In The

Supreme Court of Virginia

RECORD NO. 181684

JERMICA SHONDAL TAYLOR,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

Charles E. Haden
ATTORNEY AT LAW
1 East Queens Way, 1st Floor
Hampton, Virginia 23669
(757) 727-6972 (Telephone)
(757) 727-6974 (Facsimile)
cehaden@mindspring.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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STATEMENT OF THE CASE

On August 10, 2017, Jermica Shondal Taylor was tried in a bench trial before the Honorable Bonnie L. Jones, Judge of the Hampton Circuit Court, on one count of grand larceny in violation of Va. Code § 18.2-95, one count of breaking and entering in violation of Va. Code § 18.2-91, one count of forgery in violation of Va. Code § 18.2-172, one count of attempted uttering in violation of Va. Code § 18.2-172, one count of attempted false pretenses in violation of Va. Code § 18.2-178, and one count of attempted identity theft in violation of Va. Code § 18.2-186.3 and Va. Code § 18.2-26. Appendix [hereinafter abbreviated "Ap."] 1-2, 4-6.

At the conclusion of the Commonwealth's case-in-chief, Taylor's counsel made a motion to strike the evidence. Ap. 69-85, 144. Judge Jones denied the motion to strike. Ap. 86-87, 144. At the conclusion of all the evidence, Taylor's counsel renewed the motion to strike. Ap. 124-127, 133-138, 144. Judge Jones again denied the motion to strike and went on to find Taylor guilty as charged. Ap. 128, 139-141, 144.

At the sentencing hearing on November 8, 2017, Judge Jones sentenced Taylor to five years in prison on the breaking and entering, all suspended for a period of five years. Ap. 146-147. On the grand

larceny, Judge Jones sentenced Taylor to five years in prison, all suspended for a period of five years. Ap. 146-147. On the forgery, attempted false pretenses, and attempted identity theft, Judge Jones sentenced Taylor to three years in prison on each of the three counts, with three years suspended on each for a period of five years. Ap. 146-147. On the attempted uttering, Judge Jones sentenced Taylor to three years in prison, with two years suspended for a period of five years. Ap. 146-147. In other words, Judge Jones sentenced Taylor to an active sentence of one year in prison, plus 24 years of suspended time. Ap. 146-147. Judge Jones also ordered that Taylor pay restitution of $875 as a condition of her probation. Ap. 146-147.

On November 15, 2017, Taylor filed a notice of appeal to the Court of Appeals of Virginia. Ap. 148-149. On July 27, 2018, a Judge of the Court of Appeals granted Taylor's petition for appeal with respect to Assignment of Error No. 1. On December 4, 2018, the Court of Appeals affirmed the trial court with respect to Assignment of Error No. 1 in a Memorandum Opinion by Chief Judge Glen A. Huff. Ap. 150-154. Taylor filed a timely notice of appeal to the Supreme Court of Virginia. Ap. 155-156.

STATEMENT OF FACTS

Sometime between 9:45 a.m. and 11:45 a.m. on Thursday, November 5, 2015, Jermica Shondal Taylor allegedly broke into and entered the home of Sandra Clements, located at 27 Bayview Court in the Buckroe section of Hampton, and afterwards allegedly forged a check and attempted to utter it at a branch of the Old Point National Bank located at 4030 West Mercury Boulevard in Hampton.

Prosecution witness Sandra L. Clements testified, "I left [my home] in the morning to go to the Hampton YMCA on Pembroke." Ap. 11. "I left about quarter of ten and got back about quarter of twelve." Ap. 11. "I went to unlock my door, [but] it just sort of gave way when I turned the key in the lock." Ap. 12. "[That was peculiar] because I usually have to exert some effort … getting the door open." Ap. 12. "The first thing I noticed [inside] was that the doorframe was lying in my living room. It's a townhouse…. [W]hen I went into the house, I could look straight to the back … to the exit, and [I saw] the sliding glass door was partially ajar." Ap. 12. "[When I left to go to the YMCA earlier,] I had left $50 on my coffee table. That was gone…. [G]reeting cards that had been addressed to various people … had been torn open…. I kept jewelry in my bathroom downstairs, and that was gone." Ap. 13.

"It was five or six [items of jewelry]…. [M]ostly it was my mother's jewelry … that I couldn't find. There was a very large opal ring [worth about $150]…. There was a small opal ring [worth] about a hundred. There were several alexandrite stone pieces. There were three of those, and that was [worth] probably three to four hundred dollars. And there was a … multi-stone ring [worth] about $100. They were the main things that were missing [downstairs]." Ap. 13. "When I went upstairs, I noticed that in my bedroom where I have storage boxes under my bed … they were out a little bit from under my bed…. [S]omeone had been through the closet. I went into the front room where I kept extra checkbooks and registers, and [I saw] they were gone…. [M]y cell phone was gone…." Ap. 14. "I called the police very shortly thereafter, and they were there within fifteen minutes." Ap. 17. Asked if she could identify Commonwealth's Exhibit 1, a check payable to Jermica Taylor drawn on the Old Point account of Sandra Clements, as one the checks that had been stolen on the morning of November 5, 2015, Clements replied in the negative: "I don't know that this was one that was missing – I don't." Ap. 15, 142.

Prosecution witness Mary Grace Lovemore testified, "I'm a bank teller at Old Point National Bank [at 4030 West Mercury Boulevard in

Hampton]." Ap. 26, 30. "I was working the teller line [on the afternoon of November 5, 2015], and I called a customer up and [she] wanted to cash a check. So she presented the check, and I do what I was taught in teller school, which is to make sure everything matches, make sure the check is within the check range, make sure the handwriting matches. And when I noticed the handwriting didn't match, I [began] looking for my supervisor. My supervisor was not [available], so our protocol then is to call the customer…. So I called Ms. Clements, and she answered the phone…. [S]he sounded, you know, shaken on the phone. She was like, 'Can you talk to the police? The police are at my home right now.'" Ap. 26-27. "[I talked to the police] briefly, and they said, 'Can you stall? We're … sending a cop over there right now.'" Ap. 27. "I said okay, but by the time I got back … to my station, she was gone…. The customer had gone." Ap. 27. "I know she was wearing like leisure clothes…. [S]he was wearing a hoodie and had her hair up." Ap. 27. "[I]t was an African-American woman with relaxed hair." Ap. 33. "[She was] like thirty or forty." Ap. 33. "That's the check that was presented to me [by the woman]." Ap. 28, 142 (Commonwealth's Exhibit 1 -- check payable to Jermica Taylor). "[I wrote on the check in black ink] her driver's license number, the issue

date, and the expiry date." Ap. 28. "[When the police showed up a few minutes later,] I told them what happened and then they said, 'You need to write an official statement.'" Ap. 29.

Prosecution witness Melinda Joy Matthews testified, "I was a branch manager for Old Point National Bank at Mercury Boulevard." Ap. 38. "I was in my office [when] the teller, Mary Grace Lovemore, came to my office and said that there's a lady at her window that's cashed this check. And I pulled it up on the camera and called the police immediately, and they [responded] very, very quickly to this situation…. [I'm unsure if the woman had] left the building [by] this point…. [M]y duty was to help my teller pull up the video [of the transaction, and] call the police…. [W]ithin a couple minutes, Detective Lawrence and another officer was in my office. I showed them the video…." Ap. 38-39, 41. "That's the picture that I pulled up that day [from the security camera video]." Ap. 39, 143 (Commonwealth's Exhibit 2 -- photograph). "I gave it to the detective." Ap. 39. "It was a picture of a lady at Mary Grace's teller station cashing a check that was not hers." Ap. 39.

Corporal Jeffrey Lawrence of the Hampton Police testified that he was dispatched to investigate the incident at the bank on November 5,

2015: “On that date, [at] approximately 1:30 in the afternoon, I responded to the Old Point Bank after hearing a call come over the radio for the type of complaint that I investigated. I responded to the location there at Old Point on West Mercury Boulevard in the City of Hampton.” Ap. 35. “When I got there, I came in contact with the bank manager, Ms. Melinda Matthews, who [gave] me a brief rundown of what had occurred and provided me with a copy of a check … provided to the teller for cash.” Ap. 35, 142 (Commonwealth’s Exhibit 1 -- check). “Ms. Matthews did provide me with the surveillance camera still photos of the alleged suspect … involved in the cashing of this check.” Ap. 36. “This here is a still photo of a surveillance photograph that I received from Ms. Matthews, the … branch manager there at Old Point.” Ap. 43, 143 (Commonwealth’s Exhibit 2 -- photograph). “Based on the information that was left on the check [including] the license number … I did a check and verified the picture at the DMV against the picture here.” Ap. 43. “It did come back to a Ms. Jermica Taylor, [whose] picture on the ID matched the … picture in the [security camera] photo.” Ap. 43. “[When I interviewed Taylor, she maintained] she was not aware of [the name or address of] the person that gave her [the check] – you know, she didn’t know any names of anybody….”

Ap. 112. "She had initially told me that she was selling a TV and that she got a call from another friend – a friend of another friend that was telling her that she wanted to buy the TV." Ap. 112-113. "[Taylor indicated] it was … a female…. I wrote in [my notes] it involved [a] female who gave her the check." Ap. 113. "[S]he advised me she received a check from the woman that she sold the TV to in the parking lot, [and] advised that she was called by a friend of hers who told her that another friend … wanted to buy the TV." Ap. 114. "[Taylor indicated she] would need some time to go back to the friend that she got information about the TV [buyer from, and then she could] come back, and she would probably know her name." T.T. 112.

Detective Brian Devine of the Hampton Police testified, "I was assigned to investigate a burglary involving [Jermica Taylor] as a suspect." Ap. 49-50. "I interviewed her in the Investigations Unit Interview Room Number 2 [at the Hampton Police Headquarters on January 19, 2016]." Ap. 50. "When I first met her in the investigation room … I Mirandized her at 10:03 hours…. I showed her this photo [obtained from the security camera at Old Point National Bank and] asked her if that was her. She acknowledged that it was her and she had been at the bank." Ap. 51, 143 (Commonwealth's Exhibit 2 --

photograph). "She admitted to me that she had gone into the bank and tried to cash the check." Ap. 51. "[She indicated] she did not [succeed in cashing the check]." Ap. 52. "She left, but she had no explanation for why she left the bank [before the check could be cashed]." Ap. 52.

Jermica Shondal Taylor, age 38, took the stand at her trial and acknowledged that she entered the Old Point National Bank on West Mercury Boulevard in Hampton on November 5, 2015 and attempted to cash a check payable to Jermica Taylor: "Yes, I did." Ap. 88-89. However, Taylor denied knowing that the check she attempted to cash was a forgery, explaining that she had sold her TV that day to a woman whom she knew only by the name of Sug, who gave her the check in payment for the TV. Ap. 89-90. Taylor testified, "I … was selling a TV…. I was advertising selling a 55-inch television." Ap. 89. "I got a call stating that somebody wanted to purchase the TV." Ap. 90. "It was probably around nine-something." Ap. 90. "[The phone call was from] a lady named Sug." Ap. 90. "[I had] never met her [before]." Ap. 90. "I told her that [the asking price for the TV] was $375, and she said … she had the money to meet me…. We met off of Orcutt Avenue and I gave her the TV and she wrote me a check…." Ap. 92-93. "I thought it was from the person I sold the TV to." Ap. 102. "I didn't ask her for no

ID. She said, 'You can go right here to Old Point and cash it,' and it was right around the corner from where we were." Ap. 94. "That was the bank that was on the check…." Ap. 95. "I went into the location with my children, stood in line, [and] went to the teller and tried to cash [the] check." Ap. 95. "The lady [behind the counter] left." Ap. 95. "I stood there for a while, [maybe] five minutes. I think she was gone longer than that…. I think I got scared…. I'm like, it must be something wrong." Ap. 97. "[M]y young son said he had to use the restroom…. She didn't come back, and so that's when I left." Ap. 97. "I was disappointed…. I didn't have my TV [anymore] and then I was also out of … the funds [paid for the TV]." Ap. 97. "I was very upset. I called Teron [Davis, my then live-in boyfriend who had put me in contact with Sug], trying to find out who the individual was. He had given me a number, [but] the number I was calling was disconnected." Ap. 97, 91. "[Some time later, the police] came to my job at BJ's." Ap. 97. "It was probably like a couple of weeks [after I attempted to cash the check]…. I had just got the job [at BJ's Wholesale Club]." Ap. 98. "The detective came up to me at the job and pulled me to the side, talked to me, gave me a card, and told me to stay in contact with him." Ap. 98. "[H]e asked me who I had obtained the check from, and I told

him Sug. That's all I had known…." Ap. 98-99. "[I told the detective] that I was going to try to find out more information." Ap. 98. "I called people, I called Teron, [but] they couldn't find anything else besides the cell phone number." Ap. 99. "I gave [the detective] the number I had for Sug." Ap. 100. "I … went down to the Hampton [Police] office [to talk to the detective again in January 2016]." Ap. 101-102. Taylor denied having forged the check: "No, I didn't. I signed my name on the back." Ap. 103. Taylor also denied having broken into Ms. Clement's residence or knowing anything about the burglary. Ap. 102, 104.

On cross examination, Taylor acknowledged she never told Detective Lawrence about her boyfriend, Teron Davis, being the person who put her in contact with Sug. Ap. 105-107. Asked if she left the bank because she knew the check was forged, Taylor replied, "No, I didn't know nothing was wrong with it until the person took too long. No." Ap. 108. "I don't know about [the check] being stolen, but I just knew possibly something was wrong with the check." Ap. 108. Taylor acknowledged she was a convicted felon and had misdemeanor convictions for offenses involving lying, cheating, or stealing. Ap. 109-110.

ASSIGNMENT OF ERROR

1. The Court of Appeals erred in affirming the trial court's denial of Taylor's motion to strike the charge of attempted identity theft under Va. Code § 18.2-186.3, where the Commonwealth's evidence was insufficient as a matter of law to prove the elements of attempted identity theft, where Jermica Taylor endorsed her own name on the back side of the check and never misrepresented her identity to the bank teller while attempting to cash the check. Ap. 69-75, 124-126.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING TAYLOR'S MOTION TO STRIKE THE CHARGE OF ATTEMPTED IDENTITY THEFT UNDER VA. CODE § 18.2-186.3, WHERE THE COMMONWEALTH'S EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THE ELEMENTS OF ATTEMPTED IDENTITY THEFT, WHERE JERMICA TAYLOR ENDORSED HER OWN NAME ON THE BACK SIDE OF THE CHECK AND NEVER MISREPRESENTED HER IDENTITY TO THE BANK TELLER WHILE ATTEMPTING TO CASH THE CHECK.

Standard of Review

When examining a challenge to the sufficiency of the evidence, an appellate court must review the evidence in the light most favorable to the prevailing party at trial and consider any reasonable inferences from the facts proved. Zimmerman v. Commonwealth, 266 Va. 384, 386, 585 S.E.2d 538, 539 (2003). The judgment of the trial court is presumed to be correct and will be reversed only upon a showing that it is "plainly wrong or without evidence to support it." Viney v. Commonwealth, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005), Va. Code § 8.01-680.

Discussion of the Issue

"[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence

necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense…. [This] doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury…. [S]uch an occurrence has traditionally been deemed to require reversal of the conviction." Jackson v. Virginia, 443 U.S. 307, 316-17 (1979) (footnotes omitted). Furthermore, if facts are susceptible to two different interpretations, "one of which is consistent with the innocence of the accused, the jury or the judge trying the case cannot arbitrarily adopt the interpretation which incriminates him." Williams v. Commonwealth, 193 Va. 764, 772, 71 S.E.2d 73, 77 (1952). Instead, "[t]he interpretation more favorable to the accused should be adopted unless it is untenable under all the facts and circumstances of the case." Id. It is not sufficient that facts and circumstances proven be consistent with the defendant's guilt. To sustain a conviction, they

must be inconsistent with every reasonable hypothesis of his innocence. Strawderman v. Commonwealth, 200 Va. 855, 861, 108 S.E.2d 376 (1959). "A suspicion of guilt, however strong, or even a probability of guilt, is insufficient to support a criminal conviction." Bishop v. Commonwealth, 227 Va. 164, 170, 313 S.E.2d 390, 393 (1984).

Va. Code § 18.2-186.3, the identity theft statute, provides in pertinent part:

A. It shall be unlawful for any person, without the authorization or permission of the person or persons who are the subjects of the identifying information, with the intent to defraud, for his own use or the use of a third person, to:

2. Obtain goods or services through the use of identifying information of such other person;

C. As used in this section, "identifying information" shall include but not be limited to: (i) name; (ii) date of birth; (iii) social security number; (iv) driver's license number; (v) bank account numbers; (vi) credit or debit card numbers; (vii) personal identification numbers (PIN); (viii) electronic identification codes; (ix) automated or electronic signatures; (x) biometric data; (xi) fingerprints; (xii) passwords; or (xiii) any other numbers or information that can be used to access a person's financial resources, obtain identification, act as identification, or obtain money, credit, loans, goods, or services.

D. Violations of this section shall be punishable as a Class 1 misdemeanor. Any violation resulting in financial loss of greater than $200 shall be punishable as a Class 6 felony.

Va. Code § 18.2-186.3.

The Virginia Supreme Court has commented on the identity theft statute:

> Code § 18.2-186.3 makes it illegal to "[o]btain, record, or access" the owner's identifying information without the owner's permission and with the intent to defraud the owner. Obtaining, recording and accessing the identifying information are discrete actions that are complete when the information has been obtained, has been recorded or has been accessed. Each time such an act is performed it is a separate discrete offense. Therefore, under the clear terms of the statute, the crime of identity theft is complete when any one of these acts occurs in conjunction with the intent to defraud.

Gheorghiu v. Commonwealth, 280 Va. 678, 686, 701 S.E.2d 407, 411 (2010).

In the case at bar, the Commonwealth's evidence was insufficient as a matter of law to prove that Jermica Taylor engaged in attempted identity theft, since Taylor never misidentified herself as Sandra Clements or any other person. The bank teller, Mary Grace Lovemore, asked for and received an ID card from Jermica Taylor, and the information Taylor provided on her ID was correct. Ap. 28. Lovemore recalled: "That's the check that was presented to me [by the woman]." Ap. 28, 142 (Commonwealth's Exhibit 1 -- check payable to Jermica Taylor). "[I wrote on the check in black ink] her driver's license number, the issue date, and the expiry date." Ap. 28. Since Taylor made no misrepresentation of her own identity to the bank teller, Taylor

cannot be convicted of attempted identity theft. Even if one knowingly presents a forged check, that does not make out the elements of the offense of identity theft or attempted identity theft.

As Taylor's counsel noted in her motion to strike, "Your Honor, for identity theft … there has to be some evidence … that the accused did obtain or access records and then use the identifying information that they illegally obtained or accessed in order to obtain money or goods…. [T]hat would mean Ms. Taylor [would have to have] obtained the identity of somebody – I'm assuming that … the Government says it would be Ms. Clements … -- and by using her identity, obtained goods…. [T]here's no evidence of that in this particular case…. [T]hey have a check that they believe was given to a teller that was written to Jermica Taylor. The check was written to her, so supposedly she provided identifying information about herself in order to obtain the money for the check that was written to her…. [T]hat wouldn't meet the elements of identity theft, [namely,] using the identity of another to obtain money or goods." Ap. 69-70. "[J]ust because the check purports to be [from] that one person [Sandra Clements], even though you're trying to get the money that's for the check [drafted on the account of Sandra Clements] … the identity

used to obtain the money is Ms. Taylor's, not [someone else].... [She wasn't] using anybody else's identity in order to accomplish this.... [T]he identity being used, it's Ms. Taylor's identity. It's written to her, and then that's the person [she identified herself as]." Ap. 73. "So ... that wouldn't satisfy the statute, Your Honor, because you have to use [someone else's] identity to obtain it, and she's not using [someone else's] identity to obtain it. She's not using [someone else's] identity to obtain that. She didn't access someone else's identity and then use that information to obtain it. She used her own identity, because it was written for the [Payable] To. She couldn't [accomplish identity theft based on who the check is] from. That couldn't be done. That's an impossibility." Ap. 73-74. "I guess the fact that the check is in the individual's name [namely, Sandra Clements], that it's her check and it's written to another individual is the Commonwealth's [purported] identity theft tie, but they have to say that the use of that name was done with the intent to ... attempt to obtain the money or goods.... I don't think ... that this charge is substantiated for identity theft.... Let me pull my indictment: that she 'used identifying information of another individual without authorization or permission of such other person in violation of

18.2-26 … and 186.3 of the Code as amended in order to obtain goods or services valued in excess of $200.' She wasn't [assuming] or using the identity of that individual. In this particular case, the evidence would not rise to that. In fact, my argument for the identity theft would include [the contention] she had reason to believe that the check was valid. Somebody wrote a check to her. It was a female. They gave her a check for a TV. She went to go cash the check at [Old Point]. She used her [own] identifying information…. She went up, used her identifying information, she gave them her valid license, and … there was no attempt to utilize anybody else's identity in this particular manner…. [T]he evidence just doesn't rise to identity theft beyond a reasonable doubt, Your Honor. There's no use of identifying information of another individual in order to obtain goods and services. For that purpose, I would say that the charge should be stricken." Ap. 125.

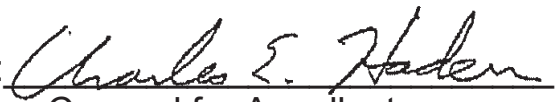
The Attorney for the Commonwealth responded in pertinent part, "Ms. Taylor did come in saying she was Ms. Taylor … but she was using that information to get money … Sandra Clements' information, her bank information on the check." Ap. 74-75.

The trial court denied Taylor's motion to strike the charge of attempted identity theft, remarking, "The evidence is the check was obtained from somebody named Sug…. This check is identified as [drawn on the account of] Sandra L. Clements, and the signature says Sandra Clements. From the testimony that I've heard, there was no attempt to verify any kind of identifying information with this. I'm going to have to deny that motion based on the evidence that I've heard." Ap. 125-126, 75. The trial court plainly erred in so ruling. Accordingly, Taylor's conviction on one count of attempted identity theft should be set aside and the indictment dismissed.

CONCLUSION

For the reasons urged herein, it is requested that this Court reverse the judgment of the Court of Appeals.

JERMICA SHONDAL TAYLOR

By: 
Counsel for Appellant

Counsel for Appellant:
Charles E. Haden (VSB No. 25330)
1 E. Queens Way, First Floor
Hampton, Virginia 23669
Telephone: (757) 727-6972
Facsimile: (757) 727-6974
Email: cehaden@mindspring.com

CERTIFICATE

I, Charles E. Haden, certify this 3rd day of June, 2019 that: 1) an electronic copy, via CD, of the Opening Brief of Appellant and Appendix were served, via UPS Ground Transportation and an electronic copy of the Opening Brief of Appellant, via email to Brittany A. Dunn-Pirio, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, 202 North Ninth Street, Richmond, Virginia 23219 (telephone: (804) 786-2011; fax: (804) 786-1991; email: oagcriminallitigation@oag.state.va.us); 2) three copies of the Opening Brief of Appellant and Appendix were hand-filed in the Clerk's Office of Supreme Court of Virginia, 100 N. Eighth St., Richmond, VA 23219 and electronic copies of the same were filed, via VACES; 3) I am an appointed attorney; 4) I request oral argument; 5) the word count is 4,474 words; and 6) I have complied with Rules 5:26 and 5:28.

Charles E. Haden