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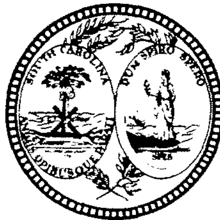

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 30, 1995

Robert L. McCurdy, Staff Attorney
South Carolina Court Administration
Post Office Box 50447
Columbia, South Carolina 29250

Re: Informal Opinion

Dear Mr. McCurdy:

You note that Act No. 7 of 1995, or the Criminal Justice Reform Act, amended S.C. Code Ann. § 16-1-57 as it relates to third and subsequent offenses involving property. The statute, as amended, now provides as follows:

> [a] person convicted of an offense <u>for which the term of imprisonment is contingent upon the value of the property involved</u> must, upon the conviction for a third or subsequent offense, be punished as prescribed for a Class E felony. (emphasis added).

Your question is as follows:

> [t]he question has arisen as to whether § 16-1-57 applies to third or subsequent convictions of § 34-11-60, drawing or uttering a fraudulent check. § 34-11-90 provides that if the amount of fraudulent check is $500 or less, the offense is within the jurisdiction of magistrate's court and, for a first offense, carries a penalty of a fine of not less than $50 nor more than $200, or imprisonment for not more than 30 days. For second or subsequent convictions in magistrates court, the defendant may be fined $200 or imprisoned for 30

> days. If the amount of the check exceeds $500, the offense is within the jurisdiction of the court of general sessions and, for a first offense, carries a fine of not less than $300 nor more than $1,000 or imprisonment for not more than 2 years, or both. The statute provides for enhanced penalties for subsequent offenses. Since the term of imprisonment is contingent upon the amount of the fraudulent check, would § 16-1-57 require that third and subsequent offenses involving checks of $500 or less be sent to the court of general sessions?

It is helpful to restate certain well-recognized tenets of statutory construction. In interpreting any statute, the primary purpose is to ascertain the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The words used in an enactment must be given their plain and ordinary meaning. Smith v. Eagle Const. Co. Inc., 282 S.C. 140, 318 S.E.2d 8 (1984). Only when the literal application of the statute produces an absurd result, will a different meaning thereto be considered. Southeastern Kusan, Inc. v. S.C. Tax Comm., 276 S.C. 487, 280 S.E.2d 57 (1981). While a penal statute must be strictly construed such an interpretation should not defeat the obvious intent of the Legislature. State ex rel. Atty. Gen. v. Broad River Power Co., 162 S.E. 93 (S.C. 1932).

An earlier version of § 16-1-57 was enacted by 1993 Act No. 184, § 7.[1] The critical inquiry here is whether the term of imprisonment for drawing or the uttering of a fraudulent check "is contingent upon the value of the property involved ..."

The statutory crime of drawing or uttering a fraudulent check is closely akin to the common law offense of acquiring or obtaining property under false pretenses. It has been stated that

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[1] As formerly written, Section 16-1-57 provided:

> [a] person convicted of an offense for which the term of imprisonment is contingent upon the value of the property involved must, upon conviction for a third or subsequent offense for such violation involving the value of property in an equal or greater amount, be fined, imprisoned, or both based upon the classification above the punishment provided for the principal offense.

> [t]he specific acts of making, uttering, and delivering a worthless check did not constitute a crime at common law .... According to most authorities, the giving of a worthless check or draft, or a check or draft which the accused has no reason to suppose will be honored, is a false pretense.

35 C.J.S., False Pretenses, §21. Likewise, in Blakeney v. State, 62 So.2d 313, 314 (Miss. 1953), the Court described the elements of the offense this way:

> [w]hile it is true that this state has in force a bad check statute, and that prosecutions may be lodged thereunder, the giving of a bad check may under certain circumstances constitute the offense of obtaining property under false pretenses.

Additionally, courts have consistently recognized that the offense of fraudulently uttering a bad check is, essentially, a so-called "property offense", much like others such as larceny or obtaining property under false pretenses. As was observed in Malkemus v. State, 129 S.W.2d 201, 202 (Tenn. 1939),

> [i]n other words, a prosecution under the bad check law is not essentially different from a prosecution for obtaining property by any other false pretense. The rule is well settled that in a prosecution for obtaining goods under false pretenses the indictment must specify the goods obtained.

In the widely-recognized treatise, Perkins on Criminal Law (2d ed.), the crime of fraudulently uttering or issuing a bad check is treated as a crime against "property". See, Ch. 4, § 4(G), at p. 315. And while, as noted, most courts analogize the statutory bad check offense to a false pretense, Perkins observes that some authorities even liken it to a larceny. Supra at p. 316. Likewise, Professor McAninch in his work on South Carolina criminal law, deems this State's bad check statute as a crime against property. McAninch concludes that our bad check law overlaps with the offenses of false pretenses as well as forgery. He observes that "... one [who] writes a check using a fictitious name and a non-existent bank account and passes the check for money or other property could be prosecuted for forgery, false pretenses or fraudulent checks." McAninch and Fairey, The Criminal Law of South Carolina, pp. 176-177.

S.C. Code Ann. Sec. 34-11-60(a) proscribes the drawing or uttering of a fraudulent check, more specifically as follows:

> (a) [i]t shall be unlawful for any person with intent to defraud, in his own name or in any other capacity, to draw, make, utter, issue or deliver to another, any check, draft or other written order on any bank or depository for the payment of money or its equivalent whether given to obtain money, services, credit or property of any kind or nature whatever, or anything of value, when at the time of drawing, making, uttering, issuing or delivering such check or draft or other written order the maker or drawer thereof does not have an account in such bank or depository or does not have sufficient funds on deposit with such bank or depository to pay the same on presentation, or if such check, draft or other written order has an incorrect or insufficient signature thereon to be paid on presentation. (emphasis added).

The bad check statute mandates that the fraudulent check must be given to obtain "money, services, credit, or property of any kind or nature whatever or anything of value ...". Section 16-1-57 requires that, in order for a third or subsequent offense as described to be a General Sessions offense, the term of imprisonment must be "contingent upon the value of the property involved ...". While in order to violate the statute, the offender must not merely be paying a preexisting debt, and, therefore, must be acquiring a new "value", still the offense is based upon the amount of the check itself. The statute requires that, in order for the offense to be committed, the maker or drawer must either not have an account or "does not have sufficient funds on deposit ...". Thus, the amount of the check itself is crucial in determining this fact. As the Court stated in Beasley v. People, 450 P.2d 658, 660 (Colo. 1969),

> [t]he gravamen of the offense with which the defendant is charged is the issuance and delivery of a worthless check. By his own act in deliberately giving a short check the defendant has clearly shown his objective is the securing of ... "a thing of value" to him. (emphasis added).

And as Profession McAninch has stated, "[t]he focus of the offense is not on the consideration for which the check is given ... [but] on the act -- passing a fraudulent check -- and the mental state -- knowledge that the check is bad coupled with the intent to defraud." McAninch and Fairey, Supra at 179.

Based upon the foregoing, a court would likely conclude that the term of imprisonment, with respect to the violations of the bad check law, depends upon or is contingent upon "the value of the property involved." In other words, while my conclusion is not free from doubt, a court would probably determine that, in this instance, the "property involved" is the check itself, rather than the property procured, and, thus, a third offense bad check violation falls within § 16-1-57's literal reach. After all, as noted above, the focus of the offense is on the act of passing the fraudulent check, not upon the "consideration for which the check is given ..." McAninch, supra. The amount of the check is what determines whether or not it is worthless because that is what determines whether there is or not sufficient funds in the drawer's account. That is probably why the General Assembly has made punishment for this offense depend upon the amount of the check itself rather than trying to focus upon the hopeless task of determining the consideration for accepting the check. Compare, § 16-13-240 (crime of false pretenses, punishment dependent upon the value of the property obtained); § 16-13-260 (same). Of course, if the General Assembly wishes to clarify this issue by specifically including bad check violations within Section 16-1-57, it could do so by subsequent legislation.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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