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Subject Procedure, Crimes
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February 12, 1979

ATTORNEY GENERAL OPINION NO. 79- 16

Ms. Patricia Ridenour
City Attorney
City of Cimarron
Cimarron, Kansas 67835

Re: Crimes and Punishments -- Crimes Against Property -- Giving a Worthless Check.

Synopsis: K.S.A. 21-3707 (giving a worthless check) would permit prosecution of worthless checks which are presented for payment of utility bills when the utility service foregoes the right to alter or terminate the service in reliance upon the check received.

Dear Ms. Ridenour:

You inquire whether K.S.A. 21-3707 applies to worthless checks which are presented as payment for monthly utility bills. K.S.A. 21-3707(1) provides:

> "Giving a worthless check is the making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivery of any check, order or draft on any bank or depository for the payment of money or its equivalent with intent to defraud and knowing, at the 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."

This section sets out the elements of the crime of giving a worthless check, and in order to prosecute it is necessary to show that each element is present. The Supreme Court of Kansas considered the elements set out in K.S.A. 21-3707 and stated at what point the offense is complete. State v. Powell, 220 Kan. 168, 173, 551 P.2d 902 (1976). In Powell the court states:

> "The gravamen of the offense of giving a worthless check as proscribed by K.S.A. 21-3707 is the act of putting a negotiable check into circulation with knowledge that sufficient funds or credit are not on deposit to pay the amount specified in the instrument. The offense is complete when such an instrument is issued with intent to defraud... ."

From both the language of the statute and the statement of the court in Powell, it is apparent that the key element for prosecution in worthless check cases is that of intent to defraud. K.S.A. 1978 Supp. 21-3110(9) provides:

> " 'intent to defraud' means an intention to deceive another person, and to induce such other person, in reliance upon such a deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property."

In applying the definition set out above, it is our opinion that the presentation of an insufficient funds check for payment of a utility bill would sufficiently induce the utility company to alter their rights concerning the particular property involved. This is particularly true in the event that the utility foregoes its right to terminate the utility supply upon presentation of the check as payment. Since K.S.A. 21-3110(16) defines "property" as "anything of value, tangible or intangible, real or personal", it is apparent that the commodity provided would fall within the property definition.

Further support for the conclusion that the element of "intent to defraud" is satisfied in this case is provided by the statutory presumption set out in K.S.A. 21-3707(2) which states:

> "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 ($3.00) 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.

This section provides a rebuttable presumption that has been upheld by the Supreme Court of Kansas as involving a natural and rational evidentiary relation between the fact proven and the fact presumed. State v. Haremza, 213 Kan. 201, 515 P.2d 1217 (1973). In that case the court approved the statutory presumption and stated:

> "In order for the presumption to come into play the facts which must be proven are as follows: (1) The defendant must have made or drawn the check; (2) Payment must have been refused by the drawee on account of insufficient funds; (3) After notice was given to the defendant that such check was not paid, the defendant failed to pay the holder of the check the amount due thereon within seven days after notice. The proof of such facts is prima facie evidence of intent to defraud and of knowledge of the defendant that he lacked sufficient funds in the depository for payment of the check on presentation." State v. Haremza, supra at 206.

Although the argument could be made that the statutory presumption set out in K.S.A. 21-3707(2) violates the constitutional protection of privilege against self-incrimination, the court in Haremza rejected such an argument. The court stated:

> "On the basis of the authority cited above we hold that the statutory presumption provided in 21-3707(2) is not unconstitutional as a violation of the due process clause of the Fourteenth Amendment to the United States Constitution." State v. Haremza, supra, at 208.

One final area of concern is whether the prosecution of worthless checks could run afoul of the Kansas Bill of Rights § 16 which prohibits imprisonment for debts. This question was answered by the court as follows:

> "The defendant's third theory of constitutional invalidity is that the worthless check statute is a collection statute which violates the constitutional provision against imprisonment for debt. The contention is not well founded. Section 16 of the Kansas Bill of Rights provides that no person shall be imprisoned for debt, except in cases of fraud. The worthless check statute makes it an offense and punishes a person for a fraud, not because he fails to redeem his check. Attacks on worthless check statutes on this basis have not been upheld in cases where the statute involved makes an intent to defraud a necessary element of the crime." State v. Haremza, supra, at 209.

For the foregoing reasons it is our conclusion that K.S.A. 21-3707 would permit prosecution of worthless checks which are presented for payment of utility bills when the utility service foregoes the right to terminate service based upon the check received. In reaching this opinion we have not construed the utility bill to constitute a past-due indebtedness; but rather, as a valuable, continuous service involving property.

As indicated in 59 A.L.R.2d 1159 there is a considerable split in authority concerning the prosecution of worthless checks which are issued in payment of a past-due indebtedness or antecedent debt. Our research has failed to reveal a single instance in which the Kansas courts have considered this issue directly. Two former Attorneys General rendered opinions on this question indicating that the issuance of a worthless check for a pre-existing obligation may be prosecuted pursuant to K.S.A. 21-3707 if "intent to defraud" exists. Attorney General Opinion No. 75-381 (1975); Attorney General Opinion of June 29, 1970. Both opinions indicate that the statutory presumption created in subsection two (2) of the statute would be sufficient to establish the requisite intent in many cases. Competent evidence to rebutt the presumption created would defeat the prosecution, and therein lies the necessity for a case-by-case analysis. We are inclined to concur with the rationale of the prior opinions, and for that reason we believe that the mere fact that the check is issued for a pre-existing obligation would not automatically bar prosecution under K.S.A. 21-3707. For your interest we have enclosed copies of the previous opinions referred to herein.

Very truly yours,

ROBERT T. STEPHAN
Attorney General of Kansas

James E. Flory
Assistant Attorney General

RTS:TDH:JEF:may