

IN THE COURT OF APPEALS OF IOWA

No. 0-371 / 89-1179

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JOHN ANTHONY McFADDEN,

Defendant-Appellant.

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Appeal from the Iowa District Court for Story County,
Thomas R. Hronek, Judge.

McFadden appeals his conviction, following a jury
trial, for third-degree theft by check. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and
Andi S. Lipman, Assistant State Appellate Defender, for
appellant.

Thomas J. Miller, Attorney General, Amy M. Anderson,
Assistant Attorney General, and Mary E. Richards, County
Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and
Sackett, JJ.

SACKETT, J.

Defendant John A. McFadden appeals his conviction of theft in the third degree in violation of Iowa Code sections 714.2(3) and 714.1(6), as a result of his cashing a postdated check. On the day the check was cashed, the account on which the check had been written was closed, and defendant had no funds available at that bank to pay the check. Defendant contends the trial court erred in (1) overruling his motion for acquittal because the evidence was not sufficient to support a conviction, and (2) in refusing to instruct the jury on his theory of defense. We affirm.

I.

Defendant contends there is not sufficient evidence to support his conviction. The check in question was written to Midland Financial for \$395. The check which was dated March 31, 1989, was cashed at Midland on March 30, 1989. Defendant received cash for the check.

The State must prove four elements when prosecuting for the crime of theft by check in violation of Iowa Code section 714.1(6):

1. That the defendant wrote a check to Midland Financial for \$395.00;
2. That the check was drawn on United Bank and Trust;
3. That defendant received \$395.00 in cash when he gave Midland Financial the check;
4. That the defendant knew at the time he presented the check to Midland Financial that the check would not be paid when presented for payment at United Bank and Trust.

Iowa Code § 714.1(6) (1989).

Defendant's contention is the evidence was insufficient to support a finding he knew the check would not be paid when he presented it. In considering this issue, we view the evidence in the light most favorable to the State. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985). We consider legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence. See State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The State has the burden to prove every necessary element of the crime with which defendant is charged. Id.

A teller at Midland Financial testified defendant called her at 8:50 a.m., on March 30, 1989, and asked if he could get a cash advance on a credit card without the credit card. She told him he needed the credit card for a cash advance. She testified defendant then asked her about cashing a check from another bank. She said she told him he could, because he had an account at Midland. Defendant then came to Midland Financial with a check he had written on United Bank & Trust for \$395. Defendant's Midland account number was written on the check. The phone number on the check was crossed out and a new number had been written in. Defendant was given cash for the check.

After cashing the check, the teller checked defendant's account at Midland Financial and found it only contained \$3.00. She then checked with United Bank. She found defendant's account with United Bank had been closed since November 1988. The account had been closed because of overdrafts. The teller called the number defendant had written on the check and found it had been disconnected. Defendant was arrested the same day. The check was never presented to United Bank & Trust for payment.

Defendant testified he told the teller the check would not be good until the next day. The teller denies this and contends she was not aware the check was postdated when she cashed it.

Defendant correctly argues a postdated check is not payable until the stated date. Iowa Code § 554.3114. There is support for the proposition that the giving of a postdated check where both the maker and the payee are aware the check is postdated cannot constitute the violation of a statute that requires the intent to defraud at the time the check is issued. See State v. James, 310 N.W.2d 197, 200-01 (Iowa 1981); State v. Doudna, 226 Iowa 351, 357, 284 N.W.2d 113, 116 (1939). See also State v. Papillon, 398 N.W.2d 553, 554 (Neb. 1986). If the victim knows a check is worthless when presented, then there is no deception. See State v. James, 310 N.W.2d at 201.

Clearly, if at the time the check is issued the parties have an agreement or an arrangement that the check will not be paid until a future event, there can be no securing of money by a worthless check, rather the money is secured by a promise of payment in the future. See James 310 N.W.2d at 201; State v. Mullen, 225 N.W.2d 305, 307 (Iowa 1975); Doudna, 226 Iowa at 857. Here there was conflicting testimony whether the teller knew the check was postdated. The teller's testimony is that she was not aware the check was postdated. Furthermore, the check was exchanged for cash at a bank.

The facts of the transaction when viewed collectively support a finding beyond a reasonable doubt that defendant knew at the time the check was presented it would not be paid. The mere fact the check was postdated does not necessarily relieve the maker from criminal responsibility if there are no representations made that the check is not cashable and from the statements and circumstances of the transaction one could conclude the check will be paid when presented. See Doudna, 226 Iowa at 358 (conviction of crime of false uttering of a bank check affirmed where maker gave check postdated one day for purpose of securing value representing reason check was postdated was bank was closed on day check was given and could not be presented until the next day). There is substantial evidence to support the conviction.

II.

Defendant next contends the trial court erred in failing to give his requested instructions. The instructions he requested were:

- (1) A check is a draft drawn on a bank and payable on demand.
- (2) When a check is postdated the time when it is payable is determined by the stated date.

After the trial court refused to give these requested instructions, the defendant sought to modify the marshaling instruction, defining the offense to reflect the time period of defendant's actions and intent as March 31, 1989, rather than March 30, 1989. Defendant contends the trial court's refusal to give the requested instruction, or to modify the dates in the marshaling instruction defining the offense, prevented him from presenting his theory of defense to the jury. Defendant testified he intentionally postdated the check because he was having trouble obtaining the money and he so advised the teller.

We find the trial court did not err in refusing defendant's requests. Defendant's two requested instructions were a request for definition of terms rather than instructions for a theory of defense. See Conner v. State, 362 N.W.2d 449, 453 (Iowa 1985). A theory of defense instruction is one that sets forth a set of facts which would preclude finding of guilt. Conner, 262 N.W.2d at 453; State v. Kase, 334 N.W.2d 223, 226 (Iowa 1984).

Nor is defendant's request a marshaling instruction. Conner, 362 N.W.2d at 453. We find no error in the failure to give the two requested instructions.

The last question is whether the trial court should have amended the marshaling instruction to March 31. There is substantial evidence in the record to support a finding the violation occurred on March 30. The trial court did not err in refusing defendant's request.

AFFIRMED.