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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6404

In the
Supreme Court of Appeals of Virginia
at Richmond

HOWARD HENRY ALLISON

v.

COMMONWEALTH OF VIRGINIA

FROM THE HUSTINGS COURT OF THE CITY OF PORTSMOUTH

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6404

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 27th day of April, 1966.

HOWARD HENRY ALLISON, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Court of Hustings for the City of Portsmouth
R. Winston Bain, Judge

Upon the petition of Howard Henry Allison a writ of error and *supersedeas* is awarded him to a judgment rendered by the Court of Hustings for the City of Portsmouth on the 8th day of November, 1965, in a prosecution by the Commonwealth against the said petitioner for a felony; but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

* * * * *

page 7 } Virginia:

At the Court of Hustings for the City of Portsmouth on November 8, 1965.

* * * * *

Howard Henry Allison, who stands convicted of forging the instrument described in the first count of the indictment and uttering a forged instrument as charged in the second count of the indictment on October 12, 1965, was this day again led to the bar in custody of the jailer of this Court, and came as well, the Attorney for the Commonwealth and George Minor, Jr., the attorney for the prisoner heretofore appointed, and the Probation Officer of this Court, who filed in Court his report as prescribed by Title 53-278.1 of the Code of Virginia, which said report is ordered filed as a part of the record in this case; and thereupon, said report was read to the prisoner by the Court, and the prisoner, by counsel, advised the Court that he did not wish to cross examine the said Probation Officer as to any matter contained therein; and did not wish to present any additional facts bearing upon the matter; and did not wish to make any additional arguments; and the Court having considered said report and all evidence and argument herein, doth deny probation and doth fix the punishment of Howard Henry Allison who stands convicted of forging the instrument described in the first count of the indictment and guilty of uttering the forged instrument as charged in the second count of the indictment, at confinement in the State Penitentiary for a period of three (3) years on each count, the sentence on the second count to run *CONCURRENTLY* with the sentence on the first count; whereupon, the prisoner, Howard Henry Allison, page 8 } by counsel, moved the Court to set aside the judgment of the Court ascertained, and grant him a new trial on the ground that the said judgment is contrary to the law and the evidence, which motion being fully heard, is overruled; and thereupon, it being demanded of the said Howard Henry Allison, if anything for himself, he had or knew to say, why the Court here should not now proceed to pro-

nounce judgment against him according to law, and nothing being offered or alleged in delay of judgment, it is considered by the Court that the said Howard Henry Allison be confined in the State Penitentiary for the term of three (3) years on each count, the sentence on the second count to run *CONCURRENTLY* with the sentence imposed on the first count of the indictment, the period by the Court in its judgment ascertained; but the said Howard Henry Allison having signified his intention to appeal to the Supreme Court of Appeals of Virginia for a writ of error to this judgment, it is ordered that execution of sentence against him be suspended for sixty (60) days from the date of this order.

And the prisoner, Howard Henry Allison, is remanded to jail.

It is further ordered that Doris O. Derieux, Court Reporter, do transcribe the evidence in this case, and the costs of the same shall be paid by the Commonwealth of Virginia.

* * * * *

page 9 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

NOTICE OF APPEAL

Howard Henry Allison hereby gives notice, pursuant to Rule 5.1, Section 4, of the Rules of the Supreme Court of Appeals of Virginia, that *she* appeals from the final judgment of the Hustings Court of the City of Portsmouth, Virginia, entered on the 8 day of November, 1965, in the above entitled case, and will apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas.*

ASSIGNMENTS OF ERROR

1. The Court erred in refusing to sustain the defendant's motion to strike the Commonwealth's evidence.
2. The Court erred in failing to strike from the record admissions made by the defendant which were the result of illegally obtained evidence.
3. The Court erred in refusing to set aside the verdict and award the plaintiff a new trial.

4. The verdict was contrary to the law and the evidence.

HOWARD HENRY ALLISON
By GEORGE MINOR, JR.
Counsel.

* * * * *

page 4 } The Court: We will proceed now with Indictment Number 16795, Commonwealth of Virginia *versus* Howard Henry Allison on a charge of forging and uttering a check, the check being number 1805.

Is the Commonwealth ready?

Mr. Oast: Yes, sir, the Commonwealth is ready.

The Court: Is the defense ready?

Mr. Minor: We are ready, Your Honor.

The Court: Mr. Bilosoly, administer the oath to the court reporter, please.

(Reporter sworn.)

The Court: Now, administer the oath to the defendant relative to the statement and then read the statement to him.

(Statement read to defendant.)

page 5 } The Court: Mr. Allison, you have just heard the Deputy Clerk, Mr. Bilosoly, read your statement to you wherein it is set forth that you being indigent, some time ago you asked the Court to appoint counsel to represent you, and at your request the Court appointed Mr. George Minor, Jr., a local attorney, to represent you. Since the appointment of Mr. Minor, you have had an opportunity to confer with him and he with you. Now that the trial date has arrived, I want to know whether or not you are satisfied with the services of Mr. Minor.

The Defendant: Yes, sir.

The Court: Is it your wish that Mr. Minor represent you here today?

The Defendant: Yes, sir.

The Court: I also want to call to your attention the fact that you have entered a plea of not guilty, but you have waived a jury, that under the Federal Constitution and the Constitution of Virginia you are entitled to a trial by jury even though you have waived trial by jury. Understanding that, if you wish to change your mind and want a jury trial,

Audrey Thompson

I will have a jury brought in here to hear your case.
page 6 } Understanding that, what are your wishes relative to being tried by the Court or by a jury?

The Defendant: By the Court.

The Court: Very well, then, do you have any questions you wish to ask the Court before you are arraigned?

The Defendant: No, sir.

The Court: All right, Mr. Bilosoly, arraign the defendant.

(Indictment read.)

Mr. Oast: Commonwealth waives the jury in this case, Your Honor.

Mr. Minor: We waive the jury in this case, Your Honor.

The Court: Very well. All right, Mr. Bilosoly, swear the witnesses.

(Witnesses sworn.)

page 7 } Mr. Minor: Your Honor, I would like to move to exclude the witnesses.

The Court: Motion to sequester granted.

AUDREY THOMPSON,

called as a witness by and on behalf of the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Oast:

Q. I want you to state your name, please.

A. Audrey Thompson.

Q. On the 10th of July, this year, where were you working?

A. Sears Roebuck in Portsmouth.

Q. Where is the store located?

A. On High Street in the seventeen hundred block.

Q. Now, do you know this defendant here?

A. No, sir, not personally.

Q. Do you know him by sight?

A. Yes, sir, but just since the trial started.

page 8 } Q. Did you cash a check of Garnett H. Slate, purporting to be signed by Garnett H. Slate, dated July 10, 1965?

Audrey Thompson

A. Yes, sir.

Q. I believe you told us that you were with Sears Roebuck and that the store is located in the City of Portsmouth; is that right?

A. Yes, sir.

Q. Now, I hand you this check number 1805 and it is in the sum of $55.40, payable to W. H. Crews, drawn on the Citizens Trust Company, Portsmouth, Virginia, purporting to be signed by Garnett H. Slate. I want you to look at that check and tell me whether or not you have seen that before.

A. Yes, sir.

Q. When did you have occasion to see it?

A. I cashed it for him.

Q. You cashed it for him?

A. I cashed it for the person that gave it to me.

Q. Are you sure who it was?

A. No, sir, I am not. I cannot identify him positively.

Q. Do you recall what the check produced in the

page 9 } way of money or goods?

A. I gave him cash.

Q. You gave him cash money?

A. Yes, sir.

Q. Did this man that presented this check present any credentials to you?

A. A Sears' charge-a-plate from the Norfolk store.

Q. And in whose name was that?

A. Crews.

Q. Would that be W. H. Crews?

A. Yes, sir.

Q. Did he sign the check in your presence?

A. No, sir.

Q. The name of Crews on the back was already on the check?

A. Yes, sir.

Q. But the man that came in there presented the charge-a-plate of W. H. Crews?

A. Yes, sir, he did. See, I noted it on the back. This is where we stamp it. That is the charge-a-plate he used.

Q. You wrote that on there?

A. No, we have a stamp, and I used the plate in

page 10 } the machine and stamped it on the check. He had that plate. He had that with him.

Mr. Oast: We want to introduce this check, Your Honor. egging him on.

The Court: Very well, sir. Check number 1805 will be received and admitted into evidence and marked Commonwealth's Exhibit No. 1.

Mr. Minor: I would like to object. It has not been connected up with the defendant at this time.

The Court: It has been tied in as a check of Garnett H. Slate—

Mr. Minor: I will not make an exception if he will tie it up.

Mr. Oast: If I don't tie it up, you may except to it.

The Court: Technically speaking, I should leave it out if the proper foundation has not been laid.

Mr. Oast: We have showed at this time that this was the check that this lady received and gave money for it.

The Court: You have not shown that this is the man who cashed it.

page 11 } Mr. Oast: If I don't show that up later, that is the time he can object and punch it to pieces.

The Court: I think you are correct. The check will be received and admitted into evidence, Mr. Minor, to which, of course, you note your exception.

(Thereupon, check number 1805 was received into evidence and marked as Commonwealth's Exhibit No. 1.)

Mr. Oast: You may question.

Mr. Minor: I have no questions.

The Court: Do you want Mrs. Thompson to remain?

Mr. Oast: Yes, sir, I guess so.

The Court: I will have to exclude you from the courtroom Mrs. Thompson; don't discuss your testimony of this case with anyone while the case is going on.

page 12 } (Witness excused.)

W. H. CREWS,

called as a witness by and on behalf of the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Oast:

Q. I want you to state your full name, please.

W. H. Crews

A. W. H. Crews.

Q. Mr. Crews, did you ever have any connections with Mr. Garnett H. Slate?

A. No, sir.

Q. Did you ever work for him?

A. No, sir.

Q. Have you ever been entitled to any payment from him in the way of checks or any other way?

A. No, sir.

Q. All right, sir. Mr. Crews, I hand you this paper writing here that is check number 1805 and it is marked Commonwealth's Exhibit No. 1 in this case. Do you know

page 13 } anything about that check?

A. That is my name but not my handwriting.

Q. You say that is your name but not your handwriting?

A. Right.

Q. Do you know anything about that check at all? Have you ever seen it before?

A. I think it is the same one I saw at Police Court.

Q. Other than at Police Court, have you ever seen it before?

A. No, sir.

Q. State whether or not you are entitled to any payments from Garnett H. Slate?

A. No, sir.

Q. I want you to turn that over on the back and I will ask you to notice that signature on the back.

A. It is not mine.

Q. How is it signed? What does it read?

A. W. H.—it looks like C-O-L-T-E-E-S.

Q. And you say that signature there on the back is not yours?

A. No, sir.

Q. You didn't make it?

page 14 } A. No, sir.

Q. Did you ever authorize anybody to do it?

A. No, sir.

Mr. Oast: You may have the witness now.

Mr. Minor: I have no questions of him, sir.

The Court: I will have to ask you to remain, too. You may be recalled to the stand. I will have to exclude you from the courtroom. You may go on the porch or into the other

courtroom. Please don't discuss your testimony with anyone until this case is over.

(Witness excused.)

GARNETT H. SLATE,

called as a witness by and on behalf of the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Oast:

page 15 } Q. I want you to tell me your name, please, and your business.

A. Garnett H. Slate, General Contractor.

Q. Now, on or about the 10th of July, this year, were some checks taken from your place of business?

A. Yes, sir.

Q. What kind of checks were they?

A. Blank checks. They were blank checks.

Q. Whose checks were they?

A. They were my checks.

Q. Did they have your name on them?

A. Yes, sir.

Q. Were they executed checks?

A. No, sir, they were blank checks.

Q. I see. Now, this defendant here, do you know him?

A. No, sir.

Q. Did you ever give him any right to have or use any of your checks?

A. No, sir.

Q. I hand you check number 1805 which happens to be drawn on the Citizens Trust Company and is purported to be signed by Garnett H. Slate. I take it you are Garnett H. Slate; is that correct?

page 16 } A. Yes, sir.

Q. And I want you to look at that check and tell me if you filled that check out.

A. No, sir.

Q. Did you sign your name on there?

A. No, sir.

Q. That is not your signature?

James R. Jordan

A. No, sir.
Q. Did you have a man by the name of W. H. Crews in your business establishment?
A. No, sir.
Q. Do you know anything about this signature of W. H. Crews or Coltees, or whatever it is?
A. No, sir.
Q. And is that one of the checks that were lost by you?
A. Yes, sir.
Q. That was one of the checks that was taken from your place of business?
A. Yes, sir.
Q. Is your place of business in the City of Portsmouth?
A. Yes, sir.

Mr. Oast: I believe that's all. You may ques-
page 17 } tion him.
Mr. Minor: I have no questions of him, sir.
The Court: All right, Mr. Slate, you may be recalled to the stand. I will have to ask you to remain and I will also ask you to go outside on the porch or in the other courtroom. Don't discuss your testimony of this case with anybody until the case is over.

(Witness excused.)

JAMES R. JORDAN,
called as a witness by and on behalf of the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Oast:
Q. I want you to tell us your name, please.
A. James Robert Jordan.
Q. And do you know the defendant here?
page 18 } A. Yes, sir.
Q. And do you recall seeing this check number 1805 which is exhibit no. 1 in this case?
A. No, sir.
Q. You never saw this check?
A. No, sir.
Q. You have never seen it before?
A. No, sir.

James R. Jordan

Mr. Oast: Now, Your Honor, I am taken by surprise by this witness and I would like to ask him some questions and see just where we are. I have a statement here from him and I just want to see where we misunderstood one another. I am taken completely by surprise.

Mr. Minor: I don't think he has laid the proper foundation to show him as an adverse witness at this time.

The Court: I don't think you have either.

By Mr. Oast:

Q. Did you make a statement to the police department, particularly Sergeant T. J. Hayth and T. E. Carson regarding this check 1805? I show you the name on the state-
page 19 } ment.

A. No, sir.

Q. You didn't make any statement?

A. Not against that check, no, sir.

Q. And do you remember signing a statement?

A. I signed a statement.

The Court: Has he seen the check you are speaking of?

Mr. Oast: Yes, sir, I offered him the check and he said he hadn't seen it before.

By Mr. Oast:

Q. Is that your signature signed on that document?

A. Yes, sir.

Q. And did you sign it?

A. Yes, sir.

Q. And I ask you to look at that paper and say whether or not you were asked to tell about this check number 1805 on the Garnett H. Slate Company made out to W. H. Crews and signed Garnett H. Slate? Do you see that question?

A. Yes.

Q. And your answer, yes. Do you want to change that today?

page 20 } Mr. Minor: Your Honor, he is arguing with the witness now.

The Court: I can't hear you, Mr. Minor.

Mr. Minor: I say, he is arguing with his own witness now.

The Court: He knows what he is doing.

Mr. Oast: Is that true? Look right at it. Look *Good.*

James R. Jordan

The Court: He is being taken as an adverse witness now.
The Witness: The only time I have seen that check was when Mr. Hayth gave it to me at the police station.

By Mr. Oast:
Q. Who?
A. Tommy Joe Hayth.
Q. And that is the only time you have seen it?
A. Yes, sir.
Q. And this statement here, when did you make that statement?
A. That says July 28, 1965.
Q. Was that the day—
A. The time on it is ten thirty at night.
page 21 } Q. Is that the day you signed this statement?
A. I can't be sure. He come down to jail and got me.
Q. That wasn't in Police Court, then, when you saw this check?
A. No, sir.
Q. That is when he talked to you and got this statement?
A. Yes, sir.
Q. And did he have that check?
A. I can't say that is the particular check.
Q. Didn't he have a check?
A. Yes, sir.
Q. And didn't you tell him you had seen this check cashed?
A. No, sir.
Q. He asked you about this check, Mr. Jordan, it says, "One day in July, around the middle of July, Country and I—"—Who is Country?
A. The defendant right there.
Q. —"went to the Sears Roebuck store in Portsmouth." Is that true? Did you go to Sears Roebuck?
A. I went to Sears Roebuck.
Q. With Country?
page 22 } A. Yes, sir.
Q. All right. "Country and I went in the front door and went to where you get checks cashed. Country gave the woman a check and some identification and she cashed the check for him." Is that right?
A. No.
Q. It is your statement. I am reading it.

James R. Jordan

Mr. Minor: He said it wasn't right, Mr. Oast, I object Your Honor. He has already said he didn't see her cash it.

The Witness: It is a little flaw right here.

By Mr. Oast:

Q. Is that what it says in there?

A. I see where it says that, but I didn't say—I didn't tell the police officer I saw the man cash the check.

Q. What did you tell him?

A. I told him I saw the man give him a check and identification. I don't know what it was.

Q. Is that the man?

A. That is the man.

Q. Well, you knew that was what he was doing?

page 23 } A. No, sir, I didn't know what he was doing.

Q. Didn't you say you went to where you get checks cashed?

A. Yes, sir.

Q. And Country gave the woman a check. Didn't you say that?

A. Yes, sir. I still wouldn't know whether he got the check cashed or not.

Q. But you knew that, didn't you?

A. Yes, sir.

Q. And you knew he wanted to get the check cashed, didn't you?

A. Yes, sir.

Q. And you saw him present the check, didn't you?

A. I didn't know what it was.

The Court: I am a little concerned about this. Let's hold up a minute.

Mr. Oast: All right, sir.

The Court: Are you impeaching your own witness, as I understand it?

Mr. Oast: I have asked leave to do it.

The Court: You said you were taken by surprise and that you wanted to check a little on the statement. I think there is a little more to it than asking one question and

page 24 } saying you are taken by surprise. You have been questioning him on whether or not the statement you have is accurate. I imagine it is probably correct, but as long as there is no jury here and you are just trying to check a little bit on it, I think it is all right. Go ahead, Mr. Oast.

James R. Jordan

By Mr. Oast:

Q. So you did see Country, whom you now tell me is that man here, present a check in Sears Roebuck, and I believe they showed you this very check, didn't they, and you told them, "I am sure it is the one." I want you to look at it good. You are under oath here today.

Mr. Minor: I object, Your Honor. He asked this question before and he said he didn't know what check it was.

Mr. Oast: I am just reading what the statement says, Mr. Minor. If you will, I would appreciate it if you would let me conduct this examination.

The Court: Counsel has a right to make an objection if he doesn't agree with it.

Mr. Oast: If he is objecting to the Court and
page 25 } the Court has passed upon it, that is all right, but he is interrupting me.

The Court: The Court hasn't passed on it.

Mr. Oast: If you heard it, that is all right with me.

Mr. Minor: My objection was that he has already asked this question and he had answered it. He said that he did not tell the police officer about any particular check. He just said he saw him cash a check. I think the record will show that, Mr. Oast.

The Court: The burden of the corroboration which the Commonwealth is held to is merely to impeach the credibility of the witness and show he is unworthy of belief. Prior inconsistent statements are not applicable.

Mr. Oast: Unless he recants them, and if he remembers the check, that is substantial evidence.

The Court: However, I don't think you can ask him over and over again.

Mr. Oast: I am just reading a part of this statement. The statement refers to the trial.

The Court: I didn't realize that. Go ahead and continue.

page 26 } By Mr. Oast:

Q. So, as I get down here, Mr. Jordan, I believe he asked you, "Is this the check you are speaking about, a check of Garnett H. Slate made out to W. H. Crews and signed Garnett H. Slate, check number 1805?" And your answer on the statement is, "I am sure it is." Did you make that statement?

James R. Jordan

A. I don't think so.
Q. You did not make that statement?
A. I don't think so.
Q. You don't think you told that to the officers?

Mr. Minor: Your Honor, he just answered the question.
The Court: I think it is all right, Mr. Minor.

By Mr. Oast:
Q. Is it the check?
A. That is the check he showed me at the police station.
Q. That is the check he showed you?
A. I think so.
Q. Didn't you tell him that that was the check?
A. Mr. Oast, read your own statement. I have never told him positively. I don't know where this come from
page 27 } there and this either. I told him I thought so. I didn't give him no definite answer.
Q. You told him you thought so?
A. Yes, sir. That was established in lower Court when they nol prossed the charge against me for breaking and entering.
Q. I am not talking about that. I am talking about this check. So you deny, do you, having given that statement to Officer Hayth and Officer Carson?
A. I don't deny giving them the statement.
Q. I want you to look at the statement and tell me exactly what you deny.
A. I don't think I gave them that kind of a statement.
Q. Do you know you didn't give them that statement?
A. No, sir, it's been quite awhile ago.
Q. You say it's been quite awhile ago?
A. Yes, sir.
Q. And you say you were not with him when he cashed the check?
A. I couldn't say whether that was the check or not.
Q. You didn't see him cash the check?
page 28 } A. No, sir. I saw him hand it to the lady, but I didn't say I saw the check.
Q. What kind of check was it?
A. You got me there.
Q. What were you doing together?
A. Can't a man walk in a place of business with his friend?
Q. I am just asking you.

James R. Jordan

A. You asked me what I was doing there together. I am telling you. I walked in there with him. Can't a man walk in a place of business with his friend?

Q. What was your purpose in going in there? To cash the check?

A. I don't know.

Q. Did you have any other purpose?

A. I didn't see it until he got up to the desk.

Q. Didn't you talk to one another?

A. No, sir, I turned around and started looking around the store.

Q. You turned around and started looking around in the store?

A. Yes, sir.

Q. And you deny that this is your statement?

A. I didn't deny that was my statement.

page 29 } Q. Now, you were in there, weren't you?

A. Yes, sir.

Q. And this man here cashed a check, didn't he?

A. As far as I know.

Q. He presented a check, didn't he?

A. Yes, sir, but I still can't say whether he cashed it or not.

Q. You saw the lady here, Mrs. Thompson, didn't you?

A. The one with the brown suit on?

Q. Right.

A. I saw her.

Q. And she was there at the time, wasn't she?

A. I couldn't tell you that.

Q. Where did you see her before?

A. I don't recall seeing her before.

Q. I thought you said you did.

A. No, sir, I didn't.

Q. Describe her to me.

A. I was outside when she was on that stand.

Q. Just one minute, let's see if I have anything further. Did you tell them that one day in July, around the middle of July, Country and I went to Sears Roebuck in Portsmouth, Virginia?

page 30 } A. Yes, sir.

Q. That is true.

A. Yes, sir.

Q. "Country and I went in the front door and went to where you get checks cashed." Is that true?

James R. Jordan

A. Yes, sir.

Q. "Country gave the woman a check and some identification." Is that true?

A. Yes, sir.

Q. "And she cashed the check for him." Is that true?

A. As far as I know. That is where he made a mistake. I said ~~as far as I know.~~

Q. You said as far as you know?

A. Yes, sir.

Q. You were telling him something, weren't you? Why did you have to add "as far as you know"? You were telling him something. He asked you to tell him about this check, didn't he?

A. I presume he did. I don't know what he went in for.

Q. And you say you presumed it?

A. Yes, sir.

Q. And you say you didn't see the lady cash the

page 31 } check?

A. I said that before.

Q. Answer me this: did Mr. Hayth present to you a check at the time you were making this statement in Court?

A. Not in Court.

Q. Is that the check he showed you?

A. I don't know.

Mr. Minor: He said he didn't know. Mr. Oast, you have asked him two or three times. What is the difference in this question and what is already in the record?

Mr. Oast: This gentleman has denied knowing about the check. Here is a statement in which he said he knew about the check by number and amount and name when he was telling the police officers about it. I am just asking him about that now.

The Court: How many times do you do this before there is an end to it? You already asked him the same thing three or four times, haven't you?

Mr. Oast: If you will recall, I was caught by surprise.

The Court: I agree with you. I think you were, I have allowed you to proceed. We don't want to sit here

page 32 } all afternoon. How many times do you ask a person something and he gives you the same answer before you stop asking him?

Mr. Oast: This isn't the same answer at all. There are two separate places where this man has denied it. He denies it

James R. Jordan

when he was in the store, number one, and he denies knowing, or maybe he isn't, about the check. I am trying to get him to say whether or not he knows that is the same check that the officer had when he was talking to him. That is what I am asking him now.

The Witness: I answered the question. I told you yes.

By Mr. Oast:

Q. That is the same check?

A. Yes, sir. I answered it twice.

Q. You saw it there? Are you sure it was the same check?

A. I saw it at the police station.

Mr. Oast: All right, that's all.

CROSS EXAMINATION.

page 33 } By Mr. Minor:

Q. You didn't tell the police officer that this was the check that the defendant had, did you?

A. I told the police officer when he asked me about it that when we went into Sears Roebuck that Country presented a check and some identification and I walked around in the store. Whether he got it cashed or not, I don't know.

Q. You don't know what check he had?

A. No, sir.

Q. It could have been this check or some other check, couldn't it?

A. Yes, sir.

Q. And you can't say under oath that he cashed this check at any particular time, can you?

A. No, sir.

Q. All right, sir.

A. I never have stated it.

Mr. Minor: That's all.

RE-DIRECT EXAMINATION.

By Mr. Oast:

page 34 } Q. You did tell the officer in this statement what?

A. That I could not identify that check as the check he cashed.

Sergeant T. J. Hayth.

Q. But you did tell the officer in the statement—
A. Mr. Oast—

The Court: I think you have covered all this. I don't want to hear any more about that. Were you at any other time in the month of July of this year at Sears Roebuck with the defendant, whom you call Country, for anything?
The Witness: No, sir.
The Court: Okay. That's all. Come down. Incidentally, I will have to exclude you from the courtroom because you may be recalled to the stand. Don't discuss the case with anybody until the case is over. Go out on the porch or go in the other courtroom.

(Witness excused.)

page 35 } SERGEANT T. J. HAYTH,
called as a witness by and on behalf of the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Oast:
Q. State your name, please. Sergeant.
A. Sergeant T. J. Hayth.
Q. What is your connection with the Portsmouth Police Department?
A. I am assigned to the Detective Bureau.
Q. Did you investigate this charge here against the defendant, Howard Henry Allison, as it pertains to a check of Garnett H. Slate, number 1805?
A. Yes, sir, I did.
Q. Tell us what you know about this.
A. This check was picked up from Sears Roebuck by Detective Sergeant Burton and brought to police headquarters. My investigation started on this after the 22nd of July. I talked to Mr. Allison about this check and asked him if this was his signature on the check. He stated this looked like his handwriting.
page 36 } Q. Did you talk to a man by the name of Jordan?
A. Yes, sir, I did.
Q. And when did you talk to him about this?

Sergeant T. J. Hayth.

A. July 28, 1965.

Q. Did you have this check—did you have a check in your hand at the time?

A. Yes, sir, I did.

Q. Will you look at this check and tell me if this is the check you had at that time?

A. Yes, sir, it is.

Q. Did he give you a statement about that?

A. Yes, sir, he did.

Q. Is there anything further that your investgation revealed?

A. No, sir.

Mr. Oast: You may inquire, Mr. Minor.

CROSS EXAMINATION.

By Mr. Minor:

Q. Sergeant Hayth, when did you first come into possession of check number 1805?

A. Mr. Minor, that was some time after our
page 37 } investigation started on the 22nd. I reveived this
check from Sergeant Burton.

Q. You don't know exactly what date you received that check, do you?

A. It was between the 22nd and the 28th. Exactly what day, I don't know, no, sir.

Q. I take it, then, you didn't get this check from Sears Roebuck yourself?

A. No, sir, I did not.

The Court: Sergeant Burton is not a witness in this case, is he?

Mr. Oast: No, sir. We had the people from Sears Roebuck here to testify to that. I don't know why he is reaching beyond that.

The Court: The only reason I asked that is because his name was mentioned and he is not in the courtroom.

Mr. Oast: No. sir.

Mr. Minor: I have no further questions. Just one minute, if Your Honor please.

Mr. Oast: We rest, Your Honor.

Mr. Minor: I want to ask him one more question.

Mr. Oast: It is perfectly all right.

Sergeant T. J. Hayth.

page 38 } By Mr. Minor:

Q. Sergeant Hayth, did you question anybody else about this particular check? Did you interrogate anybody else as to whether or not they had cashed this check?

A. No, sir.

Q. Why did you question the defendant about this particular check? Why him and not somebody else?

A. Mr. Minor, after I took the evidence to the FBI Laboratory and talked to Mr. Marshall between his investigation of the handwriting, he informed me that that was the man that had written the check. Due to certain technicalities, he would not come into court and say positively that that was the man.

Q. But you did ask this particular defendant about the check because of some other checks that were involved; isn't that right?

A. Because I had been to the FBI Lab and talked to Mr. Marshall and on the basis of his being a handwriting expert. I thought that was sufficient.

Q. And that came about because of another check; is that correct?

A. Yes, sir.

Mr. Minor: That's all.

Mr. Oast: We rest.

page 39 } (Witness excused.)

Mr. Minor: I would like to move to strike the Commonwealth's evidence, Your Honor. In the first place, we have evidence flowing from an illegally seized check.

Mr. Oast: Where is any illegally seized check in this case?

Mr. Minor: The only reason this man was ever interrogated is because of some other checks involved.

The Court: That wouldn't make any difference.

Mr. Minor: There has been no positive identification that this man ever cashed the check.

The Court: Well, I think the fact that the check was cashed by Mrs. Thompson and she says she won't be sure and she can't identify who cashed the check. This check in question was cashed by her. Then we find this man James R. Jordan, who was advisedly, a very reluctant witness, who comes in and says he was there one day and this man cashed

a check. He says he can't identify the check. He doesn't know what he cashed, but he knows he cashed
page 40 } something there. That was the only time he was there with this defendant. I think the circustances certainly make out a sufficient case to go to the jury if there were a jury. I overrule your motion, to which you note your exception.

Mr. Minor: I note my exception, Your Honor.

Your Honor, at this time the defense would like to rest. We have no evidence in this case.

Mr. Oast: We have no rebuttal. There is nothing to rebut.

Mr. Minor: The defense would like to be heard on the evidence, Your Honor.

The Court: All right, Mr. Minor.

Mr. Minor: Your Honor, I want to renew my motion to strike the evidence and would like to make a motion for summary judgment for the defendant on this basis: the Commonwealth has the burden to come in and show by a preponderance of the evidence that this check had been cashed, that it was stolen, and that this was the defendant who did it. I respectfully represent to the Court that he has shown, certainly, that that check was cashed by someone and that no authority by Mr. Slate had been given to have this check cashed and no authority by Mr. Crews—or, Mr.
page 41 } Crews said he had never seen the check. Certainly, he definitely has not established that the defendant was the one that cashed the check. I submit that the only evidence would be that on one day in July the defendant went to the store with James Jordan to cash a check and gave some identification to cash the check, and that is the only evidence that the Commonwealth has shown to connect the defendant with this particular case. I respectfully submit to His Honor that the presumption is that the defendant cashed this check and that is not sufficient. The fact that he went one day in July to cash a check is not sufficient to convict him. A lot of people went out one day in July to cash a check. I think there certainly would have to be something else shown to connect the defendant with this particular check. The presumption that follows the defendant throughout every stage of the proceeding is that he did not cash this check. This scintilla of evidence does not rebut that presumption.

Mr. Oast: We have shown, as I see it, that this check was cashed. There is no question in the world about that. The lady did not identify the man who cashed it, but
page 42 } there is no question in our minds that this check was cashed at Sears Roebuck in the City of Ports-

mouth. We find that this man Jordan comes right here today and says he was with the man and that he had a check cashed and he presented some identification. He has told us, in answer to a question from the Court that that was the only time in July he was with this man. This was on the 10th of July.

Then we have this man, the defendant, the lady has testified that this check was cashed on the 10th of July. This man is picked up and shown this check and he tells the officers that the signature looks like his. I say, the evidence is there.

The Court: Well, this is a case of circumstantial evidence, but it certainly appears to me that the Commonwealth here has made out sufficient evidence to establish the guilt beyond all reasonable doubt. You have the man identified as being in the store. We know he presented some identification, as brought out by the Commonwealth, the identification being a charge-a-plate. This was used on the 10th of July. The money was taken, we know that. The check was cashed at
page 43 } Sears Roebuck, and it was this check here, which was a forged check. Sergeant Hayth even testified that when he talked to the defendant himself he even said he went so far as to say the check looked like his handwriting. I think all things put together, Mr. Minor, I believe the Commonwealth has made out a case.

Stand up, Mr. Allison, please, sir. Howard Henry Allison, the Court having heard the evidence in indictment number 16795 charging you with forgery and uttering, to which charge you entered a plea of not guilty and waived trial by jury, the Court having heard all the evidence and considered same thoroughly does find you guilty as charged in the indictment.

Now, this matter is referred to the Probation Officer for a pre-sentence report on or before November 8th.

You may be seated.

Mr. Minor, is Mr. Allison still in custody?

Mr. Minor: Yes, sir.

The Court: He is remanded to the custody of the City Sergeant. Incidentally, I found him guilty as charged in the indictment, that would be on each count.

page 44 } Mr. Minor: Yes, sir, I understand that.

A Copy—Teste:

H. G. TURNER, Clerk.

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