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Summary of Zahavi v. State, 131 Nev. Adv. Op. 7

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CRIMINAL LAW: NEVADA'S BAD CHECK STATUTE

Summary

The Court determined that (1) a casino's knowledge of insufficient funds may negate the intent-to-defraud element under NRS 205.130; (2) there is no basis for a separate jury instruction; (3) the district court did not commit any additional errors; and (4) that NRS 205.130 is constitutional.

Background

To obtain credit and receive markers at a casino, the casino requires their patron to complete a credit application, which includes providing bank information that the casino may use to check account balances. Then the casino obtains the patron's credit report showing past player history, play at other casinos, and markers owed to other casinos. The casino then grants a line of credit to credit worthy patrons and the patron may obtain markers that can be exchanged for gaming chips. Each marker informs the patron that the marker is like a personal check and can be withdrawn from their account at any time. Each marker must then be signed by the patron before use. Generally, as a courtesy, casinos do not immediately deposit the markers until a designated disposition date or longer if the patron is working with the casino to pay a marker's remaining balance.

Between October and December 2008, Zahavi received 14 casino markers, totaling \$385,000, through existing and new lines of credit at four Las Vegas casinos. In October 2008, Zahavi executed nine markers at the Venetian Resort and Casino and the Palazzo Hotel and Casino, totaling \$184,000. Zahavi signed each marker, representing that he understood the marker to be identical to a personal check and that it was payable upon demand. The evidence introduced during trial showed that the Venetian and Palazzo obtained Zahavi's August 2008 credit report and his bank account averages, amounting to \$25,000 to \$50,000 in one account and \$50,000 to \$75,000 in another. When Zahavi failed to timely pay the markers, they were presented for payment from his bank accounts and returned for insufficient funds.

Zahavi also executed two \$50,000 markers at the Hard Rock Hotel and Casino in October 2008. He made similar representations after signing these markers and Hard Rock had similar bank information. The casino did not learn of Zahavi's actual bank account balances until two days after issuing him the markers. Again, when Zahavi failed to timely pay the markers, they were presented for payment from his bank accounts and returned for insufficient funds.

Zahavi obtained an additional three markers at Caesars Palace Hotel and Casino in December 2008. Again, Zahavi made similar representations when signing these markers. However, Caesars had Zahavi's 2005 credit report on file and did not introduce evidence showing knowledge of the current state of his bank accounts. Again, after multiple collection efforts, the casino presented the markers for payment from his bank accounts and they were returned for insufficient funds.

All four casinos sent Zahavi a required ten-day demand letter requesting payment after receiving the returned markers, yet he failed to pay. The 14 unpaid markers were then sent to the Clark County District Attorney's Office for criminal prosecution under Nevada's bad-check

¹ By Leesa Goodwin

statute. The State filed an indictment, including one count for each casino—totaling four counts, against Zahavi for writing checks with insufficient bank funds with intent to defraud.

At trial, the district court gave the following jury instruction: “Whether a payee chooses to cash a check immediately or at a later date does not alter the character of the instrument. The mere fact that a marker is held for a period of time prior to deposit does not convert the instrument into a post dated contract.” Zahavi objected to this jury instruction and proposed other instructions, which the district court rejected. The jury found Zahavi guilty on all four counts.

Discussion

District court did not err in instructing jury that a casino’s choice to hold markers does not alter the marker into a short-term loan or post-dated check

The Court recognized that according to *Nguyen v. State*, a gaming marker was a “check or draft” under Nevada’s bad check statute² and delayed payment of a marker does not render the instrument a loan document. The Court clarified the holding in *Nguyen* and reiterated that a casino marker bearing the phrase “payable upon demand” or similar language is not deemed a short term loan if both parties mutually understood and agreed to such terms. Therefore, the district court did not err regarding its jury instruction.

District court did not err in refusing to give Zahavi’s proposed jury instruction that a casino’s knowledge of insufficient funds negates the intent-to-defraud element or, alternatively, is an affirmative defense

The Court noted that the statute was silent on this issue and made no reference to negating the element of intent to defraud. The Court declined to allow negation of the intent element if the payee merely had “reason to believe” a patron had insufficient funds because casinos are under no obligation to research a patron’s financial status. However, the Court determined that the “intent to defraud” element may be negated by a showing that the casino had knowledge that the person obtaining the marker did not have sufficient funds to cover the marker at the time it was executed. The factors in determining whether intent may be negated include (1) what the payor represented and (2) what information was available to the payee. Because the Court determined that the “intent to defraud” element may be negated by a disclosure of insufficient funds to the payee, Zahavi was entitled to have the jury so instructed if there was proof in the record supporting the instruction and it was not adequately covered in other instructions.

Under the first factor, Zahavi did not affirmatively represent he had insufficient funds. He failed to affirmatively disclose to the casinos that he lacked sufficient funds in either of his accounts. In actuality, he guaranteed the casinos that there were sufficient funds available when he signed the marks and that the markers were payable upon demand and could be executed at any time.

Under the second factor, evidence indicated that at the time the casinos extended the line of credit, their records supported Zahavi’s affirmative representation that he had sufficient funds. Because Zahavi failed to make an affirmative disclosure to the casinos and the casinos had no present knowledge of his insufficiency of funds at the time the markers were executed, the Court

² NEV. REV. STAT. § 205.130(1) (2011).

concluded that there was no evidence to negate the intent-to-defraud element, and therefore the district court did not abuse its discretion by refusing the instruction.

Additionally, the district court did not abuse its discretion in rejecting Zahavi's proposed supplemental instruction on the intent to defraud because it was adequately addressed by the other instructions and he was permitted to argue his theory regarding the casino's knowledge of insufficient funds.

The Court further declined to hold that Zahavi was entitled to an instruction on an affirmative defense. None of the cases he cited characterize the payee's knowledge of insufficient funds as establishing an affirmative defense. As such, the Court concluded the district court did not abuse its discretion in failing to instruct the jury on negating the intent-to-fraud element or, alternatively, in refusing to instruct the jury that it was an affirmative defense.

NRS 205.130 is constitutional

The statute is constitutional because it punishes a fraudulent act as summarized in the first element, not the mere accumulation of debt, and this court has previously determined that "intent to defraud" is constitutional.

The Nevada Constitution states that "there shall be no imprisonment for debt, except in cases of fraud."³ This court has previously held that a criminal statute allowing a defendant to be arrested for removing or disposing of his property with the intent to defraud his creditors did not conflict with the provision in Nevada's Constitution against imprisonment for debt, except in cases of fraud.

The Court noted that other states with similarly worded bad-check statutes have also reviewed their statute's constitutionality under their constitutions and have held that including only the intent-to-defraud element of fraud in a criminal statute did not violate a constitutional prohibition against imprisonment for debt. Based on the court's prior decisions and persuasive authority from other jurisdictions with similar constitutional prohibitions, the Court concluded that Nevada's bad check statute does not violate Nevada's Constitution because Zahavi's conviction is based on committing a fraudulent act and not on incurring a debt. Accordingly, the Court affirmed Zahavi's judgment of conviction.

Conclusion

A casino's knowledge of insufficient funds may negate the intent-to-fraud element under Nevada's bad check statute and this statute is constitutional. However, a separate jury instruction or affirmative defense was not necessary. The district court here did not err, therefore the Court affirmed Zahavi's four convictions of violating Nevada's bad check statute.

³ NEV. CONST. art. 1, § 14.