



STATE OF KANSAS

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September 15, 1983

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ATTORNEY GENERAL OPINION NO. 83- 142

Mr. Rodney H. Symmonds
County Attorney
Lyon County Courthouse
Emporia, Kansas 66801

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

Synopsis: Partial payment of an insufficient funds check is not a bar to prosecution for the giving of a worthless check under K.S.A. 21-3707. The crime has been committed when the worthless check has been made, drawn, issued or delivered, and subsequent payment only goes to the question of "intent to defraud." Cited herein: K.S.A. 21-3707.

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Dear Mr. Symmonds:

You have requested our opinion regarding whether a prosecution pursuant to K.S.A. 21-3707 is precluded if the insufficient funds check is made as payment on an existing account and secondly, whether charges can be filed if partial payment is made on an insufficient funds check prior to the commencement of prosecution.

In response to your question on prosecution of an insufficient funds check made on an existing account, we must decline to issue an opinion on that issue at this time due to a pending criminal prosecution in Dickinson County District Court. The criminal case of State v. Johnson, 82 CR 218 (District Court of Dickinson County), has been appealed to

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the Supreme Court of Kansas (Kansas Supreme Court Case No. 55,353, Opinion filed July 15, 1983). Johnson, supra, raised the issues of both pre-existing debt and the prima facie intent to defraud presumption. The Court in Johnson reversed the conviction based on the instruction used and did not reach the pre-existing debt issue. We have been informed that the defendant is currently being retried and therefore we must decline to issue an opinion that will address an issue presently being litigated. Previously, however, we issued an opinion on the payment of monthly utility bills with worthless checks, Opinion 79-16 (a copy of which is attached).

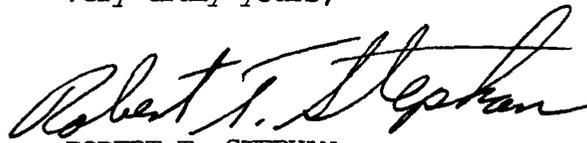
In response to your second question regarding prosecution when partial payment on an insufficient funds check has been made, it is our opinion that subsequent payment does not bar prosecution.

It is fundamental that the crime of giving a worthless check is committed when the check is made, drawn, issued or delivered. K.S.A. 21-3707. State v. Powell, 220 Kan. 168 (1976). Foor v. State, 196 Kan. 618 (1966). Subsequent attempts to pay the check are admissible to show lack of intent to defraud, but a conviction can still be upheld as was the case in State v. Marsh, 211 Kan. 585 (1973).

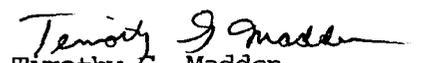
K.S.A. 21-3707(2) provides that it is prima facie evidence of intent to defraud, if the amount of the check and a maximum service charge of \$3.00 is not paid within seven days after notice has been given. This seven-day notice is not a prerequisite for prosecution since the criminal intent can be shown in other ways. State v. Shannon, 194 Kan. 258 (1965). Recovery of the money or property by the payee has no bearing on whether a crime has been committed. "The fact that the swindled party is able to recover the money or its equivalent does not abate or lessen the crime," Foor, supra, at 620.

In conclusion, partial payment of an insufficient funds check is not a bar to prosecution for the giving of a worthless check under K.S.A. 21-3707. The crime has been committed when the worthless funds check has been made, drawn, issued or delivered, and subsequent payment only goes to the question of whether or not "intent to defraud" is present.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Timothy G. Madden
Assistant Attorney General

RTS:JEF:TGM:may