S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

December 23, 2009

Opinion No. 09-189

Application of Tenn. Code Ann. § 39-14-121 to instances involving the acquisition of services

QUESTIONS

1. Is Tenn. Code Ann. § 39-14-121 violated when a person knowingly passes a worthless check to an electrician, plumber, installer, or similar individual who performs services after notifying the person in advance that payment is due immediately upon completion of performance?

2. Is Tenn. Code Ann. § 39-14-121 violated when a person knowingly passes a worthless check to a dry cleaner, auto mechanic, or similar individual who performs a service on property and transfers the property to the person passing the check only when payment is presented?

3. Is Tenn. Code Ann. § 39-14-121 violated when a person knowingly passes a worthless check to an entity against a line of credit or revolving credit card, and that entity extends further credit based on the passing of the check?

OPINIONS

1. No.

2. Yes.

3. Yes, if the circumstances suggest the requisite mental state — to obtain new credit.

ANALYSIS

The pertinent language of Tenn. Code Ann. § 39-14-121 provides:

(a) A person commits an offense who, with fraudulent intent or knowingly:

(1) Issues or passes a check or similar sight order . . . for the purpose of obtaining money, services, labor, credit or any article of value, knowing at the time there are

> not sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order, as well as all other checks or orders outstanding at the time of issuance…
>
> * * *
>
> (f) The offense of issuing or passing worthless checks is punishable as theft pursuant to § 39-14-105. Value shall be determined by the amount appearing on the face of the check on the date of issue.
>
> (g) Nothing in this section shall be construed as amending or repealing the Fraud and Economic Crimes Prosecution Act, pursuant to § 40-3-201.

The elements of the crime include: (1) intentional "or knowing" issuance of a check with (2) the knowledge that the account lacks sufficient funds on deposit to cover the check.

The Tennessee Court of Criminal Appeals has opined that a debtor, who passes a worthless check to pay a pre-existing debt, lacks the requisite intent because the drawer remains indebted thereon, and the payee did not take the check for value. *See State v. Newsom,* 684 S.W.2d 647, 649 (Tenn. Crim. App. 1984); Op. Tenn. Att'y Gen. 90-28, (1990). This ruling is in keeping with the general rule that the intent element of the offense is negated because the payee has lost nothing of value by taking a worthless check, and the debtor has obtained nothing by its utterance. *See* Annotation, Construction and effect of "bad check" statute with respect to check in payment of pre-existing debt, 59 A.L.R. 2d 1159 (1958). The debt still exists and is subject to execution. The court in *Newsom,* however, was presented with an obvious pre-existing account, on which payments were made to pay for prior obligations. The establishment of the prior debt was therefore far removed from the passage of the worthless check. Although the "worthless check" statute has been slightly amended since *Newsom,* the behavior criminalized, the passage of a worthless check to obtain something of value, has remained the same. *See* 1989 Tenn. Pub. Acts ch. 591; c*ompare* Tenn. Code Ann. § 39-1901 (1955), Tenn. Code Ann. § 39-3-302 (Supp. 1988), and Tenn. Code Ann. § 39-14-121 (a)(1) (2006).

The statute and its evolution represent the ongoing legislative attempt to address the difficulties in finding criminal intent or knowledge behind an instrument that is, in effect, a negotiable directive to a drawee bank to pay to the order of the payee, to punish criminal activity, and, at the same time, preserve the integrity of negotiable instruments. Most American jurisdictions have enacted a "bad check" or "worthless check" statute. *See* 3 LaFave, *Substantive Criminal Law*, § 20.1, 2d ed. (2003). The wording of the statute varies from state to state. Some statutes require that, in order to impose criminal liability, the defendant has to accomplish the crime by obtaining property. *See, e.g.,* Neb. Rev. Stat. Ann. § 28-603 (2009). Some statutes require knowledge that the check is worthless when issued. *See, e.g.,* Ky. Rev. Stat. Ann. § 514.040. Some, like Tennessee, require only the issuance of the check with the appropriate state of mind. *See* Ariz. Rev. Stat. Ann. § 13-817 (2009). In states where statutes require only the issuance of the check with the requisite mens rea, courts have generally held that payment of an antecedent debt with a worthless check does not violate the statute. *See Sylvestre v. Commonwealth,* 391 S.E.2d 336, 339-40 (1990) (holding that amendment to Virginia statute, which did not change the requirement of an exchange for value, did not affect prior interpretation of statute to exclude from its application bad checks issued to pay antecedent debt).

The 1989 amendment to our criminal code added an alternative mental element to the crime of worthless checks but did not affect the statutory language requiring the intent to coincide with an intended or knowing exchange for an article of value. *Compare* Tenn. Code Ann. § 39-3-301 (repealed and recodified by 1989 Tenn. Pub. Acts, ch. 592, § 1) and Tenn. Code Ann § 39-14-121. Tennessee's statute allows for proof of fraudulent intent or knowing issuance of a worthless check. Tenn. Code Ann. § 39-14-121. Regardless of the degree of intent required, the necessity that the check be issued in exchange for an article of value remains a statutory element of the crime. Our state courts' application of the statute prior to the 1989 amendment is useful to interpret the unchanged language.

When our courts have been presented with a conviction for passage of a worthless check for the purpose of obtaining new credit, they have affirmed the conviction. *Tines v. State,* 553 S.W.2d 913 (Tenn. Crim. App. 1977). In the process, the courts have reiterated the well-settled rule that the fraudulent intent necessary to sustain the conviction is a question for the jury. *See Tines,* 553 S.W.2d at 917, *see also State v. Rice,* 490 S.W.2d 516 (Tenn. 1973). Therefore, when the proof shows that the defendant obtained, and the payee lost, anything of value, such as when a check is exchanged to obtain new credit, fraudulent intent can be shown. *Newsom,* 684 S.W.2d at 649.

The 1989 amendment notwithstanding, our Supreme Court has opined that the statute addresses a very narrow set of circumstances. *See State v. Stooksberry,* 872 S.W.2d 906, 907-08 (Tenn. 1994) (post-dated check issued to pay for previously exchanged cattle is not a "sight draft" and therefore not a worthless check carrying the requisite fraudulent intent necessary to subject the maker to conviction for passing worthless checks). This Office has opined that, if a defendant were to issue a worthless check to someone who had already performed labor or conferred the value and was waiting only for payment, the check would not have been issued for value, but rather to satisfy a pre-existing obligation. *See* Op. Tenn. Att'y Gen. 00-061(April 3, 2000). Because the debt is not lessened, the issuer intends to obtain no "article of value" thereby, and the requirements of the statute are not satisfied.

1. A customer who knowingly passes a worthless check to an electrician, plumber, installer, or similar individual who performs services, after that customer has been informed prior to the performance that payment is due immediately upon completion of the work, may have the requisite intent to obtain the services by the passage of the check, but that intent exists without the actual obtaining of value.

This Office has previously opined that, if a worthless check is passed to pay for services already performed, the utterance of the check is simply to settle a debt created by the performance of the service, and the statute is not violated. Op. Tenn. Att'y Gen. 00-061(April 3, 2000). Other jurisdictions with similar statutes have held that the intent to obtain present value, not pay pre-existing debts, must exist in order to expose the issue to prosecution under the statute. *See Commonwealth v. Goren,* 893 N.E.2d 786, 790 (Mass. App. Ct. 2008) (Tennessee is within the majority of states whose worthless check statutes prohibit only the utterance of a worthless instrument in exchange for property or present value.) *See also Martin v.*

Commonwealth, 821 S.W.2d 95, 97 (Ky. Ct. App. 1991) ("The mere issuance of 'cold check' in payment for property or services not obtained by deceptive intent is insufficient" to show an offense.) Circumstances surrounding the exchange are certainly probative of intent. *Id.* And a change of the parties' positions must occur as a result of the check's passage. *Cf. Ridenhour v. State*, 650 S.W.2d 575, 577 (Ark. 1983) (Passage of check three days after receipt of chickens constitutes payment on "open account" and thus payment for a pre-existing debt not contemplated as an offense under Arkansas "hot check" statute. Ark. Code Ann. § 67-717.)

As our appellate courts have noted, the critical time frame for the inquiry is the time the instrument is passed. *See Thompson v. Adcox* 63 S.W.3d 783, 790 (Tenn. Ct. App. 2001). Although a good faith argument can be made that, with nothing more, the virtually contemporaneous exchange of payment for goods and services where payment is due immediately upon receipt is suggestive of the requisite intent — "the purpose of obtaining the good or service," the only case law on point in this and other jurisdictions suggests that, as a matter of law, notwithstanding any advance agreement, the issuance of the check after the service is completed is for the purpose of paying a liquidated antecedent debt and for that reason does not violate the statute.

2. If a person knowingly issues a worthless check in order to regain possession of personal property left with a mechanic or dry cleaner for repair or cleaning, the requirements of the statute are satisfied. The fact that a debt arose before the issuance of the check is of no consequence. It is well settled that such agreements are in the nature of bailments — "the delivery of personalty for a particular purpose or on mere deposit, on a contract expressed or implied, that after the purpose has been fulfilled it shall be re-delivered to the person who delivered it." *See Aegis Investg. Group v. Metro. Gov't. of Nashville and Davidson Co.,* 98 S.W.3d 159, 162-63 (Tenn. Ct. App. 2002).

In these situations, pursuant to the terms of the bailment, the bailor cannot regain possession of the property without tendering something of value to pay for the service. In this scenario the issuance of the worthless instrument is knowingly made to obtain possession of the personalty.

3. No mention is made in the third scenario presented of the intent of the issuer of the worthless instrument or the purpose of its utterance. The proof would have to show that, at the time the defendant passed the check, he intended to obtain new credit thereby or knew that an extension of new credit was likely. Otherwise, the statutory elements are not satisfied. The absence of an open account, the expectation of the issuer, a change in the parties' relative positions before and after the instrument issued would constitute circumstantial proof of the defendant's mens rea at the time of utterance.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

CLARENCE E. LUTZ
Assistant Attorney General

Requested by:

The Honorable William L. Gibbons,
District Attorney General
30th Judicial District
201 Poplar Avenue, 3d Fl.
Memphis, TN 38103-1947