

FARNER, Ronald & Patricia	SOUTHAMPTON	
GETTEL, Jay E. & Erma M.	N-17-73 1343 Mainsville Rd.	250.73
GETTEL, Jay E. & Erma M.	N-5-44 110 acres E. of Mongul Rd.	5556.13
GREINER, Arthur K. & Catherine	N-14F-21 Mainsville Road	169.84
HOCK, C. Walter Jr. & Mervin D.	N-1-15 13 Acres McClays Ridge	207.92
KNOLL, Paul D.	N-16-7 194 Acres Rd. 612	3546.37
LAKE, Calvin L.	N-17-97 Twp. 616	456.85
RHONE, Albert & Jessie Est.	N-6N-4A Rt. 533, Tract 2	1926.07
ROMANE, Bruce T. & Roberta	N-20-22A	87.74
STATUM, Pinkie	N-6-11J 2187 Halls Avenue	1335.05
TOWN RADIO INC.	N-20-15 Mainsville to White Church Rd.	144.83
FARNER, Ronald & Patricia	N-10-81 5 Acres Possum Hollow Rd.	223.63
GETTEL, Jay E.	72 Schultz	554.03
GETTEL, Jay E.	71 Homette	273.28
GETTEL, Jay E.	66 Amherst	159.37
GETTEL, Jay E.	73 Fleetwood	305.65
GETTEL, Jay E.	75 Hollypark	327.23
GILBERT, Robert & Candy	70 Enterprise	527.89
GRINER, Arthur	66 Brookwood	200.77
KRINER, John	66 Vandyke	448.33
STATUM, Pinkie & Joseph	70 Rembrant	318.72

BEELER, Paul & Jane	WASHINGTON	
BURKETT, Franklin E. & Linda	Q-17-44 14647 Wayne Hwy.	72.70
EAST, David	Q-19-46 12751 Old Pen Mar Rd.	650.22
GIFT, Kenneth & Nancy	Q-8-67 10076 Old Forge Rd.	2386.97
GREENE, Lester C. Jr. & Judy	Q-7-53A 11538 Anthony Hwy.	1299.62
HULL, Edward H. & Patricia A.	Q-13M-6B Beartown	573.34
KNOTT, Ronald E. & Terrie	Q-19A-84 11478 Buchanan Trail East	1484.15
LARSEN, Ronald E.	Q-19B-35 12054 Old Rt. 16	345.93
LIGHT, Donna Mae	Q-16-71 Iron Bridge Road	547.30
LONG, Donald & Judith	Q-7-190 8419 Sheffield Manor Blvd.	1618.34
SANDERS, Harold L. Jr. & Connie	Q-8-159 10510 Fish & Game Road	1230.87
SHOCKEY, Elmer A. Sr. & Lovella	Q-19F-13 11960 Pen Mar Road	814.54
WETZEL, Amos F.	Q-20K-36A 13493 Blue Ridge Avenue	58.91
WINEBRENNER, Luther	Q-13R-20 Beartown	690.31
BEELER, Paul E. & Jane	Q-19-53 Rt. 367	701.83
BEELER, Paul E. & Jane	56 Homemaker	185.64
COLEMAN, Larry L. & Gloria A.	63 Atlas	390.98
GRISSON, William & Shirley	68 Atlantic	103.18
HALEY, Louise W.	Mobile Home	673.33
HARBAUGH, Timothy L. & Beulah J.	65 Detroiter	338.49
MILLER, Kenneth	72 Atlantic	609.32
MUMMERT, Robert	68 Pacemaker	455.39
MYERS, James & Janet	73 West Brook	568.99
SHOCKEY, Elmer A. & Lovella	62 Homette	313.97
SNYDER, Richard E.	81 Brigadeer	727.95
	58 Brentwood	153.64

ALDRIDGE, Issac A. Jr. & Alice	WAYNESBORO	
GATES, Michael L. & Paula K.	31 Cottage Street	1288.25
GUYER, Larry G. & Mary L.	34 Hollinger Avenue	608.19
HILL, Michael & Barbara	121 North Potomac	1084.50
MORNINGSTAR, Ora	403 North Potomac Street	1882.28
OWENS, William C. & Charla Y.	332 Ringgold	1000.51
SHOCKEY, Robert R.	250 Wayne Avenue	344.47
SMITH, Dennis E. & Mary Lou	44 S. Potomac	1063.16
VALLEY INVESTORS	31 West Second St.	629.29
WAGAMAN, Paul	329-331 West Fourth Street	757.55
WALTER, Gary L.	Cleveland Ave. & Fifth St.	1488.63
	225 Cleveland Avenue	566.29

measure of damages. *Id.*, citing *Rabe v. Shoenberger Coal*, 213 Pa. 252, 62 A. 854 (1906). Here, the drilling of a new well corrected the problem and the cost thereof should serve as the measure of damages.

As a sidenote, we cite *Sturtz v. Yoder's Milk Transport, Inc.*, 30 Somerset 1 (1975), and *Parkes v. Opfermann*, 180 Pa. Super. 184, 119 A.2d 624 (1956). In *Sturtz*, the cost of drilling a new well, pump, and piping were the appropriate measure for damage to water supply as being necessary to restore an adequate water supply. *Id.*, at 26. In *Parker*, when the basement and garage of a recently constructed home did not meet the specifications of the contract, the damages were the cost of correcting the defective condition. *Id.*, at 188, 626; Restatement of Contracts, Section 346(1)(a).

Accordingly, we deny defendant's motion to strike paragraphs 17 and 18 of plaintiff's complaint.

ORDER OF COURT

December 5, 1984, plaintiffs shall file an amended complaint pursuant to the agreement and stipulation of counsel within twenty (20) days from this date. It is further ordered that defendant Simpson Associates' motion to strike paragraphs 17 and 18 of plaintiffs' complaint alleging the cost of replacing and drilling a new well as the measure of damages is denied.

COMMONWEALTH VS. WILLHIDE, C.P. Franklin County Branch, No. 124 of 1984

Criminal Law - Bad Check - Post-Trial Motions - Boilerplate - Post-Dated Check

1. Boilerplate motions will be preserved if a thorough memorandum is filed in support of the motions.

2. A post-dated check is one which is tendered with notice to the payee that no money is presently on deposit to cover the amount but impliedly assures that sufficient funds will be on deposit on the day it becomes due.

3. A defendant is guilty of issuing a bad check if he passes a check knowing it will not be honored, and an intent to defraud is no longer necessary.

4. Showing a check was post-dated disproves only that there is an intent to defraud.

John F. Nelson, Esq., Assistant District Attorney

Deborah K. Hoff, Esq., Assistant Public Defender

OPINION AND ORDER

EPPINGER, P.J., December 11, 1984:

On May 27, 1983, the defendant purchased a lawn mower, lawn sweeper, and other small items from the Central Tractor supply company. Defendant purchased these items by check, also dated May 27, 1983, in the amount of \$474.77. Later, the check was returned for insufficient funds and after being notified of this by registered mail, defendant did not make payment.

Defendant was charged on July 14, 1983, with issuing a bad check, a violation of 18 P.S. §4105. Thereafter, defendant waived preliminary hearing on February 24, 1984, mandatory arraignment on March 21, and trial by jury on May 14. The public defender was appointed to represent defendant on September 30, 1983, and at the non-jury trial on May 17,, 1984, was found guilty of issuing a bad check.

Prior to the trial, defendant made a motion to dismiss pursuant to Pa.R.Crim.P. 1100 and has timely filed post-trial motions in arrest of judgment and for a new trial on the grounds that the verdict was against the weight of the evidence. Both the Commonwealth and the Public Defender agreed that these issues should be submitted and argued on briefs. These motions are presently before us for disposition.

Defendant first argues that the charges should be dismissed pursuant to Rule 1100. Both parties agree that any time up to August 17, 1983,¹ should be considered to be excluded. From that day until May 14, 1984, when defendant was called to waive trial and waived trial by jury, a total of 271 calendar days passed. But we find that at least 120 of those days are excludable under Rule 1100.



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Defendant applied for the appointment of a public defender on August 25, 1983, after the issuance of the arrest warrant and his arraignment. A public defender was appointed on September 30, 1983. This time, 36 days, is excludable. *Commonwealth v. Manley*, 282 Pa. Super. 376, 381-382, 422 A.2d 1340, 1342 (1980), citing *Commonwealth v. Bussey*, 486 Pa. 221, 404 A.2d 1309 (1979); *Commonwealth v. Millhouse*, 470 Pa. 512, 368 A.2d 1273 (1977); *Commonwealth v. Smith*, 262 Pa. Super. 258, 396 A.2d 744 (1978).

A preliminary hearing was scheduled for November 21, 1983, but defendant requested a continuance of 50 days on that date until January 10, 1984, and waived Rule 1100 in the presence of his attorney. So those 50 days are also excludable. Pa.R.Crim.P. 1100(d)(2).

Then on January 10, defendant's attorney requested a continuance. Another hearing could not be rescheduled until February 13, 1984, and those 34 days are excludable. Pa.R.Crim.P. 1100(d)(3)(ii). Defendant argues that on January 10, only a two-week continuance was requested. Since the hearing was rescheduled at the earliest possible date it is an excludable judicial delay. See *Commonwealth v. Selig*, Pa., Super. 464 A.2d 450, 455-456 (1983), but even were that not so, the additional twenty days would not make the total of includable time in excess of 180 days.

As is shown by the above discussion, at least 120 days are excludable under Rule 1100. Only 151 days of includable time ran by the defendant's trial on May 14.

Defendant next argues that the verdict was against the weight of the evidence at trial. This is a boilerplate motion. In *Commonwealth v. Souders*, Franklin L.J. * (November 21, 1984, slip op., p. 3), we recently decided that boilerplate motions would be preserved if a thorough memorandum is filed in support of the motions, explaining in what manner the verdict is against the

* Editor's Note: reported at 7 Franklin 165 (1984).

¹ The complaint was filed on July 14, 1983. Pursuant to Pa.R.Crim.P. 102, the district justice of the peace issued a summons which was sent by certified mail on that date to the address shown on defendant's check, but the summons was returned undelivered on August 17, 1984.

weight of the evidence or is insufficient. *Id.*, citing *Commonwealth v. Santana*, Pa. Super. 468 A.2d 488, 491 (1983). Since a memorandum was filed in support of the motions, we will consider the motion on its merits. *Id.*

The essential argument is that no intent to defraud was demonstrated by the Commonwealth at trial because the check was post-dated. However, the evidence was not sufficient for us to find that this check was post-dated. In considering a motion that the verdict is against the weight of evidence the record and testimony is to be viewed in a light most favorable to the Commonwealth. *Commonwealth v. Meadows*, 471 Pa. 201, 205, 369 A.2d 1266, 1268 (1977). In this regard, the Commonwealth's witness, the assistant manager who accepted the check, testified that the sale was made and the check tendered towards closing time on May 27. The defendant testified that he wrote the check on the evening of May 26 after the store was closed and the bank statements had been cleared for the day. Under either situation, this would not be a post-dated check. A post-dated check is one which is tendered with notice to the payee that no money is presently on deposit to cover the amount but impliedly assures that sufficient funds will be on deposit on the day it becomes due. *Commonwealth v. Kelson*, 199 Pa. Super. 135, 139, 184 A.2d 374, 376 (1962). Nothing in the transaction suggests that the assistant manager was placed on notice that there were insufficient funds to cover the check.

Whatever that may be, showing that the check was post-dated would disprove only that there was an actual intent to defraud. *Id.*, at 139, 376. However, 18 P.S. §4105 does not require the Commonwealth to prove an intent to defraud. *Commonwealth v. Mutnik*, 486 Pa. 428, 431-432, 406 A.2d 516, 518 (1979). A defendant is guilty of issuing a bad check if he passes a check knowing it will not be honored. 18 P.S. §4105(a). Prior versions of the act required an intent to defraud, but the legislature removed that element of intent from the crime. *Commonwealth v. Mutnik*, supra, at 431, 518.

Here, the evidence clearly demonstrates that defendant issued the check and that at the time knew it would not be honored. Finding him guilty was proper and the motion in arrest of judgment and for a new trial is denied.

ORDER OF COURT

December 11, 1984, the defendant's motions in arrest of judgment and for a new trial are denied. It is ordered that the defendant be summoned to the Probation Department for the preparation of a presentence investigation report and that upon the completion of the report, the District Attorney shall list the defendant for sentence and give him notice of the time and place thereof.

COMMONWEALTH V. BAUMGARDNER OIL CO., INC., C.P.
Franklin County Branch, Misc. No. 5-1983

Criminal Law - Clean Stream Law - Strict Liability

1. Where defendant has a permit to discharge effluent greater than that permitted is found, the Commonwealth must prove beyond a reasonable doubt that defendant violated the terms of its permit.
2. The fact that effluent content as it is discharged from defendant's property is greater than permitted does not automatically prove a violation of the clean stream law.
3. The Commonwealth must prove beyond a reasonable doubt that effluent originated from defendant's activity.

Michele Straube, Esq., Attorney for the Commonwealth, Department of Environmental Resources

Jan G. Sulcove, Esq., Attorney for Defendant

OPINION AND ORDER

KELLER, J., December 12, 1984:

On November 9, 1982, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) initiated a criminal prosecution against Baumgardner Oil Company, Inc., of Fayetteville, Pennsylvania, under Sections 691.307(c), 611 and 602(a) of the Clean Streams Law, Act 394 P.L. 1987, June 22, 1937 as amended, October 10, 1980 Act 157, 35 P.S. §691.1 et seq. The proceeding commenced with the issuance of a citation by District Justice Shoemaker on DER's complaint that on or before Septem-



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