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The State of South Carolina

Office of the Attorney General

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February 6, 1995

The Honorable Ted N. Phillips
Mayor, City of Westminster
P. O. Box 399
Westminster, South Carolina 29693

Re: Informal Opinion

Dear Mayor Phillips:

Attorney General Condon has referred your letter of January 5, 1995, to me for reply. You have asked a number of questions regarding fraudulent check cases. I will respond to them in the order you have presented them.

1. To prosecute a person for writing a bad check, does a witness have to testify that the person charged actually wrote or passed a bad check? Does the witness have to be present in court if the accused plea is not guilty? Merchants claim that a certified mail receipt is sufficient for a guilty verdict without a witness being present. Is the certified mail receipt sufficient for a guilty verdict without witness being present?

Section 34-11-60 (b) of the Code of Laws (1976 as amended) provides as follows:

> [i]n any prosecution or action under the provisions of this section, a check, draft, or other written order for which the information required in item (1) of this subsection is available at the time of issuance shall constitute prima facie evidence of the identity of the party issuing the check, draft or other

> written order and that such person was a party authorized to draw upon the named account.
>
> (1) To establish this prima facie evidence, the full name, residence address and home telephone number of the person presenting the check, draft or other written order shall be obtained by the party receiving such instrument. Such information may be provided by having such information recorded on the check or instrument itself, or the number of check-cashing identification card issued by the receiving party may be recorded on the check. Such check-cashing identification card shall be issued only after the full name, residence address and home telephone number of the person presenting the check, draft or other written order has been placed on file by the receiving party.
>
> (2) In addition to the information required in item (1) of this subsection, the party receiving a check shall witness the signature or endorsement of the party presenting such check and as evidence of such the receiving party shall initial the check. Validation by a bank teller machine shall constitute compliance with this item.

In an opinion, dated March 17, 1986, construing this Code Section, we concluded that "[b]y initialing the check, the party receiving it provides evidence of his having witnessed such signature." Conversely, that opinion also concluded that, "while Section 34-11-60 does provide for a means to establish prima facie evidence of the identity of the person issuing the check and that such person was authorized to draw on account, such is not necessary where such evidence can be otherwise established." Accordingly, we noted that failure to witness the signature "would not necessarily warrant a fraudulent check being dismissed. Instead, the State is put to the additional burden of providing evidence that a particular defendant in a particular case signed the check and presented it in payment of some debt." (emphasis added). The earlier opinion also explained that "prima facie evidence" is defined as "'... evidence sufficient to establish a given fact and, which, if not rebutted or contradicted, will remain sufficient.'"

It is clear from the foregoing that Section 34-11-60 (b) provides a mechanism to establish a prima facie case with respect to the identity of the party issuing the check. While, of course, other evidence, either direct or circumstantial, can be used to establish

that a person wrote or passed a bad check, typically, the procedure used is the one set forth in the Code to make out a prima facie case.

However, even where a procedure for establishing a prima facie case exists, the State (or, in this case, usually the private party claiming to have received the bad check) must still meet its burden of producing evidence, as well as the burden of proof beyond a reasonable doubt. It has been stated with respect to criminal cases, generally:

> An accused is "presumed to be innocent" and cannot be convicted of a crime unless his guilt is proved "beyond a reasonable doubt." The "presumption of innocence" is not a true presumption, i.e. the fact of innocence is not logically deduced from proof of some other basic fact. The presumption operates merely as a procedural device to place the burden of producing evidence in the first instance upon the prosecutor. Of course, the burden of persuasion is also placed upon the prosecutor. The evidence produced by the prosecutor must establish defendant's guilt beyond a reasonable doubt....
>
> Even if a prima facie case of guilt has been established, the defendant is not required to present any evidence. There is no burden of persuasion nor burden to produce evidence on the defendant. The prosecutor is still required to convince the jury of the defendant's guilt beyond a reasonable doubt.

Wharton's Criminal Evidence (14th ed.) § 10.

Consistent therewith, the following is stated in the South Carolina Bench Book for Magistrates and Municipal Judges, in the Section dealing with fraudulent checks, IV, 11 - 12,:

> Instructions for Magistrates
>
> ... (4) Magistrates should inform the complainant that (1) he will be required to appear in court as a witness for the prosecution when the accused person is tried; and (2) he will be held liable for costs not to exceed $20 in the event the case is dismissed for want of prosecution ....

With respect to your specific question and based upon the above, a prima facie case, establishing the identity of the person passing the check will be made out by following the specifications of Section 34-11-60 (b), or by presenting other evidence with respect to such identity. Op. Atty. Gen., March 17, 1986. Nevertheless, when the defendant pleads not guilty and the case proceeds to trial, the prosecutor retains the burden of producing such evidence of the offense; otherwise, the case will be dismissed. See Op. Atty. Gen., October 3, 1979 [at trial, while unnecessary for the party who initialed the check to appear, "someone should be present who would be familiar with the individual initialing the check and therefore could authenticate the initials."]

2. State law requires the full name, address and a home number to be on the check. If the merchant accepts a check with the information required by law, there appears to be no way he can identify the person writing the check since no information is required to physically identify that person. Our judge request[s] that a driver's license number be on the check so that law enforcement personnel can physically identify the accused if arrest is required. Merchants claim they are not required by law to have a person's drivers license number on the check. Should merchants be required to have a driver's license number on their checks?

This would be a policy matter for the Legislature. As you indicate, such requirement is not presently contained in the statute and the requirement could not be imposed without legislative amendment. It is well settled that the enumeration of particular things in a statute excludes the idea of something else not mentioned. Pa. Nat. Mut. Cas. Ins. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). The terms of a statute cannot be added to by the Court. Banks v. Cola. Ry. Gas and Elec. Co, 113 S.C. 99, 101 S.E. 285 (1919). Of course, an individual merchant could require the driver's license number to be on the check for identification purposes, but the law does not require it to establish prima facie evidence of the identity of the person passing the check. See, Op. Atty. Gen., August 29, 1979 [additional addresses or post office boxes can be obtained].

3. To obtain a criminal warrant for a fraudulent check the payer has to send notice to the check drawer by certified mail to the address on the check or given at the time the check was tendered. Does the notice sent

> to the drawer also have to be sent to the drawer's bank?

As we noted in an opinion, dated December 18, 1990, "[p]ursuant to Section 34-11-70 (c) (1) a procedure for giving written notice so as to establish prima facie evidence of fraudulent intent against the maker of a check is established." The statute further provides:

> (1) For purposes of subsection (a), notice must be given by mailing the notice with postage prepaid addressed to the person at the address as printed or written on the instrument. The giving of notice by mail is complete upon the expiration of ten days after the deposit of the notice in the mail. A certificate by the payee that the notice has been sent as required by this section is presumptive proof that the requirements as to notice have been met regardless of the fact that the notice actually might not have been received by the addressee.

The form of the notice is then set forth in this provision.

Again, there is no requirement in the statute that notice be sent to the bank and the court could not add to the statute. See, Op. Atty. Gen. May 28, 1979 [failure of maker of fraudulent check to respond to notice properly sent to maker constitutes prima facie evidence of fraudulent intent against the maker]; See also, Op. Atty. Gen., May 17, 1979 [notice to maker]. I would note that subsection (2) of Section 34-11-70 does provide for notice to the bank for purposes of immunity from civil liability.

> (2) When a person instituting prosecution gives notice in substantially similar form provided in item (1) to the person and the bank upon which the instrument was drawn and waits ten days from the date notice is mailed before instituting the criminal proceedings, there arises a presumption that the prosecution was instituted for reasonable and probable cause, and the person instituting prosecution is immune from civil liability for the giving of the notice. (emphasis added).

The merchant or person instituting prosecution would probably take advantage of this provision in order to be entitled to immunity from civil liability. However, the statute does not require notice to the bank for purposes of the prima facie case.

4. Does the fraudulent check statute apply to post-dated checks, checks given for prior or pre-existing debts or checks known to be bad at the time they are received?

This question is answered by Section 34-11-60 (d) which provides:

> The section does not apply to any check given only in full or partial payment of a preexisting debt, to the giving of any check, draft or other written order where the payee knows, has been expressly notified, or has reason to believe that the drawer did not have an account or have on deposit with the drawee sufficient funds to insure payment of the check, nor to any check which has been deposited to an account of the payee within a period of ten days from the date the check was presented to the payee (emphasis added).

Specifically, as to post-dated checks, while any explicit reference to such checks has been removed from the statute [compare Section 34-11-60 (d) with the text of the same Section in the current Cumulative Supplement], the present version of the statute continues to provide an exemption therefrom where the payee "knows, has been expressly notified or has reason to believe that the drawer did not ... have on deposit with the drawee sufficient funds to insure payment of the check ...".

Despite the removal of language expressly exempting post-dated checks, it is our belief that the statute continues to exempt such checks. Some courts have held that the fact that a worthless check is post-dated, "in and of itself precludes a conviction for making and passing the check in violation of a bad check statute." 52 A.L.R.3d 464, 470. A post-dated check on its face implies notice that there is no money presently on deposit available to meet it. Commonwealth v. Kelinson, 199 Pa. Super. 135, 184 A.2d 374 (1962). Moreover our Supreme Court has held that a post-dated check is merely a promise on the part of the drawer to do a future act and have funds in the bank at the future time stated in the check, and this would be no more than an obligation to pay in the future and the check would be an evidence of debt. State v. Winter, 98 S.C. 294, 82 S.E. 419 (1914). (New trial granted where trial court failed to allow defendant to show by the prosecuting witness that check was dated ahead).

Other cases have held that where a bad check statute is made inapplicable if the payee is notified of insufficient funds in the bank to pay the check, or where the payee of any check has information that the maker has insufficient funds on deposit, post-dated checks are exempted from the statute's coverage. Seaboard Oil Co. v. Cunningham, 51

F.2d 321, cert den., 284 U.S. 657, 76 L.Ed. 557, 52 S.Ct. 35 (5th Cir. 1931). Even though the Legislature has now removed the former provision expressly exempting post-dated checks from the statute, a fact often creating the presumption of repeal, see 1A Sutherland Statutory Construction, Section 23-12 (4th ed.). I would advise that post-dated checks are still exempt from the statute because of the language therein exempting criminal liability where the payee "knows, has been expressly notified or has reason to believe that the drawer did not ... have on deposit with the drawee sufficient funds to insure payment of the check ...". Thus, the bad check law covers neither post-dated checks, checks given for a prior or pre-existing debt or those known by the payee to be bad at the time they are received.

If I can be of further assistance, or if a formal opinion is needed, please advise.

Sincerely,

Robert D. Cook
Deputy Attorney General

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