

CRIMINAL LAW: Giving a bad check under Section 4694
R. S. Missouri, 1939, without a false
representation is not a violation of
the law.

April 13, 1943

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of April 9, 1943, which reads as follows:

"I am hereby requesting an opinion
on this state of facts:

"The check was as follows:

"Versailles, Mo. March 26, 1943

"BANK OF VERSAILLES

"Pay to the order of Clyde Hayes \$25.00

"Twenty Five and no/100 - -Dollars

"signed A. R. Newell,

"(No Acct.)

"Indorsed on Back of check,

"Clyde Hayes,

"A. F. Gerhart.

"The affidavit for a felony in the
justice court of J. S. Bridges in
the City of Versailles, reads as
follows:

"A. F. Gerhart, being duly sworn
deposes and states that on the 26th
day of March, 1943, at the Township

of Moreau and in said county, A. R. Newell to the best of the affiant's knowledge did then and there with specific criminal intent, unlawfully, wilfully, wrongfully, feloniously did issue and deliver a check for the amount of \$25.00, knowing at the time that he had no funds or account with to pay same. Said check being drawn on the Bank of Versailles Mo. Said check being presented for the payment in due time and payment denied for the reason stated above, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Missouri.

"A. F. Gerhart

"Subscribed and sworn to before me on this 3rd day of April, 1943.

"J. S. Bridges
Justice of the Peace

"This check was presented on the same day it was given, and the notation about no account was made by the vice president and cashier of the Bank of Versailles, and it is admitted that A. R. Newell had no money or credit or account with the bank at the time the check was given or presented and had no money or account or funds there now.

"The affidavit before the justice was made by the justice, and on account of the amount, the statute that is to be complied with in order to make a felony is agreed and admitted to be Section 4694 R. S. Mo. 1939.

"Clyde Hayes the payee of the check owed the indorser, A. F. Gerhart \$15.00, on an old antecedent debt, and A. R. Gerhart paid in cash, to Clyde Hayes at the time of the delivery of the check to A. R. Gerhart.

"The facts are and is admitted, that A. F. Gerhart is an innocent purchaser of the check for value without notice.

"The hidden facts unknown to A. F. Gerhart at the time the check was indorsed and delivered to him, for the 10.00 in cash and the return of an old check that Clyde Hayes had given to A. F. Gerhart for an old debt, of \$15.00, are these:

"A. R. Newell had no money in the bank, but told Clyde Hayes to hold this \$25.00 check, until later; and this \$25.00 check in question was given to Clyde Hayes for second handed set of harness. Clyde Hayes has stolen these harness, and later, these stolen harness was sold to a man in Miller county, and the real owner of these harness recovered these stolen harness.

"All these facts were not known by A. F. Gerhart, and none of these facts were told to A. F. Gerhart by Clyde Hayes.

"A. R. Newell the giver of this check, the maker of this check to Clyde Hayes, claims that he never got anything of value for the check, since the harness was stolen harness, and he never did obtain the harness, and that the check was obtained from him by fraud, and no title passed to the check, and A. F. Gerhart, the innocent party did not get any title to the check, and he cannot prosecute; that he, A. R. Newell never obtained anything of value, and suppose his check was a bogus check under Sec. 4694, there is no crime committed by A. R. Newell, in so far as he and Clyde Hayes are concerned, that two crooks were trying to skin each other, and both are equally guilty.

"Clyde Hayes, the one who stole the harness, and who passed and uttered the check, is in jail for stealing the harness at Warsaw, Mo. The true owner of the harness has his harness back.

"A. R. Newell the maker of the check, sold, these stolen harness to an innocent man, for \$35.00. This man gave a check to A. R. Newell for \$35.00, and when he lost the harness, he stopped payment on the \$35.00 check.

"A. R. Newell, owed a local grocery in Versailles, \$10.00 on a grocery bill, and gave this \$35.00 check on the Miller county man for the sale of the harness; and this local merchant gave credit for the 10.00 debt, and then gave in cash to A. R. Newell, the \$25.00, difference.

"Now, the local merchant is out \$25.00 in cash, because the check he accepted was stopped, and in the long run, Newell received and has in his pocket \$25.00, and he is not worth a judgment for the recovery of the \$25.00 by the local merchant.

"Is this man A. R. Newell liable to a criminal prosecution under Section 4694, for this bogus check, that was delivered to A. F. Gerhart?

"If A. R. Newell is not liable for a criminal prosecution for giving this bogus check, under 4694, then under what statute can he be successfully prosecuted."

Under the above facts, as set out in your request, you are asking an opinion on two questions:

First, is this man, A. R. Newell, liable to a criminal prosecution under Section 4694 R. S. Missouri, 1939, for the giving of this bogus check that was delivered to A. F. Gerhart?

Second, if A. R. Newell is not liable for a criminal prosecution for the giving of this bogus check, under Section 4694, supra, then under what statute can he be successfully prosecuted?

Section 4694 R. S. Missouri, 1939, reads in part 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, * * by means, or by use, of any false or bogus check, * * * 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."

Under the facts in your request you state that A. R. Newell and Clyde Hayes were trying to cheat each other and you do not state that either A. R. Newell, or Clyde Hayes made any false representation to the prosecuting witness, A. F. Gerhart.

In order that a successful prosecution could be had, against either one of them, it is necessary for the State to show that false representations were made to the victim and were relied upon by him as true when he paid the Ten Dollars in cash and returned the old check given by Clyde Hayes to the victim, A. F. Gerhart. (State v. Donaldson, 148 S. W. 79, 243 Mo. 460; State v. Robinson, 14 S. W. (2d) 452; State v. Burton, 213 S. W. 424.)

The information must specifically show the details of the act under which the money was obtained by false pretenses. It is not sufficient to say that he fraudu-

lently, or designedly, or by use of fraudulent practices obtained the money, but it must show sufficient facts to inform the defendant under which he is charged. (State v. Martin, 126 S. W. 442; 226 Mo. 538, Ex parte Pelinski, 213 S. W. 809; State v. Wilson, 122 S. W. 701, 223 Mo. 156.) The approved information which is followed in most cases, and sets out all of the elements that must be proven under Section 4694, supra, is set out in the case of State v. Loesch, 180 S. W. 875. The complaint filed in the justice court should as nearly as possible follow the information set out therein.

The mere fact that A. R. Newell gave a check to Clyde Hayes which was drawn on a bank in which he had no funds, which check was cashed by A. F. Gerhart, in itself is not a criminal offense. There must be a confidential relation between the victim and the accused. (State v. Block, 62 S. W. (2d) 428, 333 Mo. 127, and State v. Block, 62 S. W. (2d) 432, 333 Mo. 134.)

Under the facts in your request the accused did not make any false representations to Gerhart, but had all of his dealings with Clyde Hayes. The fact that it was a bad check is not sufficient for prosecution, unless the accused made false representations that caused the victim to pay the Ten Dollars in cash and return the old check to Clyde Hayes.

If there was a conspiracy between Clyde Hayes and A. R. Newell to swindle A. F. Gerhart both could be found guilty of obtaining money under false pretenses. (State v. Starr, 148 S. W. 862, 244 Mo. 161; State ex rel Major, v. Mo. Pac. R. Co., 144 S. W. 1088, 240 Mo. 35.)

According to the facts in your request A. R. Newell and Clyde Hayes were swindling each other and there were not facts set out in your request that show any false representations having been made to A. R. Gerhart.

There is a general statute regarding the obtaining of money under false pretenses (Section 4487 R. S. Mo., 1939) but since Section 4694 R. S. Missouri, 1939, is a specific statute, in that it refers to false checks, it would be applicable if there were sufficient evidence to obtain a conviction. (State v. Richman, 148 S. W. (2d) 796, 1. c. 798.)

Honorable G. Logan Marr

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In the last paragraph of your request you state:

"If A. R. Newell is not liable for a criminal prosecution for giving this bogus check, under 4694, then under what statute can he be successfully prosecuted."

Under the facts in your request Clyde Hayes was to hold the Twenty-five Dollar check in question, and it does not show that any representation was made by A. L. Newell that the check was a good check. On the other hand, it appears that Clyde Hayes knew the check was on a bank in which A. L. Newell had no account.

CONCLUSION

In view of the facts set out in your request it is the opinion of this department that A. R. Newell is not liable to a criminal prosecution under Section 4694 R. S. Missouri, 1939, for the giving of this bogus check that was delivered to A. F. Gerhart by Clyde Hayes.

It is further the opinion of this department that since we are holding that A. R. Newell is not liable on this bogus check under Section 4694, supra, he is not guilty under any statute for the drawing of the check, for the reason that no false representations were made to A. F. Gerhart or to Clyde Hayes, the payee of the check.

APPROVED BY:

Respectfully submitted

ROY McKITTRICK
Attorney General of Missouri

W. J. BURKE
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