1980 WL 121204 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
May 2, 1980

***1** Mr. Henry Ray Wengrow
Judicial Coordinator
Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29210

Dear Mr. Wengrow:
In a letter to this Office you questioned whether a check given in payment of a monthly bill for a service which is expected to continue, such as electrical service or gas service, may be considered to to a check given in payment of a pre-existing debt and thus exempted from being considered as a fraudulent check as defined by Section 34-11-60, Code of Laws of South Carolina, 1976, as amended. As you indicated in your letter such question does not appear to have been conclusively answered by the courts in this State. My research also has not found such question to be conclusively answered by court interpretations of other states's bad check statutes.

Admittedly, by Section 34-11-60(d), supra, it is provided that '. . . any check given only in full or partial payment of a pre-existing debt . . .' may not be considered to be a fraudulent check. However by subsection (d) it is also provided that:
'. . . (t)he word 'credit' as used in this section shall be construed to mean securing further advances of money, goods or services by means of a check, draft or other written order, given in whole or in part payment of a then existing account.' (Emphasis added.)

Therefore, while a check given 'only in payment of a preexisting debt' is statutorily exempt from being considered a fraudulent check, when further services are expected and desired by the drawer, the check given in payment of the 'then existing account' is not so exempt.

With reference to such, in the opinion of this Office, a check given in payment of a service previously rendered, such as electrical service, where there is a reasonable expectation and desire by the drawer of such check that such service continue, such check may be considered to be fraudulent if otherwise coming within the prohibitions of Section 34-11-60, supra. Such a determination could be more clearly realized by the drawer's continued receipt of services during the fifteen day notice period provided the drawer by Section 34-11-70, Code of Laws of South Carolina, 1976, as amended, to make payment to avoid a finding of prima facie evidence of fraudulent intent. As you indicated in your letter, the complainant should reference such continuation of service in appearing before the magistrate.

Referencing 1973 Opinion of the Attorney General No. 3476 at page 57, which discusses the exposure of a magistrate to civil liability in certain instances involving the handling of fraudulent check cases, you have questioned the relevance of such opinion in light of the recent changes in the fraudulent check statutes. The opinion citing the Mississippi State Supreme Court decision in Richardson v. Edgeworth, Barlow, et al., 214 So.2d 579 (1968), discussed 'the seriousness of compromising or settling bad check criminal charges on the basis of payment by the defendant of the face amount of the check, plus statutory fees and costs . . ..' In Richardson, an action alleging abuse of process was brought against two justices of the peace and other defendants following the suicide of a bad check defendant.

***2** In light of the recent statutory changes in the fraudulent check statutes as delineated in Section 34-11-70(c), Code of Laws of South Carolina, 1976, as amended, where it is specifically provided that:

'(a)ny court, including magistrate's may dismiss any prosecution initiated pursuant to the provisions of this chapter, on satisfactory proof of restitution and payment by the defendant of all administrative costs . . .',

it appears that the possible civil liability of a magistrate, especially as to an abuse of process action, discussed in the referenced opinion is lessened. Prior to the enactment of the referenced section, there were no statutory provisions permitting the settlement of a bad check offense by restitution although admittedly the practice did exist in certain areas.

It has been stated by the South Carolina Supreme Court in Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967) that:
'. . . it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process.' 249 S.C. at 208.

It has also been held that an individual, who accepts payment of an amount due him and who thereafter causes criminal charges brought against the debtor to be dismissed, is not liable for an abuse of criminal process where there is statutory authority for such a compromise. See, Glidewell v. Murray-Lacy and Co., 124 Va. 563, 98 S.E. 665 (1919). Therefore, the exposure of a magistrate to civil liability, and particularly as to an abuse of process action, arising from his handling of a fraudulent check case as discussed in the 1973 opinion of this Office is clearly diminished by the recent legislation which allows for the dismissal of a fraudulent check charge by a magistrate following proof of restitution of the check and payment of administrative costs.

As to your question concerning the change from the prior statute which authorized:
'. . . a rebuttable presumption that the prosecution was instituted for reasonable and probable cause . . ..' Section 34-11-70, Code of Laws of South Carolina, 1976,

as to a case where an individual waited ten days after mailing the notice to the drawer of the alleged fraudulent check in the manner provided by the statute to initiate prosecution, to the present statutory language, which states that as to such an individual who waits fifteen days from the date notice is given as provided by the statute to initiate prosecution,
'. . . there shall arise a presumption that the prosecution was instituted for reasonable and probable cause and the person instituting prosecution shall be immune from civil liability for the giving of such notice,' Section 34-11-70(a)(2), Code of Laws of South Carolina, 1976, as amended,

it can simply be stated that the Legislature has substantially broadened the immunity from civil liability of an individual who properly institutes a fraudulent check case. Not only is statutory immunity from civil liability granted, the presumption that the prosecution was initiated for reasonable and probable cause is heightened by the Legislature's removal of the distinction that such presumption is rebuttable.

***3** Hopefully the above is in full response to your inquiry. If there is anything further, please contact me.
Sincerely,

Charles H. Richardson
Assistant Attorney General

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