

CRIMINAL COSTS: Payment of an insufficient check after five days is not a defense to the action.

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Hon. L. I. Morris
Prosecuting Attorney
LaFayette County
Lexington, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of March 28th, 1939, which reads as follows:

"It is respectfully requested that your office supply me with an opinion upon this set of facts:

"On December 1st, 1937 an information was filed under Section 4305 Revised Statutes of Missouri, 1929, on a worthless check given by 'A. C.'.

"Before a hearing on this case 'A.C.' files a petition in bankruptcy in the U. S. Federal Court. 'M', complaining witness in the criminal action stated that he had filed the claim with the district court for the full amount of the check and the cause was continued until the subsequent date. August 1, 1938, 'A. C.' declared a bankruptcy. Matters in his petition were disposed of and his assets failed to pay in full upon this check.

" 'M,' because of this failure to receive full payment insists upon criminal prosecution upon the original action.

"It is requested that your office supply me with an opinion stating whether the original criminal action can be prosecuted under Section 4035 Missouri Revised Statutes 1929, in the view of decisions rendered in State vs. Taylor, 73 S W 378."

Section 4305, R. S. Missouri, 1929, reads as follows:

"Any person who, to procure any article or thing of value, or for the payment of any past due debt or other obligation of whatsoever form or nature, or who, for any other purpose shall make or draw or utter or deliver, with intent to defraud any check, draft or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or credit with, such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of misdemeanor, and punishable by imprisonment for not more than one year, or a fine of not more than one thousand dollars, or by both fine and imprisonment."

This section is the lesser charge of section 4304, R. S. Missouri, 1929, as amended by the laws of 1931, page 200.

Section 4304, R. S. Missouri, 1929, is a felony, and applies to the drawing of checks on a bank where the drawer has no account, while section 4305, R. S. Missouri, 1929, is a misdemeanor and ap-

plies to the drawing of a check in which the drawer has an account but insufficient to cover the full amount of the check.

The gist of the crime under section 4305, supra, is the drawing of the check and the crime is committed at the time that the check is written and delivered. The fact that the check, after a five days notice had been given, was paid would not be a defense on the prosecution. It was so held in the case of State v. Loesch, 180 S. W. 875, 1. c. 879, par. 10, where the court said:

"One of the prosecuting witnesses was asked on cross-examination if the defendant had not attempted to settle with him after the deal had been consummated through which the defendant obtained the property. This character of examination and kindred questions following same were not permitted to be answered by the trial court, on the ground that, if the testimony were admitted, it would be proof simply to show self-serving acts or declarations, and hence no defense. The crime of obtaining property with the intent to cheat and defraud, which is the gist of this action, having been proved, testimony to show that the defendant had made restitution would not have been admissible. State v. Cooper, 85 Mo. 256. Much less, then, is testimony to be admitted which only tends to show that defendant would have reimbursed the parties if it had been possible. This testimony, if admitted, instead of being a circumstance in defendant's favor, would tend to show that he knew he had gotten the property of the prosecuting witnesses for nothing, and, cognizant

of this fact, evinced a willingness, when confronted with the charge, to reimburse them. The trial court therefore did not err in the exclusion of this character of testimony."

As mentioned in your request the case of State v. Taylor, 73 S. W. (2d) 378, only holds that a check post dated comes under section 4305, 4306, R. S. Missouri, 1929.

CONCLUSION.

In view of the above authorities it is the opinion of this department that if the information which was filed on December 1st, 1937, and was not dismissed, a trial could be had upon the information, even though part of payment had been made upon the check under the bankruptcy proceeding, as described in your request. The statute of limitations would be one year upon this action, for the reason that it is a misdemeanor and a new information could not be filed upon the charge.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
(Acting) Attorney General.

W. J. BURKE
Assistant Attorney General

WJB:RW