215 Va. 89

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
FEB 11 1974
RICHMOND, VIRGINIA

3

IN THE SUPREME COURT OF VIRGINIA

AT
RICHMOND
RECORD NO. 730659

EDWARD L. BAIN
PLAINTIFF IN ERROR

vs.

COMMONWEALTH OF VIRGINIA
DEFENDANT IN ERROR

FROM THE CIRCUIT COURT OF
MONTGOMERY COUNTY

APPENDIX

DAVID W. MULLEN
ATTORNEY AT LAW
PROFESSIONAL BUILDING
P.O. BOX 427
CHRISTIANSBURG, VIRGINIA
COUNSEL FOR PLAINTIFF IN ERROR

TABLE OF CONTENTS

BASIC INITIAL PLEADING---------- 1

PLEA OF PLAINTIFF IN ERROR---------- 2

JUDGEMENT APPEALED FROM---------- 2

ASSIGNMENTS OF ERROR---------- 3

TESTIMONY OR INCIDENTS OF TRIAL
GERMANE TO THE ERRORS ASSIGNED---------- 5

SECOND ASSIGNMENT OF ERROR---------- 8

THIRD ASSIGNMENT OF ERROR---------- 10

FOURTH ASSIGNMENT OF ERROR---------- 12

FIFTH ASSIGNMENT OF ERROR---------- 14

SIXTH ASSIGNMENT OF ERROR---------- 15

SEVENTH ASSIGNMENT OF ERROR---------- 16

TESTIMONY OR INCIDENTS OF TRIAL
GERMANE TO COMMONWEALTH'S ARGUMENT---------- 17

CERTIFICATION---------- 24

IN THE SUPREME COURT OF VIRGINIA

EDWARD L. BAIN
PLAINTIFF IN ERROR

VS.

COMMONWEALTH OF VIRGINIA
DEFENDANT IN ERROR

BASIS INITIAL PLEADING

INDICTMENT

(The transcript of the Circuit Court of Montgomery County trial proceedings is referred to herein as "TR" and any exhibits as "Comm. Ex. No.____.")

The basic initial pleading is the indictment rendered against Edward L. Bain by the grand jurors for the Commonwealth of Virginia on the first day of February, 1973, and states as follows(TR. 1):

In the Circuit Court of the County of Montgomery on February 1, 1973, the Grand Jury charges that on or about November 17, 1972 in the County of Montgomery, Edward L. Bain being in possession of one 1968 Volkswagon sedan on which he had given a lien to the National Bank of Blacksburg in excess of $100 did fraudulently sell or remove or otherwise dispose of said vehicle without the written consent of the said Bank. In violation of Section 18.1-116, Code of Virginia.

PLEA OF PLAINTIFF IN ERROR

Plaintiff, by counsel, entered a plea of Not Guilty to the offense as charged in the Grand Jury indictment and requested a trial by jury.

JUDGEMENT APPEALED FROM

The Circuit Court jury of Montgomery County determined that the plaintiff in error was guilty of a fraudulent conveyance as charged in the indictment and the said Court fixed his punishment at six (6) months in jail and a fine of Five Hundred ($500.00) Dollars. Counsel for the Plaintiff in Error made three (3) post trial motions in the trial court on April 17, 1973, said motions being as follows:

(A) The defendant moves the Court to set aside the Jury verdict and find him not guilty, on the grounds that the Jury verdict is contrary to the law and evidence, as presented by the Commonwealth.

(B) The defendant moves the Court to suspend the jail sentence imposed by the Jury.

(C) The defendant moves the Court to set a reasonable bond during which time the defendant would be allowed to remain free on bond until such time as a writ of error could be obtained.

Said motions (A) and (B) were overruled by the trial court. Said motion (C) was granted by the trial court and after sentence was pronounced, the sentence was suspended for sixty (60) days and bond was set at $2,500.00.

ASSIGNMENTS OF ERROR

(1) The trial court erred in refusing to give Defendant's instruction B-1 which states as follows: The Court instructs the jury that the lien referred to in the indictment means a lien noted upon the face of the title certificate for the 1968 Volkswagon referred to in the indictment.

(2) The trial court erred in refusing to give Defendant's instruction B-2 which states as follows: The Court instructs the Jury that the fraud referred to in the indictment means that the Defendant must have criminally intentionally and feloneously intended to deceive and injure the National Bank of Blacksburg.

(3) The trial court erred in refusing to give Defendant's instruction B-3 which states as follows: The Court instructs the Jury that the mere fact that the National Bank of Blacksburg may not have recovered the full amount of loan proceeds advanced by it to the Defendant does not in and of itself constitute the fraud necessary to sustain a conviction for larceny.

(4) The trial court erred in allowing the introduction of Commonwealth's Exhibits Nos. 1,2, and 3, namely disclosure statement, security agreement, and note over objections of counsel for Plaintiff in Error, on the grounds that they were not properly authenticated.

(5) The trial court erred in failing to strike the evidence of the Commonwealth after the Commonwealth had rested.

(6) The trial court erred in failing to strike the evidence after the Commonwealth and Defense had rested.

(7) The trial court erred in failing to grant Counsel for Plaintiff in Error's after verdict motions.

TESTIMONY OR INCIDENTS OF TRIAL
GERMANE TO THE ERRORS ASSIGNED

Error No. 1 assigned and the testimony germane thereto is:

(1) The trial court erred in refusing to give Defendants instruction B-1 which states as follows: The Court instructs the Jury that the lien referred to in the indictment means a lien noted upon the face of the title certificate for the 1968 Volkswagon referred to in the indictment.

(TR. 5) BY MR. GRAYBEAL:

The law as he says is quite settled and that is that the lien showing on a face of the title is noticed any purchaser. There's a specific section that says that any one selling the car has ten days on which to register a security agreement and the listing of the lien on the title is simply any prospective purchaser and does not by itself create or defeat the lien.

RICHARD PATTON, a witness having been duly and properly sworn testified as follows:

DIRECT EXAMINATION
BY MR. GRAYBEAL:

(TR. 6) Q: Would you state your name for the Court and Jury, please sir?

A: My name is Richard Donavan Patton.

Q: What is your employment, Mr. Patton?

A: I'm employed by the National Bank of Blacksburg, Assistant Vice President.

Q: Were you so employed during 1972?

A: Yes sir.

(TR. 6) Q: In the spring of that year did you see Mr. Edward Lee Bain?

A: Yes sir.

Q: Is this the gentleman you saw?

A: This is the gentleman.

Q: Did you have some transactions with him?

A: Yes, I had a loan transaction with him.

(TR. 7) **********

RICHARD PATTON, a witness having been duly and properly sworn testified as follows:

BY MR. GRAYBEAL:

(TR. 13) Q: Were you to receive anything additional from Mr. Bain?

A: Funds were dispensed to Mr. Bain. I instructed Mr. Bain to pay off the present loan on his vehicle and bring the title to the bank so that we could complete our transactions and record the lien on it. This was done for the convenience of Mr. Bain since he must be present to do this.

Q: Did he thereafter bring you the title?

A: We never received the title.

Q: Now, when you say never, this was occurring in April of 1972 and you did not get the title thereof?

A: No.

Q: Did you have any personal contact with Mr. Bain after April 6, 1972 concerning this loan?

A: I had personal contact with him concerning this loan.

Q: What was the nature of that?

(TR. 13) A: On several occasions in the nature of the initial contact was to try to advise him and assist him to bring the payments up to date.

Q: Had you received the title at that time?

A: We had not received the title.

Q: Was there any discussion of that?

A: There was no discussion of that initially.

CLIFFORD E. BISHOP, a witness being duly and properly sworn testified in part as follows:

DIRECT EXAMINATION
BY MR. GRAYBEAL:

(TR. 20) Q: State your name, please sir?

A: Clifford E. Bishop.

(TR. 21) Q: What is your employment, Mr. Bishop?

A: Bishop Motor Corporation.

Q: Was that your employment in the fall of 1972?

A: Yes sir.

Q: At that time, did you know Mr. Bain?

A: Yes sir.

Q: Did you have any transaction with him regarding a motor vehicle?

A: I traded for a blue Volkswagon '68.

Q: You traded another vehicle for a Volkswagon?

A: Traded him a Mercury, yes sir.

Q: Did you receive the title of the 1968 Volkswagon, did it show a lien on the face of it?

A: No sir.

SECOND ASSIGNMENT OF ERROR

(2) The trial court erred in refusing to give Defendant's instruction B-2 which states as follows: The Court instructs the Jury that the fraud referred to in the indictment means that the Defendant must have criminally, intentionally and feloniously intended to deceive and injure the National Bank of Blacksburg.

CLIFFORD E. BISHOP, a witness being duly and properly sworn testified as follows:

DIRECT EXAMINATION
BY MR. GRAYBEAL:

(TR. 21) Q: What is your employment, Mr. Bishop?

A: Bishop Motor Corporation.

Q: Was that your employment in the fall of 1972?

A: Yes sir.

Q: At that time, did you know Mr. Bain?

A: Yes sir.

Q: Did you have any transactions with him regarding a motor vehicle?

A: I traded for a blue Volkswagon '68.

Q: You traded another vehicle for a Volkswagon?

A: Traded him a Mercury, yes sir.

Q: Did you receive the title of the 1968 Volkswagon, did it show a lien on the face of it?

A: No sir.

Q: Did Mr. Bain advise you of any earlier transactions relating to this Volkswagon?

A: No sir.

(TR. 21) Q: Were you aware that there might be a security agreement relating to it?

A: No, I didn't.

Q: And do you recall the approximate value of the Volkswagon when you received it?

A: I suspect the thing was worth about $900.

RICHARD PATTON, a witness being duly and properly sworn testified as follows:

DIRECT EXAMINATION
BY MR. GRAYBEAL:

(TR. 13) Q: Did you have any personal contact with Mr. Bain after April 6, 1972 concerning this loan?

A: I had personal contact with him concerning this loan.

Q: What was the nature of that?

A: On several occasions in the nature of the initial contact was to try to advise him and assist him to bring the payments up to date.

Q: Had you received the title at that time?

A: We had not received the title.

Q: Was there any discussion of that?

A: There was no discussion of that initially.

(TR. 13) *********

(TR. 14,15) Q: What occurred at that....whether referring to what you heard, what occurred between you and Mr. Bain?

A: I questioned Mr. Bain about the whereabouts of the automobile that we had financed. Mr. Bain indicated to me that he had traded the car in.

THIRD ASSIGNMENT OF ERROR

(3) The trial court erred in refusing to give Defendant's instruction B-3 which states as follows: The Court instructs the Jury that the mere fact that the National Bank of Blacksburg may not have recovered the full amount of loan proceeds advanced by it to the Defendant does not in and of itself constitute the fraud necessary to sustain a conviction for larceny.

RICHARD PATTON, a witness being duly and properly sworn testified as follows:

DIRECT EXAMINATION
BY MR. GRAYBEAL:

(TR. 13) Q: Did you have any personal contact with Mr. Bain after April 6, 1972 concerning this loan?

A: I had personal contact with him concerning this loan.

Q: What was the nature of that?

A: On several occasions in the nature of the initial contact was to try to advise him and assist him to bring the payments up to date.

RICHARD PATTON, a witness being duly and properly sworn testified as follows:

DIRECT EXAMINATION
BY MR. GRAYBEAL:

(TR. 16) Q: Has the bank recovered its $2060.10 less the two payments?

BY MR. MULLEN:

If Your Honor please, I'll object to that. I don't think that's material to the criminal charges before the Court.

BY MR. GRAYBEAL:

(TR. 16) Your Honor, I believe it is.

BY THE COURT:

Well, I think it is. I'll overrule the objection.

BY MR. MULLEN:

I except.

FOURTH ASSIGNMENT OF ERROR

(4) The trial court erred in allowing the introduction of Commonwealth's Exhibits Nos. 1, 2, and 3, namely disclosure statement, security agreement, and note over the objections of counsel for Plaintiff in Error, on the grounds that they were not properly authenticated.

RICHARD PATTON, a witness being duly and properly sworn testified as follows:

CROSS EXAMINATION
BY MR. MULLEN:

(TR. 9) Q; Were you present when it (security agreement) was signed?

A: I was present when it was signed.

Q: You saw the signature?

A: I did not actually see him sign it, I can verify his signature.

Q: This was the gentleman signing there when you were present?

A: This was the gentleman who was there.

Q: And, you have another paper there, what is that, please sir?

A: The other paper is the actual note itself and it's signed by Mr. Bain and it is dated April 6th.

Q: Were you present when that was signed?

A: I was in the vicinity of where it was signed.

RICHARD PATTON, a witness being duly and properly sworn testified as follows:

BY MR. MULLEN:

(TR. 18) Q: Now, as I understood it, you talked with him concerning the loan and it's terms and you discussed the payments with him and so forth?

A: Yes.

Q: When the papers (Comm. Ex. Nos. 1, 2, and 3) were actually filled out, you didn't help him fill it out or you didn't see him sign it?

A: No.

(TR. 20) BY MR. GRAYBEAL:

Your Honor, I'll offer these as Commonwealth's Exhibits one, two, three.

BY MR. MULLEN:

Your Honor, excuse me, I'll object to the introduction of all of these documents on the basis that they haven't been properly authenticated.

BY THE COURT:

All right. They'll be received and marked as Commonwealth's Exhibits one, two, three and the record will note the objection, overruling of the objection and the exception.

FIFTH ASSIGNMENT OF ERROR

(5) The trial court erred in failing to strike the evidence of the Commonwealth after the Commonwealth had rested.

The testimony relevant to this assignment of error has been alluded to in assignments of error numbered 1, 2, 3, and 4.

SIXTH ASSIGNMENT OF ERROR

(6) The trial court erred in failing to strike the evidence after the Commonwealth and Defense had rested.

The testimony relevant to this assignment of error has been alluded to in assignments of error numbered 1, 2, 3, and 4.

SEVENTH ASSIGNMENT OF ERROR

(7) The trial court erred in failing to grant Counsel For Plaintiff in Error's after verdict motions, said motions being as follows:

(a) The defendant moves the Court to set aside the Jury verdict and find him not guilty, on the grounds that the Jury verdict is contrary to the law and evidence, as presented by the Commonwealth.

(b) The defendant moves the Court to suspend the jail sentence imposed by the Jury.

The testimony relevant to this assignment of error has been alluded to in assignments of error numbered 1, 2, 3 and 4.

TESTIMONY OR INCIDENTS OF TRIAL
GERMANE TO COMMONWEALTH'S ARGUMENT

RICHARD PATTON, a witness being duly and properly sworn testified as follows:

DIRECT EXAMINATION
BY MR. GRAYBEAL:

(TR. 6) Q: Speak right to the Judge please sir so we can all hear. You had a loan transaction with Mr. Bain?

A: I had a loan transaction with Mr. Bain.

Q: What date was that, please sir?

A: The loan was made April 6, 1972.

Q: And, where was this made?

(TR. 7) A: The loan was made at the main office at the National Bank in Blacksburg.

Q: Did you handle the transaction yourself?

A: I handled the preliminary loan and conversation with Mr. Bain, interviewed him.

Q: What amount of money was loaned to Mr. Bain?

A: The principal amount was $2574.01.

Q: What type of documents did he sign or if any?

A: He signed a disclosure statement.

Q: What is that?

A: The disclosure statement represents the interest rate, the amount of interest, the amount of any financing charge, which is credit life insurance, when your payments are to begin and how your payments are to be. There is also an agreement on there for him to sign indicating whether the loan is a secured loan or an unsecured loan.

(TR. 7) Q: And, do you have that document that he signed?

A: I have this document.

Q: Was this signed in your presence?

A: No, this was not signed in my presence.

Q: Did you talk with him about the form after it was signed?

A: I talked with him about the loan in general after it was signed and before.

Q: Did you have this document at hand at any time when you talked with him about it?

(TR. 8) A: No, the document was in the hands of the loan teller, loan clerk.

Q: Do you have another document there?

A: Yes I do have another document. This is an automobile security agreement and this indicated an agreement that the person borrowing the money has agreed.....

BY MR. MULLEN:

If Your Honor please, I will object to the introduction of this evidence. Let the Jury decide for itself what the document says, if the document is admissable.

BY THE COURT:

Well, the documents haven't been offered yet and I'll have to rule on it when it's offered after I take a look at it. Will you offer these documents?

BY MR. GRAYBEAL:

I will Your Honor.

BY THE COURT:

(TR. 8) All right, hold him back on what it contained.

BY MR. GRAYBEAL:

Yes sir.

Q: Does it have a signature on it?

A: It has a signature on it and a date.

Q: What does the name report to be?

A: Edward Lee Bain.

Q: Was this signed in your presence?

A: It was signed in the presence of the loan clerk.

BY MR. GRAYBEAL:

(TR. 9) Q: All right. Immediately after....you were in the same place where he was, is that correct?

A: Yeh, I was in the same place. My desk is right in front of the loan clerk's desk.

(TR. 10) Q: What were you shown after....you said you approved the loan, what were you shown to approve?

A: I approved the loan before the papers were filled out. Then, the papers were filled out entirely before Mr. Bain signed them. I approved the loan on a previous credit experience with Mr. Bain in the fact that he was employed in Blacksburg and I knew Mr. Bain.

Q: Was this a secured or an unsecured loan?

A: This is what we refer to as a debt consolidation loan. The time Mr. Bain had several obligations. We made one loan to pay off these obligations also Mr. Bain could meet his obligations easier. One of the obligations that was included

(TR. 10) was a loan on an automobile and that is why we took a security agreement on the car.

Q: So, it was to be secured by a....

A: It was to be secured by a car.

Q: What kind of car was it?

A: This car was a 1968 V. W.

Q: Volkswagon?

A: Volkswagon.

(TR. 10) **********

(TR. 11) Q: Now, as I understood it, you approved the loan prior to its being made?

A: That's correct. The loan can be approved in advance and then the papers should be filled out.

Q: Mr. Bain was there to apply for the loan?

A: Mr. Bain applied for the loan.

Q: To you in person?

A: To me in person.

Q: All right. Were the papers prepared while he was there?

A: The papers were prepared while he was there.

Q: And, were these presented to him in your vicinity?

A: Presented to him in my vicinity by the loan clerk.

Q: Were these brought back to you while he was still there?

A: These papers do not leave the bank. They remain in the bank in the loan department.

(TR. 11) Q: Were they brought back to you by the loan clerk?

A: I saw the papers later.

Q: All right. These remained in the bank after they were signed by him?

RICHARD PATTON, a witness being duly and properly sworn testified as follows:

BY MR. GRAYBEAL:

(TR. 14) Q: Has there been a denial of the execution of this note?

A: No, there's been no denial of the execution of the note.

Q: Or other documents?

A: No.

Q: Now in the later contact with him, what occurred please sir?

A: Well later contact was....there was several contacts made. The last contact that I remember being made that I made myself was in front of the A & P store in Blacksburg. I was in the area doing some shopping and I saw Mr. Bain there. It had been brought to my attention earlier, I didn't know whether it was true or not, that Mr. Bain had disposed of the.....

(TR. 14) **********

(TR. 15) A: I questioned Mr. Bain about the whereabouts of the automobile that we had financed. Mr. Bain indicated to me that he had traded the car in.

(TR. 15) Q: All right. Do you recall the approximate date of this?

A: This was approximately in December of last year.

Q: Was there any reference made at that time to the security agreement?

A: The reference was made to the fact that we had a lien on the car and he was not to dispose of the vehicle.

Q: What did he say?

A: I don't recall the comment on it.

Q: All right. Did you ever receive the title or the vehicle?

A: We never received the title or the vehicle.

Q: Did you ask for the vehicle?

A: I asked for the vehicle.

Q: When was that?

A. I asked for the vehicle when we were at the Gables Shopping Center in front of the A&P store.

Q: Did he thereafter produce it?

A: The vehicle was never produced.

RICHARD PATTON, a witness being duly and properly sworn testified as follows:

CROSS EXAMINATION
BY MR. MULLEN:

(TR. 17) Q: All right. Then aside to that where did you see him in reference to the loan before he went into the bank?

A: Oh, before he got the money?

Q: Yeh?

(TR. 17) A: Well, he borrowed from the bank before on a short-term basis.

Q: Oh, you lent him money before that?

A: Yeh.

RICHARD PATTON, a witness being duly and properly sworn testified as follows:

BY MR. MULLEN:

(TR. 19) Q: All right, going to whoever had the lien on the title to bring the title back to you. You said he must be present to do this? What did you mean by that statement?

A: He must be present to sign the supplemental lien form which is provided by the State of Virginia.

CERTIFICATION

I, David W. Mullen, an Attorney practicing in the Supreme Court of Virginia, do certify that I am Counsel for Edward L. Bain, Plaintiff in Error, herein and that the name of the party against whom the appeal is sought is Commonwealth of Virginia.

I do further certify that I have mailed three (3) copies of the Appendix to Gilbert W. Haith, Assistant Attorney General, 911 East Broad Street, Richmond, Virginia, Counsel of Record for the Defendant in Error.

Dated this 9th day of February, 1974.

David W. Mullen, Counsel
for Edward L. Bain, Plaintiff
in Error