

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

R. Keith Kelly, Circuit Court Judge

RECEIVED

APR 23 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

THOMAS RAYNES MARETT,

APPELLANT

APPELLATE CASE NO. 2013-002017

INITIAL BRIEF OF APPELLANT

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 2.) The trial judge erred in failing to charge the jury on the law regarding post-dated checks to the extent that per State v. McCutcheon, 282 S.C. 524, 327 S.E.2d 372 (1985), the same is a promise to pay at a future date and not a crime of obtaining property by false pretenses.....8

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STATEMENT OF ISSUES ON APPEAL

- 1.) The trial judge erred in denying counsel's pretrial motion to dismiss and the motion for a directed verdict on the offense of obtaining property by false pretenses charged against appellant since the checking account on which the post-dated check was drawn was closed because there was no evidence of any intent to defraud presented in the case as the deposit for payment was submitted prematurely and there was no evidence presented establishing that the account would have been closed on the future date placed on the post-dated check.
- 2.) The trial judge erred in failing to charge the jury on the law regarding post-dated checks to the extent that per State v. McCutcheon, 282 S.C. 524, 327 S.E.2d 372 (1985), the same is a promise to pay at a future date and not a crime of obtaining property by false pretenses.

STATEMENT OF THE CASE

Appellant Thomas Raynes Marett was convicted of obtaining property by false pretenses per jury trial held during the September, 2013 term of the Spartanburg County General Sessions Court before Judge R. Keith Kelley. Appellant was sentenced to imprisonment for a period of five years, suspended upon the service of six months and five years probation. Mary Stuart Lyles represented appellant at trial, and Assistant Solicitor Brittany Scott appeared on behalf of the state.

Appellant appealed his trial court conviction and sentence. This brief follows.

QUESTION I

The trial judge erred in denying counsel's pretrial motion to dismiss and the motion for a directed verdict on the offense of obtaining property by false pretenses charged against appellant since the checking account on which the post-dated check was drawn was closed because there was no evidence of any intent to defraud presented in the case as the deposit for payment was submitted prematurely and there was no evidence establishing that the account would have been closed on the future date placed on the post-dated check.

Appellant was indicted for and convicted of obtaining property by false pretenses. The state's case consisted of the testimony of three witnesses: Greg and Kim Ballenger, owner and manager of Refrigeration Services, Inc., respectively, and Sheila Henderson, who was the county's worthless checks program director. At trial, Greg and Kim Ballenger testified that appellant received their services on July 14, 2011, which included an inspection by their technician of his (appellant's) heating and air unit at his residence, and the installation of a new unit on that same date. Then, the check for payment, which was written on July 14, 2011, by appellant and post-dated for August 14, 2011, was presented on July 18, 2011, for payment by the Ballengers, but returned because of insufficient funds. Tr. 65, l. 14 – p. 76, l. 23; Tr. 86, l. 7 – p. 89, l. 25. Thereafter, Sheila Henderson issued four letters to appellant requesting payment of the funds owed to the Ballengers. Tr. 103, l. 6 – p. 113, l. 1. Note that appellant did not testify at trial.

In the case at bar, services were rendered to appellant by the company on July 14, 2011, but appellant's check issued for payment on July 14, 2011, was a post-dated check dated August 14, 2011. This post-dated check was prematurely submitted (twenty seven days in advance) for deposit on July 18, 2011, when it should have been sent through thirty one days later on August 14, 2011, as such was the post date for submission written on the post-dated check in question.

Prior to trial, defense counsel moved to dismiss the charge of obtaining property by false pretenses lodged against appellant as there was no proof of intent to defraud because the post date written on the post-dated check evidenced a future promise to pay at a later date. Thus, had the post-dated check been timely submitted, then the issue would have been the status of the account (open or closed) on the day of submission. Tr. 23, l. 3-p. 29, l. 11. The state argued that the check was written by appellant on a closed account so there was no intent or promise to ever pay the amount owed. Tr. 29, l. 16 – p. 33, l. 18. The court denied the motion to dismiss because the account on which the check was written was closed and thus concluded that the post-dated check was not a check at all, but rather a written instrument instead. Tr. 35, l. 16 – p. 36, l. 10; Tr. 42, l. 23 – p. 43, l. 15. Defense counsel’s response to the court’s refusal to dismiss the charge follows:

The Court: It’s a promissory note?

Defense Counsel: It’s a promise to pay. That’s all this was, was a promise to pay. I don’t –it’s a piece of paper that says, “I promise to pay you this amount.” And also the fact is, is that, if they had waited until that date to find out if it was good if it was not good, we would be sitting here in court with no defense. And he was not given the chance to make his promise to pay well. They turned around four days later cashd a check that is not legal in the State of South Carolina. That piece of paper is a promise to pay...whether it was an open account whether he had a million dollars in it or not, was a non-legal piece of paper...So if he had a million dollars in that account and they cashed it and it went through well, then, we would still have an issue because he did not agree, by posting dating it, to let them cash it.

The Court: That [was] a closed account at the time he wrote the writing.. it is not a check it is not a post-dated check.
Tr. 37, l. 14 – p. 38, l. 4; Tr. 42, l. 23 – p. 43, l. 2.

In other words, the status of the checking account (open or closed) on the day on which the services were rendered or the day of the premature submission of the bank did not matter as the

issue would have been the status of the account (opened or closed) in the future, i.e. on the date on the post-dated check, which promised future payment.

The court denied the motion to dismiss. Tr. 44, l. 3. Counsel moved for a directed verdict at the close of the state's case and at the end of the case. Tr. 123, l. 12 – p. 126, l. 12; Tr. 186, lines 13-25.

In McCutcheon, the defendant made a future promise to deliver a payment for gasoline via a post dated check to be cashed in the future i.e., upon the future delivery of the gasoline and then upon the future sale of the gasoline. In other words, the defendant, who was the purchaser that issued the post-dated check, intended for the future delivery at the future date, which was reflected on the post-dated check given to the seller. The post-dated check was proof that the amount (also based on the future resale of the gasoline) would be available for redemption on that post-dated appointed (future) time. The conversation between the buyer and seller in McCutcheon was to the effect that the gasoline “would be delivered” and that he (buyer) “would be in a position to handle it,” all of which indicted future tense, which was in keeping with and consistent with the future post dated check. The McCutcheon Court defined false pretense as “a fraudulent representation of an existing or past fact by one who knows it not to be true,” and held further that:

...a promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses. A postdated check is a promise to pay at a future time. State v. Winter, 98 S.C. 294, 82 S.E. 419 (1914).

Similarly, in the case at bar, appellant's signature on and his issuance of the post-dated check clearly referenced his intent to make good on the amount on the check at a later date, i.e., the date written on the post-dated check, as this indicated his obligation to comply with his promise in the future. Thus, appellant's post-dated check evidenced no fraudulent representation of an existed

fact. Since the record is devoid of any evidence regarding an agreement in reference to the post-dated check and future payment, then the inference is that there was a mutual understanding of this future agreement to pay later as evidenced by appellant's post-dated written check. Tr. 116, lines 1-8. Also, there was no fraudulent intent to defraud on appellant's behalf because there was no evidence that the money would not have been available or the account not opened on the date that appeared on the post-dated check. Appellant's intent was to cover the amount in the future. Sans this element of fraudulent intent, there was no proof of guilt beyond a reasonable doubt on the offense of obtaining property by false pretenses, and thus appellant's conviction on the same violated his right to due process of law guaranteed under the Fourteenth Amendment to the United States Constitution and article 1, 3 of the South Carolina State Constitution. Due process requires that the prosecution must prove every element of the offense charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). The trial judge erred in denying appellant's pretrial motion to dismiss the indictment and his directed motions, which meant his conviction was obtained in violation of the Fourteenth Amendment..

QUESTION II

The trial judge erred in failing to charge the jury on the law regarding **post-dated checks** to the extent that per State v. McCutcheon, 282 S.C. 524, 327 S.E.2d 372 (1985), the same is a promise to pay at a future date and not a crime of obtaining property by false pretenses.

Prior to trial, trial counsel made the following jury charge request:

Defense Counsel: So, you know, in these cases, it allows for a jury instruction to be issued at the end if the jury finds that it's a post-dated check then, they can find my client not guilty. ..Or are you, at this time, finding that this is not a

check; that, that cannot be an issue in our case at all whether or not it's post-dated?

The Court: Well, let me ask you this: In those cases (McCutcheon) was there an underling account that was open?

Defense Counsel: Well, that's not brought up in the case law (i.e. McCutcheon). It doesn't say...they don't ever get to that point. All these cases talk about is it was a post-dated check.

The Court: Okay. At this point, the Court is making a finding; a clear, bright line rule that, if that's what you need – and I know it is...that it is not a check period. Tr.44, l. 20 - p. 45, l. 14.

The trial judge did not explain to the jury that a **post-dated check** is a promise to commit a future act and does not qualify as a check submitted under false pretenses. See Court's exhibit #1 (jury instructions). Tr. 183, lines 4-5.

In keeping with the ruling that the writing on the paper in this case was not a check, the trial judge merely instructed the jury that “a promise to do something in the future cannot constitute a basis for prosecution for obtaining goods under false pretenses” sans any additional words as requested to the effect that a post-dated check would have qualified as the equivalent of a promise to do something in the future and thus yielded no basis for prosecution as the jury might have disagreed with the trial judge's classification of this commercial paper and viewed the written instrument as a check.

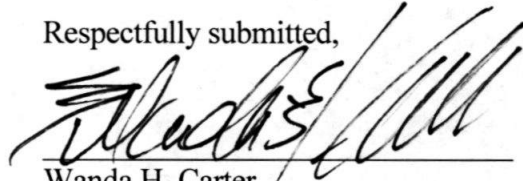
The law to be charged is determined from the evidence presented at trial. State v. Lee, 298 S.C. 363, 380 S.E.2d 244 (1990). Per McCutcheon, and counsel's position in appellant's defense that the paper was a check, albeit post-dated, and no proof submitted indicating what the status of appellant's checking account would have been on the date that

the post-dated check should have been submitted, clearly, the trial court erred in denying appellant's requested charge in the case.

CONCLUSION

Based on the foregoing arguments, appellant's conviction and sentence should be reversed and his case remanded to the lower court for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of April, 2014.

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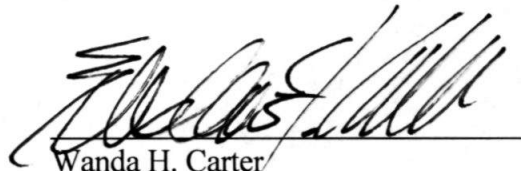
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Tr. 4-6; Tr. 24-152; Tr. 156-192
- (3) Court's Exhibit #1

I certify that this designation contains no matter which is irrelevant to this appeal.

April 23rd, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Thomas Raynes Marett, 646 Southern Street, Spartanburg, SC 29303, this 23rd day of April, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of April, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022 .