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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 15, 1996

The Honorable James S. Klauber
Member, House of Representatives
518A Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Klauber:

You raise a question concerning S.C. Code Ann. Sec. 16-13-437. Apparently, a tenant at a local housing authority misrepresents or incorrectly provides his total income for purposes of qualifying for housing. The housing authority in an attempt to accommodate the tenant, offers him the opportunity to sign a repayment agreement requiring payment over time. After a few payments are made, the tenant suddenly moves out and disappears. You wish to know whether the housing authority is then precluded from seeking a warrant simply because he has previously signed an agreement with the tenant for restitution.

Section 16-13-437 provides as follows:

> [i]t is unlawful for a person knowingly to make a false statement or representation with respect to the person's individual or family income to a public housing agency in obtaining or retaining public housing or with respect to the determination of rent due from the person for public housing. For purposes of this section public housing includes private housing provided through a housing program managed by a public housing agency. For purposes of this section, public housing agency means an agency of state, regional, county or municipal government, including housing authorities, which

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> administer state or federal housing programs. A person violating this provision is guilty of a misdemeanor and, upon conviction, must be imprisoned for not more than two years or fined more than one thousand dollars and the person convicted must be ordered to pay restitution to the public housing agency.

In interpreting a 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 of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

Nothing on the face of Section 16-13-437 suggests or implies that a warrant cannot be pursued if other attempts at restitution or payment fail. Indeed, the satisfaction of a debt and a criminal prosecution are entirely separate and independent matters. The satisfaction of a debt is a civil concern to fulfill obligations owed to private parties, while a criminal prosecution initiated by warrant or indictment is sought on behalf of and is controlled by the State to vindicate the public interest in adherence to the law. State v. Addis, 257 S.C. 482, 487, 186 S.E.2d 415 (1972); State v. Addison, 2 S.C. 356, 363-4 (1870); Section 17-1-10 [a criminal action is prosecuted by the State]. While Section 16-13-437 requires restitution in addition to punishment, as many criminal statutes now do, nothing in the statute itself indicates that the acceptance of an agreement to some or all restitution thereby bans subsequent criminal prosecution.

Our Supreme Court has held that restitution by the criminal court does not operate as an accord and satisfaction with respect to a debt. Fanning v. Hicks, 284 S.C. 456, 327 S.E.2d 342 (1985). Moreover, the converse is also true: satisfaction of debt cannot foreclose criminal prosecution. Our Court has cautioned time and again that the criminal process may not be used as a form of coercion to settle a financial obligation. As was stated in Huggins v. Winn Dixie of Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967), it is abuse of process if a criminal process is employed to obtain a collateral advantage. Said the Court, in such instances,

> [t]here is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance of any formal use of the process itself, which constitutes the tort.

Further, our Supreme Court has stressed the important public policy reasons for seeing that criminal prosecution is not hindered regardless of the outcome of private restitutions. The Court analyzed the relation between restitution and criminal prosecution in Liberty Mutual v. Gilreath, 191 S.C. 244, 253-54, 4 S.E.2d 126 (1939). In that case, the Court stated:

> [i]t is well settled that where property has been stolen or funds embezzled, it is not unlawful for the wrongdoer to make restitution and to satisfy the civil liability created by the wrong. Neither does the law prevent one, who has sustained a loss under such circumstances, from compromising with the wrongdoer, if it is not agreed either expressly or impliedly, that the prosecution for the offense shall be suppressed or stayed. Such an agreement, however, must not be in consideration that a criminal prosecution shall be suppressed, stifled or stayed. (emphasis added).

Moreover, in Op. Atty. Gen., No. 83-57 (August 9, 1983), we addressed the situation involving bad checks "where partial restitution is made both before a warrant is executed and after a warrant has been executed but prior to the case being tried." There, we reaffirmed an earlier opinion of March 18, 1971. That 1971 opinion had relied upon Section 34-11-100 which requires that payment of a dishonored check after initiation of a prosecution is not a ground of dismissal of fraudulent check charges, but may be considered in mitigation of the sentence received. Notwithstanding the presence of this statute, however, the 1983 opinion concluded that the statute

> ... appears to be nothing more than a restatement of the law, however, since neither full payment nor part payment, either before or after an arrest warrant is issued, operates as a matter of law to prohibit or terminate prosecution of the criminal offense.

Such statement is consistent with the following:

> '([s]ince the status of an act as a crime is fixed when it once completed, and that status cannot be changed by the subsequent act of the criminal or third persons ... the fact that a person who was injured by the commission of a crime has condoned the offense or made a settlement with accused ... does not relieve accused or bar a prosecution by the state

> except where there is statutory authority therefore.' 22 C.J.S. Criminal Law, Sec. 41, pp. 132-133.

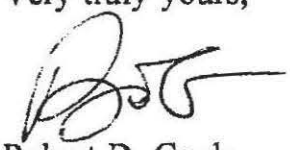
Thus, we concluded in the 1983 opinion that "partial restitution by the drawer of a fraudulent check, either before or after prosecution is initiated, is not a basis for preventing the prosecution of such drawer."

As noted, Section 16-13-437 specifically provides that restitution must be ordered as part of sentencing. Moreover, the fact that full or partial restitution is made, does not suspend or suppress the criminal prosecution. Public policy encourages private restitution, but even if fully made, such cannot tie the State's hands in prosecution of criminal offenses. Of course, Section 16-13-437 requires that a false statement or representation must have been made "knowingly". However, assuming that probable cause of a violation is established, as is the case with any offense, a warrant pursuant to Section 16-13-437 may still be issued despite any agreement made previously for restitution or any acceptance of such payments.

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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