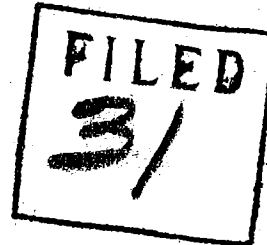


CRIMINAL LAW:
FALSE PRETENSES:

No conviction can be obtained under Section 561.450, RSMo 1949, for giving a check on a bank in which there is no account for a past due debt. Conviction can be had under Sections 561.460, RSMo 1949, and 561.470, RSMo 1949, for giving a check on a bank in which the maker has no account.

October 19, 1956

Honorable Benjamin J. Francka
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Mr. Francka:

This is in reply to your request for an opinion which reads as follows:

"This office has recently been confronted with a series of problems concerning the giving of no account checks in payment of debts. We would greatly appreciate an opinion from your office concerning the applications of Section 561.450 and Section 561.460, R.S. Mo. 49, in the following cases.

"Does Section 561.450 apply to a no account check given for a debt due? Does 561.450 apply to a check given for a past due debt? We note that Section 561.450 applies to the obtaining of any 'property or valuable thing' while Section 561.460 applies to the procuring of 'any article or thing of value or for the payment of any past due debt or obligation'.

"In case charges can not be filed in the above two instances against a person giving a no account check under Section 561.450, can they be filed under Section 561.460?

"Also, in cases where a no account check is given in violation of Section 561.450 extenuating circumstances indicate that the penalty provided

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under Section 561.460 would be more appropriate may charges be filed under Section 561.460?"

Your first question is whether or not Section 561.450, RSMo 1949, applies to "no account" check given for a debt due. The applicable portion of Section 561.450 is as follows:

"Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation, * * * or by means or by use, of any false or bogus check or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds * * * shall be deemed guilty of a felony and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years." (Underlining ours.)

It will be noted that in addition to money and property an offense may be committed by the obtention of money "or valuable thing whatever." It is thought that since penal statutes are strictly construed to the benefit of defendants in criminal cases that the interpretation of "valuable thing whatever" might not be fitted to a debt due since the status of creditor and debtor remains unchanged by the passage of the worthless paper.

Research has disclosed the case of State v. Hack, (Mo. App.) 284 S.W. 842, in which conviction was sought under Section 3553, RSMo 1919. The case shows that the section was amended in 1925 to include the following words "or for the payment of any past-due debt or other obligation of whatsoever form or nature or who for any other purpose." The check in question in that case was given in payment for a "past-due debt." The court then said, l.c. 842:

"Whilst under section 3553, Revised Statutes of Missouri 1919, the giving of a check with intent to defraud is made a misdemeanor, and section 3554 provides that, 'as against the maker or drawer thereof, the making, drawing,

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uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, * * * * * yet, since it affirmatively appears in the state's case, and in fact is conceded by the state, that the check in question was given in payment of a past-due account, the prima facie case is overcome, and it must be ruled, as a matter of law, that plaintiff, having obtained nothing on the strength of this check, could not be held as for having issued the check with intent to defraud.

"It may be well to note that cases in which checks are now given for the payment of any past-due debt fall within the purview of our bad check statute, for the Legislature has amended section 3553 so that it now provides that:

* * * * *

Section 3553, mentioned above, as changed is now Section 561.460, RSMo 1949. It should be recognized that Section 561.460 is now applicable to past-due debts and, therefore, would apply to a debt due, since the Legislature has spelled it out in no uncertain terms in the 1925 amendment. It will be noted that the amendment, as it was made, added further qualifications to what formerly had been plainly "with intent to defraud." When this amendment was made, long after the enactment of Section 561.450, supra, inquired about here, the payment of any past-due debt was included as well as the words already contained therein, "any article or thing of value." In accordance with the rules for the interpretation of statutes in regard to criminal offenses, there could be no distinguishment between the ultimate meaning of the phrases "any article or thing of value and "any valuable thing whatever." It is believed that the inclusion of the words in regard to the payment of past-due debts was recognition by the Legislature, in keeping with the Hack case above cited, that there was nothing obtained by the issuance of the check in the payment of a past-due debt as the debt remained due. It is, therefore, thought that the statement in the Hack case, in regard to the former wording of the Section (561.460), would be equally applicable to Section 561.450, as that latter section now stands.

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In the matter of State v. Willard, 109 Mo. 243, 19 S.W. 189, at l.c. Mo. 247, in regard to a check given, the court said:

"Now it must be conceded that Cartwright was not induced to part with his possession or property in the gloves and fur robe by means of the check. It stands upon his own evidence that he voluntarily extended credit to defendant from Thursday to Saturday and delivered and charged the goods to defendant on the firm books, without receiving any other promise or agreement from defendant except to pay for them at that time.

"The giving of the check on Saturday had nothing to do with obtaining these goods. They had already been delivered to defendant, and by no sort of fiction can the transaction of Saturday be made to relate back, and make an ordinary sale on a credit, obtained by no false pretense, or trick or other 'confidence game,' a crime. It would be purely 'ex post facto.'"

It is felt that the foregoing very evidently reveals the problem involved here and is a direct answer to it. A check upon a bank in which the maker has no funds given for an account due would appear to be analogous to the situation presented in the above case. The question is not only presented by such a situation as to the consideration for the check, it also involves fraud and deceit and the instrumentality of the deceit, which induced the expectant payee to part with the "money, property, or valuable thing."

It is believed that the term false pretenses describes the element of the offense mentioned above and it, of course, must be a reliance upon the truth of the false pretenses that caused the parting with the valuable thing.

In the case of State vs. Mullins, 237 S.W. 502, l.c. 504, the Supreme Court of Missouri said:

"(4) III, It may be urged that presentation of a check drawn on the bank was prima facie a representation that the defendant had funds there. The Legislature of 1917 (Acts 1917, p. 244) passed an act incorporated in the statutes of 1919 as sections 3553 and 3554. Section 3553 relates to the offense of drawing a bogus check or checks upon a bank with insufficient funds

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to meet it. It will be noted that the defendant was not prosecuted under that section but under section 3343, a general statute relating to the obtaining of money by false pretenses."

After quoting Section 3554, the section that provided for five day notice establishing intent to defraud, as is now contended in Section 561.470, the court continued at l.c. 504:

"Under that section the drawing of a check upon a bank in which the drawer has no funds would be prima facie evidence of intent to defraud unless within five days after notice of dishonor the drawer should make the drawee whole.

"For the purpose of this case we will assume, without deciding, that this section is applicable to the present transaction.* * * *"

It is, of course necessary upon any prosecution under Section 561.460 that the requisite notice provided for by Section 561.470, RSMo 1949, be given.

CONCLUSION

It is, therefore, the opinion of this office that a person cannot be convicted under Section 561.450, RSMo 1949, for giving a check on a bank in which he has no account for a debt due.

It is further the opinion of this office that a conviction can be had under the misdemeanor sections 561.460 and 561.470, RSMo 1949, against a person who gives a check upon a bank in which he has no account upon his having been given proper notice under Section 561.470, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Paris.

Yours very truly,

JWF:mw

John M. Dalton
Attorney General