

Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ALAN H. DEGROOT,)	S. Ct. Crim. No. 2008-0107
Appellant/Defendant,)	Re: Super. Ct. Crim. No. 249/2008 (STT)
)	
v.)	
)	
PEOPLE OF THE VIRGIN ISLANDS,)	
Appellee/Plaintiff.)	
)	
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)	
)	
)	

On Appeal from the Superior Court of the Virgin Islands
Argued: December 14, 2010
Filed: April 29, 2013

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Kele Onyejekwe, Esq.
Appellate Public Defender
St. Thomas, U.S.V.I.
Attorney for Appellant

Tiffany V. Monrose, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee

OPINION OF THE COURT

HODGE, Chief Justice.

Alan H. DeGroot, under the terms of a plea agreement, pleaded guilty to the crime of attempting to obtain money by false pretenses under title 14, sections 331(2) and 834(2), of the Virgin Islands Code. He now seeks reversal of his conviction because he argues that presenting a forged check to a bank does not constitute the crime of attempting to obtain money by false

pretenses. DeGroot has failed to show, however, that his guilty plea was either involuntary or made without the advice of counsel. We therefore affirm his conviction.

I. STATEMENT OF RELEVANT FACTS AND PROCEDURAL POSTURE

In an Information dated June 24, 2008, DeGroot was charged with 1) harassment by telephone, 2) threatening a witness, 3) third-degree assault, 4) grand larceny, 5) attempting to obtain money by false pretenses, 6) forgery, and 7) possessing stolen property. (J.A. at 16-23.) Initially, DeGroot pleaded not guilty. But as a result of a September 4, 2008 amended plea agreement, DeGroot agreed to withdraw his plea of not guilty and plead guilty to attempting to obtain money by false pretenses. (J.A. at 15.) In exchange, the People agreed to recommend that: 1) he be sentenced to six months incarceration with all but thirty days suspended; 2) he be placed on supervised probation for two years; 3) he perform fifty hours of community service; and 4) the remaining charges in the Information be dismissed. (J.A. at 15.) DeGroot accepted the People's plea bargain (J.A. at 15) and pleaded guilty to Count 9 of the Information, attempting to obtain money by false pretenses (J.A. at 38). The trial court accepted DeGroot's guilty plea (J.A. at 38-39) and in an Amended Judgment entered on October 22, 2008, the Superior Court ordered that: 1) DeGroot be incarcerated for two years with credit for time served, 2) DeGroot be assessed \$75.00 in court costs, and 3) the remaining charges against DeGroot be dismissed with prejudice. (J.A. at 10-11.) DeGroot filed a timely notice of appeal on September 30, 2008. (J.A. at 9.)

II. JURISDICTION

We exercise jurisdiction over this appeal pursuant to title 4, section 32(a), of the Virgin Islands Code which provides, in pertinent part that, "[t]he Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court,

or as otherwise provided by law.” Because the October 22, 2008 Amended Judgment embodies the adjudication of guilt and imposed sentence, it is a final order from which an appeal lies under this statute. *Brown v. People*, 56 V.I. 695, 698-99 (V.I. 2012).

III. DISCUSSION

On appeal, DeGroot argues that the factual allegations, as set forth by the People, do not constitute the crime of attempting to obtain money by false pretenses. Specifically, DeGroot claims that it is impossible to obtain money by false pretenses solely by presenting a check to a bank because a check is not a factual assertion. He thus argues that the trial court lacked jurisdiction to enter a judgment against him. Alternatively, DeGroot contends that Federal Rule of Criminal Procedure 12(b)(3)(B) permits him to raise on this appeal the issue whether the information failed to state the necessary elements of the offense.

We find that DeGroot’s arguments lack merit. As this Court has recently explained, a defect in an information does not deprive the Superior Court of its power to adjudicate a criminal case, but rather goes to the merits of the case. *Tindell v. People*, 56 V.I. 138, 146-47 (V.I. 2012). Therefore, assuming without deciding that the information failed to allege an essential element of the crime of attempting to obtain money by false pretenses, the Superior Court clearly possessed subject matter jurisdiction to accept DeGroot’s guilty plea. See *United States v. Cotton*, 535 U.S. 625, 629 (2002) (“[D]efects in an indictment do not deprive a court of its power to adjudicate a case”). Moreover, Superior Court Rule 128(a)—and not Federal Rule of Criminal Procedure 12(b)(3)(B)—governs pre-trial motions in Superior Court proceedings,¹ and thus DeGroot may

¹ Superior Court Rule 7 provides that “[t]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by . . . the Federal Rules of Criminal Procedure.” Super. Ct. R. 7. However, when a Superior Court rule governs the same subject matter as a federal rule, the federal rule cannot apply to Superior Court proceedings pursuant to Superior Court Rule 7. In *Tindell*, we recognized that the United States Court of Appeals for the the Third Circuit has interpreted Federal Rule of Criminal

not challenge the sufficiency of the Information for the first time on appeal, given that, through his guilty plea, he has admitted to “all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.” *Tindell*, 56 V.I. at 153 (quoting *United States v. Broce*, 488 U.S. 563, 569 (1989)).

Finally, the alleged lack of a factual basis for DeGroot’s guilty plea is also completely resolved by our *Tindell* decision, which held that, since Superior Court Rule 126—which governs pleas—only requires that a guilty plea be entered knowingly and voluntarily, the Superior Court bears no obligation to find a factual basis as a prerequisite to accepting a guilty plea. *Id.* at 151. Importantly, “while the requirement that a guilty . . . plea be voluntary is constitutionally required, the other aspects of Federal Rule of Criminal Procedure 11—including the factual basis requirement—‘ha[ve] not been held to be constitutionally mandated.’” *Id.* at 151 n.14 (quoting *McCarthy v. United States*, 394 U.S. 459, 465 (1969)). Therefore, since DeGroot has not challenged the voluntariness of his plea agreement or the reasonableness of the sentence imposed by the Superior Court, we find no reason to disturb his conviction.

IV. CONCLUSION

Because DeGroot unconditionally pleaded guilty and was subsequently convicted for the crime of attempting to obtain money by false pretenses, the inquiry on appeal must be limited to whether the underlying plea was both counseled and voluntary. DeGroot has failed to challenge

Procedure 12(b)(3)(B) to mean that a defendant must be permitted to challenge for the first time on appeal the sufficiency of his superseding indictment. *Tindell*, 56 V.I. at 148 (citing *United States v. Hedaihy*, 392 F.3d 580, 589 (3d Cir. 2004)). Rule 12(b)(3)(B) therefore “permit[s] a defendant who enters an unconditional guilty plea to argue on appeal that the specific facts alleged in the charging document do not amount to a criminal offense.” *Id.* at 148-49 (quoting *United States v. Panarella*, 277 F.3d 678, 680 (3d Cir. 2002)). In *Tindell*, however, we also recognized that Superior Court Rule 128(a) specifically requires all pre-trial motions to be ruled on prior to judgment. *Id.* at 149 (citing Super. Ct. R. 128(a)). Accordingly, we concluded that “allowing a defendant to argue for the first time on appeal that the information fails to state an offense would be inconsistent with Superior Court Rule 128(a). Thus, Superior Court Rule 128(a), and not Federal Rule of Criminal Procedure 12, governs pre-trial motions in the Superior Court, even if Superior Court Rule 128(a) provides a less comprehensive framework than Federal Rule of Criminal Procedure 12.” *Id.* at 150 (internal citation omitted).

his guilty plea as being either involuntary or made without sufficient counseling, and the record indicates that he knowingly, intelligently, and voluntarily pleaded guilty to the crime of attempting to obtain money by false pretenses. Therefore, we affirm the judgment of the Superior Court.

Dated this 29th day of April, 2013.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

CONCURRING OPINION

SWAN, Associate Justice, concurring.

Appellant, Alan DeGroot (“DeGroot”), was charged in an eleven-count Information, with offenses which involved presenting a fraudulent check to a banking institution for payment that he knew was fraudulent at the time of the presentation. Pursuant to a plea agreement, DeGroot pled guilty to the charge of attempting to obtain money or property by false pretenses pursuant to title 14, sections 834(2) and 331(2) of the Virgin Islands Code. After being sentenced in accordance with the plea agreement, DeGroot filed a timely appeal contesting his conviction on several grounds. Because I believe DeGroot’s claims are distinct from a mere challenge to the Information, and includes challenges to the statute under which he is convicted, and that the merits of his claim should be addressed for plain error, I write separately. For the reasons enumerated below, I would affirm his conviction after such analysis; thus I join in the judgment of the Court.

I. FACTS & PROCEDURAL HISTORY

On or about May 29, 2008, DeGroot drove his fiancée, Ashley Jo Anderson (“Anderson”), to the Merchant Commercial Bank (“the Bank”) at the Port of Sale Mall, in St. Thomas, U.S. Virgin Islands. (J.A. at 19, 35; Information at 4.) Anderson entered the Bank and attempted to cash a check for \$1,700.00, drawn on a bank account owned by Attorney Ann Rost (“Rost”). While Anderson was waiting to complete the transaction, a bank employee telephoned Rost because the signature on the check presented did not correspond with Rost’s signature in the Bank’s records. (J.A. at 21.) Rost instructed the Bank’s employee not to cash the check and to contact the police. (*Id.*) Rost neither wrote nor signed the check; therefore, the check bore a forged signature. DeGroot was aware that Rost did not sign the check. (*Id.* at 12-14.) Although

DeGroot denied stealing the check from Rost, during oral argument before this Court his counsel admitted that DeGroot forged the check.

Rost, DeGroot and Anderson knew each other because both DeGroot and Anderson were Rost's former clients. Rost had previously assisted them in the legal adoption of Anderson's and DeGroot's nine month old baby to a Florida couple.¹ (J.A. at 36.) However, DeGroot and Anderson accused Rost of failing to remit to them a portion of the funds from the adoption as previously agreed. (*Id.*)

DeGroot and Anderson were jointly charged in a June 24, 2008 eleven-count Information. DeGroot was charged with the following crimes, to all of which he pled "not guilty": Count V, Harassment by Telephone, Telegraph, or Written Communication, in violation of title 14, section 706(1) of the Virgin Islands Code; Count VI, Retaliating Against or Threatening a Witness, in violation of title 14, section 1510(a)(2) of the Virgin Islands Code; Count VII, Assault in the Third Degree, in violation of title 14, section 297(2) of the Virgin Islands Code; Count VIII, Aiding and Abetting in Attempted Grand Larceny, in violation of title 14, sections 1083(1), 331(2) and 11(a) of the Virgin Islands Code; Count IX, Aiding and Abetting in Attempting to Obtain Money by False Pretense, in violation of title 14, sections 834(2), 331(2) and 11(a) of the Virgin Islands Code; Count X, Aiding and Abetting in Forgery, in violation of title 14, sections 791(2) and 11(a) of the Virgin Islands Code; and Count XI, Aiding and Abetting in Receiving or Possessing Stolen Property, in violation of title 14, sections 2101(a) and 11(a) of the Virgin Islands Code. (*Id.* at 16-20.)

¹ The record is not sufficiently clear as to whether the child belonged to both DeGroot and Anderson, or whether Anderson was assisting DeGroot in obtaining funds for a child he fathered with another individual.

Subsequently, DeGroot and the People consummated an amended plea agreement in which DeGroot agreed to plead guilty to Count IX, Attempting to Obtain Money by False Pretense, in violation of title 14, sections 834(2) and 331(2) of the Virgin Islands Code. (*Id.* at 15.) A change of plea hearing was held on September 15, 2008. (*Id.* at 24.) During the hearing, DeGroot attempted to justify his role in the theft of the check and his role in the attempt to negotiate the forged check by stating the following:

I did drive my fianc[ée], soon to be wife, to the bank. I knew what she was doing that was my fault. We both made a mistake. We should never even done anything that we did. But we did it for a reason. I guess you could say it was for a good reason on our part. But it was a bad reason because it was the wrong way to go. The whole case started because Ms. Ann Rost gave up -- me and Ashley gave up my nine month old son to Ms[.] Rost for adoption in Florida. And Ms[.] Rost had still yet to turn over all of our money that she was supposed to turn over to us from the adoption. And that was one of the reasons why my fianc[ée] did what she did. That was the reason why that I drove her to the bank and let [her] go in[side]. And I don't know how to put the exact words to you.

(*Id.* at 36.) The trial court accepted DeGroot's plea and adjudicated him guilty at the change of plea hearing. (*Id.* at 39.) On September 23, 2008, the trial court imposed upon DeGroot a suspended two-year sentence with credit for time served in pre-trial incarceration as well as two years of probation, and imposed a fine and various court costs. (*Id.* at 61-62.) The trial court entered its Judgment on October 3, 2008, and an Amended Judgment was entered on October 22, 2008. (*Id.* at 10-13.) On September 30, 2008, DeGroot filed a timely Notice of Appeal. (*Id.* at 9.)

II. ISSUES

DeGroot advances several issues on appeal, namely: 1) Whether a conviction for aiding and abetting an attempt to obtain money by fraudulent representation or pretenses can be proven based on presenting a forged check to the bank, if a check is not a statement of value, a representation, nor a pretense under United States Supreme Court and United States Third

Circuit Court of Appeals case law precedent; 2) Whether DeGroot's plea of guilty to the crime of obtaining money by false pretenses must be vacated as factually impossible where he attempted to obtain money DeGroot believed was owed to him, by presenting a knowingly forged check to be drawn on the bank account of the alleged debtor; 3) Whether the Virgin Islands Legislature intended title 14, section 834 to be applicable to check fraud; and 4) Whether the Superior Court lacked jurisdiction to accept DeGroot's guilty plea to the crime of obtaining money by false pretenses because the Information failed to charge him with any conduct that can be considered a crime in the Information's Count IX, Obtaining Money by False Pretenses. Because of several commonalities among the issues propounded by DeGroot, it is unavoidable that I reiterate several factual aspects of the case, as I separately resolve all the issues raised on appeal.

III. JURISDICTION

We exercise jurisdiction over this appeal pursuant to title 4, section 32(a) of the Virgin Islands Code which provides, in pertinent part that, "[t]he Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law."

IV. STANDARD OF REVIEW

Interpretations of Virgin Islands law are afforded plenary review. *Government of Virgin Islands v. Smith*, 949 F.2d 677, 680 (3d Cir. 1991) (citing *Saludes v. Ramos*, 744 F.2d 992, 993-94 (3d Cir. 1984), while the trial court's findings of fact are reviewed for clear error. *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007) and *United States v. Coggins*, 986 F.2d 651, 654 (3d Cir. 1993). Issues of statutory construction are subjected to plenary review. *Creque v. Luis*, 803 F.2d 92, 93 (3d Cir. 1986); *Miller v. People*, 54 V.I. 398, 401 (V.I. 2010).

V. DISCUSSION

A. The trial court was within its jurisdiction to adjudicate DeGroot’s case despite an allegedly defective Information; and this Court may review the merits of DeGroot’s particular claims regardless of his guilty plea.

First, I will explicate the effect of a guilty plea and an allegedly defective information on our ability to hear this matter. I find that the People’s contention is correct that the sufficiency of an information or lack thereof does not deprive the Superior Court of its jurisdiction and that DeGroot’s guilty plea limits the issues he may advance on appeal. (Supp. Br. of Appellee at 4). DeGroot contends that the Information was deficient in that it failed to allege a crime under Virgin Islands law; therefore, his convictions must be vacated. However, the United States Supreme Court has held that “defects in an indictment do not deprive a court of its power to adjudicate a case.” *United States v. Cotton*, 535 U.S. 625, 630 (2002). *See also Tindell v. People*, 56 V.I. 138, 146-47 (V.I. 2012). Further, DeGroot waived any procedural defects by virtue of pleading guilty pursuant to a plea bargain. *See Id.* Any alleged defects in the Information would not render his conviction reversible, even if found to exist. *Id.*

We have previously ruled that the sufficiency of an information cannot be challenged for the first time on appeal. *Id.* at 145-46. However, in *Tindell*, the Appellant argued that the Information was defective due to the People’s error in failing to include certain elements that were required for a charge of failure to comply with broker-dealer registration requirements. *Id.* at 145. This case is clearly distinguishable because DeGroot does not challenge the technical requirements of the Information, or that it failed to allege an essential element of the crime for which he was charged. Rather, DeGroot’s argument is jurisdictional and goes beyond a claim of defects in the Information. The crux of DeGroot’s argument is that the offenses he was charged with committing cannot constitute illegal misconduct. I do not believe as the majority does that

Tindell's holding has the sweeping effect of barring a defendant from challenging the constitutionality of a statute, or the illegality of his charged misconduct. Such a holding would go against the well-established principles that a conviction based on an information that affects substantial rights can, indeed, be challenged and reversed, as will be demonstrated below.

In response to the People's claim that DeGroot has waived his right to challenge the sufficiency of the Information due to his guilty plea, DeGroot contends that he was properly charged and that there are no missing elements to the crime as stated in the Information. (Supp. Br. of Appellant 10.) However, DeGroot asserts that he cannot be properly convicted because the allegations in the Information are no longer a crime based on the holdings of the United States Supreme Court in *Williams v. United States*, 458 U.S. 279 (1982) and other cases.

The basis of DeGroot's arguments on appeal is his contention that his misconduct cannot constitute a crime in light of United States Supreme Court decisions regarding the fraudulent presentation of a check. DeGroot claims that the Information is invalid under *Williams*, 458 U.S. at 284-85. Concomitantly, the United States Supreme Court has held that, "statutes creating and defining crimes cannot be extended by intendment, and . . . no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute.'" *Todd v. United States*, 158 U.S. 278, 282 (1895) (quoting *United States v. Lacher*, 134 U.S. 624 (1890)).

It is noteworthy that any challenge DeGroot would raise concerning the way he was charged should have been brought to the trial court's attention, and not raised for the first time on appeal. Generally, if a timely objection was not made at trial, a party risks forfeiture of claims for relief on appeal. See *Puckett v. United States*, 556 U.S. 129, 133 (2009); see also *United States*

v. Vosburgh, 602 F.3d 512, 531 (3d Cir. 2010). However, issues raised for the first time on appeal may be reviewable when they concern the validity of the statute under which a defendant was convicted. *See United States v. Spells*, 537 F.3d 743, 748 (7th Cir. 2008)(review was permitted although the defendant failed to object at trial because a Supreme Court ruling changed the applicable law during direct appeal.)

The Federal Rules of Criminal Procedure restricts challenges to an information by requiring that they be made before the start of trial. However, there are exceptions for jurisdictional challenges such as challenges asserting that an information that fails to state an offense, which can be made at any time while a case is pending.² Fed R. Crim P. 12(b)(3)(B). Importantly, an established body of case law confirms that a challenge to an information based on the failure to allege a punishable offense presents a claim of a fundamental defect that can be raised for the first time on appeal. *United States v. Spinner*, 180 F.3d 514, 516 (3d Cir. 1999). *See also United States v., Sinks*, 473 F.3d 1315, 1320-21 (10th Cir. 2007)(an indictment's failure to charge an offense may be raised at any time, including for the first time on appeal) and *United States v. Foley*, 73 F.3d 484, 488 (2d Cir. 1996)(challenge to indictment for failure to set forth the elements of bribery could be addressed on appeal, whether or not raised at trial).

Also, a guilty plea does not bar a jurisdictional challenge to an information. Failure of an indictment to state an offense is a jurisdictional challenge. *Spinner*, 180 F.3d at 516. A criminal defendant is not barred from challenging on appeal that the actions to which he plead guilty were not proscribed by statute. *See United States v. Al Hedaithy*, 392 F.3d 580, 586-89 (3d Cir. 2004)(a defendant who enters an unconditional guilty plea may argue for the first time on appeal

² A case is considered to be "pending" after the adjudication of an appeal or after the time for appeal passes. *See United States v. Hartwell*, 448 F.3d 707, 720 (4th Cir. 2006)(Williams, concurrence).

that the specific facts alleged in the charging document do not amount to a criminal offense). *See also United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003)(a guilty plea does not waive a defendant's right to argue that conduct to which he or she admitted was not a criminal offense under the applicable statute); *United States v. Hill*, 564 F.2d 1179, 1180 (5th Cir. 1977)(a guilty plea does not bar an appeal asserting that an indictment "failed to state an offense, or that the charge is unconstitutional, or that the indictment showed on its face that it was barred by the statute[.]"). "Even if there is an unconditional plea of guilty or a waiver of appeal provision in a plea agreement, [a court of review] has the power to review if the factual basis for the plea fails to establish an element of the offense which the defendant pled guilty to." *United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002). *See also United States v. Castro*, 704 F.3d 125, 138 (3d Cir. 2013) (plain error was found in an insufficiency of the evidence challenge because the prosecution failed to prove an essential element of the charged offense, and this failure constituted a "miscarriage of justice" notwithstanding an appellate waiver provision of a plea agreement). Accordingly, there is more than sufficient persuasive legal authority, in addition to a Federal Court Rule, supporting the conclusion that DeGroot may challenge his indictment, despite his guilty plea, where he challenges the criminality of his conduct.

Furthermore, a guilty plea waives most of a defendant's non-jurisdictional and procedural rights. *See Tollett v. Henderson*, 411 U.S. 258, 267 (1973)(holding that "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea"). However, in some circumstances, a guilty plea does not necessarily waive a defendant's right to challenge the constitutionality or validity of the statute under which he was charged. *See Menna v. NewYork.*,

423 U.S. 61, 62-63 n.2 (1975) (holding that a guilty plea is an admission of the facts as charged that removes all issues of factual guilt and “simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established” and that “a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute”). *See also Bousley v. United States*, 523 U.S. 614, 617 (1998) (where a guilty plea was not a bar to the collateral attack of a conviction due to a subsequent decision of the Supreme Court holding that defendant’s conduct was not criminal under the statute.)

I review DeGroot’s claims with caution, however, because the United States Supreme Court rulings that DeGroot contends invalidated the law under which he was charged were in effect prior to his conviction. *See Williams*, 458 U.S. at 284-85. Even so, the United States Supreme Court has also noted that although an error in an Indictment or Information does not deprive a Court of its jurisdiction, a post-conviction challenge to an Information may prevail if there is plain error that affects a defendant’s substantial rights. *See Cotton*, 535 U.S. at 631. Because DeGroot’s claim of legal impossibility does not implicate a factual challenge to his guilt or to the elements of the crime charged in the Information, but rather focuses on whether his actions were criminal, I can consider the merits of his appeal.

B. The Crime of Obtaining Money by False Pretense Does Not Require A Finding that A Financial Instrument Bear or Make A “Statement”, “Presentation,” or “Representation.”

DeGroot pled guilty to Count IX of the Information, charging him with violation of title 14, section 834 of the Virgin Islands Code as an aider and abettor. Title 14, section 834 of the Virgin Islands Code reads, in pertinent part that “[w]hoever knowingly and designedly, by false

or fraudulent representation or pretenses, defrauds any other person of money or property, shall – . . . (2) if such property or money was \$100 or more in value, be imprisoned not more than 10 years.” Title 14, section 11(a) of the Virgin Islands Code provides: “[w]hoever commits a crime or offense or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” Count IX of the Information reads:

On or about May 29, 2008, in St. Thomas, U.S. Virgin Islands, the Defendant, **ALAN H. DEGROOT**, knowingly and designedly, by false representation, did aid and abet another, in an attempt to defraud a person of money in excess of \$100.00, to wit: without authorization of Ann Rost, the Defendant fraudulently presented a check at Merchant Commercial Bank at Port of Sale, belonging to Ann Rost, in violation of **T. 14 V.I.C. 834(2), and 331(2), OBTAINING MONEY BY FALSE PRETENSE, T. 14 V.I.C. § 331(2) ATTEMPT, T. 14 V.I.C. § 11(a) PRINCIPALS.**

(Information at 4) (emphasis in original).

On appeal, DeGroot argues that it is “impossible to obtain money by false or fraudulent representation or pretenses solely by presenting a check at a bank. [The reason is that] a check is neither a representation nor a pretense.” (Br. of Appellant 18) (emphasis omitted). In support of his argument, DeGroot cites a number of sources, including *Williams*, 458 U.S. 279; *United States v. Frankel*, 721 F.2d 917 (3d Cir. 1983) and *United States v. Schwartz*, 899 F.2d 243 (3d Cir. 1990) for the proposition that a check is neither a representation, nor a statement. DeGroot argues, and the United States Court of Appeal for the Third Circuit (“Third Circuit”) has recognized, that “the Supreme Court rejected the notion that a false statement is made by presenting for deposit a check not backed by sufficient funds. The Third Circuit stated that ‘technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as ‘true or false.’” *Frankel*, 721 F.2d at 919 (quoting *Williams*, 458 U.S. at 284).

The courts in these cases maintain that a check is not property with measured value, but a promise to pay the amount represented. *Williams*, 458 U.S. at 284-85. The facts supporting that rule, however, differ from the facts that control this case. All the cases DeGroot proffers pertain to the criminal conduct involving check kiting, “a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two or more banks.” *Id.* at 283. Specifically, check kiting involves depositing a check drawn from Bank A (assume in the amount of \$100,000), where the check kiter knows the account contains insufficient funds, to Bank B that will grant instant credit on the deposited check. While Bank B is processing this check, the check kiter deposits another check drawn on an account at Bank B into the Bank A account, which also issues to the kiter immediate credit. When Bank B checks the sufficiency of the funds in Bank A, the check clears because of the immediate credit given by Bank A, creating an artificial or pseudo balance in the checking account. With this scheme, the check kiter has swindled \$100,000 of funds he never owned. (*See id.* at 281 n.1).

Here, unlike the criminal defendant in *Williams* and other cases where the defendants’ convictions for this scheme were overturned because the courts found that a check is not a statement, the circumstances surrounding DeGroot’s conviction do not involve check kiting nor the drawing of a check from an account with insufficient funds. Furthermore, in this case DeGroot did not present a check to be drawn on *his own* bank account where the attempted withdrawal was ineffective because of insufficient funds. Indeed, this case has nothing to do with insufficient funds or the creation of a pseudo-balance. Instead, DeGroot drove his then-girlfriend to the bank, for the express purpose of cashing a check drawn on the bank account of another person, Rost, whose check book had been stolen and whose signature on that check had been forged. Rost neither signed the check nor authorized payment to DeGroot, yet when DeGroot

and Anderson presented the check to the Bank, they represented to the Bank that Rost had issued the check. The Information upon which DeGroot was charged explicitly stated that “the Defendant, ALAN H. DEGROOT, knowingly and designedly, *by false representation*, did aid and abet another, *in an attempt to defraud* a person of money in excess of \$100.00, to wit: *without authorization of Ann Rost*, the Defendant *fraudulently presented* a check at Merchant Commercial Bank at Port of Sale, belonging to Ann Rost[.]” (J.A. at 19)(emphasis added). Undeniably, whether any writing on a check constitutes a statement is irrelevant for purposes of DeGroot’s guilty plea. Importantly, the courts in the cases DeGroot cited, such as the *Williams* court, expressed their hesitancy in criminalizing the presentation of a check in instances where the accounts had insufficient funds at the moment of the presentation of a check for payment. Insufficient funds in an account when a check, drawn on the same account, is presented for payment is not the pivotal issue in this case.

The trial record informs that this case involves much more than a simple presentation of a check to a bank. This case involves presentation of a check to a banking institution with an attempt to defraud a person, Rost, of money by an act of deceit; the act of Anderson, aided and abetted by DeGroot, in presenting a forged check to the Bank in the misleading belief that Rost had issued the check and had made a promise to pay, was the false conduct perpetrated by the forging of Rost’s signature on the check. More succinctly, the crime encompassed several fraudulent acts. First, the check was stolen. Second, Rost’s signature was forged on the check which was calculated to deceive or mislead the Bank. Third, DeGroot intended to obtain money by a false pretense, which is the forged check. Fourth, DeGroot intended to illegally obtain money from Rost’s account. Therefore, DeGroot’s conduct vastly exceeded the mere presentation of a check with an amount written on it for which the account on which the check

was drawn had insufficient funds. DeGroot's actions and the elements of the crime to which DeGroot pled guilty confirm that this case entails more than just a figure on a check purportedly representing the amount of the check.

During the plea hearing, the People's counsel stated that, had this case gone to trial, the People would have proven "that the defendant unlawfully took the check book of Attorney Rost and aided and abetted Ashley Anderson in attempting to cash a check, one of Attorney Rost's checks at Merchant Bank without her authorization." (J.A. at 35.) DeGroot, when asked by the trial court to explain what happened concerning his conduct during the facilitation of the crime, denied the alleged theft of Rost's check book. However, DeGroot did state:

THE DEFENDANT: . . . I did drive my fiancé[e], soon to be wife, to the bank. I knew what she was doing that was my fault. We both made a mistake. We should never even done anything that we did. But we did it for a reason. I guess you could say it was for a good reason on our part. But it was a bad reason because it was the wrong way to go. This whole case started because Ms. Ann Rost gave up -- me and Ashley gave up my nine month old son to Ms[.] Rost for adoption in Florida. And Ms[.] Rost had still yet to turn over all of our money that she was suppose to turn over to us from the adoption. And that was one of the reasons why my fiancé[e] did what she did. That was the reason why that I drove her to the bank and let [her] go in[side]. And I don't know how to put the exact words to you. (J.A. at 35-36.)

Importantly, the Third Circuit has explained that "'false pretenses' is the act of 'illegally obtaining money, goods, or merchandise from another by fraud or misrepresentation.'" *Oritani Sav. & Loan Ass'n v. Fid. & Deposit Co. of Md.*, 989 F.2d 635, 639 (3d Cir. 1993). DeGroot's act of transporting his fiancée to the Bank to cash a check that he knew bore the forged signature of Rost constituted aiding and abetting in an act of fraud or misrepresentation.

Banks are required to honor checks so long as they contain the requisite information of validity including the signature of the drawer. By forging Rost's signature, the purported drawer, DeGroot, misrepresented to the Bank that Rost had instructed the Bank to pay the

amount indicated on the check to DeGroot and his fiancée. The sum of money written on the check, \$1,700.00, is the sum of money DeGroot and his fiancée attempted to mislead Merchant's Commercial Bank into paying them, to the detriment of Rost and the Bank. DeGroot never attempted to dissuade his fiancée from attempting to cash the \$1,700.00 check, and DeGroot never attempted to dissociate himself verbally, or by overt conduct, from the unlawful venture. Rather, DeGroot counseled, aided, abetted, and procured the commission of the crime of attempting to obtain money by false pretense. Therefore, DeGroot was a willing participant in the crime for which he pled guilty. Undeniably, DeGroot's actions did constitute aiding and abetting someone, Anderson, to commit a crime under Virgin Islands law. Accordingly, the People did present sufficient evidence to support a conviction had the case gone to trial.

DeGroot focuses his argument on whether a check can be a representation. We have emphasized that all of the case law pertaining to check representation offered by DeGroot addresses the valuation of checks drawn from a defendant's *own* account and whether the face value of the check controls, or whether the amount of the check is a promise to pay as opposed to actual property with an actual value. DeGroot is reminded that in Count IX of the Information he is not charged with drawing and delivery of a worthless check under 14 V.I.C. 835(a)(1). Crucially, this case involves more than just a check with a number or monetary figure written on the check and drawn against an account with insufficient funds. Rather, this case involves DeGroot aiding and abetting in committing an act of fraud or misrepresentation and the forging of a person's signature in order to mislead a commercial institution into erroneously releasing money based upon a fraudulent document. DeGroot's culpable acts under 14 V.I.C. § 834 occurred when he surreptitiously obtained the check, consciously drove his fiancée to the Bank to cash a check that he knew bore the forged signature of Rost, and presented the check as if

authorized so that the Bank could rely upon it. Therefore, DeGroot's argument that a check is not a statement, representation, or presentation is irrelevant to his conviction for aiding and abetting in attempting to obtain money by false pretenses.

C. DeGroot's plea of guilty to the crime of an attempt to obtain money by false pretense should not be vacated as factually impossible, even if Rost was indebted to him.

DeGroot asserts that his conduct cannot possibly amount to criminal activity because the potential victim, Rost, was indebted to him in the amount of money that he attempted to obtain from the bank as the balance due him from an adoption case in which Rost had represented him. Essentially, DeGroot asserts a right to "self-help," which is not cognizable under Virgin Islands law. Thus, I reject this theory which is irrelevant to the crime of attempting to obtain money by false pretense, irrespective of whether DeGroot believed Rost owed him money from the adoption. The trial record is devoid of any lawful document or court judgment confirming that Rost is indebted to DeGroot. Here, the pertinent fact is that DeGroot knew that Rost had not authorized payment to him from her account and that the check Anderson presented at the Bank had a forged signature, making the check an illegal document.

Section 834(2) of title 14 of the Virgin Islands Code makes it a crime to "knowingly and designedly, by false or fraudulent representation or pretenses, defraud[] [another] of money or property." Had the case gone to trial, to sustain a conviction against DeGroot, the Government would have had to prove beyond a reasonable doubt that DeGroot aided and abetted in an attempt to fraudulently make a representation or pretenses, knowing such representation or pretense to be false, in order to defraud Rost of her money or property. *See Bowry v People*, 52 V.I. 264, 269 (V.I. 2009)(noting that the government must prove that the defendant knowingly made false statements with the specific intent to defraud the victim).

To determine whether the Government would have satisfied its burden, I must determine how “defrauding a person” or a “false representation” is construed for the purposes of 14 V.I.C. § 834, and whether a defendant’s frame of mind or actual intent is relevant to a conviction. I have previously determined, consistent with 14 V.I.C. § 834 and with common law usage, that “a person ‘defrauds’ another if he makes a misrepresentation of an existing material fact, knowing it to be false, ... intending one to rely [] under circumstances in which such person does rely to his damage.” *Bowry*, 52 V.I. at 269 (quoting *Gov’t of the V.I. v. Adams-Tutein*, 47 V.I. 514, 522 (D.V.I. App. Div. 2005)) (citing BLACK’S LAW DICTIONARY 423 (6th ed. 1990)). Therefore, to properly sustain a conviction the record must demonstrate “the use of fraud or trickery to obtain another’s money or property.” *Adams Tutein*, 47 V.I. at 523.

The Government must show that DeGroot submitted false statements with the specific intent to defraud the victim. *See Bowry*, 52 V.I. at 269 (citing *Adams-Tutein*, 47 V.I. at 522). The Government is not required, however, to submit direct evidence of DeGroot’s intent in order to obtain a conviction. *Bowry*, 52 V.I. at 269 (citing *Gov’t of the V.I. v. Greene*, 708 F.2d 113, 115-116 (3d Cir. 1983) and *United States v. White*, 611 F.2d 531, 539 (5th Cir. 1980)). Importantly, DeGroot’s overt conduct and activity immediately before and during the criminal activity manifested his intent. Consistent with the common law usage of defraud, and as applied to 14 V.I.C. § 834, “the statutory requirement that another person must have been defrauded imports the requirement that another conferred a benefit or turned over something of value to the actor in reliance on the misrepresentation.” *Adams-Tutein*, 47 V.I. at 522-23. The statute under which DeGroot was convicted criminalizes the aiding and abetting of “knowingly and designedly, by false or fraudulent representation or pretense, defraud[ing] any other person of money or property.... [Therefore] the government was required to prove that [DeGroot] knowingly

submitted false statements with the specific intent to defraud the victim.” *Bowry*, 52 V.I. at 268 - 269 (citing *Adams-Tutein*, 47 V.I. at 522).

A review of the sufficiency of the evidence to uphold a conviction must be viewed in a light most favorable to the government. *Brown v. People*, 54 V.I. 496, 504 (V.I. 2010) and *United States v. Riley*, 621 F.3d 312, 329 (3d Cir. 2010) (citing *United States v. Pearlstein*, 576 F.2d 531, 534 (3d Cir. 1978)). DeGroot alleges that the evidence is insufficient to sustain his conviction because he held a claim of right to the funds he attempted to acquire as payment for what he believes was owed to him by Rost. DeGroot cites no statutory law or case law precedent to support his contention that satisfaction of an alleged debt is a defense to obtaining money by false pretenses under the Virgin Islands Code. DeGroot’s legal recourse for payment from Rost was to initiate legal proceedings or an action for debt or for breach of contract against Rost to recover the money he was purportedly promised.

I can find no case law in the Virgin Islands which delineates claim of right or honest belief as a defense to fraud or theft. A few courts in other jurisdictions have held, in very limited circumstances, that honest belief or a claim of right may be a defense to similar offenses, if the accused acted in the honest belief that he was authorized to appropriate the money, or acted in the honest belief that the owner consented to the appropriation. *See* 32 Am. Jur. 2d *False Pretenses* § 29 (citing *Ex parte Wood*, 564 So. 2d 860 (Ala. 1990) and *State v. Kramer*, 809 S.W.2d 50 (Mo. Ct. App. E.D. 1991)). The courts in jurisdictions that accept a claim of right theory disapprove of using this mechanism of self-help in order to obtain funds to which an accused believes he has a rightful entitlement. For instance, one court disagreed with the defendant’s contention that she was entitled to the funds in her husband’s separate checking account because he left her and her children penniless, and was not current with his child-support

obligations, which she claimed were \$3,000 in arrears. *Groves v. Commonwealth*, 646 S.E.2d 28, 29 (Va. Ct. App. 2007). The defendant in that case admitted that she had no permission to use the funds in that account, and the court affirmed the trial court's finding that she had "no authority whatsoever, legally, to take anything out of her husband's separate account." *Id* at 31.

By DeGroot's admission, he knew his actions in this case were wrongful. DeGroot stated that he and his fiancée "made a mistake", and "should [have] never ... done [what they] did." (J.A. at 36.) Further, no fact exists in the record to suggest that Rost authorized payment to DeGroot. To the contrary, Rost directed the Bank's employee to call the police upon being apprised of DeGroot's and Anderson's action. (*Id.*) The very fact that DeGroot either forged or caused to be forged Rost's signature on the check, serves to verify that he did not possess an honest belief that Attorney Rost consented to the appropriating of funds in her checking account. DeGroot admits that the forgery of the check was the "wrong way to go" in obtaining funds that he believed rightfully belonged to him. (*Id.* at 36)

The trial record contains sufficient evidence to establish that DeGroot made an attempt to aid and abet in defrauding the victim of money he had no authority to take. Further, DeGroot aided and abetted in presenting a check to a banking institution for payment that was fraudulently represented to the bank to have been signed by Rost with DeGroot having full knowledge that Rost never signed the check or authorized funds to be drawn from her account. Considering DeGroot's acknowledgment of his wrongdoing and the fact that Rost had not authorized either DeGroot or Anderson to withdraw funds from her bank account, his claim of right and alleged honest belief failed to overcome the findings of his intent to defraud as substantiated by his criminal conduct. Because the trial record confirms DeGroot's unequivocal

attempt to defraud, it is irrelevant whether DeGroot's actions were motivated by an attempt to collect money he perceived as rightfully his.

D. DeGroot was charged under the appropriate section of the Virgin Islands Code.

DeGroot further asserts that the Virgin Islands Legislature never intended for 14 V.I.C. § 834 to apply to issues of fraud involving checks because title 14 V.I.C. § 835 addresses the drawing and delivering of worthless checks. In support of his assertion, DeGroot cites to our decision in *Gilbert v. People of the Virgin Islands*, 52 V.I. 350, 357 (VI. 2009). As DeGroot notes, we concluded in *Gilbert* that “the existence of another provision suggest[s] that the legislature did not intend a broad brush for another.” (Br. of Appellant 31) (citing *Gilbert*, 52 V.I. at 363). DeGroot contends that he was incorrectly charged under 14 V.I.C. § 834 because section 835 supersedes that section for conduct concerning check offenses.

As with all the other issues DeGroot has raised for our review, DeGroot bases his arguments on case law and hypothesis that overlook the fraudulent aspects of his conduct, and focuses solely on the premise of presentation of a check to a bank with the check drawn on an account with insufficient funds. The statute DeGroot asserts would have been more applicable to his offense states that:

Whoever makes, draws, utters, or delivers any check, draft or order for the payment of money to the value of \$100 or more upon any bank or other depository knowing at the time of such making, drawing, uttering or delivering *that the maker or drawer has not sufficient funds in, or credit with, such bank or other depository for the payment of such check, draft or order, in full, upon its presentation*, shall be fined not more than \$1,000 or imprisoned not more than 5 years, or both[.]

14 V.I.C. 835(a)(1)(emphasis added). A violation of section 835(a)(1) is euphemistically called “bouncing a check,” which is not an issue in this case. Furthermore, the cornerstone of section

835(a)(1) violation is the absence of sufficient funds in the account upon which the check is drawn at the time the check is presented for payment. Thus, by its restrictive language §835(a)(1) is limited to checks, drafts or order for the payment of money. Considering the facts of this case, it is difficult to perceive why DeGroot contends that § 835 would have been more appropriate than the statute under which DeGroot was ultimately convicted. The People have charged DeGroot with:

knowingly and designedly, by false representation, ... aid[ing] and abet[ting] another, in an attempt to defraud a person of money in excess of \$100.00, to wit: without authorization of Ann Rost, [DeGroot] fraudulently presented a check at Merchant Commercial Bank at Port of Sale, belonging to Ann Rost, in violation of **T. 14 V.I.C. 834(2), and 331(2), OBTAINING MONEY BY FALSE PRETENSE, T. 14 V.I.C. § 331(2) ATTEMPT, T. 14 V.I.C. § 11(a) PRINCIPALS.** (Information at 4.)

The language of § 835(a)(1) and § 834(2) encompass vastly different criminal conduct. Similarly, the title of each section connotes this difference as one section is titled “Obtaining money by false pretense” and the other is titled “Drawing and delivering worthless checks.” More succinctly, all “[d]rawing and delivering of worthless checks” may constitute “obtaining money by false pretense,” but all “obtaining money by false pretense” does not necessarily always involve a check. This case involves more than merely presenting a check as the drawer for payment for which there are “insufficient funds” in the account to pay the check. Irrefutably, this case has nothing to do with “insufficient funds” in a bank account at the time of presentation of a check for payment. This case is about making a false representation and attempting to defraud a person of money by utilizing a forged check. A check was just the vehicle used in the attempt to obtain money by false pretense. There is sufficient evidence in the record to satisfy all the elements of 14 V.I.C. § 834. I have elaborated upon the ways in which the record reveals that

DeGroot attempted to defraud the victim through fraudulent representations of money he was not authorized to obtain, and I shall not reiterate them here.

No language exists, however, in the Information which charges DeGroot with knowing whether Rost's checking account contained sufficient funds to honor the check at the time of presentation to the Bank. Likewise, no facts in this case question the amount of the money in the account, nor was the amount of funds in the bank account ever raised as an issue at trial.

When interpreting the meaning of a statute and the intent of the legislature is clear, then that is the "end of the matter," and further analysis of the statute is unnecessary. *Gilbert*, 52 V.I. at 356 (quoting *In re Infant Sherman*, 49 V.I. 452, 456 (V.I. 2008)). See *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993)). See also *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. ___, 131 S.Ct. 1885, 1891 (2011) (the Supreme Court looks first to a word's ordinary meaning when interpreting a statute); and *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. ___, 131 S.Ct. 1968, 1980 (2011) (holding that "Congress's "authoritative statement is the statutory text"). A statute should never be construed in a manner that would lead to injustice or absurd results. *Gilbert*, 52 V.I. at 256 (citing *American Dredging Co. v. Local 25, Marine Division, Int'l Union of Operating Engineers*, 338 F.2d 837, 842-43 (3d Cir. 1964)). Unquestionably, 14 V.I.C. § 835 does not encompass the range of DeGroot's conduct. The sufficiency of the funds in Rost's account has never been an issue in this case, but would have been an issue had DeGroot been charged under § 835(a)(1) with "drawing and delivering a worthless check," instead of under § 834(2) with "obtaining money by false pretense," as he was charged. To hold that an accused should be charged under a statute where none or only part of the evidence confirms the elements of the offense would generate an absurd result and constitute an injustice to the accused. Therefore, based upon the trial record before us, I conclude that

DeGroot was charged under the appropriate section, § 834(2), of the Virgin Islands Code. Thus, I would affirm DeGroot's conviction.

VI. CONCLUSION

For the reasons elucidated above, I join in affirming the judgment of the Superior Court.

DATED this 29 day of April, 2013

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST
VERONICA J. HANDY, ESQ.
Clerk of the Court