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STATE OF DELAWARE
THE COURTS OF THE JUSTICES OF THE PEACE
820 NORTH FRENCH STREET, 11TH FLOOR
WILMINGTON, DELAWARE 19801

NORMAN A. BARRON
CHIEF MAGISTRATE

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LEGAL MEMORANDUM 80-18

TO: ALL JUSTICES OF THE PEACE
STATE OF DELAWARE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: SEPTEMBER 4, 1980

RE: BAD CHECK CASES

As you are well aware, Justices of the Peace have jurisdiction to hear, try and finally determine the criminal charge of Issuing a bad check. 11 Del.C., §2702(16). The crime of Issuing a bad check is set forth in 11 Del.C., §900 and reads as follows:

> "§900. Issuing a bad check; class A misdemeanor.
>
> A person is guilty of issuing a bad check when he issues or passes a check knowing that it will not be honored by the drawee. For the purpose of this section, as well as in any prosecution for theft committed by means of a bad check, it is prima facie evidence of knowledge that the check (other than a postdated check) would not be honored that:
>
> (1) The issuer had no account with the drawee at the time the check was issued; or
>
> (2) Payment was refused by the drawee upon presentation because the issuer had insufficient funds or credit, and the issuer failed to make good within 10 days after receiving notice of that refusal.

Issuing a bad check is a class
A misdemeanor."

The trial of an Issuing bad check charge is a little more difficult than the normal case because of the need for documentary evidence to support the charge[1]. Before getting into an analysis of such a trial, perhaps it would be useful to define some of the words used in the statute. To do so, please refer to the below reproduction of check number 450.

DAVID W. LEE
13 Vine Street
Wilmington, DE 19809

450

Sept. 2, 19[illegible]

Pay to the order of Stop & Shop Food, Inc. (3) $ 1.0.10

Sixty and [illegible]/100 Dollars

PEOPLES BANK (2)
& Trust Company

David W. Lee (1)

:03100537:0450 2-057-304 0000001620

1. David W. Lee is the DRAWER. He is the person drawing the check and addressing it to the drawee for payment.
2. Peoples Bank is the DRAWEE. The bank is the entity to whom the check is addressed and who is requested to pay the amount of money mentioned, ($60.00) to the payee.
3. Stop and Shop Food, Inc. is the PAYEE.

11 Del.C., §900 speaks in terms of "issuing" and "passing" checks. These words are defined under 11 Del.C., §901 as follows:

"§901. Definition of 'issues' and 'passes'.

[1]This Legal Memorandum is issued because of the large number of inquiries received regarding the trial of a issuing bad check case. It is hoped that this Memorandum will answer most of the questions raised.

> (a) 'Issues.' A person issues a check when, as drawer thereof or as a person who signs a check as drawer in a representative capacity or as agent of the person whose name appears thereon as the principal drawer or obligor, he delivers it or causes it to be delivered to a person who thereby acquires a right against the drawer with respect to the check. One who draws a check with intent that it be so delivered is deemed to have issued it if the delivery occurs.
>
> (b) 'Passes.' A person passes a check when, being a payee, holder, or bearer of a check which previously has been or purports to have been drawn and issued by another, he delivers it, for a purpose other than collection to a third person who thereby acquires a right with respect thereto."

Referring back to the reproduction of check number 450, we see that David W. Lee, the drawer, becomes the issuer of check number 450 when he delivers said check to Stop and Shop Food, Inc.. If that check is bad, that is, if the check is not going to be honored by the drawee, Peoples Bank, and the drawer, David W. Lee, knew it was not going to be honored by the bank, then David W. Lee is guilty of Issuing a bad check.

Let's suppose Stop and Shop owes Alex Smith $60.00. If, on the back of check number 450 Stop and Shop writes "Pay to the order of Alex Smith" and endorses it thereunder "Stop and Shop Food, Inc." and delivers said check to Alex Smith, Stop and Shop passed the check upon delivery to Mr. Smith. If before delivery, Stop and Shop had presented the check to the drawee, Peoples Bank, and if the bank in turn had informed Stop and Shop that they would not honor the check because of no account or insufficient funds, and Stop and Shop then delivers the check to Alex Smith, for purposes

other than for collection[2], Stop and Shop would be guilty of passing a bad check.

The usual case which comes before you as Judges involves a person who issues rather than passes a bad check so we will now concentrate on that particular charge. To paraphase section 900 of Title 11, a person is guilty of Issuing a bad check when he delivers, as drawer, a check to a payee knowing that the check will not be honored by the drawee. We thus see that there are two (2) elements of the offense:

(1) The defendant drawer delivers a check to a payee;

(2) knowing that the check will not be honored by the drawee.

The first element can be proven easily by the prosecution simply by introducing through the testimony of the payee evidence that the defendant delivered a check to him. The payee should have the check and should offer same into evidence. At this point we must digress for a moment and look at the Delaware Uniform Rules of Evidence (D.R.E.).

Rule 1002 of the D.R.E. states as follows:

> "Rule 1002. Requirement Of Original.
>
> To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by statute."

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[2]The collection exception is based upon common sense. If Alex Smith was a collection agent, Stop and Shop might well sell the check to Mr. Smith at a discount, let's say $30.00. Both parties would know the check was bad. Mr. Smith would then attempt to collect from the drawer, Mr. Lee, and if successful would recover a $30.00 profit.

Rule 1002 sets forth the so-called Best Evidence Rule which is to the effect that "in proving the terms of a writing, where such terms are material, the original document must be produced . . ." McCormick on Evidence, §196; 4 Wigmore on Evidence, 3rd Ed., §1174. Day v. State, Del.Supr., 297 A.2d 50 (1972).

Assuming that the Best Evidence Rule applies in a prosecution for Issuing a bad check, one must remember that the rule states a preference for original documents but does not foreclose use of secondary evidence if a proper foundation has been laid. Cooper v. State, Md.App., 397 A.2d 245 (1979). The Best Evidence Rule comes into play only when the terms of a writing are being established and an attempt is made to offer secondary evidence; the rule is not applicable when a witness testifies from personal knowledge of the matter, even though the same information is contained in a writing. D'Angelo v. United States, 456 F.Supp. 127 (D.Del. 1978). In any event, in accordance with Rule 1003 of the D.R.E., "A duplicate[3] is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Thus, in the case of United States v. Gerhart, 538 F.2d 807 (CCA 8th, 1976), the Court ruled admissible a photocopy of a photocopy of a bank check in a criminal proseuction since the defendant raised no genuine issue as to authenticity of the original and no unfairness would result.

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[3] "Duplicate" is defined under Rule 1001(4) of the D.R.E. as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction or by other equivalent techniques which accurately reproduce the original."

From the above, I conclude that although the original is preferable, you should allow a duplicate check, (for example, a xerox copy of the original) into evidence in a issuing bad check case when:

1) The party offering the check offers testimony that the duplicate appears similar in all respects to the original; that is, that the duplicate has added or deleted nothing from what is contained on the original; and

2) No real or genuine question is raised as to the authenticity of the original.

Keep in mind, also, that if no objection is made to the introduction of a duplicate, you need not rule on the issue. The duplicate is simply admitted into evidence without objection.

Back to the prosecution of the case. The original check or a duplicate of the original is introduced into evidence by the payee. Remember that often the payee is alone in Court. No lawyer stands beside him. He is probably not trained at all in the law or in prosecuting bad check cases. He may have the check or a duplicate thereof with him but doesn't know that it should be offered into evidence. Recognizing that the purposes of the D.R.E. is to promote the growth and development of the law of evidence "to the end that the truth may be ascertained and proceedings justly determined", Rule 102 of the D.R.E., it would be perfectly proper, in my view, to interrogate the witness thusly:

Court: "Do you have the check with you?"

Payee: "Yes, your Honor."

Court: "Do you not want to present it into evidence so that the Court may consider it?"

Payee: "Yes, I guess I do, Judge."

Court: "Very well. Please hand to me the check and I will mark it State's Exhibit No. 1."

Recall that you have the discretion to interrogate any witness. Rule 614 of the D.R.E.; Legal Memorandum 80-1 dated June 24, 1980. Once the check or a duplicate thereof has been introduced and once the payee has identified the defendant and has testified that the defendant delivered the check in question to the payee, the first element has been proven, that is, that the defendant drawer delivered a check to the payee. Now we move on to the second element, to wit: that the defendant did so knowing that the check would not be honored.

A person "knows" that a check will not be honored when he is aware that such circumstances exist. 11 Del.C., §231(b) (1). And, when acting knowingly suffices to establish an element of an offense, the element is also established if a person acts intentionally. 11 Del.C., §253.

It is difficult to ascertain what goes on in a person's mind. Therefore, you are allowed to look at all of the surrounding circumstacnes in determining whether the defendant had the requisite knowledge. Superior Court standard jury instruction number 4I states, in effect, that you are permitted to draw an inference, or in other words to reach a conclusion, about a defendant's state of mind from the facts and circumstances surrounding the act the defendant is alleged to have done. In reaching this conclusion, you may consider whether a reasonable man in the defendant's circumstances would have had or lacked the requisite knowledge. You should, however, keep in mind at all

times that it is the defendant's state of mind which is at issue, and in order to convict a defendant you are required to find beyond a reasonable doubt that he, in fact, had the knowledge required for a finding of guilt. See: 11 Del.C., §307(a).

In addition to the above, there is prima facie evidence of knowledge that the check (other than a postdated check)[4] would not be honored when:

"1. The issuer had no account with the drawee at the time the check was issued; or

2. Payment was refused by the drawee upon presentation because the issuer had insufficient funds or credit, and the issuer failed to make good within 10 days after receiving notice of that refusal." 11 Del.C., §900.

Prima facie evidence of knowledge means credible evidence which tends to prove knowledge. It has been said that prima facie evidence is evidence which standing alone is sufficient to convict the defendant of the offense with which he is charged, but such evidence is not necessarily conclusive. Prima facie evidence may not only be rebutted by contradictory evidence, but also by evidence so explaining the conditions and circumstances under which the alleged unlawful act was committed as to convince the trier of fact that the person charged was not guilty of violating the law. State v. Dill, Del.Ct.Gen.Sess. 152 A. 424 (1930); State v. Hemmingway, Del.Ct. Oyer & Terminer, 156 A. 305 (1931).

If the check was not honored by the bank because the issuer had no account with the bank at the time the check was issued,

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[4] A postdated check is one in which the date given on the check is later than the true date. If it is September 2, 1980, and the check is dated September 5, 1980, the check is postdated. Until the date arrives, there can be no violation of §900 with regard to a postdated check.

the check will most likely be stamped "ACCOUNT CLOSED". Once such a check or a duplicate thereof is introduced into evidence, prima facie evidence of knowledge exists that the check (other than a postdated check) would not be honored. Note that for this rule to be in effect, the lack of an account with the bank must exist when the check was issued; that is, when the drawer delivered the check to the payee. If the drawer delivers a check to the payee on September 2, 1980 at a time when the drawer had sufficient funds in his account, and two days later closes his account with the drawee, there is not in such a case prima facie evidence of knowledge that the check would not be honored. In such a case, the payee would be better off prosecuting his case under a theft or theft-related statute. Say the plaintiff loans the defendant $100.00. The defendant, in repayment of the loan, issues a check to the plaintiff in the amount of $100.00. The defendant drawer closed his account with the drawee two (2) days later. Thereafter, the plaintiff payee presents the check for payment but payment is refused because the defendant drawer's account had been closed. It can be said that the defendant obtained property of the plaintiff, (the $100.00) and intended to appropriate it by intentionally creating the impression at the time the loan was made that he would repay to the plaintiff the $100.00 when that impression was false. The defendant would be guilty of Theft in violation of 11 Del.C., §841[5]. From the above, it is important to note the time that the account in question was closed in relation to the time in which the check was issued. Unless the

[5]The same kind if situation would exist if the check was not honored for reasons other than closed account or insufficient funds. Unauthorized signature would be one such example.

check was presented for payment on the same day as its issuance, it will normally be necessary for the payee, in order to take advantage of the prima facie evidence of knowledge provision, to have a bank employee present testimony as to the date of the closing of the account. You as the Judge can avoid problems in this regard if you review with the payee at the time he seeks a warrant exactly what occurred with regard to the check in question. If the payee states that the account was closed, ask the payee when the account was closed. If the payee doesn't know, before you sign a warrant for Issuing a bad check, have the payee find out from the bank. If the account was closed at the time the check was issued, you may authorize the warrant and tell the payee to be sure that the appropriate bank official is subpoenaed for trial. If the account was not closed at the time the check was issued, you may then consider a theft-related warrant. In this way, you don't have to go through an entire trial of Issuing a bad check only to dismiss the charge on the technicality that the account wasn't closed at the time the check was issued or that there was no evidence that the account was closed when the check was issued. Such a disposition no doubt frustrates the payee-victim of the alleged crime and gives him an unfavorable impression of justice in our Courts. The problem is easily remedied by looking closer at the case at the time the warrant is sought.

If the check is not honored by the bank because of insufficient funds, to take advantage of the prima facie evidence of knowledge provision, the payee must establish to your satisfaction that he gave notice to the issuer and that the issuer failed to

make good within 10 days after receiving notice that the drawee refused payment because of insufficient funds. The best method of making such a showing is for the payee to present into evidence a receipt for certified mail along with a copy of a letter addressed to the issuer at his correct address. The letter should state that the check in question was refused by the applicable bank because the issuer had insufficient funds in the particular account, and it should demand that the issuer make good the amount of the check within 10 days of receipt of the letter. The receipt for certified mail should contain a postmark which shows the date of delivery. The 10 day period should run from the date of the postmark. If the issuer failed to make good to the payee the amount of the check within the 10 day period, then the prima facie evidence of knowledge provision applies.

Other methods of showing notice are also admissible though they should probably be accorded less weight than the method referred to above. Thus, the payee can simply testify that he called the defendant and told him of the insufficient funds and that the defendant should make the check good within 10 days or a warrant will be sought. Any objection to such testimony would go to its weight rather than to its admissibility. You would have to decide, in such a case, whether the State, (the payee) has proven its case, including that the defendant knew that the check would not be honored, beyond a reasonable doubt. (Review the legal concepts regarding criminal cases as set forth in Legal Memorandum 80-15, dated August 20, 1980.)

Should you conclude, after reviewing all of the evidence in the case, that the defendant is guilty beyond a reasonable doubt, than you must find the defendant guilty. If you entertain such a doubt, then you must give the defendant the benefit of that doubt by finding the defendant not guilty.

Should you find the defendant to be guilty of the charge, you must be aware of 11 Del.C., §4206(a) which states as follows:

> "(a) The sentence for a class A misdemeanor shall be fixed by the court and shall not exceed 2 years imprisonment and such fine or other conditions as the court may order; provided, however, that the court shall require a person convicted of issuing a worthless check under §900 of this title to make restitution to the person to whom the worthless check was issued." (Emphasis added.)

You have no discretion here. You must, pursuant to the above statute, order restitution as a part of any sentence imposed under 11 Del.C., §900. The better practice is to order the defendant to make restitution directly to the victim by a time certain and have the victim report to the Court whether or not restitution has been made as of that date. If restitution is made as a condition to a term of probation, non-payment of restitution would constitute a violation of that probation for which action by the Court may be taken pursuant to 11 Del.C., §4334.

NAB:pm

cc: The Honorable Daniel L. Herrmann
The Honorable William Marvel
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Richard S. Gebelein
The Honorable Lawrence Sullivan
The Honorable William J. O'Rourke

The Honorable Richard McMahon, State Prosecutor
Harold Schmittinger, Esquire, Pres., Delaware State Bar Assoc.
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