

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CLARENCE D. TATE,

Appellant.

FILED
COURT OF APPEALS
DIVISION TWO
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STATE OF WASHINGTON
BY ADURY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas J. Felnagle

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO FIND TATE GUILTY OF TWO COUNTS OF FORGERY AND TWO COUNTS OF THEFT BEYOND A REASONABLE DOUBT.

The state argues that it presented sufficient evidence to prove that Tate intended to cash a fraudulent check and defraud Best Check Cashing because “a jury may infer criminal intent from a defendant’s conduct where it is plainly indicated as a matter of logical probability.” Brief of Respondent (BOR) at 9-10.

The state relies on State v. Meyers, 133 Wn.2d 26, 941 P.2d 1102 (1997), but Meyers is distinguishable from this case. In Meyers, a jury found Meyers guilty of sexual exploitation of a minor. Id. at 30. The state’s evidence included Meyers’ video tape of his daughter in the bathtub with multiple shots of extreme close-ups of the child’s pubic area, while he was instructing her to move in certain ways. Id. at 30 Meyers claimed that he made the tape only to anger his girlfriend, but the evidence established that he never showed her the tape. Id. at 37-38. The State Supreme Court reasoned that the jury could have inferred the requisite criminal intent from Meyers’ conduct. Accordingly, the Court concluded that the jury inferred that Meyers videotaped his daughter for the purpose

of sexual stimulation and there was sufficient evidence to support the guilty verdict. Id. at 38.

Unlike in Meyers, the jury here could not have inferred the requisite criminal intent as a matter of logical probability based on the state's evidence. The state merely presented evidence that Tate went to Best Check Cashing and cashed a counterfeit check. In State v. Scoby, 117 Wn.2d 55, 61-62, 810 P.2d 1358 (1991), the State Supreme Court held that mere possession is insufficient to prove knowledge that a written instrument is a forgery. In Scoby, the state presented evidence that Scoby bought \$2 worth of gas with a \$20 bill that had corners torn off. Scoby then asked the cashier for two \$10 bills in exchange for what appeared to be a \$20 bill. The cashier made the exchange but as Scoby left, she realized that the bill was actually a \$1 bill with the corners of a \$20 bill pasted onto it. Id. at 56. The cashier testified that she just accepted the bill but once she looked directly at it, she saw the alteration immediately, "I saw George Washington's face and \$20 corners. I knew it wasn't right in a second." Id. at 62. Both \$20 bills were admitted into evidence and the jury found Scoby guilty of forgery. Id. at 62-63. The Supreme Court upheld the verdict, concluding that "the jury might have reasonably inferred that the alteration of the \$1 bill was so obvious, and the match between the corners on the altered \$1 bill and the torn \$20 bill so striking,

that beyond a reasonable doubt Scoby knew he was passing an altered \$1 bill.” Id. at 63.

Here, the record substantiates that there were no patent defects as to the quality of the check. 13RP 57-58. The state admits that the check was “of a quality sufficient to deceive a cashier.” BOR at 10. Moreover, the employee who accepted the check at Best Check Cashing did not testify. Consequently, there was insufficient evidence for a jury to infer from Tate’s conduct that he knew that the check was a forgery and intended to defraud Best Check Cashing.

The state argues further that it provided “sufficient evidence that defendant aided Bromley.” BOR at 12-13. To the contrary, because the state failed to prove that Tate knew that the check that he cashed was a forgery, there was insufficient evidence that he aided Bromley in cashing a forged check. Tate’s mere presence when Bromley cashed her check fails to show that they “ran the same check scheme together.” State v. Rutunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981).

Reversal and dismissal is required because there was insufficient evidence to convict Tate of the two counts of forgery and two counts of theft.

2. REVERSAL IS REQUIRED BECAUSE TATE ESTABLISHED AN AFFIRMATIVE DEFENSE TO THE THREE COUNTS OF BAIL JUMPING.

The state argues that Tate failed to establish an affirmative defense because he failed to show that he was immediately hospitalized or sought immediate treatment. BOA at 14. However, the state fails to cite any authority for its assertion that Tate must seek immediate treatment. Under RCW 9A.76.010, a medical condition that *requires* immediate treatment constitutes uncontrollable circumstances. (Emphasis added). Dr. Rivera concluded that Tate “made every attempt to seek medical care for his conditions and was unable to cope with his panic attacks when faced with the challenge of appearing in court and was debilitated to the point of ‘shutting down’ or becoming incapacitated.” 15RP 139; Ex. 22.

Dr. Rivera described Tate’s anxiety disorder as a very complex and serious condition that “is very sudden, appears unprovoked, and is often disabling.” 15RP 138-39. He emphasized that a panic attack “can occur at any time, including sleep, and the person can develop phobias about driving, leaving their homes, et cetera, and become unable to perform routine activities. A panic attack is one of the most distressing conditions a person can experience.” 15RP 139. Dr. Rivera’s report substantiates that Tate’s anxiety disorder required immediate treatment, and when he

was able to control his anxiety disorder enough to seek treatment, he in fact did undergo treatment.

Reversal is required because Tate proved by a preponderance of evidence that uncontrollable circumstances prevented him from appearing in court.

3. REVERSAL IS REQUIRED BECAUSE THE COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE THE INFORMATION CHARGING TATE WITH FORGERY AND THEFT.

In arguing that the court did not abuse its discretion by admitting the information, the state misstates the facts. The state claims that the “State offered the information in conjunction with the order establishing the conditions of defendant’s release to show that defendant knew he had pending criminal charges that would require his presence in court.” BOR at 16. However, the record reflects that the prosecutor moved to admit the information without stating any purpose for its admission, “This is a copy of -- a certified copy of the Information charging Mr. Tate with two counts of Theft in the First Degree and two counts of forgery. It was filed approximately March 29th of 2004. I would move to admit Number 8 at this point.” 14RP 93. Defense counsel argued that the jury already knew what the charges were and it would be prejudicial to provide a copy of the information. 14RP 92-93. The court tersely replied, “All right,” and

admitted the information, instructing the prosecutor to remove the declaration of probable cause. 14RP 94.

The state argues that the “information, stripped of the State’s declaration, provided only objective facts, the crimes with which defendant was charged.” BOR at 17. The state erroneously assumes that the accusations made by the prosecutor in the information are facts when in truth, they are assertions of fact. Furthermore, the assertions of fact are obviously not objective because the prosecutor is an advocate for the state. Accordingly, under this Court’s holding in State v. James, 104 Wn. App. 25, 32-34, 15 P.3d 1041 (2000), there is no distinction between a motion with a declaration and an information because they both contain hearsay. See Brief of Appellant (BOA) at 18-20.

The state argues further that, “[i]ntroducing an information to prove the underlying offence [sic] of the bail jumping is common and accepted in Washington.” BOR at 17, citing State v. Gonzales, 132 Wn. App. 622, 633, 132 P.3d 1128 (2006); State v. Ibsen, 98 Wn App. 214, 989 P.2d 1184 (1999); and State v. Green, 101 Wn. App. 885, 6 P.3d 53 (2000). Aside from the fact that the state did not move to admit the information for that purpose, the cases have no application to this case because they do not involve the issue of admitting an information as evidence.

As the state emphasizes, the jury was well aware of the charges against Tate because the court informed the jury of the charges and reiterated the charges against Tate by way of the jury instructions. BOR at 17. Consequently, the information had no relevance and was needlessly cumulative. ER 401, ER 403.

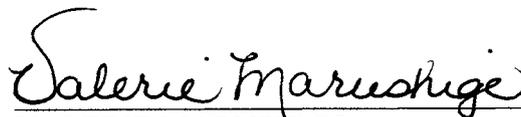
The court abused its discretion in admitting the information into evidence because it contained inadmissible hearsay, in violation of Tate's constitutional right to confrontation. The court's error requires reversal.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse and dismiss Mr. Tate's convictions.

DATED this 7th day of June, 2007.

Respectfully submitted,



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WSBA # 25851

Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th of June, 2007 in Des Moines, Washington.



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