

CRIMINAL LAW:

When money is not obtained on a "bad check" the drawer is not guilty of obtaining money under false pretenses.

April 28, 1943



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

Dear Sir:

We are in receipt of your request for an opinion, dated April 24, 1943, which reads as follows:

"The facts are these: A driver of a commercial truck, was entrusted by the owner and operator of the truck with some money of Mr. W. B. Anderson, consisting of a Montgomery-Ward check, and some cash. The M-W check was made payable to Anderson and the same was indorsed by Anderson. The truck driver, had a wreck, and he used the cash and the check was indorsed, and went through and was paid by M-W. Whether the check was indorsed by the truck driver was not known. Anyhow this check was cashed in St. Louis County. It is conceded that the truck driver would be liable for a criminal prosecution for embezzlement by an agent in St. Louis County, Mo.

"Mr. Anderson prevailed upon the truck owner to make good the loss of Anderson, and the truck owner C. E. Bennett gave a post dated check for the \$65.00 to Anderson, and when the check was due, the check was presented here to the local bank, the bank of C. E. Bennett and on which the bank was drawn. The payment of the check was refused by the bank, and the said Mr. Anderson left the check with the bank for collection. The bank then presented this check in per-

April 28, 1943

son to Mr. C. E. Bennett, and the check was not paid because the said C. E. Bennett did not have any funds in said bank. The banker made a notation on the check, "payment stopped", at the request and order of C. E. Bennett. The check was returned unpaid to the payee Mr. W. B. Anderson.

"Then W. B. Anderson seeks to prosecute C. E. Bennett for a bogus check under sec. 4694 R. S. 1939, because the check was really not paid because there were no funds in the bank.

"This check was given by C. E. Bennett, in order to pay to Anderson the loss Anderson suffered by reason of the embezzlement of the agent of C. E. Bennett. Bennett never received anything of value other than he was trying to make good the theft of the check and money by his agent that belonged to Mr. Anderson. The truck driver, C. E. Bennett, and W. B. Anderson live in Morgan County, and the bank on which the check was drawn is in Morgan County.

"The first question, is this state of facts, with the notation of payment stopped, sufficient to make a crime for a bogus check in order to prosecute under sec. 4694, or any other criminal check statute? And secondly, was this check given in compromise of a felony, because W. B. Anderson tacitly stated, if he got his money the truck driver would not be prosecuted in St. Louis County. Is this check valid, even for a criminal prosecution?"

The facts as stated in your request briefly are as follows:

A Mr. Anderson gave some cash and a Montgomery Ward check which was payable to Anderson, and indorsed by him, to the owner and operator of a truck. It may be presumed that Mr.

Anderson gave the owner and operator of the truck the money to purchase something in St. Louis for him. The owner and operator of the truck then gave the money and the indorsed Montgomery Ward check to one of his drivers who, after having a wreck in the city of St. Louis, cashed the check and spent the money and proceeds of the check.

The truck owner and operator made good the loss of the money and the proceeds of the Montgomery Ward check by giving a postdated check for Sixty-five Dollars to Mr. Anderson. This check, when due, and when presented, was refused payment by the bank, for the reason there was not money in the bank to cover it. The bank, however, received the check for collection, and when it was not paid the banker made a notation on the check, "payment stopped" at the request and order of C. E. Bennett, who was the operator and owner of the truck.

Your first question is:

Under the above statement of facts is the owner and operator of the truck guilty of obtaining money under false pretenses as set out in Section 4694 R. S. Missouri, 1939, where the check contained the notation, "payment stopped?"

Section 4694 R. S. Missouri, 1939, reads 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 statement or pretense, or by any other means or instrument or device, commonly called 'the confidence game,' 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, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, 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."

The above section specifically states, "obtaining money." Under the facts in your request C. E. Bennett, the owner and operator of the truck at the time he gave the postdated check did not receive any money, for the reason that he had received the money for a purpose at a time previous to the giving of the check. The fact that he gave a postdated check on a bank in which he had no funds, in itself, is not obtaining money under false pretenses. It would be necessary that he made other false representations before a prosecution could be had under Section 4694, supra. It was so held in the case of State v. Richman, 148 S. W. (2d) 796, 1. c. 798, where the court said:

" \* \* \* The Assistant Attorney General who presented the State's case here contended in both printed and oral argument that the check given by defendant was a 'false token' and a 'false writing' within the meaning of Sec. 4095, and that the delivery of the check, without more, constituted a representation that defendant had sufficient money on deposit subject to his check to pay it and that the bank would pay it. Stress is also laid on the word 'designedly' in Sec. 4095 and it is contended, if we understand the State's argument, that by the use of that word the offense denounced by Sec. 4095 is distinguishable from the offense defined in Sec. 4305. So far as that precise point is concerned, we are unable to perceive such distinction. \* \* \* \* \*"

Also, in order to obtain a conviction under Section 4694, supra, it would be necessary that the information contain the element of obtaining the money from the prosecuting witness. It was so held in the case of State v. Loesch, 180 S. W. (2d) 875, l. c. 878, where the court said:

" \* \* \* that the pretenses made were false, and defendant's knowledge of their falsity when made (State v. Janson, 80 Mo. 97; State v. Bradley, 68 Mo. 140); that the parties defrauded relied upon and believed in the truth of the pretenses made by the defendant, and were thus induced to and did part with their property (State v. Kelly, 170 Mo. 151, 70 S. W. 477; State v. Hubbard, 170 Mo. 346, 70 S. W. 823; State v. Vorback, 66 Mo. 168; State v. Evers, 49 Mo. 542); \* \* \* \* \* ."

It is possible that under Section 4695 R. S. Missouri, 1939, the truck owner who owes Anderson could be prosecuted for giving a check on a bank in which he had no funds, even though it was for a past due debt. Section 4695 R. S. Missouri, 1939, 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."

That he could be prosecuted under Section 4695, supra, was held in the case of State v. Richman, 148 S. W. (2d) 796. The fact that the check was postdated does not relieve him from such a prosecution under the above section for a misdemeanor. It was so held in the case of State v. Taylor, 73 S. W. (2d) 378, par. 5, 95 A. L. R. 476, 335 Mo. 460, where the court said:

"The question has been raised whether a postdated check is within the purview of section 4305, R. S. 1929 (Mo. St. Ann. Sec. 4305, p. 2998), inasmuch as the payee of such a check, in accepting it, relies upon the maker's promise to do something in the future rather than upon an assurance, express or implied, that the check is good when given. To this it may be answered, as in the California case (People v. Bercovitz, supra), that there is nothing in the language used having the effect of excepting a case from the operation of the statute merely because the check is postdated. But a more complete answer is to be found in our own statutes. \* \* \*"

Section 4305 above mentioned is now Section 4695, supra. Under this section it is a misdemeanor and the prosecution would be barred one year after the check was issued.

Your second question was:

Whether the giving of the postdated check to Mr. Anderson by the owner and operator of the truck was a compromise of a felony.

Under the facts set out in your request the truck driver did not embezzle the money and check from Anderson, but embezzled it from the truck owner for the reason there was no confidential relation between Anderson and the truck driver. (State v. Block, 62 S. W. (2d) 428)

April 28, 1943

The fact that Mr. Anderson accepts the money would not prevent prosecution of the case, even if it were true that the truck driver embezzled the money and check from Anderson and not from the truck owner. It was so held in the case of State v. Cooper, 85 Mo. 256, l. c. 261, where the court said:

" \* \* \* This instruction fully and fairly, with the other as to reasonable doubt, presented the case to the jury. The fact that Lawrence got his money back after or at the time of the arrest cannot affect this prosecution."

#### CONCLUSION

It is, therefore, the opinion of this department that if a person gives a postdated check drawn on a bank in which he has no account, as the payment of a past due debt, and at the time of the giving of the check, or shortly thereafter, did not obtain any money, he cannot be prosecuted under Section 4694 R. S. Missouri, 1939, for obtaining money under false pretenses.

It is further the opinion of this department that if a person gives a postdated check drawn on a bank in which he has no money, for the payment of a past due debt, he can be prosecuted under Section 4695 R. S. Missouri, 1939, even though payment has been stopped on the check, and may be found guilty of a misdemeanor.

It is further the opinion of this department that if a person accepts money which has been obtained from him by false pretenses it would not be compromising a felony for the reason that the acceptance of the money after, or at the time of, the arrest of the defendant cannot affect the prosecution of the defendant.

APPROVED BY:

Respectfully submitted

ROY McKITTRICK  
Attorney General

W. J. BURKE  
Assistant Attorney General

WJB:HW