Opinion No. 41-3772

April 22, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Richard F. Rowley Assistant District Attorney Clovis, New Mexico

*{*61}* This will acknowledge receipt of your letter of April 19 wherein you ask for an interpretation of Section 1, Chapter 142 of the New Mexico Session Laws of 1937, on the following two points:

(1) Is is a felony to give a post-dated check which does not clear when presented?

(2) Is it a felony to give a check with instructions to hold the same, the maker promising to have funds available in the future?

The question which you have propounded is most perplexing and one upon which our Supreme Court has never directly passed.

Chapter 142 of the Session Laws of 1937 amended Chapter 126 of the Session Laws of 1929, which amended Chapter 132 of the Laws of 1919. Section 1 of Chapter 142 of the Session Laws of 1937 reads as follows, to-wit:

"It shall be unlawful for any person for himself or as the agent or representative of another or as an officer of a corporation or partnership to draw, make, utter, issue or deliver to another any check, draft, or order on any bank or depository for the payment of money or its equivalent, knowing, at the time of the making, drawing, uttering, or delivery of any such check, draft, or order as aforesaid that he has not sufficient funds on deposit in or credit with such bank or depository with which to pay such check, draft, or order upon presentation."

The pertinent change found in the 1937 law is that it omits the words "with intent to defraud". There is no question but what prior to the enactment of the 1937 law, supra, that the gist of the offense of giving a worthless check was "the intent to defraud", and our Supreme Court so held in the case of State vs. Davis, 26 N.M. 524. The question to now be answered, however, in view of the 1937 law, is to determine whether or not the gist of the action is still "the intent to defraud", notwithstanding the fact that the Legislature in enacting the 1937 law failed to so specifically provide.

The State of Kansas has a statute which substantially follows Section 1 of Chapter 142 of the New Mexico Session Laws of 1937 and in the case of State vs. Avery, 207 P. 838, 23 A.L.R. 453, the Supreme Court of Kansas in passing on both of the questions *{*62}* which you have propounded, without equivocation, held that a post-dated check or a promise to pay in the future was no defense and that the maker of such an instrument was subject to prosecution. I quote from the Court's opinion, quoting from page 457:

"The second count of the information was not vitiated by the allegation that, when the check was given, the defendant told the payee he had no funds in the bank to meet it. The payee was not deceived, but deception of the payee of a worthless check is not the primary evil which the statute was designed to frustrate.

"The third count of the information was based on a post-dated check. The specific evils which the statute was designed to remedy follow from the giving of a worthless post-dated check, and no reason is apparent for excepting such a check from operation of the statute if, when it is given, the drawer knows it is worthless for want of funds."

The Supreme Court of South Dakota, however, in the case of State vs. Nelson, 76 A.L.R. 1226, in holding contrary to the decision of the Supreme Court of Kansas, said:

"In the opinion in State vs. Avery, the Kansas court say: 'The purpose of the statute was to discourage overdrafts and resulting bad banking (Saylors vs. Bank, 99 Kan. 515, 518, 163 P. 454) to stop the practice of 'check kiting,' and generally to avert the mischief to trade, commerce, and banking which the circulation of worthless checks inflicts. Although the statute tends to suppress fraud committed by the worthless check method, the evils referred to are all quite distinct from those consequent on fraud, and the statute is to be regarded as creating a new and distinct offense.'

"We are not able to agree in full with this part of the opinion. In the first place, this law has no application to overdrafts; because unless the check is honored, there can be no overdraft, and if the check is honored, then no offense was committed by issuing the check. And, if the law was intended to obviate the demoralization of business caused by the circulation of worthless checks, then there would have been no occasion for incorporating sections 3 and 5 into the law. North Dakota has a bad check law, so also have many other states, but so far as we are advised all such laws, except those of North Dakota, South Dakota, and Kansas, make moral turpitude in some form an element of the offense."

And the Court in rendering its decision, went on to say:

"Under the law the penalty is for failure to pay the check when presented for payment, and for that reason the law is a 'bad debt' or debt collecting law, and violates the provisions of section 15 of article 6 of the Constitution, which prohibits imprisonment for debt founded on contract. This is especially true as to a postdated check which in effect is only a representation by the drawer that he expects to have funds in the bank with which to pay the check on the date named therein. In this respect there is no essential difference between a postdated check and a promissory note, and there is no difference in principle between prescribing a prison sentence for failure to pay a promissory note when due and failure to pay a postdated check when due. Burnam vs. Commonwealth, 282 Ky. 410, 15 S. W. (2d) 256.

"We believe the purpose of this law to be, and certainly its effect is, to use criminal *{*63}* processes of the court to enforce the collection of debts, and as applied to postdated

checks it is unconstitutional. As to whether it is unconstitutional when applied to a present dated check or a check given for a present valuable consideration, we express no opinion at this time."

The State of South Dakota has a statute which substantially follows our 1937 law.

Again the Supreme Court of California in the case of People vs. Bercovitz, 126 P. 479, in holding that a maker of a post-dated check was subject to prosecution, said:

"We are not here concerned with a case where the fact of want of sufficient funds and credit is made known by the drawer to the person to whom he delivers the check or draft at the time of the delivery, and the payee chooses, with such knowledge, to rely on a promise or representation of the drawer that he will make such provision that the amount thereof will be paid on presentation. It may be that, as to such a case, a conviction could not properly be had under the section in question. In the case at bar, the evidence was ample to support the conclusion that nothing was said from which it might be inferred by the person to whom the check or draft was given that the drawer did not then have sufficient funds in the bank to pay the amount named therein on its presentation. In fact, according to Mr. Cohn, defendant told him substantially that he had ample money to meet it. There is also evidence that Mr. Cohn did not in fact notice that the check was dated February 6th until some time after its delivery. The case clearly falls within the express terms of section 476a Penal Code."

Although the Supreme Court of California did not pass upon the exact question as to whether a maker of a postdated check could be prosecuted under their statute, if the payee was advised of the post-dating of such check, it occurs to my mind that they very strongly lean in that direction and would, in all probability, hold that a maker of a post-dated check would not be subject to prosecution.

A case which impresses me very much as being directly in point on the two questions which you have propounded is a South Carolina case styled State vs. Winter, 82 S.E. 419, wherein the Court said:

"The ninth exception complains of error in refusing the defendant's first request to charge, which is as follows:

(1) 'If the check in question in this case was given prior to the date it bears, and it was dated at a subsequent date as a time upon which it was to have been paid, it has only the effect of a promise to pay, at a future time, and is not within the statute making it a misdemeanor to draw a check when the drawer has no funds to meet it.'

"This was a correct proposition of law applicable to the case and should have been charged. The defendant had the right to show that the check was given at a different time from that at which goods were purchased and obtained, and it was competent for the defendant to show by evidence other than the check itself that it was not correctly dated. If goods were obtained at one time and check given subsequently, that would not

be a misdemeanor but a simple promise to pay. If check was dated ahead, and it was expressly stated at the time it was passed that the drawer had no funds in the bank, such check would only mean a promise on the part *{*64}* of the drawer to do a future act and have funds in the bank at the future time stated in the check, and this would be no more than an obligation to pay in the future, and the check would only be an evidence of debt. His honor was in error in interpreting the statute as he did in the charge to the jury in refusing to allow the defendant to show by the prosecuting witness that the check was dated ahead and to show that the prosecuting witness had admitted that the check was dated ahead at the time it was given, and the exceptions raising these questions are sustained."

Again the Supreme Court of Mississippi, in the case of Hammack vs. State, 75 So. 436, said:

"The appellant perpetrated no fraud on Moore by giving him the check here in question; for he informed Moore at the time that he did not have sufficient funds in or credit with the bank on which it was drawn for its payment. The wrong, if any, which was done Moore by appellant was not giving him the check, but failing to comply with his (appellant's) promise to deposit sufficient money with the bank to cover it. The case, therefore, does not come within the intent of chapter 120, Laws of 1916, so that the judgment of the court below will be reversed, and appellant discharged."

And, lastly, the annotation reported at 5 A.L.R. 1254, as a general rule of law, says:

"The general rule is that, to obtain or sustain a conviction under statutes making it a criminal offense to give a check or draft without sufficient funds to meet it, proof of a fraudulent intent is essential, since to constitute crime intent must concur with the act."

In view of the foregoing decisions, I am constrained to the viewpoint that the maker of a post-dated check is not subject to prosecution under and by virtue of Section 1, Chapter 142, New Mexico Session Laws of 1937, if the maker advises the payee that said check is post-dated and does not attempt, through stealth, to post-date said check without the knowledge of the payee in order to avoid prosecution.

I am likewise of the opinion, in view of the foregoing decisions, notwithstanding the contrary viewpoint of Kansas and a few other states, that the maker of a check who delivers the same to the payee with instructions to the payee to hold the same is not subject to criminal prosecution by virtue of Section 1, Chapter 142, New Mexico Session Laws of 1937.

In closing, however, I again call your attention to the fact that our Supreme Court has never directly passed on these questions. The question is moot in our state and I believe that those decisions which deny prosecution in such instances lay down the better rule and are followed by the greater weight of authority.

Trusting that the foregoing sufficiently answers your inquiry, I am

By HOWARD F. HOUK,

Asst. Atty. General