

June 9, 2008

David E. Belton, Esquire
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Dear Mr. Belton:

In a letter to this office you referenced that 18 U.S.C. § 1033(e)(1)(A) states that

[a]ny individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business, shall be fined as provided in this title or imprisoned not more than 5 years, or both.

In your letter you state that “1033 is devoid of any definition for ‘dishonesty’ or ‘breach of trust.’” You have requested an opinion of this office as to what felonies would fall within the category of “dishonesty” or “breach of trust”.

There is a specific statute establishing the offense of breach of trust with fraudulent intent. S.C. Code Ann. § 16-13-230 states that

(A) A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny.

(B) A person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrate's court if the amount is one thousand dollars or less. Upon conviction, the person must be fined or imprisoned not more than is permitted by law without presentment or indictment by the grand jury;

(2) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years if the amount is more than one thousand dollars but less than five thousand dollars;

(3) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years if the amount is five thousand dollars or more.

Therefore felony convictions arise for defendants where the amount is one thousand dollars or more. As set forth in State v. McCann, 167 S.C. 393, 397-398, 166 S.E.2d 411, 413 (1932),

[t]he effect of the decisions from which we have quoted is clearly a holding that breach of trust with fraudulent intention, in this state, is nothing more or less than larceny. It might well be termed "statutory larceny," as distinguished from larceny at common law. The main distinction between the two crimes is this: In common-law larceny, possession of the property stolen is obtained unlawfully, while in breach of trust, the possession is obtained lawfully. As will be seen by an examination of the cases of State v. Posey, supra; State v. Gorman, 2 Nott & McC. (11 S. C. L.) 90, 10 Am. Dec. 576; State v. Thurston, 2 McMul. (27 S. C. L.) 382; State v. Self, 1 Bay, (1 S. C. L.) 242; and State v. Lindenthal, 5 Rich. (39 S. C. L.) 238, 57 Am. Dec. 743, if possession of the property is obtained through artifice, trick, or other fraud, then such possession is not lawfully obtained and the crime is larceny at common law, rather than that of breach of trust, as contemplated by the statute.

As set forth in State v. Butler, 21 S.C. 353 (1884), in order to constitute the offense of breach of trust, there must be an appropriation which is accompanied with a fraudulent purpose to destroy the right of the true owner.

As to what offenses would be included within the category of a felony involving dishonesty, the law is less than clear. *Black's Law Dictionary*, rev'd 4th ed., defines "dishonesty" as "[d]isposition to lie, cheat, or defraud; untrustworthiness; lack of integrity." In State v. Al-Amin, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct.App. 2003), the State Court of Appeals defined "dishonesty" as

... " 'disposition to lie, cheat, or steal.' " United States v. Papia, 560 F.2d 827, 845 (7th Cir.1977) (citing Random House College Dictionary 380 (abr. ed.1973))...; see also Webster's New Twentieth Century Dictionary 525 (2d ed.1983) (defining "dishonesty" as "deceiving, stealing, etc.")... "To be dishonest means to deceive, defraud or steal." State v. Saldano, 36 Wash.App. 344, 675 P.2d 1231, 1236 (1984) (citing Oxford English Dictionary (1969))... See also Gregory v. State, 616 A.2d 1198, 1204 (Del.1992) (defining the term "dishonesty" as "the act or practice of lying, deceiving, cheating, stealing or defrauding.")... " 'In common human experience[,] acts of deceit, fraud, cheating, or stealing ... are universally regarded as

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conduct which reflects adversely on a man's honesty and integrity.’ ” Bogard v. State, 624 So.2d 1313, 1317 (Miss.1993).

My review of federal cases citing 18 U.S.C. § 1033(e)(1)(A), while determining that certain offenses would fall within the category of felonies involving dishonesty, does not reveal any cases which set forth a clear definition of the term “dishonesty” as used in such provision. See, e.g., Beamer v. Netco, Co, Inc., 411 F.Supp. 882, 889 (S.D. Ohio, 2005) (“Beamer has a felony conviction for the interstate transportation of stolen checks...This conviction obviously involves a “criminal felony involving dishonesty or breach of trust.”).

This office has in prior opinions dealt with the question of whether certain offenses constitute crimes of moral turpitude. An opinion dated June 27, 2005 citing McAninch and Fairey, *The Criminal Law of South Carolina*, 49 (2d ed. 1989) referenced that “[m]ost offenses involving moral turpitude “...seem to include some sort of dishonest behavior.” Therefore, reference to what offenses have been deemed crimes of moral turpitude may be useful in determining whether an offense is within the category of a felony involving dishonesty for purposes of the cited federal statute. Reference may be had to prior opinions of this office and of the State appellate courts in determining whether certain offenses constitute crimes of moral turpitude.

In State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), the State Supreme Court cited Rule 609(a)(2), SCRE which provides that evidence of a crime involving dishonesty is admissible for impeachment purposes regardless of the punishment. In Cheeseboro, the Court determined that impersonating an officer involves misrepresentation and, therefore, is a crime involving dishonesty for purposes of Rule 609. However, as with moral turpitude, there is no exact definition provided as to what is a crime of dishonesty for purposes of Rule 609 and any determination must be made on a case by case basis. See State v. Johnson, 334 S.C. 78, 87, 512 S.E.2d 795, 800 (1999) (“Rule 609(a)(2), SCRE, does not define or list the crimes involving dishonesty or false statement.”). Also, as with moral turpitude, reference may be made to State appellate case decisions regarding Rule 609 as to what constitutes a crime involving dishonesty. In State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155-156 (2006), the State Supreme Court stated that

[u]nder Rule 609(a)(2), SCRE, if a crime is viewed as one involving dishonesty, the court must admit the prior conviction because, prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect.

The Court recognized that under such Rule convictions for shoplifting and writing bad checks were properly admitted. However, the Court ruled that violations of narcotics laws and firearms violations do not involve dishonesty. See also State v. Shaw, 328 S.C. 454 n.5, 492 S.E.2d 402 (Ct.App. 1997) (“The states that view shoplifting as a crime involving dishonesty and have a rule similar or identical to our Rule 609(a)(2), SCRE, generally regard theft as dishonest conduct that reflects upon honesty,

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integrity and veracity.”); Al-Amin, supra (armed robbery is a crime of dishonesty under Rule 609(a)(2)).

S.C. Code Ann. § 16-1-90 provides of a list of offenses classified as felonies. Reference made be had to such in considering whether certain offenses are felonies and, thereafter, whether such offenses involve dishonesty.

I regret that this office is unable to provide a more complete answer to your question as to what felonies would fall within the category of “dishonesty”. However, in the absence of a clear definition by the courts, I can only suggest the foregoing criteria that may be utilized in determining whether on a case by case basis a particular offense would come within that category.

With kind regards, I am,

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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