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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 22, 2001

The Honorable Thomas E. Shealy
Municipal Judge, City of Gaffney
P.O. Box 2109
Gaffney, South Carolina 29342

Re: Your Request for Opinions

Dear Judge Shealy:

In a letter to this Office, you request opinions on issues which you indicate "constantly come up in [your] courtroom." You present these issues through the following three questions:

1. Where does the crime of disposal of property under lien take place (S.C. Code Section 29-1-30 and Section 36-9-319?

2. Since Code Section 16-13-420 does not apply to lease-purchase or conditional sales contracts, what statute does apply when the customer stops paying on the item and fails to return it?

3. Many of the rent-to-own contracts are written as rental agreements. How do I tell if it is a valid rental agreement or a lease-purchase agreement?

In reference to your first question and by way of background you state that:

> This is a jurisdictional issue. The loan companies want jurisdiction where the lien was created so that all they need to prove is that the property was disposed of without their consent. The accused attack jurisdiction on the basis that if the disposal took place outside of the City, then my court lacks jurisdiction.

Unfortunately, complete answers to your questions would require a knowledge of factual issues surrounding the various charges and contracts/agreements involved. I understand that you are attempting to address a recurring problem in your municipality and I have attempted to provide you with the general law on the subjects which I hope will be applicable to your situations.

Request Letter

Venue for Charges Pursuant to §§29-1-30 & 36-9-319

A determination of the appropriate venue for criminal charges brought pursuant to a specific statute should begin with a review of the language of the statute. The statutes in question provide, in pertinent part, as follows:

> *§29-1-30* Any person who shall wilfully and knowingly sell and convey any real or personal property on which any lien exists without first giving notice of such lien to the purchaser of such real or personal property shall be deemed guilty of a misdemeanor ....
>
> *§36-9-319* Notwithstanding Section 36-9-311, any person who sells or disposes of any personal property subject to a security interest, except for personal property titled by the Department of Public Safety or the Natural Resources Enforcement Division of the South Carolina Department of Natural Resources, without the written consent of the secured party, and fails to pay the debt secured by the security interests within ten days after sale or disposal or fails in this time to deposit the amount of the debt with the clerk of the court of common pleas for the county in which the secured party resides is guilty of a misdemeanor.

The general law in South Carolina is that more than one jurisdiction can be the appropriate venue for criminal process, depending on the circumstances. See Wray v. State, 288 S.C. 474, 343 S.E.2d 617 (1986) (where acts essential to the offense are committed in different counties, the accused may be tried in either county); See also State v. McLeod, 303 S.C. 420, 401 S.E.2d 175 (SCApp.1991) (where some acts material to the offense, and requisite to its consummation, occur in one county, and some in another, venue is proper in either county). This Office has previously opined that this general law is also applicable to offenses arises partly within a municipality. See OP. ATTY. GEN. (Dated May 14, 1996) (Municipality would have jurisdiction over offense involving the telephone where receiver of call is within the city limits even if call is placed from a location outside city limits).

In examining the above statutes, it is clear that the acts described could involve or touch on more than one jurisdiction. Section 36-9-319 in particular contains express provisions tying the offense to the location where the security interest was created. For instance, §36-9-319 requires the "written consent of the secured party" and references the failure of the debtor "to pay the debt secured by the security interests within ten days after sale or disposal .... or fails in this time to deposit the amount of the debt with the clerk of the court of common pleas for the county in which the secured party resides ...." While Section 29-1-30 does not contain such specific contacts to the location of the lien, obviously the creation of the lien is a prerequisite to the offense. Moreover, depending on the facts of the sale, the jurisdiction where the lien was created could have other contacts to the event. For example, steps taken such as phone calls or the posting of advertisements to facilitate the sale could result in significant contacts with the jurisdiction where the lien was

created. The bottom line is that all factors surrounding the alleged violation of either Section 36-9-319 or 29-1-30 must be examined to determine "whether some acts material to the offense, and requisite to its consummation" occurred within your municipality.

While I have been unable to locate any South Carolina authority related to venue for violations of the relevant statutes, the Courts of Virginia have considered similar questions related to similar statutes. In Gregory v. Commonwealth, 377 S.E.2d 405 (1989), the Supreme Court of Virginia held that the trial court had jurisdiction to try a defendant for fraudulent disposal of liened property, even though formation of the intent to deprive the creditor of collateral and actual disposal of collateral took place outside the Commonwealth, where lien was created in the Commonwealth and the debtor failed to obtain the creditor's consent to dispose of the collateral. Further, in Moore v. Commonwealth, 1993 WL 271342 (Va.App.), the Virginia Court of Appeals found venue was appropriate where the "vehicles were financed and their titles were held" because the "fraudulent disposal of the vehicles to defeat the bank's lien interests therein were accomplished in part" in the county where the bank was located. Again, the determination as to appropriate venue must be judged on the facts of the particular case, but these cases may provide guidance for you. I have enclosed copies for your review.

Alternatives to §16-13-420

S.C. Code Ann. §16-13-420 proscribes the failure to return rented objects. As you point out, Section 16-13-420 is made expressly inapplicable to lease purchase agreements and conditional sales type contracts. This exception, however, does not prevent the prosecution of a wilful, fraudulent breach of such an agreement or contract. I would suggest that, in such a case, Breach of Trust with Fraudulent Intent pursuant to S.C. Code Ann. §16-13-230 be considered.

In South Carolina, a breach of trust with fraudulent intent has been described as "larceny after trust, which includes all of the elements of larceny or in common parlance, stealing, except the unlawful taking in the beginning." State v. Owings, 205 S.C. 314, 316, 31 S.E.2d 906, 907 (1944), quoted in State v. Scott, 330 S.C. 125, 130, 497 S.E.2d 735, 738 (Ct.App.1998). Our Courts have also held that "[t]he primary difference between larceny and breach of trust is that in 'common-law larceny, possession of the property stolen is obtained unlawfully, while in breach of trust, the possession is obtained lawfully.' " Scott, 330 S.C. at 130, 497 S.E.2d at 738 (quoting State v. McCann, 167 S.C. 393, 398, 166 S.E. 411, 413 (1932)) (emphasis in original).

Depending on the nature of the contract and other facts surrounding the breach of a lease-purchase agreement, it seems that Breach of Trust with Fraudulent Intent could be applicable to an intentional, fraudulent breach of such an agreement.

Definition of Lease-Purchase Agreement

Whether an agreement is a rent-to-own or lease-purchase agreement rather than a standard rental agreement clearly depends on the specific terms contained in the agreement. Some guidance can be found in the portion of South Carolina's Consumer Protection Code related to "Consumer Rental-Purchase Agreements." S.C. Code Ann. §37-2-701(6) provides as follows:

> "Consumer rental-purchase agreement" means an agreement for the use of personal property by an individual primarily for personal, family, or household purposes, for an initial period of four months or less (whether or not there is any obligation beyond the initial period) that is automatically renewable with each payment and that permits the consumer to become the owner of the property ....

It seems that the operative language is ".... and that permits the consumer to become the owner of the property ...." Accordingly, any agreement that provides for a change in ownership at the conclusion of the lease or rental period could be considered a lease-purchase, rent-to-own or rental-purchase agreement. I enclose for your review an opinion from the Kansas Attorney General dated March 15, 1977, which sets out some distinguishing features of a lease-purchase agreement. I hope that this opinion will prove useful to you.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

David K. Avant
Assistant Attorney General

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Enclosures