

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

February 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-1783-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**MICHAEL J. LINK,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Vernon County:  
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Dykman, Sundby, and Vergeront, JJ.

PER CURIAM. Defendant Michael J. Link appeals from a judgment entered on a jury verdict convicting him of one count of theft by bailee, contrary to § 943.20(1)(b), STATS., for defrauding Elmer McDowell of \$3,599 in proceeds from an oral logging contract. Link and his co-defendant, Wayne Steele, conducted what the State calls a "scam" pursuant to which they would locate a stand of timber and offer to log off the timber and pay the owner

a lump sum. It is undisputed that Link and Steele entered into an oral contract with Elmer McDowell to harvest some of the timber on McDowell's land. Link insisted that their agreement with McDowell was to pay him a lump sum of \$6,000. McDowell claimed, however, that Link and Steele agreed to pay him sixty percent of the highest bid defendants obtained for the timber and defendants would keep the remaining forty percent.

Defendants received two bids: \$18,040 from the Konkel Sawmill and \$14,500 from the Nelson Sawmill. Of course, they accepted the higher bid. They paid McDowell \$7,225; however, on a sixty/forty basis McDowell would have been entitled to approximately \$10,800 as his share.

Defendants asked for and received two checks from Konkel, one for \$12,040 and one for \$6,000. They showed McDowell a copy of the \$12,040 check and did not mention the \$6,000 check. They told McDowell that Konkel had made the highest bid.

Defendants testified that they paid McDowell \$7,225 out of the goodness of their hearts; however, this figure represents sixty percent of \$12,040, the figure which appeared on the copy of the check defendants showed to McDowell. At the conclusion of the State's case, Link moved to dismiss the complaint on the ground that the oral contract with McDowell was invalid because it violated the statute of frauds, § 402.201(1), STATS. The trial court denied his motion, concluding that the statute of frauds does not apply to a prosecution for criminal theft.

Link does not cite any authority for his imaginative defense. He argues, however, that the jury should have been instructed that under the Uniform Commercial Code's statute of frauds, Link and Steele did not possess McDowell's money at all because the oral contract was void. It appears to be defendant's position that because McDowell could not recover on the contract, they did not possess his money.

The Wisconsin Supreme Court has held that the statute of limitations for civil fraud does not apply in a criminal fraud case. *Lambert v. State*, 73 Wis.2d 590, 609, 243 N.W.2d 524, 533 (1976). As the court said: "[T]he

question in an action for criminal fraud is not whether the victim *could* legally rely on the fraudulent promises, but rather whether he *did* reasonably rely on them in surrendering his property or funds." (Emphasis added.)

The essence of the offense of theft by bailee is the intent of the defendant to convert the property of another to his own use. See 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8.6(f) (1986).

We conclude that the trial court properly refused to instruct the jury that the contract between McDowell and the defendants was void under the statute of frauds.

*By the Court.* – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.