STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82-131

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

Synopsis: In a prosecution for the crime of giving a worthless check, the presumption of notice that results when the holder of a check that has been returned by the drawee sends written notice in compliance with K.S.A. 21-3707(2) is a conclusive presumption. Actual receipt of the written notice need not be shown by the prosecution, if the holder has satisfied the requirements of K.S.A. 21-3707(2). However, evidence that defendant did not receive the formal written notice is admissible pursuant to K.S.A. 60-460(m), as an exception to the hearsay rule of evidence, but merely as mitigating evidence at the time of sentencing. Cited herein: K.S.A. 8-255, 21-3707, 60-460.

* * *

Dear Mr. Karstetter:

You have requested our opinion on three related questions, each of which concerns the statutory presumption of notice that is to be given by the holder to the drawer or maker of a check, order or draft payment that has been refused by a drawee on account of insufficient funds.

Your first question is whether the presumption of notice that arises, if the procedural requirements of K.S.A. 21-3707(2) are satisfied, is successfully rebutted when the letter giving formal notice of the returned check has been returned by the United States Post Office as "unclaimed," "refused," or "moved, left no forwarding address."

K.S.A. 21-3707 creates the crime of "giving a worthless check," and it provides, in part, in subsection (2):

> "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, the drawee unless the maker or drawer pays the holder thereof the amount due thereon and a service charge not exceeding $3 for each check, within seven days after notice has been given to the maker or drawer that such check, draft or order has not been paid by the drawee. As used in this section, 'notice' includes oral or written notice to the person entitled thereto. Written notice shall be presumed to have been given when deposited as restricted matter in the United States mail, addressed to the person to be given notice at such person's address as it appears on such check, draft or order."

After reviewing this section it is apparent that the legislature has provided that two separate presumptions will arise in a prosecution for the crime of giving a worthless check. The first presumption mentioned is the clearly rebuttable presumption of intent to defraud and of knowledge of insufficient funds. The Kansas Supreme Court has discussed and upheld this rebuttable presumption in State v. Calhoun, 224 Kan. 579, 581 (1978) and State v. Haremza, 213 Kan. 201, 206,207 (1973).

The second presumption contained within K.S.A. 21-3707(2) is a presumption of notice, i.e., the defendant was properly notified that the check was returned to the holder by the drawee bank for insufficient funds. This is an irrebuttable presumption which is based on language within the statute that is patently different from the preceding presumption of intent to defraud and knowledge of insufficient funds.

The threshold in considering the effect of these provisions is to determine the nature of the presumption discussed. A brief summary of the three categories of presumptions will be of assistance to this discussion. In Washington v. Harris, 502 F.Supp. 1267 (S.D. N.Y., 1980), the court discussed the distinctions between the three major groups of evidentiary presumptions, as follows:

> "A 'conclusive' presumption requires the jury to find an ultimate fact to be true based upon proof of another fact, and even the most persuasive evidence cannot rebut such a presumption. A 'mandatory' presumption requires the jury to find an ultimate fact to be true based upon proof of another fact unless they are otherwise persuaded by evidence offered in rebuttal. An 'inference,' sometimes referred to as a 'permissive' presumption, allows, but does not require, the jury to find an ultimate fact to be true based upon proof of another fact if upon consideration of all the circumstances revealed by the evidence they are satisfied that the ultimate fact is more likely than not to follow from the fact proved." [Citations omitted, emphasis supplied.] Id. at 1271-72. See, also, Stumbo, Presumptions: A View At Chaos, 3 W.L.J. 182, 186-195 (1964).

From the preceding, it is clear that the presumption of notice contained within K.S.A. 21-3707(2) is a conclusive or irrebuttable presumption. At this point it is significant to note that this conclusive presumption of notice does not pertain to any element of the crime of giving a worthless check. It merely represents a legislative intent to make prosecution of worthless check cases more expedient in the interests of public policy. The prosecution, as in all criminal cases, is still charged with the responsiblity of proving, beyond a reasonable doubt, the essential elements of the offense with which the accused is charged. If the prosecution fails to establish all of the essential elements necessary to constitute the giving of a worthless check, the defendant is entitled to an acquittal. Sandstrom v. Montana, 442 U.S. 510 (1979); In re Winship, 397 U.S. 358 (1970); United States v. Tecumseh, 630 F.2d 749 (10th Cir. 1980) cert. denied 449 U.S. 961.

The Kansas Supreme Court in a recent opinion, State v. Jones, No. 53,813 (filed May 8, 1982), was asked to consider a statute, K.S.A. 8-255, which provides the authority to the division of vehicles to suspend a person's driver's license. Subsection (b) of that statute requires the division to notify the licensee of the fact of the license suspension or revocation. The court held in relevant part:

> "The State is entitled to rely upon its record of all licensees' addresses, and it is also entitled to rely upon the presumption that letters, sent by ordinary mail postage prepaid, are received by the addressee in the ordinary course of the mails. The use of certified mail, return receipt requested, would be preferable but is not required. Once the State has complied with the mandatory notice requirement of K.S.A. 8-255(b) by mailing, the presumption of receipt arises and is not rebuttable. Evidence of non-receipt may, however, be introduced by the accused in mitigation at time of sentencing.
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> "We hold . . . that in a prosecution under K.S.A. 1981 Supp. 8-262, the State need not prove actual receipt of the notice . . . "

You also inquire whether the Supreme Court of Kansas in State v. Calhoun, supra, in its discussion of K.S.A. 21-3707(2), was referring to the mandatory presumption of intent to defraud and knowledge of insufficient funds or to the conclusive presumption of notice. The question was resolved by the Kansas Court of Appeals in Kopp's Rug Co. v. Talbot, 5 Kan.App.2d 565, 568 (1980), in which the court stated in pertinent part: " Calhoun dealt with a presumption of intent in a criminal case . . ."

Your final question concerns the situation in which the written notice sent by the holder to the drawer pursuant to the terms of K.S.A. 21-3707(2) is returned to the holder by the United States Post Office. Specifically, you inquire as to whether the information that is stamped, printed or written on the envelope by post office personnel is inadmissible during trial as hearsay evidence. In our judgment, such information would be admissible in a worthless check prosecution under the provisions of K.S.A. 60-460(m), which provides an exception to the hearsay rule for

> "[w]ritings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness . . . ."

It is our opinion that such information is recorded in the regular course of the post office's business and made under circumstances that indicate reliability. Thus, we believe the information would be admissible as an exception to the rule against hearsay evidence. However, since the presumption of notice has been determined to be conclusive, such evidence cannot be introduced by the defendant to rebut the presumption of notice, but merely as evidence of a mitigating circumstance reducing the degree of culpability, to be considered at time of sentencing by the trial court.

In conclusion, it is our opinion that in a prosecution for the crime of giving a worthless check, the presumption of notice that results when the holder of a check that has been returned by the drawee sends written notice in compliance with K.S.A. 21-3707(2) is a conclusive presumption. Actual receipt of the written notice need not be shown by the prosecution, if the holder has satisfied the requirements of K.S.A. 21-3707(2). However, evidence that defendant did not receive the formal written notice is admissible pursuant to K.S.A. 60-460(m), as an exception to the hearsay rule of evidence, but merely as mitigating evidence at the time of sentencing.

Very truly yours,

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RTS:JEF:JMF:may