

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000917-MR

BILLY TANNER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARTIN F. MCDONALD, JUDGE  
ACTION NO. 04-CR-003580

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Billy Tanner brings this appeal from a March 29, 2006, judgment of the Jefferson Circuit Court adjudging him guilty of two counts of theft by deception over \$300.00 (Kentucky Revised Statutes (KRS) 514.040) and sentencing Tanner to one-year imprisonment probated for five years.<sup>1</sup> We affirm.

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<sup>1</sup> Billy Tanner was convicted at a jury trial on February 1, 2006, of two separate counts of theft by deception over \$300.00. The judgment of conviction and sentence was entered by the court on March 21, 2006, and erroneously stated that Tanner was convicted of one count of theft by deception over \$300.00 and one count of theft by unlawful taking over \$300.00. By a subsequent judgment of conviction and sentence entered March 29, 2006, the circuit court set aside Tanner's prison sentence as a result of payment of restitution in full as of that date. The judgment subsequently placed Tanner on probation for a period of five years. Again, this

Tanner was employed by ITI Telecom, LLC (ITI). ITI is a limited liability company that was organized in March of 1999. In all annual reports filed with the Kentucky Secretary of State, subsequent to the filing of Articles of Organization, Tanner was listed as a member of the LLC. The record does not reflect the exact business that ITI was engaged in. ITI's daily operations were handled by John Graves.

Kenneth Allen owned and operated a business known as Calling All Cards, which was a wholesale distributor of phones and phone cards. Graves and Allen reached an agreement whereby ITI agreed to buy merchandise from Allen. The first transaction occurred on October 30, 2001. Allen met with Graves at ITI's office. Graves informed Allen that in all transactions with ITI, its checks would have to be signed by Tanner.<sup>2</sup> Graves called Tanner, and Tanner came to ITI's office where he signed a blank check for ITI. Graves completed the check payable to Calling All Cards, including the amount (\$6,840.00) owed for the merchandise ITI purchased from Calling All Cards, and finalized this transaction.

On November 2, 2001, ITI again purchased merchandise from Allen. On this occasion, Tanner was not present, but Graves completed a check (in the amount of \$4,959.00) that bore Tanner's signature. After Allen deposited the checks, he was informed by the bank that the checks had been returned due to insufficient funds. Allen then unsuccessfully attempted to collect the money from Graves and Tanner.

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judgment also references Tanner being convicted of theft by unlawful taking, which the parties have acknowledged in their briefs did not occur. For purposes of this appeal, this Court has treated the judgment on appeal as being two counts of theft by deception over \$300.00.

<sup>2</sup> Part of Tanner's duties with ITI Telecom, LLC included signing blank checks. In 2000, Tanner was charged with two counts of theft by deception, which were dismissed when John Graves paid the restitution.

Allen eventually reported the incident to the Jefferson County Attorney's Office, alleging a claim under Kentucky's back check statute, set forth in KRS 514.040(1)(e). The county attorney subsequently sent "10-day letters" to Tanner in an attempt to collect the money. When this failed, the matter was presented to a Jefferson County Grand Jury, and Tanner was indicted upon two counts of theft by deception over \$300.00. A trial by jury ensued on February 1, 2006, and Tanner was convicted of two counts of theft by deception over \$300.00. He was sentenced to a total of one-year imprisonment. Tanner subsequently filed a motion to vacate the sentence of imprisonment and attached a check representing payment of the restitution in full. The court granted Tanner's motion to vacate his sentence and resented Tanner to one-year imprisonment probated for five years. This appeal follows.

Tanner argues the circuit court erred by denying his motion for a directed verdict of acquittal. Specifically, Tanner argues that the evidence was insufficient to support his conviction upon both counts of theft by deception over \$300.00 because the Commonwealth failed to prove he "issued" or "passed" the checks as required by KRS 514.040. A directed verdict of acquittal is proper when viewing the evidence in a light most favorable to the Commonwealth it would have been unreasonable for a jury to have found guilt. Ky. R. Civ. P. 50.01; *Thacker v. Com.*, 194 S.W.3d 287 (Ky. 2006).

KRS 514.040 reads, in relevant part, as follows:

- (1) A person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally:

- .....
- (e) Issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

Relying upon a provision of the Uniform Commercial Code (UCC) (KRS 355.3-104), Tanner argues that when he signed the blank checks and gave them to Graves the checks were not negotiable instruments and did not become negotiable instruments until Graves completed the checks and gave them to Allen. Also, relying on another provision of the UCC (KRS 355.3-105), Tanner further argues he did not issue a check as required by KRS 514.040.

The Kentucky Supreme Court previously addressed a similar issue in *Luttrell v. Commonwealth*, 644 S.W.2d 647 (Ky. 1983). In *Luttrell*, appellant argued that the UCC should be used to interpret KRS 514.040. The Supreme Court clearly rejected the argument and held:

We . . . will not impose the rigid requirements of the Uniform Commercial Code upon the statute dealing with theft by deception.

*Id.* at 648. Pursuant to *Luttrell*, we will, likewise, not “impose the rigid requirements” of the UCC upon KRS 514.040. We, thus, reject Tanner's arguments that the UCC should be used to interpret KRS 514.040.

Even if we were to apply the UCC in interpreting KRS 514.040, Tanner has failed to address the applicable provisions of the UCC that are actually relevant to this inquiry. By signing the blank checks, Tanner is clearly the drawer of the checks as defined in KRS 355.3-103. As the drawer of the check, Tanner is obligated to pay the check according to its terms, even if the check was not complete when he signed it. KRS

355.3-414(2)(b). Tanner would not be obligated to pay the checks if there was an unauthorized addition of words or numbers added to the check after he signed it sufficient to constitute an alteration under KRS 355.3-407. However, the evidence in this case clearly reflects Tanner knew that the checks would be completed by Graves and delivered to a third party. Tanner's conduct is sufficient to satisfy the "issued" requirement of KRS 514.040 since he signed them knowing and intending for the checks to be completed by Graves with the addition of words and numbers.

Considering the evidence as a whole, we believe there existed more than sufficient evidence upon which a reasonable juror could have found Tanner guilty of both counts of theft by deception over \$300.00 under KRS 514.040. Accordingly, the circuit court did not err by denying Tanner's motion for directed verdict.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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