FILED
MAR 24 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 24, 1981

vs.)

DUANE ALAN SMITH,) 0-378
63209

Defendant-Appellant.)

Appeal from Black Hawk District Court - Roger F. Peterson, Judge.

Defendant appeals his conviction of false use of a financial instrument under section 715.6, Supplement to the Code 1977, claiming there was an insufficient factual basis for his guilty plea to the charge. AFFIRMED.

Gerald B. Carney of Laird & Carney, Waverly, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; and Merle Wilna Fleming, Assistant Attorney General; for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals his conviction, upon plea of guilty, to the offense of false use of a financial instrument in violation of section 715.6, Supplement to the Code 1977. He claims that there was an insufficient factual basis for his guilty plea to the charge. We affirm.

As a result of defendant's admissions at the time of his guilty plea, certain facts are undisputed. On July 14, 1978, defendant presented a check for $18 to a gasoline station in Waterloo in exchange for some beer. The check which forms the basis of the criminal charge against the defendant belonged to one Donald Warrior. Defendant crossed out Warrior's preprinted name in the upper left-hand corner of the check. Defendant signed his own name to the instrument, but Warrior's account number was still plainly visible at the bottom of the check. Defendant admitted that he did not have Warrior's authority to use the instrument.

On appeal defendant argues that there was an insufficient factual basis for his guilty plea to the charge of false use of a financial instrument and that the most he could be charged with was theft in violation of section 714.1(6), Supplement to the Code 1977. Determination of this issue requires the consideration of several provisions of chapter 715, Supplement to the Code 1977.

Section 715.6, which creates the crime of which defendant has been convicted, provides:

> The use of a financial instrument with the intent to obtain fraudulently anything of value by one who knows that the instrument is not what it purports to be, or who knows that he or she is not the person nor the authorized agent of the person who, as shown on the instrument, has the right to so use the instrument, shall constitute the false use of a financial instrument. False use of a financial instrument is a class C felony.

For purposes of the foregoing statute, section 715.1(1) defines a "financial instrument" as "a check . . . which ostensibly evidences an obligation of . . . the person who has purportedly executed it or authorized its execution." In addition, section 715.2 provides:

> One uses a financial instrument when he or she does any of the following:
>
> 1. Makes or executes such instrument or an endorsement thereon, or alters such instrument so as to materially change its nature or the right or obligation which it purports to represent.
>
> 2. Tenders or offers such instrument to another in the course of a financial or commercial transaction, with the representation, either express or by implication, that the instrument is what it purports to be and that he or she is a

person who is shown on its face to be one who may rightfully so use such instrument.

3. Possesses such instrument, knowing it to be false or knowing that he or she has no right to use or possess it.

Defendant is guilty of the offense charged only if (a) the instrument is a financial instrument as defined in section 715.1(1) and (b) the transaction constitutes "use of a financial instrument" as defined in section 715.2, and (c) this use of a financial instrument violates the substantive provisions of section 715.6. The second issue, involving the definition of "use of a financial instrument" is the least difficult to dispose of. Because defendant admitted at the guilty plea proceedings that he had no right to use or possess the printed check, the transaction falls within subsection (3) of section 715.2. Under that definition, there has been a use by defendant of a financial instrument if the check involved meets the definition of section 715.1(1).

More difficulty is presented in determining whether the guilty plea proceeding established a factual basis for a finding that the check was a "financial instrument" under the definition of section 715.1(1) and, if so, whether the transaction falls within the gamut of conduct which is made criminal under section 715.6. These issues involve very similar elements and will be considered together.

In applying the statutes involved in the present case, we must accept the premise that the check evidences the obligation of Donald Warrior rather than the obligation of the defendant. This is so because this has at all times been the State's theory of the case as evidenced by the allegations of the trial information charging the crime and the position which has been adopted in the State's brief on this appeal.

In order for the check involved in the present case to fall within the statutory definition of "financial instrument" one of two circumstances must appear. Either the instrument must evidence the obligation of the person who purportedly executed it or it must evidence the obligation of the person who authorized its execution. Given the facts that the State's theory has always been that the instrument evidences Donald Warrior's obligation, it must therefore appear to someone acting on the instrument that he had purportedly authorized its issuance against his account.

A violation of the substantive provisions of section 715.6 also requires that one of two circumstances must appear. Either the person using the instrument (here defendant) must know that it is not what it purports to be, or must know that he is not the person nor the authorized agent of the person who, as shown on the instrument, has the right to use it.

To determine whether a factual basis was shown with respect to the statutory requirements heretofore alluded to, we examine the following colloquy in the guilty plea proceeding:

> THE COURT: With respect to this charge the allegation is that you apparently drew a check on an account of Donald Warrior payable—or drawn on the National Bank of Waterloo and signed your name to it. Apparently you didn't have the authority to do that at the time. Is that a fair statement of what happened, or could you tell me just what basically happened?
>
> THE DEFENDANT: That's correct.
>
> THE COURT: Do you know Donald Warrior?
>
> THE DEFENDANT: Yes, I did.
>
> THE COURT: And you just got a check of his and made it payable to a Derby — Is that a gas station or something?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: —in the sum of $18. And you knew that you didn't have his authority to do that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And apparently you did that and got some gas or something from the Derby gas station?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: At that time did you intend to get some merchandise for that check?
>
> THE DEFENDANT: Yes, I got beer.
>
> THE COURT: Okay. And you knew at that time you didn't have authority to do that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay.
>
> Mr. Davidson, do you know of any legal defenses to this matter?
>
> MR. DAVIDSON: I don't, your Honor.
>
> THE COURT: Do you know of any reason why he should not enter a guilty plea?
>
> MR. DAVIDSON: No, I don't.
>
> THE COURT: Ms. McGivern, do you know of any legal defenses to this matter?
>
> MS. MC GIVERN: No, your Honor.
>
> THE COURT: Do you know of any reason why Mr. Smith should not enter a guilty plea?
>
> MS. MC GIVERN: No.

> THE COURT: Mr. Smith, in respect to this charge of a False Use of a Financial Instrument what is your plea, guilty or not guilty?
>
> THE DEFENDANT: Guilty, your Honor.
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> THE COURT: Mr. Smith, I'm going to accept your guilty plea, find that you're making this voluntarily, it's intelligently made, and there is a factual basis for it.

We have no problem in finding a factual basis for the necessary statutory elements from the foregoing colloquy. Defendant admitted that he was negotiating a check drawn on Warrior's account without authority. Defendant's mere possession of a printed check bearing Warrior's account number would cause one acting on the check to infer that defendant had authority to do what he did.

The only element which presents any difficulty is the requirement of section 715.6 that it must appear on the instrument that Warrior was the person who had the right to use it. We believe we may take judicial notice of the fact that in these days of automated banking, the coded account number could result in the charging of Warrior's account in the first instance, regardless of whose name was signed to the check. Thus, to one of the principal parties to the transaction, the drawee bank, this number would be an adequate indication that Warrior had the right to use the instrument.

We have considered all issues presented and find no ground for reversal.

AFFIRMED.