NO. 23726

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
GREGORY LUSSIER, doing business as
Financial Freedom Advisors, Inc., Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(CASE NO. CT6-7:8/4/00)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Gregory Lussier (Lussier), doing business as Financial Freedom Advisors, Inc. (FFAI), appeals from the August 4, 2000 judgment, entered by per diem District Court Judge Ruby A. Hamili, finding Lussier guilty of Negotiating a Worthless Negotiable Instrument, Hawaii Revised Statutes (HRS) § 708-857 (1993), and sentencing him to probation for one year and jail for ten days, suspended on the condition that he pay the $5,170.62 amount of the check within one year at the rate of $500 per month.[1] We vacate and remand for a new trial before a different judge.

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[1] In this case, it may have been argued that the court did not expressly require a monthly payment. At the sentencing on August 4, 2000, Defendant-Appellant Gregory Lussier (Lussier) asked the court, "So I would still be in compliance even if I paid the full amount 11 months from now?" The court responded, "Certainly." Thereafter, the court scheduled a return date on December 5, 2000, and stated that Lussier has "indicated at least he can make that payment of at least 500 [dollars per month], so he would show a good faith effort at least in four months." This is not an order. However, the notation of the judgment by the clerk on the calendar states that Lussier is required to "PAY RESTITUTION $5170.62 IN $500 MO INSTALLMENTS," and Hawaiʻi Rules of Penal Procedure Rule 32(c)(2) states that "[t]he notation of the judgment by the clerk on the calendar constitutes the entry of the judgment."

COMPLAINT, TRIAL, AND DECISION

By Complaint filed on April 4, 2000, Lussier was charged with two counts of Negotiating a Worthless Negotiable Instrument, HRS § 708-857. Count One allegedly occurred on or about June 10, 1999, and Count Two allegedly occurred on or about July 12, 1999.[2] The trial occurred on August 4, 2000. Lussier was found guilty of Count Two and not guilty of Count One.

RELEVANT STATUTE

HRS § 708-857 states, in relevant part, as follows:

> **Negotiating a worthless negotiable instrument.** (1) A person commits the offense of negotiating a worthless negotiable instrument if that person intentionally issues or negotiates a negotiable instrument knowing that it will not be honored by the maker or drawee.
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> (2) For the purpose of this section, . . . either of the following shall be prima facie evidence that the drawer knew that the negotiable instrument would not be honored upon presentation:
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> . . . .

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[2] Count One alleges that "on or about the 10th day of June, 1999, . . . LUSSIER, [doing business as] FINANCIAL FREEDOM ADVISORS, INC. [(FFAI)], did intentionally issue or negotiate a negotiable instrument . . . knowing that it would not be honored by the maker or the drawee . . . ." Count Two alleges that "on or about the 12th day of July, 1999, . . . LUSSIER, [doing business as] FINANCIAL FREEDOM ADVISORS, INC., did intentionally issue or negotiate a negotiable instrument . . . knowing that it would not be honored by the maker or the drawee . . . ."

Both counts erroneously allege that Lussier was "[doing business as] FINANCIAL FREEDOM ADVISORS, INC." FFAI is a corporation that has its own separate legal identity.

Both counts also erroneously allege the date when Lussier intentionally issued or negotiated a negotiable instrument knowing that it would not be honored by the maker or the drawee. In both situations, Lussier issued post-dated checks. The dates alleged are the dates the checks were dishonored by the bank, not the dates of their issue.

(b) Payment was refused by the drawee for lack of funds upon presentation within thirty days after date or issue, whichever is later, and the drawer failed to make good within ten days after actual receipt of a notice of dishonor[.]

TRIAL

A business named Exceptional, Inc., doing business as Employer's Options (EO), supplied wages, taxes, and medical insurance payments for the employees of FFAI[3] and FFAI was obligated to reimburse EO for those payments within 30 days. FFAI failed to pay the reimbursements due, and EO sued FFAI. Mediation resulted in a written May 20, 1999 agreement by FFAI to pay $4,852.92 to EO on that day by 4:30 p.m.

Payment was not made on May 20, 1999. Ten days later, Lussier presented EO with FFAI's check no. 1076 in the amount of $4,852.92 and postdated June 10, 1999. The check was signed by Lussier. Lussier was the President and Secretary of FFAI and the only person who could sign checks for FFAI on that corporate account at American Savings Bank. EO deposited the check but the check was returned because Lussier had stopped payment on it.

In a letter to EO dated June 9, 1999, to Jennifer Brittin of EO, Lussier stated, in relevant part, as follows:

> Please find enclosed the following:
>
> 1. A new check in the amount of $5,094.21 dated 7/12/99 to replace the previous check for the lower amount of $4,852.92 dated 6/10/99. Please return the check dated 6/10/99.

[3] Although the checks indicate that the name of the corporation is "Financial Freedom Advisors, Inc.," the bank statements indicate that the name of the corporation is "Financial Freedom Financial Advisors, Inc."

> 2. An amount of $241.29 has been added for the lost invoice number 1008692. An invoice calculation is attached. The calculation for the new check is $4,852.92 plus $241.29 equals $5,094.21.
>
> 3. A second check in the amount of $76.41 is to pay for one month of additional interest at the rate of 1.50% per month. The total of these two checks is $5,170.62.
>
> I hope that you are satisfied with these calculations and the additional interest to pay for the delay on one month. You will be paid in full on 7/12/99. The court trial date was set for 7/17/99. It is my understanding that on 7/17/99 you will be able to tell the Judge that we have both come to an agreement through mediation and that you have been paid in full.
>
> I realize that you expected to receive the total amount by 6/10/99 but the corporation checking account has no money right now. The personal money that I received recently had to be used for mortgage payments. However, I will have approximately $20,000 in personal funds coming in the first week of July. I intend to make a personal loan to my corporation to cover the two checks that total $5,170.62.

FFAI's check no. 1079 in the amount of $76.41 was signed by Lussier and dated July 12, 1999. FFAI's check no. 1080 in the amount of $5,094.21,was signed by Lussier and dated July 12, 1999.

When checks nos. 1079 and 1080 were deposited on July 12, 1999, the bank returned them due to insufficient funds. The same thing happened when they were redeposited. EO advised Lussier of EO's inability to cash the checks. On July 30, 1999, the manager of EO wrote Lussier a letter stating as follows:

> I have been instructed by Employers Options President, Jennifer L. Brittin, to file a police report regarding two checks for the amounts of $5,094.21 and [$]76.41 returned by American Savings Bank failing to complete transactions because of insufficient funds. A police report (99-54258) has been filed. I have been informed by Maui Police Department that you have ten days to respond with payment. Failing to do so, Maui Police Department will then proceed with their administrative procedures in behalf of Employers Options request for prosecution.

The prosecution introduced evidence of the following activity in the FFAI checking account at American Savings Bank:

MONTH	ACTIVITY	AMOUNT
May 1999	5 deposits	$1,698.43
	5 checks	1,512.47
	balance	174.97
June 1999	8 deposits	635.38
	1 withdrawal	15.00
	3 checks	789.13
	service charge	5.35
	balance	.87
July 1999	3 deposits	636.36
	2 withdrawals	60.00
	2 checks	637.23
	service charge	4.65
	balance	64.65-
August 1999	3 deposits	700.75
	2 checks	636.10
	service charge	4.65
	balance	4.65-
Sept 1999	8 deposits	1,865.67
	9 checks	1,861.02
	service charge	6.10
	balance	6.10-

When defense counsel examined Lussier, the following was stated:

> Q. And when you say that you wanted to make sure there would be sufficient funds, why do you say that?
>
> A. I had been informed that there would be a delay in receiving income.
>
> [DEPUTY PROSECUTOR]: Your Honor, I'm going to object to that. That is calling for hearsay from another party.
>
> THE COURT: The objection is sustained.
>
> [DEPUTY PROSECUTOR]: Thank you. Move to strike his statement.
>
> THE COURT: Response is stricken.

. . . .

Q. And why was it that you anticipated sufficient funds by that second postdated check, date of July 12th?

A. I was expecting to receive money in the first week of July from a company called Bices (phonetic) into my Financial Freedom Corporation account.

Q. Let's talk about this Financial Freedom Corporation. Is that a different corporation from Financial Freedom Advisors?

A. Yes, it is. It's a company that operates in the same office and it has different sources of income, it's actually a separate business.

[DEPUTY PROSECUTOR]: Your Honor, at this time, I move for an objection, I move to strike his testimony, as not relevant.

THE COURT: Your objection is sustained.

[DEPUTY PROSECUTOR]: Thank you.

[DEFENSE COUNSEL]: Your Honor, again, this goes towards whether he intended or not to make good on these checks. It's an offer of proof that he intended to transfer funds from one checking account to another by the due date of the check, and that, I believe we need to present evidence upon.

THE COURT: With respect to this matter, [Defense Counsel], what is relevance [sic] here is the account upon which the checks that were issued are concerned. Whether there are monies elsewhere, the issue at hand today is the account reflected in the complaint.

[DEFENSE COUNSEL]: I think, Your Honor, as long as there is that outstanding matter of why the parties agreed to the postdating in the first place, I think there is an understanding by the parties that it would be postdated to give him time to get the funds into the account, no matter how.

We're just trying to prove, going ultimately to his intent, that he did have the funds in one account and all he needed to do was transfer it to the other account, but before that something happened.

[DEPUTY PROSECUTOR]: Your Honor, if they're not going to present any evidence that he did so, then it's not relevant. I don't think by looking at the records that they're going to be able to claim that, so all of this is not relevant.

THE COURT: With respect to the objection, it is sustained. Unless it actually did occur it's not relevant.

When defense counsel questioned an employee of American Savings Bank about Lussier's bank statements showing activity in

the account of Financial Freedom Corporation (FFC) during the relevant times, the prosecution objected on the basis that "it's a different account and it's not relevant[.]" Defense counsel responded that "[i]t will be proven by [Lussier's] testimony that he had access, personal access, exclusive access to both accounts and had every intention to transfer funds from this account to the account from which the checks were drawn on and that ultimately goes to his intent." The court sustained the prosecution's objection.

When defense counsel further examined the employee of American Savings Bank, the following was stated:

> Q. It is possible for a person who controls two bank accounts to transfer funds from one to another; isn't that correct?
>
> [DEPUTY PROSECUTOR]: Objection. Relevancy.
>
> [THE COURT]: Offer of proof?
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> [DEFENSE COUNSEL]: Again, Your Honor, this goes ultimately to his intent, whether he intended to put funds into that account to try to make these checks good.
>
> [DEPUTY PROSECUTOR]: Your Honor, again, if there is no proof that he did that, then it's not relevant. It's pure speculation.
>
> THE COURT: Your objection is sustained.

When defense counsel asked Lussier whether he informed EO prior to July 12 that the check dated July 12 would be no good and Lussier responded in the affirmative and stated that he told EO that "my account had been levied by the [Internal Revenue Service (IRS)]," the court sustained the prosecution's objection

that Lussier was "testifying about something that is beyond the scope of this case."

When the prosecution asked Lussier whether on July 12 he had sufficient funds to cover the July 12 check, Lussier responded that he had sufficient funds but not in that account.

At the conclusion of Lussier's testimony, defense counsel asked Lussier why, following July 17,[4] he did not have sufficient funds in the FFAI account, Lussier responded that it "was because of a continuous levy by the IRS." Lussier did not identify the account(s) affected by the continuous IRS levy.

In closing argument, the prosecutor argued, in relevant part, as follows:

> When [Lussier] claims that there was a tax lien on his account, I would point out to the fact that, even in September there are checks running from September 8th, that are okayed by the bank, since September 15th, that have been cleared by the bank, written on that account.
>
> Since Mr. Lussier is the only person who can write on that account that would tend to show that perhaps he's not being quite forthright with the Court when he claims that there was a tax lien on that account and he had no access to it.
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> If he's writing checks on it in September and in August, as documented by the bank records, I don't know where he's getting the story that he's telling the Court that there was a tax lien on the funds in that account.

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[4] In Lussier's June 9, 1999 letter to Jennifer Brittin of Exceptional, Inc., doing business as Employer's Options (EO), Lussier stated, "The court trial date was set for 7/17/99. It is my understanding that on 7/17/99 you will be able to tell the Judge that we have both come to an agreement through mediation and that you have been paid in full." At trial, defense counsel asked Lussier, "After EO tried to cash the second check and it was not honored, what did they do on July 17th?" Lussier responded, "On July 17th, we went to court." When the prosecutor objected on the basis that "[t]he issue of what happened in a civil case has no --," the court sustained the objection.

> It appears that he still had access to the account, he was depositing money into it, he was taking out checks on it, but the one thing he was never ever doing was making enough money and placing it in this account to cover his checks. The fact is, money was coming in, small amounts of money, but he was also taking out money at the same time. He was paying off other bills, but never paying off the big check.
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> The reason for it is, he never intended to make good that check and that is what the gravamen (phonetic) of this case is.

In closing argument, defense counsel argued, in relevant part:

> Well, it's hard to squeeze blood out of a turnip at that point, because the IRS came and levied all of his accounts,[5] including the accounts, which anticipated the accounts receivable, the accounts receivables that were coming in, the larger sums of money that he anticipated, which ultimately might have been used to pay this.
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> . . . .
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> He did not know the IRS was -- there is no proof to show that he knew IRS was going to come and levy his monies, whether it be in this account, or any of his other accounts, which the American Saving's custodian testified that he had.
>
> I think, Your Honor, it's reasonable to ask the Court to consider that he could have and did intend to transfer money from one account to the other by July 12th, in order to get these checks good, he was just precluded from doing so.
>
> I think that is the main thing they have to prove is that he intended to write these bad checks and I think that's hard to prove, because all the parties knew, including the complaining witness, that the checks were postdated and that they were postdated for a reason. That was that he did not have the money at the time.

(Footnote added.)

POINTS AND ARGUMENTS ON APPEAL

In this appeal, Lussier contends that

> the prosecution was required to prove, beyond a reasonable doubt, that it was Lussier's conscious object to issue check 1080 being aware of, believing, or hoping that the check would not be honored. Lussier's defense was that he did not have the requisite state of mind to commit the offense at

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[5] There is no evidence that the Internal Revenue Service levied FFAI's checking account.

> the time he negotiated check 1080. Therefore, any evidence which addressed Lussier's state of mind was relevant to the adjudication of this case.

Lussier argues that "THE TRIAL COURT ERRED IN REFUSING TO ALLOW LUSSIER TO TESTIFY ABOUT RELEVANT FACTS AND PRESENT CORROBORATING EVIDENCE THEREBY DENYING HIS CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE." More specifically, Lussier complains that

> [a]t trial, the court did not allow testimony or evidence in the following areas: (1) how funds were regularly paid into the FFA account by FFC, (2) that the FFC account had accumulated enough money to cover the check, and (3) that a tax levy was issued against the FFC account *after* Lussier had delivered check 1080 to Brittin and *before* he could transfer funds. When Lussier attempted to testify about the monetary relationship of the two businesses, the prosecutor objected and the court sustained the objection. Additionally, when Lussier attempted to testify about the tax levy and effect of tax levy on his available funds, the prosecutor objected and the court sustained the objection. Moreover, when the defense attempted to enter the FFC bank records into evidence, the prosecutor objected and the court sustained the objection.

(Emphases in original, record citations omitted.)

The prosecution responds that

> the fact that Lussier may have had funds in another account has no bearing under the law of whether he intended to make these checks good written on another account because he did not in fact do so. Absent concrete evidence that there was a regular exchange of funds between these accounts, it is pure speculation and not relevant.
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> . . . .
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> By Lussier's own statement, Lussier did not know with certainty that he would receive monies from Bices in early July, he merely anticipated or hoped such funds would be coming in. This is different from a situation where funds regularly arrive at a certain time, such as a payroll deposit where reliance on the funds actually coming in is in good faith. More importantly, such monies would be deposited into the Financial Freedom Corporation account, a <u>separate account</u> for a separate business with different source of income from the Financial Freedom Advisors Inc. account. Therefore, being a separate account, there was no relevance to this evidence. The fact remains, contrary to Lussier's assertions that he did have the funds in one account and all he needed to do

> is to transfer it over into the other account, that he never did make such a transfer.
>
> . . . .
>
> . . . [A]lthough the Court ruled that this evidence was not relevant, Lussier attempted to get in evidence that his account had been levied by the IRS. Since this evidence pertained to a separate account, it was not relevant and the Court correctly sustained the objection.
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> . . . .
>
> First, again, there is no credible evidence of the IRS tax levy or the date when such levy allegedly took effect. No offer of proof was made with respect to that evidence. Secondly, Lussier wants the courts to believe that his account had a tax levy without any notice to him. It is absolutely clear that Lussier knew that he owed back taxes. It is also clear that he must have been aware of said obligation and consequently of the possibility of a tax levy long prior to July 12, 1999. As such, he had no reasonable expectation that any incoming funds would be available for transfer into the FFA, Inc. account.
>
> Finally, Lussier was allowed on two occasions to testify that there was an IRS levy.[6]

(Emphasis in original; footnote added.)

DISCUSSION

It was the prosecution's burden to prove that (1) on June 9, 1999, Lussier intentionally issued check no. 1080, postdated July 12, 1999, knowing that it would not be honored by the bank upon presentation on July 12, 1999, and (2) check no. 1080 was not honored by the bank upon presentation on July 12, 1999.

The following was prima facie (but not conclusive) evidence that Lussier knew that check no. 1080 would not be honored upon presentation: (1) Payment was refused by the bank

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[6] This statement is only half true. On the first of these two occasions, the court sustained the prosecution's objection that Lussier is "testifying about something that is beyond [the] scope of this case, Your Honor."

for lack of funds upon presentation; and (2) Lussier failed to make good within ten days after actual receipt of a notice of dishonor.

It is clear that the prosecution presented prima facie evidence of Lussier's guilt. In defense, Lussier sought to prove that on June 9, 1999, when he issued check no. 1080, postdated July 12, 1999, he thought he would have access to sufficient funds in FFC's account to deposit into FFAI's account so that check no. 1080 would be honored on July 12, 1999. The prosecution objected to this evidence on the ground that it was not relevant. The court sustained the objection.

If the evidence Lussier presented and attempted to present in his defense was not relevant, all of it should have been excluded and none of it should have been discussed in closing argument. If it was relevant, none of it should have been excluded. At the trial, Lussier's evidence was excluded in large part, admitted in small part, and thoroughly discussed in closing argument as if all of it had been admitted.

It appears that the prosecution has failed to recognize the difference between relevant evidence and credible/persuasive evidence. Evidence that is relevant may or may not be credible/persuasive. Evidence of why check no. 1080 was not honored on July 12 is relevant to the question of Lussier's intent when he issued it on June 9. The following evidence is

relevant to the question of Lussier's intent when he issued check no. 1080 on June 9: (a) on June 9 Lussier reasonably believed that post-June 9, pre-July 12, he would have access to funds in the FFC account that he could have, and would have, used to deposit into FFAI's account so that FFAI's account would have had sufficient funds to pay check no. 1080 on July 12; and (b) Lussier's access to those funds in the FFC account was denied post-June 9, pre-July 12, by an unanticipated IRS levy on the FFC account. Whether this evidence is credible/persuasive evidence is for the court to decide.

Upon objection by the prosecution, the court prevented Lussier from introducing most of this evidence. It is true that Lussier eventually was allowed to testify that "[f]ollowing July 17th" he did not have sufficient funds in FFAI's account because of an IRS levy. However, this testimony does not identify the account levied by the IRS. Moreover, this evidence does not overcome the harm caused by the prior exclusion of other relevant evidence. This is especially true in light of the court's expressed conclusion that such evidence was not relevant, that "[u]nless it actually did occur it's not relevant[,]" and that "what is [relevant] here is the account upon which the checks that were issued are concerned. Whether there are monies elsewhere, the issue at hand today is the account reflected in the complaint."

We conclude that Lussier was substantially prejudiced by the trial court's (1) erroneous exclusion of relevant evidence and (2) erroneous legal conclusion that relevant evidence was not relevant.

CONCLUSION

Accordingly, we vacate the judgment entered on August 4, 2000, and remand for a new trial before a different judge.

DATED: Honolulu, Hawai‘i, May 9, 2002.

On the briefs:

Matthew L. Hall,
Deputy Public Defender,
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Chief Judge

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Associate Judge

Associate Judge