FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	Filed November 22, 1978
Appellee,	)	
vs.	)	612/61386
ROBERT GREENFIELD, II,	)	
Appellant.	)	

Appeal from Polk District Court - Gibson C. Holliday, Judge.

Defendant appeals forgery conviction claiming an attempted use of an expired credit card cannot be deemed passing of an instrument "apparently capable of defrauding." Affirmed.

John C. Wellman, of Des Moines, for appellant.

Richard C. Turner, Attorney General, Lona Hansen, Assistant Attorney General, and Dan Johnston, Polk County Attorney, for appellee.

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

CARTER, J.

Defendant appeals his conviction for forgery, contrary to § 718.1, The Code. He asserts the trial court erred in (1) overruling his motion for directed verdict based upon a claim the forgery was legally ineffective to defraud; (2) failing to instruct upon legal efficacy of the subject of the forgery; and (3) failing to sustain defendant's contention that § 713.39, The Code, making the false use of a credit card a public offense, precludes a prosecution for forgery.

On August 22, 1977 defendant gave a K-Mart sales clerk two dresses, priced at a total of $26.70, and a Master Charge card imprinted: "Good Thru 1-77." The sales slip was made out, imprinted and defendant signed it with the name of D. L. Buck. Noting the card was no longer good the sales clerk refused to close the sale without authorization from her supervisor who in turn had to contact Master Charge. Master Charge indicated the card was not only invalid but was stolen as well. Defendant was apprehended and charged with forgery.

I. The issue raised by defendant's motion for directed verdict is the claim that there was no legal efficacy to the transaction whereby defendant forged the signature of D. L. Buck because the credit card presented had expired. In passing upon this contention it is essential to note that defendant is not charged with any alteration, forgery or false making of the credit card. Rather it is charged in the information that he did "forge a Master Charge credit card sales slip." The sales slip may be the subject of forgery separate and apart from the card itself. People v. Roberts, 27 Ill. App.3d 489, 326 N.E.2d 116 (1975). Moreover, the great weight of authority supports the right to pursue a forgery prosecution on the false documentation even though the defendant is also in violation of a statute making misuse of a credit card a separate crime.

The instrument which defendant signed provides:

> "The issuer of the card identified on this item is authorized to pay the amount shown as TOTAL upon proper presenta-

[1]State v. Ulmer, 21 Ariz. App. 378, 519 P.2d 867 (1974); People v. Gingles, 32 Cal. App. 3d 1030, 108 Cal. Rptr. 744 (1973); People v. Liberto, 274 Cal. App.2d 460, 79 Cal. Rptr. 306 (1969); People v. Couch, 500 P.2d 967 (Colo. 1972); People v. James, 497 P.2d 1256 (Colo. 1972); State v. McCurdy, 257 So.2d 92 (Fla. App. 1972); Kindred v. State, 258 N.E.2d 411 (Ind. 1970); State v. Devenow, 253 La. 796, 220 So.2d 78 (1969); State v. Gledhill, 67 N.J. 565, 342 A.2d 161 (1975); State v. Chase, 515 P.2d 1337 (Ore. App. 1973); State v. Dumont, 471 P.2d 847 (Ore. App. 1970); Hutchins v. State, 483 P.2d 519 (Wyo. 1971).

> tion. I promise to pay such TOTAL (together with any other charges due thereon) subject to and in accordance with the Agreement governing the use of such card.
>
> /s/ D. L. Buck"

The applicable statute, § 718.1, The Code, provides as far as material to this charge:

> If any person with intent to defraud, falsely make, alter, forge, or counterfeit any:
>
> * * *
>
> "Instrument in writing, being or purporting to be the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is or purports to be created, increased, transferred, invade, discharged, or diminished — he shall [be guilty of the offense.]."

It was noted in State v. Sherwood, 90 Iowa 550, 553, 58 N.W. 911, 912 (1894), that the issue as to an allegedly forged instrument is "does it 'purport', within the meaning of the statute, to create a liability." Courts which have faced similar issues involving forged credit card sales slips have held that we need look only to the apparent legal efficacy of the instrument from the standpoint of the party whose name is forged. People v. Searcy, 199 Cal. App.2d 740, 743-44, 18 Cal. Rptr. 777, 781-82, 90 ALR 2d 814 (1962); Jackson v. State, 463 S.W.2d 182, 184 (Tex. Crim. App. 1971). This is true even if that party is not the person whom the defendant intends to defraud.[2]

Defendant's argument goes astray by focusing on the legal obligations, if any, of the issuer of the card and the likelihood that said party or the K-Mart store might be defrauded. The focus should be on whether the instrument purports to create a legal obligation on Buck's part. The test is whether if the instrument forged were genuine, it "would be the foundation or evidence of another's liability." State v. Wooderd, 20 Iowa 541, 547 (1866).[3] In the present case the instrument clearly would be the foundation for or evidence of Buck's liability to indemnify the issuer of the card if it paid the credit

[2]It is not necessary that there be an intent to defraud any particular person, only a general intent to defraud is required. People v. Moyer, 1 Ill. App.3d 245, 273 N.E.2d 210, 213 (1971); Durnell v. State, 277 N.E.2d 366, 369 (Ind. 1972).

[3]This is in accord with the definition of forgery contained in 3 Underhill, Criminal Evidence (5th Ed. 1957) § 770 at 1769: "Forgery may be committed in any writing, which, if genuine, would operate as the foundation of another's liability or the evidence of his right."

item. Had Buck actually executed the instrument and the issuer of the card had, on the strength thereof, paid the credit items and sought reimbursement therefor, Buck could not defeat the claim on the basis that his card had expired. This would have been a fact known to him when he gave the authorization and indemnity agreement.

The only purposes served by the reference to the expired credit card in the agreement to which Buck purports to subscribe is (a) to identify the financial institution to whom the authorization is directed and the indemnification agreement is granted; and (b) to incorporate by reference in this newly made obligation an existing set of terms and conditions. Neither of these purposes is defeated by the fact the credit card had expired. The reference to the card still serves to identify the financial institution to whom Buck's promise runs. And the fact that the terms which are referred to were initially intended to govern use of a card which has now expired in no way precludes the incorporation of such terms in a new written undertaking made by Buck after the expiration date of the card. The instrument is "legally capable of effecting a fraud." State v. Johnson, 26 Iowa 407, 418-19 (1868).

The legal efficacy of the document which was uttered must be determined upon what the document provides, not upon whether the K-Mart employees or the card issuer would accept the forged document as evidence of Buck's liability. Whether it would or would not be so accepted depends upon circumstances extrinsic to the agreement upon which Buck's signature was forged. In determining whether a document has sufficient legal efficacy to be the subject of forgery, extrinsic evidence may be used to show that an instrument invalid on its face is in fact valid. State v. Sherwood, 90 Iowa 550, 553, 58 N.W. 911, 912 (1894); cases collected in Annot. 174 A.L.R. 1300, 1327-29 (and supplements). But the converse is not true. An instrument which is not invalid on its face may be the subject of forgery even though extrinsic evidence may show that it is in fact invalid. State v. Van Auken, 98 Iowa 674, 68 N.W. 454 (1896); State v. Johnson, 26 Iowa 407, 418-19 (1868); State v. Pierce, 8 Iowa 231, 234 (1859); Earnest v. State, 113 So.2d 517, 522 (Ala. 1959); State v. Greene, 192 N.W.2d 712, 717 (S.D. 1971); cases collected in Annot. 174 A.L.R. 1300, 1318-27 (and supplements).

State v. Johnson, supra, held that a forged certificate of a justice of the peace certifying to the number of gopher scalps turned in for a bounty could be the subject of forgery even if said certificates were not such evidence as would be accepted by the

county to support payment of the bounty. In State v. Van Auken, supra, the prosecution was for falsely altering and forging the record of the proceedings of the board of supervisors to show that the board allowed an auditor a certain sum for hired help. The court, in affirming a conviction for forgery, pointed out that although the act purportedly authorized was otherwise contrary to law, this fact was not revealed on the face of the falsely made record.

In commenting on these and similar cases, it is stated in Annot. 174 A.L.R. 1300, at 1318:

> "An instrument falsely made, with intent and purpose to defraud, is a forgery, although, had it been genuine, other steps must have been taken before the instrument would have been perfected."

And, as noted this rule has been applied even though the evidence reveals that such additional steps were in fact impossible of attainment.

Application of the foregoing principles in the present case leads to the conclusion that the undertaking in question was not invalid on its face. Whether Buck had a valid credit card in force is an extrinsic circumstance not necessarily negated by the presentation of an expired card. It is clear from the record that whether or not the card would be accepted by the store employee was not dependent upon whether defendant presented an unexpired credit card. Rather, it was dependent upon whether a call to the Master Charge central telephone number produced an authorization for the proposed transaction. The record shows that defendant assured the sales clerk that the transaction was valid. While this factor is not essential to sustain a finding of forgery on the present record, it has been held that oral representations may be considered in determining whether an instrument uttered purports to be genuine. State v. Chase, 515 P.2d 1337, 1340-41 (Ore. App. 1973).

The evidence viewed most favorably to the state establishes a forgery of a signature to a written instrument with an intent to defraud. The instrument in question on its face purports to create an obligation on Buck's part and purports to grant an authorization and right of indemnification to the issuer of the card. Such forgery clearly offends against the statute and the motion for directed verdict was properly overruled.

II. Defendant's second contention on appeal is also without merit. His proposed instruction on legal efficacy was properly denied. The issue presented was one of law for the court and has been so considered in the cases in which the issue has been presented.

III. Lastly, as heretofore noted, defendant's contention that § 713.39, The Code, making the false use of a credit card a public offense, precludes the prosecution for the separate offense of forging the sales slip is contrary to the great weight of authority.[4] We reject this claim.

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

AFFIRMED.

Donielson and Johnson, JJ., concur; Oxberger, C.J., and Snell, J., dissent.

[4]See cases cited in footnote 1, supra.

OXBERGER, C. J. (dissenting)

I dissent. Defendant cannot be convicted of forgery if the instrument involved was not "apparently capable of defrauding." State v. Pierce, 8 Iowa (Cole) 231, 235 (1859). In the instant case, defendant attempted to use the expired credit card of D. L. Buck. The fact of expiration was imprinted on the sales slip along with the indemnitor's identification. Thus, the slip itself revealed there was no line of credit between Master Charge and Buck. It is for the jury to decide if the instrument, invalid on its face, is nevertheless apparently capable of defrauding. Perhaps, the law should be changed to allow a forgery conviction even if the instrument is not capable of defrauding a reasonable person into believing it is genuine. In the absence of such modification, I believe State v. Pierce, supra, controls.

Snell, J. joins in this dissent.