

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

JOSEPH OCCHIPINTI

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 925 MDA 2012

Appeal from the Order Entered April 27, 2012
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0002836-2011

BEFORE: FORD ELLIOTT, P.J.E., PANELLA, J., and ALLEN, J.

MEMORANDUM BY PANELLA, J.

Filed: April 4, 2013

Appellant, the Commonwealth of Pennsylvania, appeals from the order entered on April 27, 2012, that granted Appellee, Joseph Occhipinti's petition for writ of *habeas corpus*, by the Honorable Vito P. Geroulo, Court of Common Pleas of Lackawanna County. By granting the petition, the trial court dismissed the Commonwealth's charge that Occhipinti had committed the crime of theft by failure to make required disposition of funds received, 18 Pa.Cons.Stat. Ann. § 3927. After careful review, we affirm.

Occhipinti was a minority shareholder and corporate secretary of State Petroleum Distributors, Inc., ("SPD") a gasoline distributor. In approximately February 2008, Occhipinti approached SPD customer William Bracey, owner of Bracey Supermarket, Inc., with an offer allowing Bracey to hedge against rising gasoline prices by pre-paying in amounts of

\$500,000.00. Bracey agreed to the oral offer, and tendered a check for \$500,000.00 to SPD in February, 2008.

Later that year, on August 18, 2008, Bracey tendered another \$500,000.00 check to SPD. This check was deposited into a SPD bank account and subsequently transferred into an operating account where it was used to satisfy an overdraft of the account. Bracey only received \$53,278.22 worth of gasoline from SPD after the check was deposited.

The Commonwealth subsequently charged Occhipinti with theft by deception, receiving stolen property, and deceptive business practices. However, upon appearing at the preliminary hearing on January 25, 2010, the Commonwealth withdrew all three charges and amended the information to contain a single count of theft by failure to make required distribution. This charge was dismissed at the close of the preliminary hearing.

The Commonwealth re-filed a complaint against Occhipini on July 13, 2011, again charging him with theft by failure to make required distribution of funds. A second preliminary hearing was scheduled for July 19, 2011, but was not held after the magisterial district judge granted a defense motion challenging the propriety of the Commonwealth's procedure in re-filing the charges. On appeal to the Lackawanna County Court of Common Pleas, this decision was overruled, and a second preliminary hearing was held on November 22, 2011. At the close of the second preliminary hearing, the charge was bound over for trial.

Thereafter, Occhipinti filed a petition for writ of *habeas corpus*, alleging that the Commonwealth could not establish that a crime had occurred. At a hearing on the petition, the Commonwealth rested on the transcripts from the prior preliminary hearings. As noted, the trial court ultimately granted the petition and dismissed the charge against Occhipinti. The Commonwealth then filed this timely appeal.

On appeal, the Commonwealth raises two issues for our review:

- A. Whether the Commonwealth met the first element of the crime of theft by failure to make required disposition of funds received, in that Appellee did obtain the property of another?
- B. Whether the Commonwealth met the third element of the crime of theft by failure to make required disposition of funds received, in that Appellee did intentionally deal with the property obtained as the Appellee's own?

Appellant's Brief, at 4.

In reviewing challenges to the pre-trial grant of a petition for *writ of habeas corpus*, we note that

at a habeas corpus hearing, the Commonwealth need not produce evidence of such character and quantum of proof as to require a finding by a jury of the accused's guilt beyond a reasonable doubt. But it should be such as to present 'sufficient probable cause to believe, that the person charged has committed the offense stated[.]'

Commonwealth v. Jackson, 809 A.2d 411, 416-417 (Pa. Super. 2002) (citation omitted).

Here, the offense at issue is failure to make a required disposition of funds received:

Offense defined. A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition.

18 Pa.Cons.Stat. Ann. § 3927(a). In general, this statute has been interpreted to require the Commonwealth to establish four separate elements, the first and third of which are the subjects of the Commonwealth's issues on appeal. As we conclude that the trial court correctly held that the Commonwealth had not presented evidence capable of supporting a conclusion that there was probable cause to believe that Occhipinti had committed the crime of theft by failure to make a required distribution, we need not address the other elements of the crime.

The first element the Commonwealth must establish is that the defendant obtained the property of another person. ***See Commonwealth v. Stein***, 585 A.2d 1048, 1050 (Pa. Super. 1991). The trial court held that the Commonwealth's evidence could not establish that Occhipinti never intended to honor the contract. The Commonwealth argues that the trial court erred in applying a *mens rea* requirement of intentional action to this element. Under the specific circumstances of this case, we hold that this

issue is irrelevant. The fundamental problem with the evidence presented by the Commonwealth in this case is that it fails to establish that Occhipinti ever “obtained” the money from Bracey.

The Commonwealth alleges that its evidence establishes that Occhipinti “essentially did ‘acquire, in any way’ the money he needed to get out of debt with Dunmore Oil.” Appellant’s Brief, at 15. However, this argument mischaracterizes the evidence. The evidence presented by the Commonwealth establishes that Bracey did not hand the August 18, 2008 check personally to Occhipinti. **See** N.T., Preliminary Hearing, 11/22/2011, at 34. Bracey testified that it was possible that some other agent of SPD picked up the check from one of Bracey’s business locations. **See id.**, at 25. The endorsement on the check was hand-printed “State Petroleum Dist For deposit only, Acct # ...” Additionally, it is undisputed that Bracey’s check was deposited into SPD’s business account, and was never transferred to Occhipinti’s personal possession in any manner. **See id.**, at 68-69.

A corporation is a separate, fictional legal person distinct from its shareholders or employees. **See *Viso v. Werner***, 471 Pa. 42, 49, 369 A.2d 1185, 1188 (1977) (“Nor are we persuaded that because the corporation in the instant case was operated by the appellant as sole shareholder, its independent identity should be ignored.”). When a corporation enters into a contract, it does so only on behalf of its separate, fictional capacity, unless the contract or circumstances explicitly state otherwise. **See id.**; ***Electron***

Energy Corp. v. Short, 597 A.2d 175 (Pa. Super. 1991) (corporation's president was not a party to a contract he signed in his capacity as agent for the corporation). Here, there is no argument, nor is there any proof, that Occhipinti disregarded the corporate formalities or treated corporate assets as his own. Nor is there any argument or evidence that Occhipinti entered into any of the relevant contracts in his personal capacity.

Bracey testified that the payee of the check was SPD. ***See*** N.T., 11/22/2011, at 21. SPD was a "C" corporation at the time in question, with Occhipinti being only a minority shareholder. ***See id.***, at 46. Robert Lambert, president of SPD at the time in question, testified that other officers and employees of SPD were able to make deposits into the business accounts. ***See id.***, at 52. Furthermore, Lambert testified that transfers between SPD's business accounts happened frequently, and that any agent of SPD was authorized to make such transfers. ***See id.***, at 55. Lambert was another minority shareholder; Stanford Venture Capital held the majority of outstanding shares. ***See id.*** Accordingly, despite the Commonwealth's arguments, there is simply no evidence of record that Occhipinti, even in his capacity as an agent of SPD, ever obtained the property of Bracey.

It is also important to note, although it is irrelevant to this specific element, that the Commonwealth's argument also mischaracterizes the nature of the debt to Dunmore Oil. There is no evidence in the record that

can establish that Occhipinti, in his personal capacity, owed any debt to Dunmore Oil. At best, the evidence of record can allow for an inference that SPD was in debt to Dunmore oil.¹ However, there is no evidence of record that Occhipinti had personally guaranteed the debt. Nor is there any evidence that Occhipinti was in any other way personally liable for the debt. As such, the Commonwealth's contention that it was permissible to infer that Occhipinti exercised control over the money for his own benefit is not supported by the record. Thus, we agree with the trial court that the Commonwealth failed to meet its burden of establishing that Occhipinti ever personally obtained Bracey's property. As this failure is sufficient to support the trial court's order, we need not reach the Commonwealth's second issue on appeal.

Order affirmed. Jurisdiction relinquished.

¹ Indeed, this is the most reasonable interpretation of the facts of record. Unfortunately, the record is not definitive on the nature of the debt, other than the fact that a corporate account related to SPD was debited for the debt, and that allegedly an agent of Dunmore Oil told the Commonwealth that SPD could not receive further deliveries of gasoline until the debt was satisfied.