

05707-4

05707-4

No. 65767-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL BARNHART,

Appellant.

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

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

D. STATEMENT OF THE CASE 1

D. ARGUMENT 3

MR. BARNHART’S CONVICTION SHOULD BE
REVERSED AND THE CHARGE DISMISSED WITH
PREJUDICE BECAUSE THE STATE FAILED TO
PROVE THE ELEMENTS OF THE CRIME..... 3

a. Due Process requires the State to prove each element
of the offense charged beyond a reasonable doubt. 3

b. The State failed to prove Mr. Barnhart delivered a
check on or about August 28, 2008..... 4

c. The State failed to prove Mr. Barnhart intended to
defraud the complainant when he delivered the check,
because the complainant agreed to accept a
postdated check, knowing Mr. Barnhart had
insufficient funds in his account..... 5

d. Reversal and dismissal is the appropriate remedy. 8

E. CONCLUSION..... 9

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>City of Seattle v. Slack</u> , 113 Wn.2d 850, 784 P.2d 494 (1989).....	3
<u>State v. Etheridge</u> , 74 Wn.2d 102, 443 P.2d 536 (1968).....	6
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	4
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	8
<u>State v. Pike</u> , 118 Wn.2d 585, 826 P.2d 152 (1992)	8

Washington Court of Appeals Decisions

<u>State v. Ben-Neth</u> , 34 Wn. App. 600, 663 P.2d 156 (1983).....	4
<u>State v. Boyanovsky</u> , 41 Wn. App. 166, 702 P.2d 1237 (1985).....	6
<u>State v. Spruell</u> , 57 Wn. App. 383, 788 P.2d 21 (1990).....	8

United States Supreme Court Decisions

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	3
<u>In re Winship</u> , 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	3
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970).....	4
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).....	9

Decisions of Other Jurisdictions

<u>Anderson v. Bryson</u> , 115 So. 505 (Fla. 1927)	6, 8
<u>Gumm v. Heider</u> , 348 P.2d 455 (Or. 1960).....	6

<u>In re Griffin</u> , 257 P. 458 (Cal. Dist. Ct. App. 1927);	6, 7
<u>State v. Bruce</u> , 262 P.2d 960 (Utah 1953)	6, 7
<u>State v. Papillon</u> , 389 N.W.2d 553 (Neb. 1986).....	6, 7
<u>State v. Patterson</u> , 243 P. 355 (Mont. 1926)	6
<u>State v. Stout</u> , 448 P.2d 115 (Ariz. Ct. App. 1968);	6
<u>White v. State</u> , 158, 280 N.W. 433 (Neb. 1938)	6

Constitutional Provisions

Const. art. I, § 17.....	8
Const. art. I, § 3.....	3
U.S. Const. amend. XIV	3

Statutes

RCW 9A.56.060	4
---------------------	---

A. ASSIGNMENT OF ERROR

Mr. Barnhart's conviction violates due process and the constitutional prohibition on imprisonment for debt because the State failed to prove all of the elements of unlawful issuance of a bank check.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

To convict a defendant of unlawful issuance of a bank check, the State must prove the defendant delivered a check with intent to defraud, knowing he had insufficient funds in his account.

Tendering a post-dated check is not a violation of the statute where the recipient knows the check is postdated and agrees to accept the promise of future payment. Here, Skagit Transmission agreed to accept Mr. Barnhart's postdated check for work performed on a truck, knowing that Mr. Barnhart had insufficient funds to cover the check at the time of delivery. Must Mr. Barnhart's conviction be reversed?

C. STATEMENT OF THE CASE

In August of 2008, appellant Daniel Barnhart took his truck to Skagit Transmission in Burlington to have the transmission fixed. RP 1, 11, 17. When the repair shop completed the work, Mr. Barnhart asked if he could pick up the truck – which he needed for

work – but pay later. RP 53. Mr. Barnhart told the manager he did not have sufficient funds in his account at the moment, but he expected income imminently from several sources, including his home refinancing. RP 16, 21, 58.

The company agreed to let Mr. Barnhart pick up the truck on August 7, 2008, without paying, and allowed him to give them a check that was postdated for August 28, 2008. RP 16, 21, 54, 57, 58. Mr. Barnhart hoped to have sufficient funds in the account by the future date, but called Skagit Transmission several times in the interim asking for more time. RP 17, 56. Eventually, Skagit Transmission deposited the check, and it was returned for insufficient funds. RP 17, 56.

Skagit Transmission contacted police, and Mr. Barnhart was charged with unlawful issuance of a bank check. CP 16-17. At trial, Skagit Transmission employees testified to the facts above. After the State rested its case, Mr. Barnhart moved to dismiss the case for failure of proof. RP 61. Mr. Barnhart stated:

We have two witnesses who testified that they both knew at the time they received the check there was not money backing it. So I think the individuals here have recourse for a civil action, but this is not a criminal offense. There is not a criminal intent to defraud. ... [T]here's no evidence that when that

check was handed there was intent to defraud anyone.

RP 61-62. The court ruled, "Well, it is probably not the strongest case in the history of criminal jurisprudence, but ... the jury could find the elements of the charge." RP 63.

Mr. Barnhart appeals. CP 78-79.

D. ARGUMENT

MR. BARNHART'S CONVICTION SHOULD BE REVERSED AND THE CHARGE DISMISSED WITH PREJUDICE BECAUSE THE STATE FAILED TO PROVE THE ELEMENTS OF THE CRIME.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. The State failed to prove Mr. Barnhart delivered a check on or about August 28, 2008. The State charged Mr. Barnhart with unlawful issuance of a bank check (“UIBC”) in violation of RCW 9A.56.060(1) (2008).¹ To convict a defendant under this statute, the State must prove the defendant wrote a check with intent to defraud, knowing he had insufficient funds in his account. State v. Ben-Neth, 34 Wn. App. 600, 606, 663 P.2d 156 (1983).

Here, the information alleged, “On or about August 28, 2008, ... [Daniel Barnhart], with intent to defraud, did make, draw, utter, or deliver to another person a check or draft ... on a bank or other depository for the payment of money, knowing at the time of such drawing or delivery that s/he did not have sufficient funds in or credit with said bank or other depository to meet said check or draft in full upon its presentation.” CP 16. To “to convict” jury instruction

¹ The statute provides, “Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or other depository, to meet said check or draft, in full upon its presentation, shall be guilty of unlawful issuance of bank check.”

similarly included the element, “[t]hat on or about the 28th day of August, 2008, the defendant, acting with intent to defraud, delivered a check or draft to another person.” CP 60 (Instruction 6).

But the State failed to prove Mr. Barnhart delivered a check on or about August 28, 2008. On the contrary, the State’s witnesses testified that Mr. Barnhart delivered a check on August 7, and the check was postdated August 28. RP 16, 21, 54, 57, 58. Thus, the State failed to prove Mr. Barnhart committed unlawful issuance of a bank check as charged.

c. The State failed to prove Mr. Barnhart intended to defraud the complainant when he delivered the check, because the complainant agreed to accept a postdated check, knowing Mr. Barnhart had insufficient funds in his account. In addition to failing to prove Mr. Barnhart delivered a check on August 28, the State failed to prove Mr. Barnhart intended to defraud Skagit Transmission when he gave them a postdated check. Skagit Transmission knew the check was post-dated, and knew Mr. Barnhart did not have sufficient funds on August 7 when he picked up his truck. Both parties agreed that Mr. Barnhart could take his truck on August 7 without paying, so long as he promised to have sufficient funds at a later date.

Postdating a check does not automatically remove a transaction from the scope of the UIBC statute. State v. Boyanovsky, 41 Wn. App. 166, 169, 702 P.2d 1237 (1985). However, tendering a postdated check is not a violation of the statute where the recipient knows the check is postdated and agrees to accept the promise of future payment. State v. Papillon, 389 N.W.2d 553, 556 (Neb. 1986); State v. Bruce, 262 P.2d 960, 962 (Utah 1953); Anderson v. Bryson, 115 So. 505, 507 (Fla. 1927); In re Griffin, 257 P. 458 (Cal. Dist. Ct. App. 1927); State v. Stout, 448 P.2d 115, 118 (Ariz. Ct. App. 1968); Gumm v. Heider, 348 P.2d 455, 468 (Or. 1960); State v. Patterson, 243 P. 355 (Mont. 1926).² This is so because at the time the check was delivered, “[t]here was no misrepresentation of an existing fact. The representation was rather in the nature of a future promise.” Patterson, 243 P. at 355. The acceptance of a postdated check “constituted an extension of credit to the defendant.” Stout, 448 P.2d at 118.

Where the maker of a check, at the time of delivery thereof to the payee, makes known to the latter that he has no funds in the bank to meet the payment of

² But see State v. Etheridge, 74 Wn.2d 102, 107, 443 P.2d 536 (1968). Etheridge relied on White v. State, 158, 280 N.W. 433, 436 (Neb. 1938), which was overruled by Papillon, *supra*. The out-of-state cases cited above interpret statutes with the same elements as our UIBC statute.

the check there is no deception; and the mere fact that the maker fails or is unable to keep his promise to have funds there on or before a given date does not constitute any evidence that at the time of the transaction the check was issued with intent to defraud.

Griffin, 257 P. at 458. “[T]he statute denounces the passing of a bad check only where there is a misrepresentation that the maker has money or credit at the time the bad check is passed. It logically follows that it does not apply when both maker and payee know that the check is postdated.” Bruce, 262 P.2d at 962. “[W]here the maker of a postdated check informs the payee at the time of its delivery that he or she has no funds in the bank to pay the check if presented immediately after issuance, the maker cannot be guilty” of UIBC. Papillon, 389 N.W.2d at 556.

Here, it is undisputed that Skagit Transmission knew Mr. Barnhart had insufficient funds at the time he delivered the check, and it is undisputed that Skagit Transmission accepted a postdated check as a promise of future payment. The acceptance of the check constituted an extension of credit to Mr. Barnhart. While Mr. Barnhart is liable for payment, he is not guilty of unlawful issuance of a bank check. Thus, his conviction violates due process.

Mr. Barnhart's conviction also violates article I, section 17 of the Washington Constitution, which prohibits imprisonment for debt. Const. art. I, § 17. A conviction based solely upon a breach of a contractual obligation to pay violates this provision. State v. Pike, 118 Wn.2d 585, 595, 826 P.2d 152 (1992). Although it is acceptable to imprison for fraud, the State failed to prove intent to defraud, as explained above. See, e.g., Anderson v. Bryson, 115 So. at 507 (intent to defraud element negated by acceptance of postdated check). For this reason, too, Mr. Barnhart's conviction is unconstitutional.

d. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Barnhart committed the offenses of which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656

(1969)). The appropriate remedy for the errors in this case is dismissal of the charge with prejudice.

E. CONCLUSION

For the reasons set forth above this Court should reverse Mr. Barnhart's conviction and dismiss the charge with prejudice.

DATED this 11th day of January, 2011.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)

Respondent,)

v.)

DANIEL BARNHART,)

Appellant.)

NO. 65767-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] RICHARD WEYRICH, DPA
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] DANIEL BARNHART
14764 JACKPOT
MOUNT VERNON, WA 98273

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF JANUARY, 2011.

X _____


Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711