

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-04

Date Issued: January 28, 1998

Requested by: Jeanne McLean Behrens, Bottineau County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether the issuance of an insufficient funds check in an amount less than \$100 is a criminal offense under N.D.C.C. § 6-08-16(1) which would authorize a court to issue an arrest warrant.

II.

Whether individual insufficient funds checks in amounts less than \$100 may be combined to authorize the imposition of enhanced penalties under N.D.C.C. § 6-08-16(1).

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that the issuance of an insufficient funds check in an amount less than \$100 is a criminal offense under N.D.C.C. § 6-08-16(1) which would authorize a court to issue an arrest warrant.

II.

It is my further opinion that individual insufficient funds checks in amounts less than \$100 may not be combined to authorize the imposition of enhanced penalties under N.D.C.C. § 6-08-16(1).

- ANALYSES -

I.

House Bill 1238, as adopted by the 1997 Legislative Assembly, amended N.D.C.C. § 6-08-16(1) by establishing graded offenses dependent upon the amount of an insufficient funds check. That section provides:

A person may not, for that person, as the agent or representative of another, or as an officer or member of a firm, company, copartnership, or corporation, make, draw, utter, or deliver any check, draft, or order for the payment of money upon a bank, banker, or depository, if at the time of the making, drawing, uttering, or delivery, or at the time of presentation for payment, if the presentation for payment is made within fourteen days after the original delivery thereof, there are not sufficient funds in or credit with the bank, banker, or depository to meet the check, draft, or order in full upon its presentation. Violation of this subsection is an infraction if the amount of insufficient funds or credit is not more than one hundred dollars, a class B misdemeanor if the amount of insufficient funds or credit is more than one hundred dollars and not more than five hundred dollars, and a class A misdemeanor if the amount of insufficient funds or credit is more than five hundred dollars.

Prior to its amendment, N.D.C.C. § 6-08-16 established a class B misdemeanor penalty for the issuance of an insufficient funds check. Under the 1997 amendments the issuance of an insufficient funds check in an amount not more than \$100 establishes an infraction penalty.

N.D.C.C. § 12.1-32-01(7) imposes a maximum penalty of a \$500 fine for conviction of an infraction offense. That section provides:

Infraction, for which a maximum fine of five hundred dollars may be imposed. Any person convicted of an infraction who has, within one year prior to commission of the infraction of which the person was convicted, been previously convicted of an offense classified as an infraction may be sentenced as though convicted of a class B misdemeanor. If the prosecution contends that the infraction is punishable as a class B misdemeanor, the complaint shall specify that the offense is a misdemeanor.

After considerable study, the 1973 Legislative Assembly adopted a completely revised North Dakota criminal code. Senate Bill 2045 approved in that year departed from the long-established criminal classification system existing in North Dakota since statehood by establishing five classes of criminal offenses; A, B, and C felonies and A and B misdemeanors. 1973 N.D. Sess. Laws ch. 116, § 31.

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The effective date of Senate Bill 2045 was delayed until July 1, 1975, to permit the 1975 Legislative Assembly to continue study of the revised criminal code and to refine the 1973 criminal code revisions.

In 1975, the Legislative Assembly, through Senate Bill 2040, added a sixth class of offense to the criminal code. This class of offense was an infraction which, although it would impose no jail sentence, did establish a maximum fine of \$500 upon conviction of an infraction offense. 1975 N.D. Sess. Laws ch. 116, § 23.

A Hornbook to the North Dakota Criminal Code, 50 N.D.L.R. 639 (1974), discussed the 1973 criminal code revision adopted by Senate Bill 2045 and recognized the interest after the 1973 legislative session to include a sixth class of offense which was less serious than a class B misdemeanor for which a fine, rather than imprisonment, would be appropriate punishment.

Perhaps the most discussed aspect of the criminal code revision was the proposal that the New Code include a penalty for offenses less serious than class B misdemeanors for which a fine, but not imprisonment, would be appropriate punishment. See *Minutes of the Committee on Judiciary "B"*, N. Dak. Legislative Council, Jan. 24-25, 1972 at 9-10, Sept. 21-22, 1972 at 18-20 [hereinafter cited as *Minutes "B"*]. The proposal is not included in the New Code.

The Committee on the Judiciary "A" has the assignment of revising the criminal statutes not changed by S. Bill No. 2045, Forty-third Legislative Assembly of North Dakota (1973), and serving as a forum for revision of that bill. *Minutes of the Committee on Judiciary "A"*, N. Dak. Legislative Council, May 28, 1973, app. A at 1 [hereinafter cited as *Minutes "A"*]. In response to these duties it has been proposed that N.D. Cent. Code § 12.1-32-01 (effective July 1, 1975) be amended to include an additional class of offense. The new addition is labeled infraction and is subject to a fine of up to \$500 or for the second infraction within one year a sentence of up to thirty days as well as the fine. N.D. Cent. Code § 12.1-32-01(6) (proposed by Committee on Judiciary "A"). It is probably appropriate to alter the culpability statutes to include infractions. This was done in earlier drafts of the New Code but was deleted when the concept was excised from the New Code. *Minutes*

"B", *supra* Mar. 2-3, 1972 at 18, Sept. 21-22, 1972 at 18, 20.

A Hornbook to the North Dakota Criminal Code, 50 N.D.L.R. 639, 646 n.2 (1974).

The North Dakota Legislative Council's Interim Committee on Judiciary "A" considered the inclusion of the infraction offense within the criminal code as one of its first orders of business. After welcoming members of the committee, "[t]he Chairman called on the Committee Counsel to review a draft of a proposed 'infraction' offense classification, which classification would not authorize imprisonment as a sentence for conviction of a criminal offense." Minutes of the Committee on Judiciary "A", August 30, 1973 at 1.

In response to the chairman's request, the counsel for the committee discussed the bill draft proposal to establish the infraction offense as a new subsection to N.D.C.C. § 12.1-32-01 and to set forth the procedures for trial of infractions, now codified in N.D.C.C. § 12.1-32-03.1.

The Committee Counsel stated that, in accordance with the definition of "offense" contained in Subsection 21 of Section 12.1-01-04, infractions will be "crimes" in North Dakota. The Committee Counsel said that the staff was suggesting that this be the case in order that there be no question as to the procedure to be used (criminal procedure) in the arrest and trial of an offender charged with an infraction, and to differentiate an infraction from a non-criminal violation under Chapter 39-06.1 of the Century Code, dealing with administrative disposition of traffic offenses.

The Committee Counsel noted that Subsection 2 of Section 12.1-32-03.1 was designed to ensure further that procedures to be followed in dealing with a person arrested, and to be tried, for an infraction are the same as those followed when dealing with an alleged misdemeanor.

Minutes of the Committee on Judiciary "A", August 30, 1973 at 3. Members of the committee specifically discussed whether an infraction should be a criminal or a non-criminal offense.

Representative Murphy inquired as to why the "infraction" type of offenses were not separated out and

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made non-criminal. Judge Pearce stated that he believed it was because the availability of criminal procedure was desirable and should be maintained.

Minutes of the Committee on Judiciary "A", August 30, 1973 at 4.

The committee's recommendations were subsequently adopted by the 1975 Legislative Assembly in Senate Bill 2040.

There is little question that an infraction, as defined in N.D.C.C. § 12.1-32-01(7), is a criminal offense under the North Dakota criminal code. Under N.D.C.C. Title 12.1, "offenses" are classified by the penalties which may be imposed. An infraction is a class of an offense under the criminal code. The term "offense" is defined in N.D.C.C. § 12.1-32-04(20) as "conduct for which a term of imprisonment or a fine is authorized by statute after conviction." N.D.C.C. § 12.1-32-01(7) clearly makes reference to persons who may be "convicted" of an infraction when applying enhanced penalties for subsequent convictions of infraction offenses.

The North Dakota Legislature since 1975 has treated an infraction as a criminal offense.

Prior to establishment of the unified court system, North Dakota had county justices who were authorized to hear, try, and determine criminal offenses. N.D.C.C. § 33-01-08, prior to its repeal in 1981, provided:

The jurisdiction and authority of county justices to prevent the commission of public offenses, to institute searches and seizures, to require the arrest and detention of persons charged with crime, to require and accept bail, and otherwise to act as magistrates in matters of crime, is prescribed by title 29. Each county justice has jurisdiction and authority coextensive with his county to hear, try, and determine all cases of class A misdemeanor, class B misdemeanor, and infraction arising from crimes committed in the county for which he is elected or appointed and every other criminal action in which jurisdiction is conferred specially by law.

N.D.C.C. § 12.1-32-03.1 specifically provides for the application of all statutes and rules relating to criminal procedure in the trial of a person charged with an infraction except trial by jury and the receipt of a court appointed counsel. N.D.C.C. § 12.1-32-03.1(1). All provisions of law and rules of criminal procedure relating to

misdemeanors will apply to infractions including powers of law enforcement officers, the jurisdiction of courts, and periods for commencing action and bringing a case to trial, and the burden of proof. N.D.C.C. § 12.1-32-03.1(2). N.D.C.C. § 12.1-32-03.1(3) specifically makes reference to a "conviction of an infraction" in relation to sentencing alternatives.

In addition to adopting the infraction offense classification as a part of the criminal code, the 1975 Legislative Assembly amended numerous statutory provisions in N.D.C.C. Title 29 relating to criminal procedure by treating misdemeanors and infractions as equivalent offenses in establishing the jurisdiction of municipal judges and small claims court referees (N.D.C.C. § 29-01-15), the compromise of misdemeanors or infractions (N.D.C.C. § 29-01-16), the application of the two-year statute of limitations (N.D.C.C. § 29-04-03), admission to bail (N.D.C.C. §§ 29-05-12, 29-21-21), prosecution on information (N.D.C.C. § 29-09-02), and arrest, warrants for arrest, and bench warrants provisions (N.D.C.C. §§ 29-05-25, 29-06-08, 29-12-05, and 29-16-05).

In addition to statutory provisions recognizing an infraction as a criminal offense, attorneys general and their staff have also consistently concluded that an infraction is a criminal offense under the North Dakota Century Code. Letter from Attorney General Robert O. Wefald to Roy E. Herrud (May 31, 1983); Letter from Assistant Attorney General Richard R. Tessier to E.F. Welch (May 1, 1986); Letter from Attorney General Nicholas J. Spaeth to Darrell Farland (November 21, 1989).

I recognize that the drafters of the proposed federal criminal code upon which N.D.C.C. title 12.1 is based suggested an offense called an "infraction" to be applicable to non-criminal offenses. In the commentary on specific sentences, it is stated:

It should also be noted that the proposal adds a category of offense called "infraction." There is no comparable term in the present Federal vocabulary. The idea, however, is that there should be a category of offenses, largely regulatory in nature, which are not properly crimes and which, for procedural purposes as well as for purposes of labeling and punishment, are not treated as crimes. Such offenses now abound in number, and are commonly characterized by the imposition of absolute or strict liability.

II Working Papers of the Nat. Comm. on Reform of Fed. Crim. Laws, pp 1302-1303 (1970). Reference is made, however, in a footnote to that commentary, to proposed section 1006 of the proposed federal criminal code as examples of the types of offenses which would be subject to the infraction penalty.

A review of proposed section 1006 discloses that the offenses with which the drafters of the proposed criminal code were concerned related to federal regulatory offenses which historically involved civil penalties for their violation, which do not involve conviction of an offense, and which do not contain the usual safeguards that surround a criminal prosecution. These regulatory offenses generally apply to particular groups rather than the general public, have detailed, specific, and flexible controls established by the regulating agency, and are primarily concerned with health, safety, inspection practices, licensing, and the maintenance of records and filing of reports to establish compliance with the specific regulatory scheme. The recommendation of the drafters of the proposed criminal code was to remove all offenses which have the characteristic of regulatory offenses from the criminal code. I Working Papers of the Nat. Comm. on Reform of Fed. Crim. Laws, pp 403-417 (1970).

In adopting the infraction offense classification in N.D.C.C. § 12.1-32-01, the 1975 Legislative Assembly significantly departed from the drafter's recommendations of the proposed federal criminal code. The North Dakota infraction offense classification is applicable to offenses which would not be considered to be "regulatory offenses" as described in the proposed criminal code which would warrant civil, rather than criminal, sanctions. Most significantly, the 1975 Legislative Assembly, in enacting N.D.C.C. § 12.1-32-01(6) (now N.D.C.C. § 12.1-32-01(7)) specifically made reference to the fact of the offender being "convicted of an offense classified as an infraction." Unlike civil administrative sanctions and penalties, an infraction under N.D.C.C. § 12.1-32-01 is subject to many of the same constitutional and procedural requirements as a criminal offense. As noted previously, the person charged with an infraction is not entitled to be furnished counsel at public expense nor to have a trial by jury unless that person would be subject to a sentence of imprisonment as a repeat offender. N.D.C.C. § 12.1-32-03.1(2) specifically applies all criminal procedure laws and rules relating to misdemeanors to infractions which includes the burden of proof; i.e., proof beyond a reasonable doubt. N.D.C.C. § 12.1-32-03.1(3) again makes specific reference to a "conviction of an infraction" which would initiate the sentencing procedures. The specific statutory provisions adopted by the 1975 Legislative

Assembly when creating the infraction offense classification discloses a clear and unambiguous intent that an infraction is a criminal offense which will permit the imposition of a fine or sentencing alternatives other than imprisonment for a first conviction.

N.D.C.C. § 6-08-16(1) classifies the issuance of an insufficient funds check in an amount not to exceed \$100 to be an infraction offense. North Dakota Rule of Criminal Procedure 4(a) authorizes the issuance of a warrant for the arrest of a defendant upon probable cause to believe that a criminal offense has been committed by that defendant. An infraction as defined by N.D.C.C. § 12.1-32-01(7) is a criminal offense which will authorize the issuance of an arrest warrant upon the appropriate probable cause finding.

## II.

House Bill 1238 as adopted by the 1997 Legislative Assembly amended N.D.C.C. § 6-08-16(1) to grade an insufficient funds check offense as either an infraction, a class B misdemeanor, or a class A misdemeanor. The grading of the offense is dependent upon the amount of insufficient funds or credit. Issuance of a check, draft, or order with insufficient funds or credit of not more than \$100 is an infraction, with insufficient funds or credit of more than \$100 but not more than \$500 is a class B misdemeanor, and with insufficient funds or credit of more than \$500 is a class A misdemeanor offense. Neither House Bill 1238 nor N.D.C.C. § 6-08-16 contain any provision for aggregating insufficient funds checks to reach a required monetary threshold to invoke a higher criminal penalty and offense.

The North Dakota Legislature has authorized the aggregation of individual criminal acts involving monetary loss to permit the charging of an offense with a greater penalty than could otherwise be charged when the individual acts were charged. N.D.C.C. § 12.1-23-05(6) authorizes the charging of thefts committed pursuant to one scheme or course of conduct as one offense and the amounts proved to have been stolen may be aggregated in determining the grade of the offense. In addition, in the insufficient funds check area, N.D.C.C. § 6-08-16.2(4) imposes a class C felony offense when a person willfully issues at least two instruments within a 90 day period if the "total amount of the instruments was for at least \$500" and other preconditions of that statute are met.

Had the 1997 Legislature intended the aggregation of amounts of individual insufficient funds checks to permit the charging of a greater offense under N.D.C.C. § 6-08-16(1), provisions equivalent to



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N.D.C.C. § 12.1-23-05(6) or 6-08-16.2(4) could have been adopted. They were not.

Penal statutes are to be construed most strictly against the government. State v. Hogie, 424 N.W.2d 630 (N.D. 1988). Absent a clear legislative directive that the amounts of each individual insufficient funds check be totaled or aggregated to determine the offense classification threshold, the classification of the offense as an infraction or as a class A or B misdemeanor under N.D.C.C. § 6-08-16(1) will be dependent upon the amount of the individual check, draft, or order for which there was not sufficient funds to permit its honor upon its presentation.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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ATTORNEY GENERAL

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