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The State of South Carolina

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The Honorable Daniel Pieper
Berkeley County Magistrate
Post Office Box 60965
North Charleston, South Carolina 29419

Dear Judge Pieper:

In a letter to this Office, you raised several questions regarding fraudulent checks. Such offense is set forth in Sections 34-11-60 et seq. of the Code.

In your first question you asked

> 1. Once a valid fraudulent check warrant is signed, does the sheriff or his deputy have the authority to accept restitution within a certain number of days in lieu of arresting and bringing the defendant before a judicial officer for the setting of bond when to do so is contrary to the express instructions of the judge issuing the warrant who is not in agreement with any similar practices statewide or within the county?
>
> a. When a judge personally directs the deputy who has been assigned the warrant to serve the warrant, and the deputy refuses to do so by giving the defendant time to make restitution, can the deputy be charged with obstruction of justice? If not, what may the deputy or the sheriff be charged with?
>
> Due to the tremendous increase in fraudulent checks, this practice concerns me, not to mention the appearance that the magistrate's office is acting merely as a collection agency if the deputy refuses to serve the warrant. Further, it is my understanding that it is the judge's decision,

> not that of the sheriff or his deputy, as to whether to dismiss a fraudulent check case or merely suspend the sentence upon payment of restitution.
>
> b. Is the acceptance of restitution by deputy sheriffs contrary to the requirements of the magistrates to accept and receipt bond monies before trial, as well as set bond in the first place?

I am unaware of any provision authorizing a sheriff or his deputy to accept restitution in lieu of arresting a defendant on a fraudulent check charge and bringing the defendant before the judge who issued the warrant. Pursuant to Section 34-11-70(a)

> (w)hen any check, draft, or other order is not paid by the drawee because the maker or drawer did not have an account with or sufficient funds on deposit with the bank or the person upon which the draft, check, or other written order was drawn when presented or the draft, check, or order has an incorrect or insufficient signature on it, and the maker or drawer of the check, draft, or other written order fails to pay the amount due on it, together with a service charge of fifteen dollars, within ten days after written notice has been sent by certified mail to the address printed on the check or given at the time it is tendered or provided on a check-cashing identification card stating that payment was refused upon the instrument, then the check constitutes prima facie evidence of fraudulent intent against the maker.

After the warrant is issued, Section 34-11-70(c) authorizes a court to dismiss any fraudulent check prosecution upon proof of restitution and payment of administrative costs which are submitted before the trial date. Such provisions authorizing dismissal are not applicable to a sheriff or his deputy. Also, pursuant to Section 34-11-90(c) of the Code

> After a first offense conviction for drawing and uttering a fraudulent check ... the court shall, at the time of sentence, suspend the imposition or execution of a sentence upon a showing of satisfactory proof of restitution and payment by the defendant of all reasonable court costs accruing not to exceed twenty dollars.

> For a second and subsequent convictions ... the suspension of the imposition or execution of the sentence shall be discretionary with the court. (emphasis added).

As to your question concerning whether refusal to serve a warrant in the referenced circumstances constitutes obstruction of justice, Section 23-15-40 of the Code states:

> The sheriff or his regular deputy, on the delivery thereof to him, shall serve, execute and return every process, rule, order or notice issued by any court of record in this State or by other competent authority.

While this Office has recognized in a prior opinion dated September 24, 1981 that a magistrate's court is not a court of record, it appears that a magistrate would be considered "other competent authority." See: Opinion of the Atty. Gen. dated September 18, 1985. ("As the chief law enforcement officer of the county, the sheriff has historically been mandated to serve process issued by all courts of record "or by other competent authority.")

In Rogers v. Marlboro County, 32 S.C. 555 558, 11 S.E. 383 (1890) the State Supreme Court indicated as to a sheriff's responsibilities,

> When a warrant is placed in his hands by proper authority, his duty is to execute it, or attempt to do so. It is no part of his duty to inquire whether the prosecution is well founded, either in law or fact, and it would be impertinent in him to do so....
>
> ....
>
> ... The sheriff is a ministerial officer. He is neither judge nor lawyer. It is not his duty to supervise and correct judicial proceedings; but being an officer of court, ministerial in character, he cannot impugn its authority nor inquire into the regularity of its proceedings. His duty is to obey. This principle applies alike to him, whether the execution issues from a court of general or limited jurisdiction.

Therefore, generally a law enforcement officer acts as a ministerial officer in executing a warrant valid on its face. Bennett v. City of Grand Prairie, 883 F.2d 400 (5th Cir. 1990).

The offense of obstruction of justice is defined at common law as "any act which prevents, obstructs, impedes or hinders the administration of justice." See: State v. Cogdell, 273 S.C. 563, at 567, 257 S.E.2d 748 (1979). A ten year sentence is provided for such offense. Whether or not such an offense is committed in the circumstances referenced by you would have to be determined on a case by case basis. However, I would bring to your attention several other offenses which could also be considered: misconduct in office (State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983), Section 8-1-80 of the Code); neglect of duty by sheriff (Section 8-1-60 of the Code); contempt of court (State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983); State ex rel. McLeod v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979). Also, in certain circumstances consideration could be given to the provisions of Section 16-9-240 of the Code which states:

> If a sheriff, deputy sheriff, constable or other officer authorized to serve legal process receives from the defendant or any other person any money or other valuable thing as a consideration, reward or inducement for omitting or delaying to arrest a defendant or to carry him before a magistrate, for delaying to take a person to prison, for postponing the sale of property under an execution or for omitting or delaying to perform any duty pertaining to his office he shall be punished by a fine not exceeding three hundred dollars.

See also: Section 16-9-210 of the Code. As stated, this Office cannot categorically indicate whether any of the referenced offenses, or any others, would be committed in the circumstances noted by you. A case by case analysis would have to be undertaken in each situation and any decision would have to be based upon the relevant facts and circumstances. Moreover, the advice of this Office as set forth should not be construed as commenting upon any particular factual situation inasmuch as this Office cannot comment upon or find facts in such regard.

As to you question concerning whether the acceptance of restitution by deputy sheriffs conflicts with a magistrate's bail bond responsibilities, I would only reiterate that a deputy is not authorized to accept restitution in lieu of serving a warrant on a fraudulent check charge. Sections 34-11-70(c) and 34-11-90(c) referenced above relate to actions by a court upon a showing of restitution. As outlined in the prior opinion to you dated November 13, 1990, upon arrest, the setting of bail is generally considered generally to be a judicial function.

You next asked whether statewide assessments based on a fine may be collected by a deputy sheriff in addition to the administrative court cost fee when a deputy accepts restitution, the warrant

is not served and the case is dismissed upon payment of restitution. You asked whether the assessments collected differ if a defendant is brought to trial and is found guilty rather than having the case dismissed upon payment of restitution.

Pursuant to Section 34-11-70(c), any court, including a magistrate's court, may dismiss a fraudulent check prosecution on satisfactory proof of restitution and payment of administrative costs not to exceed twenty dollars "... submitted before the date set for trial after the issuance of a warrant." (emphasis added.) Also, pursuant to Section 34-11-90(d), after a conviction for issuing a fraudulent check, a defendant is obligated to pay in addition to any fine imposed, all court costs, not to exceed twenty dollars along with the fifteen dollar service charge. This twenty dollar administrative court cost is unique to fraudulent check cases. See: S. C. Bench Book for Magistrates and Municipal Court Judges, pg. III-103.

In addition to the twenty dollar fee, various fees and assessments are also authorized. Such fees include the Law Enforcement Council fee and the Hall of Fame Committee fee (Section 23-23-70 of the Code), the community corrections assessment (Section 24-23-210 of the Code), and the local correctional facilities assessment (Section 14-1-210 of the Code). However these assessments are collected only where there is a conviction. These assessments would not be collected where a fraudulent check case is dismissed upon payment of restitution as set forth above. Reference should be made to the particular statute for the amount to be collected in each case.

You also asked whether a magistrate is authorized to report a defendant as guilty where a law enforcement officer merely collected restitution, did not serve the warrant, and no trial date was set. In such circumstances, I am unaware of any basis for a finding of guilt in such circumstances. The determination of guilt is considered to be a judicial function. See: Opinion of the Atty. Gen. dated June 12, 1980.

In another question you asked:

> (M)ay the owner of a business retain a person, engaged in the practice of collecting bad checks for a set fee, for the purpose of sending out required notices and for procuring the warrant for the owner? Assume for the purposes of this question the following information is presented under oath prior to the signing of the fraudulent check warrant:
>
> 1. That the affiant is an agent of the owner;

2. That the affiant has not purchased the bad check from the owner, nor does the affiant receive a percentage of the amount received;

3. That the owner will appear at trial to testify and present the case; and

4. That any restitution money is paid to the owner.

Is this any different than the owner sending over his bookkeeper to sign a warrant?

Pursuant to Section 34-11-70(a)(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. If the maker fails to pay the amount of the check, along with the service charge, "... within ten days after written notice has been sent by certified mail to the address ... (of the maker) ... then the check constitutes prima facie evidence of fraudulent intent against the maker." The statute further provides

> 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 might not actually have been received by the addressee. (Emphasis added.)

A form of the notice required is set forth. Pursuant to subsection 2

> When any person instituting prosecution gives notice in substantially similar form provided in item (1) of this subsection 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.)

These provisions refer to "a certificate by the payee" and statutory immunity for the person instituting prosecution. The applicability of these provisions to other individuals is not readily apparent.

However, pursuant to subsection (e) of Section 34-11-70 of the Code

> ... subsequent persons receiving a check, ... by endorsement from the original payee or a successor endorsee have the same rights that the original payee has against the maker of the instrument, if the maker of the instrument has the same defenses against subsequent persons as he may have had against the original party. However, the remedies available under this chapter may be exercised only by one party in interest.

The "subsequent persons" referenced are therefore granted the same rights as the original payee. I am enclosing a copy of a prior opinion of this Office dated October 12, 1987 which dealt with the question of the authority of collection agencies to collect checks which they accept as endorsees even though the agency knows the checks have been dishonored. The opinion concluded that the above-referenced provision would not authorize a collection agency to accept a check as an endorsee in such circumstances and then seek a warrant pursuant to Section 34-11-60 as an endorsee. The opinion specifically referenced that the fraudulent check provisions are not applicable 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 thereof...."

Pursuant to Section 22-3-710 of the Code

> All proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue.

It is generally stated that "(a)ny citizen who has reasonable grounds to believe that the law has been violated has the right to cause the arrest of a person whom he honestly and in good faith believes to be the offender...." 22 C.J.S. Criminal Law, Section 326 p. 392.

Therefore, any individual could act as an affiant on a warrant, including an individual engaged in the practice of collecting bad checks. Of course, it is within the magistrate's discretion as to

whether probable cause has been shown and therefore whether any warrant should issue. See: S. C. Bench Book, pgs. III 10-13. However, as set forth, by statute the payee on the check must provide the certificate that notice has been sent to the maker of the check and Section 34-11-70(a)(2) limits the immunity from civil liability to "the person instituting prosecution." Again, the applicability of these provisions to other individuals is not readily apparent.

With kind regards, I am

Very truly yours,

Charles H. Richardson
Assistant Attorney General

CHR/an
Enclosure

REVIEWED AND APPROVED BY:

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