

**IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH

v.

**HARRY M. SWANK, II,
Defendant**

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No.: 03-10,565

OPINION AND ORDER

Before the Court is Defendant's Motion to Dismiss filed July 14, 2003, asserting that the bad checks charge currently pending against him should be dismissed. The affidavit of probable cause states that Defendant presented a check to Herrold and Sons Masonry on February 25, 2002 in the amount of \$6,087.15. Herrold and Sons attempted to cash the check on multiple occasions but could not because the Defendant's account, upon which the check was written, did not have sufficient funds. The Defendant failed to respond to a certified letter demanding payment. Defendant asserts in his motion to dismiss that at the time the check was accepted it was understood by Herrold and Sons that there were insufficient funds in the account and that the check should not be cashed without the prior approval of the Defendant. He claims that under these circumstances, the bad check statute does not apply and he cannot be held criminally liable. No evidence as to the facts of the case was submitted at the time of the hearing on this matter, and the attorneys restricted themselves to legal argument. The Court will therefore rely upon the facts as stated above for purposes of this opinion.

Defendant and his attorney support their position by citing the case of Commonwealth v. Kelinson, 199 Pa.Super. 135, 184 A.2d 374 (1962), which provides that “the acceptance of a post-dated check amounts to a delivery on credit and the remedies of nonpayment of such checks are set forth in the Uniform Commercial Code.” Id. at p. 140, 377. It further holds that “(a) mere promise for future conduct does not suffice to constitute a false pretense even though the promisor never intended to perform.” Id. at 378, 143 – 143. The Commonwealth argues that the case cited by the defense is inapplicable because the bad check statute was later amended. The 1984 amendment removed the requirement that the Commonwealth prove an element of intent to defraud. Subsequent amendments maintained this change. See eg. Commonwealth v. Kysliger, 506 Pa. 132, 484 A.2d 389 (1984), 135, 390, citing Commonwealth v. Mutnik, 486 Pa. 428, 406 A.2d 516 (1979) (“(T)he legislature intended to denominate the passing of a check for which there are insufficient funds, where the insufficiency is within the knowledge of the issuer, as a crime regardless of whether the issuer possessed a specific intent to defraud.”)

This Court agrees with the Commonwealth’s interpretation of the bad check statute as the current state of the law. The Commonwealth is no longer required to prove a Defendant’s intent to defraud in order to obtain a conviction on a bad check charge. Consequently, the defense of lack of intent to defraud is not available to a defendant. Even if we assume that the Defendant’s version of the facts is true and he issued a post-dated check, the

bad check charge will still be properly placed before the jury to determine if at the time he issued the check, the Defendant knew that the check would not be honored. As such, it is a factual question which only the jury can decide.

ORDER

AND NOW, this 28th day of August, 2003, for the reasons set forth above, the Defendant's Motion to Dismiss is DENIED.

By the Court,

Nancy L. Butts, Judge J.

xc: Matthew Zeigler, Esquire
DA (RF)
Hon. Nancy L. Butts
Diane L. Turner, Esquire
Gary Weber, Esquire