contrary to the state’s comment: “the evidence showed that the shortfall [account deficiency] was both temporary and inadvertent.” (Appellee’s Brief at 14-15), the evidence presented by the prosecution proved no such thing (although, the reason the account was deficient is irrelevant). Mr. Greene called sometime later that day and the bank stated the account insufficiency was remedied, however this too is irrelevant as the state concedes the time of the theft is the relevant time period for valuation. Id. at 136-37. Moreover, if the state admits that the fact that the account insufficiency was remedied later is relevant, so too is it relevant that a stop-payment was placed on the check later that day (contrary to state’s argument in appellee’s brief at 16). Mr. Cheung merely testified that he was not sure why the account funds were insufficient, did not know when such insufficiency was remedied, and that a stop-payment was placed on the check sometime that day. Id. at 74, 86, 87. Thus, Mr. Cheung’s account had insufficient funds on the morning of March 22, 2004 to be able to pay out a check for a little over a thousand dollars and Mr. Greene so proved by actually presenting the check to the drawer bank and receiving no value because of the insufficiency. See Simmons, 109 S.W.3d at

475 (if defendant can show insufficient funds to pay face value of check rebuts presumption check is worth face value).

Contrary to the state's comment: "Luceny was and remained liable to cover it [check]", the prosecution clarified that this was not true at trial. The prosecution questioned Mr. Cheung: "Okay. And did you suffer a loss? You said the check was over a thousand. Did you suffer a loss?" to which Cheung responded, "No, I didn't."

R.206:76. Furthermore, Mr. Cheung explained he did not suffer a loss because of the insufficiency. Id. at 77. Thus, Mr. Greene rebutted any presumption that the value of the check was the face value by presenting it to the drawer bank who refused payment on the basis of insufficient funds immediately after Mr. Greene was issued the check. The state then failed to show what, if any value, the check actually had. However, what the state did show is that Luceny Corporation was in fact no longer liable for payment of the check and did not suffer a loss. If the check is not worthless, then it was the state's burden to show its value. Moreover, the state fails to acknowledge this case law or the general rules of commercial law in appellant's brief that stand for the proposition that Luceny was no longer liable for the amount of the check. See Appellant's Brief at 9-16.

Even if value is a question to be determined by the jury, the state still has the burden to prove the value. See Appellee's Brief at 12 (quoting State v. Burks, 455 A.2d 1148, 1151 (N.J. Super. Ct. App. Div. 1983)). "Every element of the crime charged must be proven beyond a reasonable doubt." State v. Harman, 767 P.2d 567, 568 (Utah Ct. App. 1989). "Although 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.” Garza, 487 N.W.2d at 556. See also Wilson v. State, 939 S.W.2d 313, 314 (Ark. Ct. App. 1997)(theft by deception that has actually been consummated, rather than mere attempt must be supported by both value and deception). In fact, in Burks on which the state relies, the court holds that the jury must thus be instructed on relevant commercial law and UCC sections in order to determine the amount on which the drawer of the check could still be held liable for an insufficient funds check. The court held that the jury would be free to find the value of a check is the face value if someone could be held liable and specifically noted this would be the case when there is “no evidence to detract from the expectation of negotiation and payment of the face amount.” Burks, 455 A.2d at 1151. In fact, in Burks the case was remanded for a new trial because the jury was not so instructed as the jury was not instructed in a like manner in this case if this Court holds that value is a determination for the jurors. Moreover, value is a question for the jury in Burks because the statute in New Jersey so explicitly indicates value should be determined by the jury, so it is not controlling for the Utah statute. Id. at 1150 (“The amount involved in a theft shall be determined by the trier of fact.”).

This case is similar to Wilson, 939 S.W.2d 313 (Ark. Ct. App. 1997), which only supports an attempted theft by deception charge because the state must show *value* and deception and the state is not capable of showing value when no value is received. Likewise, the state failed to show actual value for the check in this case for a crime which is graded by the value of the theft. As such, the evidence only supports an attempt conviction.

CONCLUSION

For these reasons and those more fully set forth in Appellant's Opening, Mr. Greene, respectfully requests this Court to reverse this case and remand to the trial court to enter a misdemeanor attempt.

RESPECTFULLY SUBMITTED this 29th day of March, 2006.



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 Jeanne B. Inouye at 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 29th day of March, 2006.



JOSIE E. BRUMFIELD

DELIVERED copies to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of March, 2006.
