



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

March 14, 1996

The Honorable Don Henderson
Chair
Senate Jurisprudence Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711-2068

Letter Opinion No. LO96-031

Re: Whether a constable is authorized
to collect on a bad check and related
questions (ID# 37356)

Dear Senator Henderson:

You ask about the legality of a scheme where "constables 'collect' on bad checks, fines, and fees" when serving arrest warrants without taking the subject of the warrant before a magistrate. Penal Code section 32.41 makes it a class C misdemeanor for a person to issue a check knowing he has insufficient funds on deposit with the drawee to cover it.¹ Subsection (e) provides that a person charged with an offense under the section may make "restitution" for a bad check "through the prosecutor's office if collection and processing were initiated through that office" or "[i]n other cases . . . with the approval of the court in which the offense is filed . . . through the court." Additionally, article 102.007 of the Code of Criminal Procedure authorizes a county attorney, district attorney, or criminal district attorney to collect from the issuer a fee in stated amounts for collecting and processing a bad check. *See also* V.T.C.S art. 9022 (providing for processing fee collectible by holder of dishonored check).

We assume that when you ask about a constable's "collecting" on bad checks, you mean collecting "restitution" from the check issuer, as distinct from the processing fee and the fine for the offense. Attorney General Opinion MW-222 concluded that a justice of the peace had no authority to collect restitution on a dishonored check, MW-222 (1980 at 2), in light of the provisions now in Government Code section 614.041, which read in relevant part:

(a) A peace officer commits an offense if the officer:

(1) accepts for collection or undertakes the collection of a claim for debt for another, unless the officer acts under a law that prescribes the duties of the officer

¹Subsection (g) of section 32.41 provides that the offense under that section is not a lesser included offense of an offense under sections 31.03 (theft) and 31.04 (theft of service). *See also* Penal Code § 31.06 (presumptions of requisite knowledge of issuer of bad check for property or services).

(b) An offense under Subsection (a) is a misdemeanor punishable by a fine of not less than \$200 or more than \$500.

(c) In addition to the fine, the peace officer may be removed from office.

Attorney General Opinion MW-222 also cited in support of its conclusion Attorney General Opinion C-190 which had similarly found that a sheriff was not authorized to collect on bad checks given the provisions now in Government Code section 614.041. *Id.* at 1; *see* Attorney General Opinion C-190 (1963) at 4.

Thus Attorney General Opinions C-190 and MW-222 found that, unless a law prescribed such duty for him, a peace officer's collection of restitution on a bad check was a "collection of a claim for debt for another" within the proscription of Government Code 614.041(a)(1). The constables about whom you ask here are peace officers. Code Crim. Proc. art. 2.12(2). We find no provision of law "prescribing" as a duty of a constable collection of restitution for bad checks. Again, Penal Code section 32.41 expressly authorizes restitution through the prosecutor's office if that office initiated collection and processing of the check or otherwise through the court "in which the offense is filed." We conclude that a constable is not authorized to collect restitution on bad checks.

Since we understand from the scenario you present that the constable, in appearing to serve the warrant, will execute it and take the bad check defendant before a magistrate unless he is able to obtain restitution as well as the fine for the offense and the processing fee, our conclusion that he may not collect the restitution moots the questions as to his authority to collect the fine and fee--he will not be collecting the fine and fee by themselves in such circumstances but rather will be taking the defendant before a magistrate. Therefore we do not address your questions as to his authority to collect the fine and fee without taking the defendant before a magistrate.

You also ask whether the practice you describe exposes anyone or any entity to civil or criminal liability. Again we have concluded that the constable's collection of restitution would violate section 614.041, Government Code. Subsection (b) of section 614.041, set out above, provides that an offense under that section is a misdemeanor punishable by a fine of not less than \$200 or more than \$500. Also, subsection (c) makes violation of the section grounds for removal from office. However, we do not attempt to speculate as to what other civil or criminal liability the practices in question may give rise to since such liability would ultimately depend on the facts of the case. *See, e.g.,* Attorney General Opinions JM-1276 (1990) at 1, JM-1224 (1990) at 15 (questions of potential liability generally too speculative and fact-bound to be resolved in opinion process).²

²*But see generally* Attorney General Opinion V-109 (1947) (county liability for repayment of fine improperly imposed).

Finally you ask: "can the problem be alleviated by styling the warrant to say instead that the peace officer may collect the money and then turn it over to the county treasurer without need of magistration?" We limit our discussion here to the "problem" that the constable is not authorized to collect restitution for a bad check, and that Government Code section 614.041 subjects him to criminal liability as well as removal from office for doing so.

We find no authority for issuance of such a warrant. *See* Code Crim. Proc. chs. 15 (arrest warrant), 18 (search warrant). Since we have concluded above that the constable is without authority under state law to engage in the practice in question, and that state law subjects him to penalties for doing so, we do not believe that styling the warrant so as to purportedly authorize this practice can alleviate the problem. Such a warrant would be inconsistent with state law and thus ineffective to authorize the practice or relieve the constable from the liability prescribed by state law for engaging in it.

S U M M A R Y

A constable is not authorized to collect restitution for a bad check. Government Code section 614.041 subjects him to a criminal penalty and possible removal for doing so. A warrant styled so as to purportedly authorize the practice is ineffective to authorize it or to relieve the constable from liability for engaging in it.

Yours very truly,



Sarah J. Shirley
Chair, Opinion Committee