

PROSECUTING ATTORNEYS:  
BOGUS CHECKS:  
MAILING CHARGES:  
CRIMINAL LAW:

A prosecuting attorney sending notice to one pursuant to Section 561.470 VAMS on complaint of an insufficient fund check in violation of Section 561.460 VAMS, cannot charge to or demand of the complainant, the mailing charges thereof.

February 16, 1961

*Mimeo copies*

FILED  
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Honorable Stephen E. Strom  
Prosecuting Attorney  
Cape Girardeau County  
Cape Girardeau, Missouri

Dear Mr. Strom:

This is in response to your letter of January 11, 1961, wherein you requested an official opinion of this office concerning the following:

"This office, as is probably the case with many other prosecuting attorneys, has a large number of complaints filed with reference to insufficient funds checks. The practice of my predecessor in office has been that prior to filing charges under the 'insufficient funds check statute', section 561.460, notice be given to the drawer of the check by a registered letter, return receipt requested, by the prosecuting attorney advising that charges would be filed if the check is not paid within five days. The purpose of this notice, of course, is to obtain the benefit of the presumption of intent to defraud provided by Section 561.470.

"To send a notice to the drawer of the check, registered mail, with return receipt requested, to be delivered to the addressee only, costs \$1.14. In view of the considerable number of such letters which are sent the postage expense can become somewhat large.

"It has been suggested that the office of the prosecuting attorney make a charge of \$1.00 or \$1.25 to each person making a complaint

on an insufficient funds check to cover this expense. The use of these letters is the easiest method with which to prove notice to the maker of the check.

"I hereby request your opinion whether the prosecuting attorney may charge and collect a fee from each complainant on a bad check charge, such fee being sufficient to cover postage and registered mail charges which may be necessary in that particular case."

Basically the duties and obligations of Prosecuting Attorneys are derived from the Statutes of Missouri. It thus becomes necessary to examine said statutes in determining the extent of said duties and obligations.

Under Section 56.060 VAMS,

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the state or county may be concerned....."

Section 561.460, RSMo provides:

"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."

Section 561.470, RSMo further provides:

"As against the maker or drawer thereof, the making, drawing, 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, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee."

It is to be noted that the statute is silent as to who shall give said notice, and in what manner said notice is to be given. The only purpose of the statute would seem to be a method of establishing prima facie evidence of drawer's intent to defraud when he has not paid instrument after five days notice. Said statute does not declare this method to be the sole and exclusive means whereby intent to defraud can be established, nor does it state that this notice must and can only be given by the prosecuting attorney to be an effective method of establishing this prima facie evidence of fraud. Furthermore, the statute does not indicate that said notice must be given in a particular manner.

In State v. Kaufman, 308 SW 2d 333, the St. Louis Court of Appeals, in interpreting Section 561.470, stated:

"This section of the statute establishes a rule of evidence. It provides that the failure of the defendant to pay the drawee bank the amount of the check after receiving five days notice that the check was not paid shall be prima facie evidence of fraudulent intent and knowledge on the part of the defendant of the insufficiency of his funds and his credit with the bank. Proof of the giving of the notice referred to in this statute is not an essential element of the offense. If the notice was not given the State had the right to prove fraudulent intent and knowledge of the insufficiency of funds or credit in some other manner. Failure to give the notice would merely prohibit the state from availing itself of the presumption created by the statute. Also, payment by the defendant within the five days would not be a defense to the charge. Such payment would only abrogate the presumption created by the statute. What we have just said may be unnecessary to the contention being examined but is important to another assignment to be discussed. This statute does not call for written notice. No doubt the Legislature was aware that there are many comparable statutes throughout the other states. Some specifically require a written notice and others do not. If a written notice was contem-

plated the Legislature would have so stated. We have found no case that holds a written notice is required under a statute similar to §561.470." (underlining supplied)

Consequently the notice given to the drawer of the instrument by the holder thereof and one given by the prosecutor would differ entirely in its purpose.

Basically, the notice given by the holder is for the ultimate purpose of collecting the amount of the instrument unpaid in the hands of the holder. On the other hand, said notice given the maker by the prosecutor would have as its purpose establishing prima facie evidence of intent to defraud on the part of the maker. In the event the prosecutor gives written notice by registered mail with a return receipt, said method would prove that the notice had actually been received by the drawer of said instrument.

Said notice should never be given by a prosecutor to a drawer of an instrument for the purpose of collection, but rather to facilitate said prosecutor in the prosecution of said drawer for fraudulently uttering or delivering said instrument.

It therefore follows that said notice when given by the prosecutor is within the purview of his office as a public official for the people of his county, and not as a mere collection agent for the holder of the instrument. Prosecution furthers the public interest, rather than the private interest of the complainant.

Thus, any expense incurred by the prosecutor in sending said notice must be borne solely by him as an expense of his public office. Performance of his official duties should, in no event, be conditioned upon a private person bearing the expense incident thereto.

The notice, when used by the prosecuting attorney, should never be couched in language advising or intimating that charges will be filed or prosecution commenced if the check or draft is not paid within five days. Such language would clearly imply that in the event of payment within 5 days there would be no prosecution even though there may be actual intent to defraud. For payment by the drawer or maker within this five day period would only serve to do away with the presumption of intent to defraud created by the statute, but it in nowise completely destroys the prosecutor's right to prosecute said individual if he can otherwise prove the drawer's or maker's intent to defraud at the time said individual uttered or delivered said instrument.

As stated in STATE v. KAUFMAN, 308 SW 2d 333, loc. cit. 338:

" \* \* \* Also, payment by the defendant within the five days would not be a defense to the charge. Such payment would only abrogate the presumption created by the statute."

The Missouri statutes contain express provisions regarding what equipment shall be furnished to county officers by his county as well as a classification of expenses:

VAMS Section 49.510:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

VAMS Section 50.680:

"Class 4. The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six." (Underlining supplied.)

In this connection stamps, stationery and the like are expressly provided for by statute as a necessary expense of the maintenance of the office of Prosecuting Attorney.

Therefore it becomes incumbent upon the prosecuting attorney, within his discretion if he deems that the public interest will

be facilitated thereby, to bear the expenses of sending a notice pursuant to Section 561.470 VAMS by registered mail with a return receipt.

#### CONCLUSION

A prosecuting attorney sending notice to one pursuant to Section 561.470 VAMS on complaint of an insufficient fund check in violation of Section 561.460 VAMS, cannot charge to or demand of the complainant, the mailing charges thereof.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George W. Draper, II.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General