



STATE OF KANSAS

Office of the Attorney General

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Attorney General

January 6, 1978

ATTORNEY GENERAL OPINION NO. 78- 5

The Honorable Michael G. Glover
State Representative
1719 West 20th Terrace
Lawrence, Kansas 66044

Re: Crimes and Offenses--Worthless Checks--Presumptions

Synopsis: When the maker of a check payment of which is refused by a bank or other depository due to insufficient funds thereupon promptly and within seven days of notification that payment of the check had been refused, pays the amount thereof to the holder of said check, failure to pay, in addition, any service charge sought to be assessed by the holder of the check affords no basis for prosecution under K.S.A. 21-3707. The holder of such a check may lawfully assess such a service charge, but may not enforce payment thereof through use of the criminal law processes of the state.

* * *

Dear Representative Glover:

You inquire concerning the validity of the statutory presumption provided by K.S.A. 21-3707(2) insofar as the presumption is based upon failure of the accused to pay a service charge assessed by the holder of a check, payment of which has been refused by a bank due to insufficient funds or no account.

K.S.A. 21-3707 defines the offense of giving a worthless check as

"making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivering of any check, order

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or draft on any bank or depository for the payment of money or its equivalent with intent to defraud and knowing, at the time of the making, drawing, issuing or delivering of such check, order or draft as aforesaid, that the maker or drawer has no deposit in or credits with such bank or depository or has not sufficient funds in, or credits with, such bank or depository for the payment of such check, order or draft in full upon its presentation."

To establish the offense, the prosecution must prove, first, that the accused did in fact issue the check in question, that payment of the check was refused by the bank or other depository for no account or lack of sufficient funds, and that in issuing the check, the accused acted with intent to defraud and with knowledge of the lack of sufficient funds for payment of the check upon its presentation. Prior to 1972, if the prosecution established that the accused had failed to pay the holder of the check the amount thereof within seven days after receiving notice that payment of the check had been refused for insufficient funds, that showing constituted "prima facie evidence" of intent to defraud and of knowledge of the lack of sufficient funds.

The validity of the statutory presumption was considered in *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217 (1973). Applying the general test that "a statutory presumption will be upheld as constitutional if, in accordance with the experience of mankind, there is a natural and rational evidentiary relation between the fact proved and the one presumed," the court found just such a "natural and rational evidentiary relation" between nonpayment of a dishonored check by the accused within seven days after being notified that payment of the check had been refused by the bank due to insufficient funds, and the fraudulent intent and guilty knowledge which the statute permits to be inferred from that nonpayment:

"Where a person has written an insufficient funds check and receives property or other consideration therefor from the payee of the check, and further, where the maker of the check has been notified that the check has not been paid and fails to make payment with seven days after such notice, we find that

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there is nothing unreasonable or arbitrary in making such fact prima facie evidence of fraudulent intent or guilty knowlege. It appears to us that in the usual course of things where one person gives another a check, he intends to induce such person to give up some property right in reliance that the check will be paid on presentation. The notice provision gives to the drawer of the check a final opportunity in which to make the check good and is peculiarily for his benefit." 213 Kan. at 207.

The conviction which was affirmed in this case was based upon K.S.A. 1971 Supp. 21-3707, prior to its amendment by the 1972 legislature. As amended, subsection (2) provides in pertinent part thus:

"In any prosecution against the maker or drawer of a check, order or draft payment of which has been refused by the drawee on account of insufficient funds, the making, drawing, issuing or delivering of such check shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank or depository, providing such maker or drawer shall not have paid the holder thereof the amount due thereon and a service charge not exceeding three dollars (\$3) for each check, within seven (7) days after notice has been given to him that such check, draft, or order has not been paid by the drawee." [Underscored language added by 1972 amendment.]

Clearly, this amendment was not enacted to cure any constitutional infirmity or weakness in the then-existing statute, nor was it added in order to enhance the utility of the statute from a prosecutorial perspective. The sole apparent purpose of the amendment was to lend to the commercial and mercantile community the leverage of the criminal law processes of the state to enforce the assessment and collection of service charges on insufficient fund checks.

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Pursuant to that amendment, two facts, established conjunctively, constitute "prima facie evidence" of two elements of the offense, knowledge at the time of making or drawing the check that there was either no account or insufficient funds for payment thereof, and an intent to defraud the recipient of the check, those facts being failure of the drawer to pay the amount of the check to the holder thereof within seven days after being given notice that payment of the check had been refused, and failure within a like period to pay a service charge assessed by the holder of the check not exceeding three dollars. As the court found in *State v. Haremza, supra*, there is an obvious "natural and rational evidentiary relation" between one of the facts proved, the maker's failure to pay the check promptly when given an opportunity to do so, and the facts to be inferred therefrom, that the maker in fact issued the check with fraudulent intent and guilty knowledge that insufficient funds were on hand at the time to permit payment of the check on presentation. If, however, the maker of a check promptly pays the holder thereof upon being notified that payment by the bank has been refused, such timely payment in and of itself negatives the existence of the intent to defraud and guilty knowledge of insufficient funds which are elements of the offense. Timely payment of a dishonored check, in and of itself, negatives essential elements of the offense, an intent to defraud and guilty knowledge at the time of making the check. The assessment of a service charge by the holder thereof at the time the maker pays it is a transaction entirely separate and independent from the facts which constitute the offense itself, the giving of a worthless check. An individual who promptly pays a check upon being notified that it had been refused by the bank might reasonably object to payment of any service charge by the holder of the check, and that objection hardly supports an inference that despite the maker's prompt action to honor the check, he acted with fraudulent intent and guilty knowledge in its issuance. There is no "natural and rational evidentiary relation" whatever between the maker's refusal to pay a service charge assessed by the holder of the check when making timely payment thereof, and the existence of any fraudulent intent at the time of issuing the check "to induce the recipient to give up some property right in reliance that the check will be paid on presentation." *State v. Haremza, supra* at p. 207. Nonpayment of a service charge, standing alone, is not naturally and rationally probative of any element of the offense as defined by subsection (1) of K.S.A. 21-3707.

It may doubtless be argued that, as stated in *Haremza, supra*, "a person intends all the natural and probable consequences of

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his voluntary acts," and that accordingly, the maker of an insufficient fund check should reasonably foresee that if payment is refused upon its presentation to the bank, that the holder will incur some expense in contacting the maker and collecting on the item. We are not concerned here with what the maker of the check might reasonably be deemed to have foreseen, but what the maker may reasonably be deemed to have intended, as an element of a criminal offense. The prosecution must prove that in issuing the check, the maker intended, with fraudulent purpose, to induce the payee to give up some property right in reliance that the check will be paid on presentation. That fraudulent intent is negated by timely payment of the dishonored check. It will surely be the most extraordinary instance in which the maker of an insufficient funds check who has promptly and upon notification paid the amount thereof to the holder may be claimed to have intended, by refusing to pay a service charge, to defraud the holder out of the cost of collection.

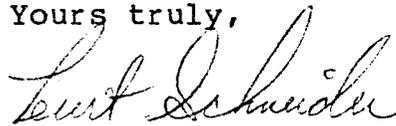
Certainly, the merchant who accepts a check which is subsequently refused payment by the bank is authorized to assess a service charge against the maker of the check. However, refusal to pay such a service charge, standing alone, is clearly insufficient to support a prosecution under K.S.A. 21-3707 against the maker of an insufficient funds check who has promptly and within the seven day period paid the amount of the check to the holder thereof. The processes of the criminal law are not available merely to enforce the assessment and collection of service charges for insufficient fund checks, but rather, to punish persons found guilty of issuing such checks with an intent to defraud and guilty knowledge that the check would not be paid upon presentation.

As Attorney General, it is my responsibility to furnish my official opinion in writing upon questions of law submitted by the legislature or either house thereof. By a custom of many years' standing, attorneys general have furnished such opinions upon questions of law submitted by individual members of the legislature. Nonetheless, I find no authority for this office to furnish formal legal opinions and assistance to legislators concerning matters which are unrelated to the conduct of official state business. The question which is presented in your letter was posed to a member of my staff several weeks ago by a legislative staff assistant. At that time, there was no suggestion that the inquiry was made other than at the request of a legislator, and certainly, no suggestion that the inquiry arose out of the assistant's personal affairs. Since that time, it has come to my attention that the earlier inquiry may have been prompted not by any legislative concern, but by the assistant's personal

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interest in the question arising out of entirely personal matters. It is not entirely coincidental, I judge, that your letter raises formally the identical question. It has been an overriding concern of my office to provide prompt and careful responses to all members of the legislature concerning the many questions which arise in its deliberations. Obviously, when any member uses his or her official capacity as a pretext for obtaining legal opinions from this office for the personal and private benefit of particular individuals, the resources of my staff are necessarily diverted from the official business of the state. I hope that the practice will be discouraged in the future. The personal legal affairs of legislative staff members are just that, their personal affairs, and the taxpayers of the state should not be called upon to subsidize free legal counsel to any person for private gain or advantage.

Yours truly,



CURT T. SCHNEIDER
Attorney General

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