

**State of Wisconsin
Court of Appeals
District 1
Appeal No. 2013AP1722
2013AP1723**

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01-24-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

State of Wisconsin,

Plaintiff-Respondent,

v.

David Phillip Foley,

Defendant-Appellant.

**On appeal from a judgment of the Milwaukee County
Circuit Court, The Honorable David A. Hansher,
presiding**

Defendant-Appellant's Reply Brief

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Table of Authority

Cases

| | |
|--|---|
| <i>State v. Hayes</i> , 2004 WI 80, 273 Wis. 2d 1 (2004) | 8 |
| <i>State v. Timblin</i> , 259 Wis. 2d 299, 315, 657 N.W.2d 89 (2002) | 4 |

Table of Contents

Argument

- I. Timblin is inapplicable to the present case..... 4

- II. A sufficiency of the evidence question is not
subject to the waiver rule..... 8

- III. Foley’s claim that Bystra had an obligation to pay on
the check even if Anchor dishonored it is not
underdeveloped..... 9

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Argument

I. *Timblin* is inapplicable to the present case.

The centerpiece of the state's response is *State v. Timblin*, 2002 WI App 304, 259 Wis. 2d 299, 315, 657 N.W.2d 89 (2002), a case in which the defendant-appellant appealed the circuit court's order denying his motion to withdraw guilty pleas to counts of theft by fraud on the grounds that he had not made any false representations directly to the victims of those counts.¹ A reading of that case demonstrates that it is inapplicable to the sufficiency of the evidence issue presented by this appeal; and the court's discussion in *Timblin* is not even particularly pertinent to the court's analysis of that issue .

Firstly, after quoting extensively from *Timblin*, the state inexplicably stops immediately before the most meaningful paragraph in the opinion, where the court of appeals wrote:

We recognize that had *Timblin* decided to take this case to trial, he would have been entitled to put the State to its proof with respect to whether he should be held criminally liable for taking the Graffs' money. However, *Timblin* decided to plead guilty and he has not provided a "fair and just" reason to upset the trial court's acceptance of his pleas. He has not demonstrated a "genuine misunderstanding of the plea[s]' consequences" or "haste and confusion in entering the plea[s]" or "coercion on the part of trial

¹ Rather, as the state explains, *Timblin* made false representations to Lichtensteiger, who repeated them to Graff, who then gave money to Lichtensteiger to give to *Timblin*.

counsel”; therefore, we will not upset the discretionary decision of the trial court to deny Timblin's motion to withdraw his guilty pleas.

Timblin, 2002 WI App 304, 259 Wis. 2d at 315, 657 N.W.2d at 97.

Here, Foley did take his case to trial. On this appeal Foley argues that he should not be held criminally liable for the transaction with Anchor Bank because he made no false representations directly to Anchor Bank.

By contrast, the issue on appeal in *Timblin* was whether the circuit court erroneously exercised its discretion in denying Timblin’s motion to withdraw his guilty pleas. Tangentially related to that issue was the question of whether the record contained a factual basis for Timblin’s guilty plea where he never spoke directly to the victims (the Graffs). Thus, the court of appeals’ discussion of whether Timblin was criminally liable for taking the Graffs’ money is *obiter dictum*.

Moreover, the court’s discussion on that point is not particularly pertinent to the situation here. In *Timblin*, the court of appeals found it important that Timblin intended that Lichtensteiger would repeat Timblin’s bogus statements about the investment opportunity to the Graffs; and that the Graffs *justifiably* relied on the misrepresentations unwittingly made by Lichtensteiger. In that discussion, the court relied on the Restatement of Torts, which provides that:

The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in ***justifiable reliance*** upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

(emphasis provided) *Timblin*, 2002 WI App 304, 259 Wis. 2d at 314, 657 N.W.2d at 97.

In that case, Timblin lied to Lichtensteiger about the nature of the “investment”, and Timblin hoped that Lichtensteiger would repeat that lie to the Graffs, who would in turn be persuaded to send money to Timblin. Timblin’s lie to Lichtensteiger was the proximate cause of the Graffs sending money to Timblin. The Graffs *justifiably*² relied upon Lichtensteiger’s misrepresentations.

Here, though, Foley made a false representation to Bystra when Foley gave Bystra the \$10,000 E*Trade check made out to Sport-n-Cuts that Foley knew was worthless. Foley may have even hoped that Bystra would deposit the bogus check into the Sport-n-Cuts account at Anchor Bank.

After that, though, none of the persons involved in the transactions *justifiably* relied upon Foley’s original misrepresentation.

² Although probably not intelligently

Bystra was the first. He wrote out the \$7000 check to Foley without ever determining whether the original E*Trade check had cleared. Given the timing of the transaction, it was highly unlikely that, even if the check were not bogus, that it would have cleared by the time Bystra wrote the \$7000 check to Foley.³

Next, the teller at Anchor Bank issued a cashier's check to Foley without ever determining that the D*Trade check had cleared. The teller was in the best position to determine the amount of cleared funds in the Sport-n-Cuts account. She needed only to refer to official bank records. Instead, she issued a cashier's check supposedly based upon Foley's original misrepresentation to Bystra. This, under no meaning of the word, did Anchor Bank *justifiably* rely on Foley's original misrepresentation to Bystra.

³ This is what is known as "check kiting" ("playing the float" by using a check to deposit funds into a checking account, and then writing a new checks on the deposited funds before the funds have cleared). This form of fraud is illegal and check kiting can be prosecuted under several existing laws including 18 U.S.C. § 1344.

II. A sufficiency of the evidence question is not subject to the waiver rule.

The state argues that because Foley did not make this specific challenge to the sufficiency of the evidence before the circuit court, he has waived the right to make the argument on appeal. (Respondent's brief p. 9).

The state's waiver argument is wholly without merit. The issue here is a question of the sufficiency of the evidence to support a criminal conviction. The appellant is not required to make a motion before the circuit court challenging the sufficiency of the evidence in order to raise the issue on appeal. As the supreme court explained in *State v. Hayes*, 2004 WI 80, 273 Wis. 2d 1, 24 (2004):

A challenge to the sufficiency of evidence is different from other types of challenge not previously raised during trial. This difference justifies allowing a challenge to the sufficiency of the evidence to be raised on appeal as a matter of right despite the fact that the challenge was not raised in the circuit court. This interpretation comports with the text, context, history, and purposes of the statute, including the consequences of alternative interpretations.

There is no reason to apply the waiver rule to a sufficiency of the evidence question. The reason for the waiver rule is to prevent a party from laying in the weeds before the circuit court, allowing an error to occur, and then complaining about the error for the first time on appeal when the parties and the court are unable to fix the problem. When

the defendant challenges the sufficiency of the evidence before the circuit court the state has already rested (i.e. there is no further opportunity to fix the problem).

III. Foley's claim that Bystra had an obligation to pay on the check even if Anchor dishonored it is not underdeveloped.

In his opening brief Foley made the point that Anchor Bank lost no tangible property because, by writing the \$7000 check to Foley, Bystra created an obligation on his part to pay the check⁴. As mentioned in the previous section, Anchor Bank was not supposed to be funding the cashier's check with their own money; rather, the bank was supposed to be funding the cashier's check with customer funds that were already in the Sport-n-Cuts account. The only reason that bank funds became involved at all was because the clerk who wrote the cashier's check did so without first determining that there were sufficient cleared funds in the account to cover it. This mistake was in no way prompted by Foley presenting the bogus E*Trade check to Bystra.

Because Bystra wrote a \$7000 check to Foley, he has a legal obligation to pay that check. This situation is nothing like those examples set forth by the state in its brief (insurance

⁴ That is, Bystra-- not the bank-- was the true victim of the original fraud.

covering a burglarized home, etc).

Dated at Milwaukee, Wisconsin, this _____ day of
January, 2014.

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Dated this _____ day of January, 2014:

Jeffrey W. Jensen

