1973 S.C. Op. Atty. Gen. 55 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3476, 1973 WL 20940

Office of the Attorney General

State of South Carolina
Opinion No. 3476
February 23, 1973

***1 In Re: Bad checks; Execution of Warrants by County Sheriffs.**

Honorable Frank Powell
Sheriff
Richland County
1100 Huger Street
Columbia, South Carolina

Dear Sheriff Powell:
You have made several inquiries relative to your execution of fraudulent check arrest warrants:

I.

MAY A MAGISTRATE REQUIRE THAT A SHERIFF COLLECT FROM A DEFENDANT A FINE WHEN THE DEFENDANT IS ARRESTED?

No fine or prison sentence may be imposed by a magistrate before a defendant is tried and found guilty, either in person or in absentia, or pleads guilty in person. It follows that a sheriff is not empowered to collect a fine that could not have been lawfully imposed in the first place.

For the protection of both you and your deputies, I advise that the obtaining of money unlawfully from a person by virtue of your Office could constitute the common law crime of extortion (Ref.: Wharton's Criminal Law, Anderson, Bribery and Extortion, § 1392 et seq.) or a civil and criminal violation of the Federal Civil Rights Act, Title 42, Sec. 1981, et seq., U.S.C. The fact that you might be directed to collect such a fine by the magistrate, either verbally or in writing, affords you no protection. Such an order would be void ab initio, and it is not only your right, but also your duty, to refuse to comply with such an order.

II.

MAY A MAGISTRATE REQUIRE THAT A SHERIFF COLLECT A CASH BOND FROM A DEFENDANT?

South Carolina does not permit any judge to require that bond be in cash. For this reason, inter allia, a sheriff is not bound by an order of any court to obtain from a defendant cash bond in lieu of being brought before the court or placed in jail to await court appearance.

The custom of permitting defendants charged with police court offenses to post cash bond with police officers in lieu of being arrested and placed in fail is wide-spread and a custom of long standing. This does not make the practice legal, but our State Supreme Court has held that when a defendant takes advantage of the practice, he may not thereafter complain about it. In other words, this practice is not authorized by law, except in certain traffic cases, but it appears that when it is done the officer is probably safe from any legal action as a result.

III.

MAY A MAGISTRATE REQUIRE THAT A SHERIFF COLLECT FROM THE DEFENDANT THE AMOUNT OF THE PAD CHECK PLUS A FEE FOR SETTLEMENT OF THE CASE?

In connection with this question, two basic things should be understood: (1) South Carolina law does not permit settlement or compromise of any criminal offense, including the offense of uttering, etc., bad checks, and (2) A sheriff is not authorized under law to do anything with regard to a defendant named in an arrest warrant except to bring him before the issuing judge or commit him to jail to await appearance before the court.

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 fee and costs, was recently highlighted by a court action in Mississippi in which two deputy sheriffs were sued for the suicide of a bad check defendant. A verdict was returned against the deputies, and was upheld by the Mississippi State Supreme Court (Richardson v. Edgeworth, Barlow, et al., 214 So. 2nd 579, 588, in which the court said:

***2** 'A justice of the peace (magistrate) is a judicial officer. A justice of the peace court (magistrate's court) is a judicial body. This officer and this court have no constitutional right or power to serve as a collection agency for creditors. A creditor may properly file his claim for a civil debt against the debtor in a justice of the peace court (magistrate's court). But the justice of the peace (magistrate) serves only as a judicial officer to determine the validity of the claim. He is not a collection bureau. If he acts as a collection bureau, or if he utilizes the criminal processes of the court to collect a civil debt, he is preventing the functions of this—court and bringing disrespect upon the entire judicial process.'

The same question has not been presented to the Supreme Court of this State, so it is not possible to say with confidence what our Court would say. It is clear, however, that there is substantial doubt about the validity of the custom followed in most magisterial districts of South Carolina, i.e. compromising or settling bad check criminal charges upon payment of the face amount of the check, plus statutory fees and mileage. The Mississippi Court decided the question on constitutional due process grounds. Should our Court follow suit, or if the question should be decided by the Federal Courts on constitutional grounds as Mississippi has decided, the General Assembly would be without authority to make the practice lawful by legislation.

An added danger to sheriffs in these cases is that in a suit alleging abuse of process, which was the basis of the Mississippi suit, the defense ordinarily available to a police officer, that he was executing a process valid on its face, would not be available—because the arrest warrant is authority to arrest the defendant, not to settle the case.

Notwithstanding the foregoing, it has been customary in South Carolina for a long period of time for bad check cases to be settled upon payment by the defendant of the face amount of the check, plus statutory fees and mileage, as provided by statute. Custom does not make law, but even the General Assembly has recognized the custom many times by enacting legislation providing fees for magistrates and sheriffs when bad check cases are settled or compromised.

With the foregoing in mind, the remaining questions will be answered as if the prevailing custom of settling bad check cases were valid—and with the understanding that in the opinion of this Office such practice is not lawful. This is done because certain of your inquiries relate to actions that would be unlawful in any event.

IV.

MAY A MAGISTRATE REQUIRE A SHERIFF TO COLLECT FROM THE DEFENDANT BOTH A CASH BOND AND A SETTLEMENT FEE?

The answer to this question is clearly, 'No!'. To collect a bond and a settlement fee is manifestly contradictory. The bond is to insure the appearance of the defendant in court for trial. A settlement fee is an amount of money the defendant pays so that the

criminal charge will be dropped. If the charge is dropped, the requirement that bond be posted is unjustified. On the other hand, where the case has not been settled or compromised, there is no authority for the collection of a settlement fee.

***3** Even in cases in which the defendant is arrested, posts bond for his release, and later pays the amount of the check, plus settlement fee, to have the charge dropped, the bond, if posted in cash, should be returned to the defendant. Neither the county nor any official of the county has a right to such bond money—assuming there was no valid forfeiture for failure to appear in court at a proper time after due notice.

V.

MAY A MAGISTRATE REQUIRE A SHERIFF TO COLLECT
A SETTLEMENT FEE FOR TWO MAGISTRATE'S COURTS?

When bad check warrants are issued in one county and sent to another county to be countersigned and executed, sheriffs are sometimes requested to collect settlement fees for both the issuing magistrate and the countersigning magistrate, i.e. the settlement fee provided by statute in both counties.

Statutes providing for settlement fees in bad check cases permit the collection of only one fee per check. Since settlement can be effected only in the county or magisterial district in which the offense took place, there is no authority for the collection of a settlement fee for the countersigning magistrate.

VI.

MAY A DEFENDANT IN JAIL AWAITING TRIAL BE REQUIRED TO PAY A FINE BEFORE BEING RELEASED?

When a defendant is placed in jail on a bad check warrant, there are three things that may be done lawfully:

1. He may remain in jail until trial, if he does not furnish reasonable bond or recognizance for appearance at trial. A reasonably speedy trial must be provided any defendant, and, when the check involved, or any one of them, is for more than $100, the rules of the South Carolina Supreme Court require that the defendant be taken before the Clerk of Court, or other person specifically appointed by the resident circuit judge for such purpose, as soon as is practicable (usually not later than the next work day), to be advised of the nature of the charge against him and to make a determination as to whether or not free counsel must be furnished. Whether or not this requirement is reasonable as a practical matter has little to do with the situation. It is required by law.

2. He may furnish bond or recognizance for appearance for trial and be released from jail pending trial.

3. By custom (See question I), he may pay to the magistrate the settlement fee provided by statute, actual mileage at 10¢ per mile, and the face amount of the check. No charge against him remains.

Since no fine can be imposed before trial or plea of guilty, a defendant placed in jail on an arrest warrant to await trial may not be required to pay a fine to obtain his release.

GENERAL COMMENTS

There has been concern that some sheriffs, magistrates, and constables might be headed for unnecessary and avoidable trouble if certain reported practices involving bad check cases are, in fact, being followed. For example, it has been said that a few magistrates have instituted the practice of charging a fee for dismissing or withdrawing a criminal warrant not involving a bad check. No authority exists for the imposition of such a fee to be paid to the county, and collection of such a fee by a magistrate for himself is a violation of the State's criminal laws. Section 27–428 and 429.

***4** Use of any State, county, or municipal office for the enforced collection of monies not due is an extremely serious act. Section 1983, Title 42, United States Code, et seq., the Civil Rights Act, provides for both civil suit and criminal prosecution against State and local officers engaging in acts done in their official capacities that are construed to constitute a deprivation of any right guaranteed by the United States Constitution. Even judges are not immune from Section 1983 action when they violate the Section by acts beyond their authority.

The foregoing general comments are not for the purpose of warning anyone. This Office has no supervisory or administrative authority over any magistrate, constable, or sheriff. The comments are simply for the purpose of informing those who might be engaging in some prohibited practice because of a lack of understanding of the illegality of what they are doing, and the possible consequences thereof.

Yours very truly,

Joseph C. Coleman
Deputy Attorney General

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