1983 S.C. Op. Atty. Gen. 66 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-45, 1983 WL 142716

Office of the Attorney General

State of South Carolina
Opinion No. 83-45
July 22, 1983

***1** The Honorable Robert J. Harte
Solicitor
Second Judicial Circuit
Post Office Box 2327
Aiken, South Carolina 29801

Dear Solicitor Harte:
In a letter to this Office, you referenced a situation where an individual mails a check out of the State along with an order for merchandise. The seller, prior to waiting for the check to clear, sends the merchandise. Later it is discovered that the check is worthless. You have questioned whether the jurisdiction for any criminal action lies in South Carolina or the other State.

Section 34–11–60 makes it 'unlawful for any person with intent to defraud . . . to draw, make, utter, issue or deliver to another, any check . . .,' without sufficient funds in the bank. In Patterson v. Commonwealth, 216 Va. 306, 218 S.E.2d 435 (1975), a similar statute was interpreted to mean 'draw' or 'make' or 'utter' or 'deliver', making each word a separate offense. Likewise, a fair reading of Section 34–11–60 yields the same result; 'draw, make, utter, issue or deliver . . .' must be read in the disjunctive, each constituting a separate offense. Thus, the violation of any one of these will satisfy Section 34–11–60.

To determine where jurisdiction lies, we must examine the meaning of each of these terms.

'Draw' means simply to write and sign. Black's Law Dictionary (5th ed.). Thus, when the maker, with the intent to defraud, fills in and signs the check, he violates Section 34–11–60. In the situation in question then, the check would be 'drawn' in South Carolina.

'Make' also means to write and sign. Id. Again, in our case, the check would be 'made' in South Carolina.

To 'utter', when used in the context of a bogus check means 'to put into circulation'. State v. Beaver, 266 N.C. 115, 145 S.E.2d 330 (1965). Arguably, then, the check is 'uttered' by the maker when he puts it in the mail. [1] Thus, in our case, the offense of 'uttering' a worthless check would be committed in South Carolina.

'Delivery' in the ordinary sense, implies some sort of receipt. E.g., McKenzie v. State, 145 Ga.App. 224, 243 S.E.2d 646 (1979). However, 'delivery' as a term of law takes on added significance. Section 36–1–201, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, defines 'delivery' with respect to instruments as 'voluntary transfer of possession'. Cartwright v. Coppersmith, 222 N.C. 573, 24 S.E.2d 246, 249 (1943) defined what constitutes a delivery of a negotiable instrument. The Court said in part:
To constitute delivery, there must be a parting with the possession and with power and control over it by the maker for the benefit of the payee or endorser . . .. An actual delivery is not essential, and a constructive delivery will be held sufficient if made with the intention of transferring . . ..

Although mail is not irretrievable, arguably a constructive delivery has been made upon mailing, since mailing can be said to evidence an intent to transfer, and since the term 'issue' is synonymous with 'delivery', (Section 36–3–102(1)(a), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended), then in the given situation, if delivery is completed in South Carolina, the check is also issued in this State, satisfying Section 34–11–60.

***2** In State v. Moore, 128 S.C. 192, 122 S.E. 672 (1923), the Court held that, 'the offense [of fraudulent checks] does not consist in non-payment of the debt, but . . . in the public nuisance resulting from the practice of putting worthless checks in circulation'. Our interpretation, then, of Section 34–11–60 is consistent with Moore, since the only offense occurs at the time of 'drawing, making, uttering, issuing or delivering,' and that offense is the intent to defraud. See, State v. McCord, 258 S.C. 163, 187 S.E.2d 654 (1972). Other jurisdictions are in accord with this rule. [2]

In the situation you have presented, then, Section 34–11–60 would be violated in South Carolina and, subsequent to trial in South Carolina, would meet the constitutional requirement that a person be tried where the crime is committed. U.S. Constitution, Art. III, § 2; U.S. Constitution, Amend. VI.

In summary, we would advise that South Carolina would have jurisdiction in such a case. It must be mentioned, however, that this is the only question we address here. Other States may or may not have jurisdiction simultaneously over the same set of facts.
Sincerely,

Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 It has been held that 'uttering and publishing' is not completed until receipt of the check by the seller. See, State v. Douglas, 114 Ohio St. 190, 150 N.E. 733 (1926). In Douglas, this Court reasoned that the United States Mail is an agent of the sender, and can be recalled anytime. However, in Section 34–11–60, 'publishing' is not mentioned, thus, arguably, State v. Beaver enunciates the most accurate construction of this term in South Carolina.

2 See, e.g., Mortensen v. State, 214 Ark. 528, 217 S.W.2d 325 (1949) where the Court said, 'If the crime covers only the conscious act of the wrongdoer [and not consequences], the crime is punishable only where he acts.'

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