

FILED

MAY 31 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**STATE OF IOWA,**

)

Plaintiff-Appellee,

)

Filed May 31, 1983

vs.

)

ALLEN H. MARTIN,

)

3-72

67967

Defendant-Appellant.

)

Appeal from Cerro Gordo District Court - B. C. Sullivan, Judge.

Defendant appeals his conviction of false use of a financial instrument in violation of Iowa Code § 715.6. REVERSED.

Francis Hoyt, Appellate Defender, and Charles L. Harrington, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson, Snell and Schlegel, JJ. Hayden, J., takes no part.

SCHLEGEL, J.

Defendant appeals his conviction of false use of a financial instrument in violation of Iowa Code section 715.6. He contends the evidence is insufficient to sustain his conviction. We reverse.

Defendant was accused of presenting, for deposit to his savings account, a check payable to two other persons, Hicke and Blomquist. Hicke and Blomquist had previously reported the check to be "lost or stolen." The check bore purported endorsements by both Hicke and Blomquist. A police officer with experience in handwriting analysis testified that Hicke's endorsement was probably genuine but that Blomquist's endorsement had been forged in handwriting which was clearly "disguised" but could not be linked to the defendant's handwriting sample. Blomquist was dead at trial time.

The case was tried to the court, which overruled defendant's motion for judgment of acquittal, and which found him guilty of false use of a financial instrument. The court concluded the State had proved beyond a reasonable doubt that the defendant had "fraudulently tendered a financial instrument and profited thereby, knowing full well that he had no right to use or possess it." The court found the State had failed to prove the defendant knew that the purported endorsement by Blomquist was forgery; however, the court did not believe such knowledge to be a necessary element of the crime charged. Defendant's motions in arrest of judgment and for new trial were overruled; he brought this appeal.

Defendant was charged with the crime of false use of a financial instrument. That crime is defined in Iowa Code section 715.6, which 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.

Thus, to be convicted under this section, a person must either: 1) know that the instrument is not what it purports to be, or 2) know that he or she has no right to use the instrument. The check involved here is clearly a "financial instrument" as that term is defined in Iowa Code section 715.1. We agree with the trial court that defendant could not be found guilty under the first alternative. There was no showing that he was aware that Blomquist's "endorsement" of the check was in fact a forgery. Thus, defendant had no reason to believe the check was anything other than what it purported to be--an instrument endorsed in blank by the designated payees.

Instead, the court found defendant guilty under the second alternative, i.e., he tendered the check "knowing full well that he had no right to use or possess it." We disagree. The statute makes it clear that, to be found guilty under this second alternative, a person must know that he or she has no right to use the instrument. If both endorsements on the check in this case had in fact been authentic, the check would have been genuine bearer paper which anyone, including defendant, could lawfully use. Iowa Code § 554.3204; State v. Sanders, 309 N.W.2d 144, 146 (Iowa Ct. App. 1981).¹ Although Blomquist's endorsement was forged, there was no showing that defendant knew that fact when he presented the check for deposit. Therefore, for all that appears in the record, defendant could have reasonably believed that both endorsements were genuine and, under Sanders, could have thought he had the right to use the check. Under those circumstances, defendant would not have known that he had no right, for purposes of section 715.6, to use the check.

The State had the burden of proving all elements of the offense, including defendant's actual knowledge that he had no right to use the check. In this case,

¹ We decline the State's invitation to overrule the Sanders decision.

that knowledge could only come from a realization that the Blomquist endorsement was a forgery and that, therefore, the check was not a genuine bearer instrument. Because the State did not prove defendant's knowledge of the forgery, there was no proof that he knew he had no right to use the check. Since the State failed to sustain its burden of proving this essential element of the offense, defendant was entitled to a judgment of acquittal. Defendant's conviction and sentence are reversed and the case is remanded for entry of a judgment of acquittal.

REVERSED AND REMANDED WITH DIRECTIONS.

Oxberger, C.J., and Snell, J., concur; Donielson, J., dissents.

DONIELSON, J. (dissenting)

I respectfully dissent.

I stand by the reasoning of my dissent in State v. Sanders, 309 N.W.2d 144, 146 (Iowa Ct. App. 1981). I cannot, therefore, join the majority's interpretation of section 715.6. In this case, as in Sanders, the majority holds that the statute is not violated when the defendant wrongfully negotiates a bearer instrument "even though he intends to defraud the rightful owner by doing so" and even though the name of the person to whom the stated value is to be paid appears on the face of the instrument. Id. at 146 (quoting 4 Yeager and Carlson, Iowa Practice Criminal Law & Procedure § 365 at 96 (1979)). Yet I believe this is precisely the situation which section 715.6 proscribes and distinguishes from one in which the genuine bearer instrument does not indicate the name of the person who has a right to use it: "The use of a financial instrument with the intent to obtain fraudulently any of value by one . . . 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 . . ." (Emphasis added) But for this statutory language, the instrument here would be a truly genuine bearer instrument, same as a dollar bill. However, we cannot ignore the limiting effect of this language on the negotiability of the instruments such as the one in the instant case. The majority chooses to do so.

In the instant case, the court specifically found that the defendant had "fraudulently tendered a financial instrument and profited thereby, knowing full well that he had no right to use or possess it." I believe there is sufficient evidence in the record to support this finding. See State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). Substituting the names of the defendant and of those persons named on the financial instruments, the following statement from my dissent in Sanders applies here as well:

It is true that this was a bearer instrument and that as such it was payable to the bearer and could be negotiated by delivery alone. § 554.3204(2), The Code. However, because section 715.6 specifically addresses the situation where the name of the person entitled to use the check appears on the instrument, I fail to see the relevance of the fact that this was a bearer instrument. The only relevant consideration is that the name[s] of [Hicke and Blomquist were] the one[s] shown on the instrument and that the defendant knew at the time that he was neither [Hicke and Blomquist] nor authorized by [them] to negotiate the check. In light of these facts, the conviction should be affirmed.