

OPINION
62-42

July 16, 1962 (OPINION)

CHECKS

RE: Nonsufficient Funds - Intent When Indebtedness Past Due

Your letter of June 29, 1962, has been received. You state that since the effective date of the amendment of section 6-08-16 of the North Dakota Century Code by the 1961 Legislature your office has adopted the practice of having complaints signed and filed with the state's attorney in certain cases where a taxpayer who was delinquent in payment of income taxes or sales taxes issued an NSF check in payment of those taxes.

Mr. John B. Hart, State's Attorney, Rolette County, Rolla, North Dakota, has presented the following question.

Does the issuance of a check in payment of a past due indebtedness, including past due taxes constitute a violation of section 6-08-16 of the North Dakota Century Code, as amended, if at the time of such issuance, or at the time of presentation of the check, the person issuing same does not have sufficient funds in or credit with the bank to meet such check in full upon its presentation?

Mr. Hart contends that the issuance of a worthless check in payment of a past due indebtedness or in payment of a tax does not constitute a violation of section 6-08-16, N.D.C.C., as amended, because nothing of value is obtained by such attempted payments nor is the payee deprived of anything of value. You wish our opinion on this matter.

Section 6-08-16 of the North Dakota Century Code, as amended, provides in part as follows:

1. Any person for himself or as the agent or representative of another, or as an officer or member of a firm, company, copartnership, or corporation makes or draws or utters or delivers any check, draft, or order for the payment of money upon a bank, banker, or depository, and at the time of such making, drawing, uttering or delivery, or at the time of presentation for payment if made within one week after the original delivery thereof, has not sufficient funds in or credit with such bank, banker, or depository to meet such check, draft, or order in full upon its presentation, shall be punished by a fine of not less than ten dollars, and not more than one hundred dollars, or by imprisonment in the county jail for not more than thirty days, or by both such fine and imprisonment. The word 'credit' as used in this section shall mean an arrangement or understanding with the bank, banker, or depository for the payment of such check, draft, or order. The making of a postdated check knowingly received as such, or of a check

issued under an agreement with the payee that the same would not be presented for payment for a time specified, shall not constitute a violation of this section. This section shall not be construed to nullify or supersede any of the provisions of chapter 12-38."

Chapter 12-38 of the North Dakota Century Code involves the obtaining of property under false pretenses.

Upon considering the bad check laws of other jurisdictions, I find that the statutes of the various states can be grouped as follows:

1. Statutes prohibiting the issuance of a check, with the intent to defraud, without sufficient funds to meet the check upon its presentation for payment.
2. Statutes prohibiting the issuance of a check without sufficient funds to meet it upon its presentation for payment and thereby obtain money, merchandise, property or other thing of value.
3. Statutes prohibiting the issuance of a check without sufficient funds to meet it upon presentation for payment, with no reference to an intent to defraud or the accomplishment of the fraud.

The majority of the courts in those states having statutes similar to groups one and two or a combination of the two hold that the issuance of a worthless check in payment of a past due indebtedness does not constitute a violation of those statutes under the theory that, as the giving of the check is not simultaneous with the obtaining of something of value, it does not constitute fraud or that the intent to defraud is negated if the person receiving the check was not deprived of something of value at the time the check was received.

In this connection, see 35 C.J.S Section 21, pages 828-837; 59 A.L.R. 2d. 1159-1164; Moore v. People (Colo.), 235 P. 2d. 798; Berry v. State (Ga.), 111 S.E. 669; Commonwealth v. Hammock (Ky.), 250 S.W. 85.

The courts in construing the third type of statute hold that the intent to defraud or the accomplishment of a fraud are not elements of the statutory offense of issuing a check without sufficient funds to pay same, and the issuance of a worthless check for the payment of a past due debt does constitute a violation of the statute.

The Supreme Court of Kansas, in State v. Avery, 207 p. 837, 839, in construing a statute of this type, which is very similar to section 6-08-16, said:

The purpose of the statute was to discourage overdrafts and resulting bad banking (Saylor v. Bank, 99 Kan. 515, 518, 163 Pac. 454) to stop the practice of 'check kiting,' and generally to avert the mischief to trade, commerce and banking which the circulation of worthless checks inflicts. Although the statute tends to suppress fraud committed by the worthless check method, the evils referred to are all quite distinct from those

consequent on fraud, and the statute is to be regarded as creating a new and distinct offense."

In addition to the above statute, the State of Kansas also has a statute relating to the obtaining of money or property by false personation which is similar to section 12-38-04 of the North Dakota Century Code.

In this connection, also see State v. Bean, 175 Kan. 814, 267 P.2d. 509, cases cited therein; 35 C.J.S. Section 21(c), page 837 and State v. Edwards, 190 N.C. 322, 130 S.E. 10.

In amending section 6-08-16, the Legislature in 1961 deleted from section 6-08-16 the reference to prima facie evidence of the intent to defraud, and the amended section does not make an intent to defraud an element of the statutory offense. The amended section, however specifically provides that the section does not nullify or supersede any of the provisions of chapter 12-38.

Section 12-38-04 of the North Dakota Century Code involves the obtaining of money or property under false pretenses and as an element of the offense an intent to cheat or defraud another must exist.

It, therefore, appears that separate and distinct offense are contemplated by section 6-08-16, as amended, and chapter 12-38, although violations of both may occur simultaneously; that is, if a person issues a worthless check he has violated section 6-08-16, and if he does so with an intent to defraud, he has also violated section 12-38-04.

Considering the above, it further appears that in amending section 6-08-16, the Legislature contemplated that the mere making, drawing, uttering or delivering of a check without sufficient funds in or credit with the drawee at the time of such making or at the time of presentation for payment constitutes a violation of the section without reference to an intent to defraud or the actual accomplishment of a fraud, and consequently it is our opinion that the person who makes, draws, utters or delivers a check of this nature in payment of a past due indebtedness or tax has violated section 6-08-16 and is subject to the penalty provided therein.

LESLIE R. BURGUM

Attorney General