William Terry CECIL *v.* STATE of Arkansas

CR 84-156 676 S.W.2d 730

Supreme Court of Arkansas
Opinion delivered October 8, 1984

1. APPEAL & ERROR — FAILURE TO RAISE ARGUMENT BEFORE TRIAL COURT — EFFECT. — An argument will not be considered on appeal if it is not raised before the trial court.
2. CRIMINAL PROCECURE — TRIAL COURT SHOULD USE ARKANSAS MODEL CRIMINAL INSTRUCTIONS — EXCEPTION. — In a criminal case, the trial court should use Arkansas Model Criminal Instructions unless explicit reasons are given for not doing so.
3. CRIMINAL LAW — "HOT CHECK" LAW NOT A PART OF CRIMINAL CODE. — The hot check law is not and never was a part of the criminal code.
4. JURY INSTRUCTIONS — CHARGE UNDER "HOT CHECK" LAW — GIVING OF AMCI 3601 REGARDING "INTENT TO DEFRAUD" PROPER UNDER CIRCUMSTANCES. — The phrase "intent to defraud" in AMCI 3601, which was given by the trial court, was properly explained to the jury in the instructions, and the trial court did not err in refusing to substitute another instruction requested by the appellant.

Appeal from Washington Circuit Court; *Mahlon Gibson,* Judge; affirmed.

Darrell E. Baker, Jr., Public Defender, for appellant.

Steve Clark, Atty. Gen. by: *Patricia G. Cherry,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. William Terry Cecil was convicted by a Washington County jury of ten violations of The Arkansas hot check law, Ark. Stat. Ann. § 67-719, et seq. (Supp. 1983), and sentenced to eight years imprisonment. He makes two arguments on appeal. First, he argues that the law is unconstitutionally vague and, second, that the trial court refused to properly instruct the jury that one must have the "purpose" to defraud instead of an "intent" to defraud.

The first argument will not be considered because it was

not raised before the trial court. *Cain* v. *Arkansas State Podiatry Examining Board,* 275 Ark. 100, 628 S.W.2d 295 (1980); *Sweeney* v. *Sweeney,* 267 Ark. 595, 593 S.W.2d 21 (1980). The second argument we find meritless.

The trial court properly used Arkansas Model Criminal Instructions, specifically, AMCI 3601, in this case to instruct the jury. We have held that the trial court should use such instructions unless explicit reasons are given for not doing so. *Per curiam* order of January 29, 1979, 264 Ark. 967. The relevant portion of the instruction given is as follows:

> Second: That as to each of the 10 described checks above, the defendant, William Cecil, knew at the time he made or drew or uttered or delivered the check that there were not sufficient funds on deposit with the bank for payment in full of the checks and all other outstanding checks against such funds;
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> Third: That William Cecil made or drew or uttered or delivered the particular checks with intent to defraud.
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> If you find that the defendant, William Terry Cecil, made or drew or delivered or uttered the checks and that William Cecil had no account with the bank when the check was made or drawn or delivered or uttered, then you may consider that fact along with all of the other evidence in the case in determining whether William Cecil intended that the check or checks would not be honored and that he had the intent to defraud.

The appellant's argument is that the phrase "intent to defraud" is the very kind of vague and confusing phrase the new criminal code was designed to abolish, by using instead such words as "purposely" and "knowingly" to describe criminal intent. The argument ignores that the hot check law is not and never was a part of the criminal code, and the phrase "intent to defraud" used in this case was properly explained to the jury in the instruction given. Therefore, the court did not commit error in refusing to make the substitution requested.

Affirmed.