

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002344-MR

KEN CHAPPELL

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE ROBERT E. GILLUM, JUDGE
ACTION NO. 03-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

McANULTY, JUDGE: Ken Chappell appeals his conviction in the Pulaski Circuit Court for one count of theft by failure to make required disposition of property, KRS 514.070. Chappell argues on appeal that the facts proved by the Commonwealth did not establish that offense. He relies on Commonwealth v. Jeter, 590 S.W.2d 346 (Ky.App. 1979), which held that KRS 514.070 does not criminalize a transaction in which a seller accepts money for the purchase of merchandise and then refuses to deliver the property. Chappell's motion to dismiss the indictment prior to

trial on that basis was denied. Chappell moved for a directed verdict of acquittal at the close of the Commonwealth's evidence, and at the close of all the evidence. Those motions were denied. After the jury found Chappell guilty, he was sentenced by the court to one year in prison.

Chappell owned and operated a business known as Cumberland Products Distributing, LLC in Burnside, Kentucky. On September 4, 2002, Ronald Catron went with a friend to Chappell's place of business to purchase a pool table. Chappell waited on Catron. Catron determined that he did not want any of the pool tables in the store, and found one he wanted to purchase in a store catalogue. It was common practice for Cumberland Products to order the pool tables in this fashion. Chappell informed Catron that Catron was required to prepay half of the purchase price and that the table would be available in approximately two weeks.

Catron paid Chappell \$600 by check. He left the payee line blank on the check and Chappell filled in the line with his name; Chappell testified that he did so in front of Catron. Chappell testified that this procedure was not uncommon, and that a number of his customers preferred making the check out to the owner personally rather than the company. Chappell stated that sometimes he would cash the checks written by customers and sometimes deposit them, and then he would use cash or obtain a

money order for ordering items. One of Chappell's employees also testified that customers could either write checks to Cumberland Products or to Ken Chappell if they made it out to the owner.

Catron received a receipt for the transaction which reflected a total price of \$1200 from which \$600 was subtracted on the receipt. Two weeks passed and Catron had not received his pool table or heard from Cumberland Products. Catron stated that he called the company's phone number and left messages on voice mail, but never received a call back. He returned to the store but Chappell was not present. The only person available was an employee who did maintenance for Cumberland Products. Catron told the maintenance person to tell Chappell to call him or he would go to the Commonwealth's Attorney's Office about the matter. When approximately a month had passed since placing the order, Catron went to the Commonwealth's Attorney's Office to file criminal charges.

Chappell now argues that he was not properly convicted of theft by failure to make required disposition of property because the facts of his case are not genuinely distinguishable from the facts of Jeter. In Jeter, some customers of the store owned by the defendant in that case had paid for appliances which were not subsequently delivered or were delivered in unsatisfactory condition. The defendant was indicted on one

count of theft by deception and four counts of theft by failure to make required disposition of property. After the close of the Commonwealth's case, the trial court dismissed all five counts. The Commonwealth brought an action for the certification of the question of law whether KRS 514.070 includes the course of conduct in which a seller accepts money for the purchase of merchandise and then refuses to deliver the property as promised. 590 S.W.2d at 346.

In holding that such a fact pattern did not fall within the scope of KRS 514.070, this Court first referenced the official commentary to the statute, which stated:

It is not the purpose of this statute to impose a criminal sanction on the relationship of debtor and creditor. To constitute an offense there must be a breach of trust, growing out of a contract or confidential relation.

Id. at 347. The basis for the trial court's dismissal of the charges in Jeter was that the transactions all involved a debtor-creditor relationship, and so were not within the scope of the statute. Id. The Commonwealth argued on appeal to this Court that a "fiduciary duty" was established by the defendant's promise to deliver the goods. This Court was not persuaded, and noted that for that matter it could also be argued that a contract and an accompanying trust relationship was created. Next, the court found that those considerations were "not

decisive as to the scope of the statute." Id. Instead, the court cited examples of transactions that would fall within the scope of the statute:

The basic thrust of this statute is to impose penal sanctions for such conduct as a retailer's failure to pay over to the state sales taxes which have been collected, a contractor's failure to make proper application of payments in satisfaction of materialman's liens, an employer's failure to apply withheld employee's wages to a pension fund, or a bank employee's failure to properly credit funds deposited for the account of a customer.

Id. (quoting Brickey, Kentucky Criminal Law, § 14.08.)

The basis of the court's decision in Jeter was not the language of the commentary, but the "literal language" of the statute itself. KRS 514.070 states:

(1) A person is guilty of theft by failure to make required disposition of property received when:

(a) He obtains property upon agreement or subject to a known legal obligation to make specified payment or other disposition whether from such property or its proceeds or from his own property to be reserved in equivalent amount; and

(b) He intentionally deals with the property as his own and fails to make the required payment or disposition.

The court in Jeter determined from the statute that it was not enacted to penalize the type of conduct alleged against the defendant in that case. The court summed up its holding:

K.R.S. 514.070 does not proscribe the type of transaction whereby a seller accepts money for the purchase of merchandise and then refuses to deliver the property as promised. The statute was instead enacted to penalize the misapplication of property received from another.

Id. at 347-348.

The Commonwealth in the case at bar does not challenge the soundness of Jeter. Instead, the Commonwealth argues that Jeter is distinguishable because Chappell breached Catron's trust by failing to place the order for the pool table which he had been promised. Conversely, the court below distinguished the case by the fact that the store in Jeter was not incorporated, but was owned by an individual. However, we find that neither of these fact distinctions renders Jeter distinguishable on its essential premise. Therefore, we reverse.

We conclude it makes no difference that Chappell did not have the table on the premises and was required to order it. We believe that the distinction presented by the Commonwealth does not create a criminal case under the statute. The essence of the agreement between Chappell and Catron was a sale, not placement of an order, and Jeter says that under such circumstances KRS 514.070 is not applicable. Chappell was not an agent for Catron but was simply the seller of goods, with an obligation to deliver the pool table. We do not believe that

the statute's language supports penalizing a retailer who has to order his stock of inventory and fails to deliver goods, as opposed to a retailer who has stock on hand and fails to deliver goods.

We also do not agree that the fact that Chappell's business was incorporated differentiates this case. For one thing, Jeter does not make explicit what kind of business was involved in that case. Furthermore, the testimony in the case at bar showed that it was Chappell's usual business practice to accept personal checks made out to himself as the owner in addition to accepting checks to the corporation. We find no real difference from the transactions in Jeter as opposed to this case.

We believe the fact pattern in this case is the same in all material respects as that of Jeter. The evidence showed that Chappell was similarly a seller who accepted money from a customer, Catron, for the purchase of merchandise and then refused to deliver the property as promised. As Jeter expressly held, such conduct does not fall within the scope of KRS 514.070. Therefore, we reverse Chappell's conviction.

ALL CONCUR.

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