

Opinion No. 51-5391

July 25, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Richard F. Rowley District Attorney Ninth Judicial District Clovis, New Mexico

{*81} In reply to your letter of May 29 requesting an opinion as to the venue in a case in question and as to whether or not our check statute is constitutional under the statement of facts as presented in your letter.

First, I wish to say that we have been flooded with requests for opinions and that has been the cause of delay in answering your letter. I have also given this request of yours considerable study.

I agree with you, and it is my opinion, that the venue in this particular case is in Lea County where the check was issued. I base my reasoning on § 42-801, N.M.S.A., 1941 Compilation, which has not been repealed or amended and reads as follows:

"Proper county for trial -- Death in this state from injury inflicted in another state. -- All trials of criminal offenses shall be had in the county in which they were committed: Provided, when an offense shall be committed on the boundary of two (2) counties, or within five hundred (500) yards of such boundary, or where the persons committing such offense shall be on one side, and the injury be done on the other side of the boundary, a trial may be had in either of such counties: Provided, further, that if any mortal wound shall be given, or any poison shall be administered, or any means shall be employed in an county by which any human being shall be killed, who shall die thereof in another county, the trial of such offense may be had in either county: Provided, also, that if any such wound or mortal injury shall have been inflicted in another state on any human being, who shall die thereof in this state, a trial for such offense may be had in the county in which the death happened."

According to your letter, the maker of this check purchased some merchandise from the Mauldin Lumber Company, in Clovis, and Mauldin delivered a load of lumber to the purchaser in Lea County. The original check was paid to Mauldin by the maker in Lea County. Later, when the attention of the maker was called to the fact that the check was no good, another one was sent from Lea County, through the mail, to Mauldin at Clovis. There is no question but what the crime of issuing a worthless check was done in Lea County. Therefore, in view of the above quoted statute, the venue in this case is in Lea County where the check was issued by the maker.

§ 41-2108, N.M.S.A., 1941 Compilation, reads as follows:

"Drawing checks with insufficient funds. -- It shall be unlawful for any person for himself or as the agent or representative of another or as an officer of a corporation or

partnership to draw, make, utter, issue or deliver to another any check, draft, or order on any bank or depository for the payment of money or its equivalent, knowing, at the time of the making, drawing, uttering, or delivery of any such check, draft, or order as aforesaid that he has not sufficient funds on deposit in or credit with such bank or depository with which to pay such check, draft, or order upon presentation."

§ 41-2109, N.M.S.A., 1941 Compilation, makes the drawing of checks on insufficient funds a felony.

In the case of *State v. Meeks*, 30 Ariz. 436, 247 P. 1089, the Court in that case held:

{*82} "Where a statute provides that one who gives a check with the intent to defraud, knowing he has no funds to meet it when presented, may be punished, it is not unconstitutional under the provision that 'there shall be no imprisonment for debt, except in cases of fraud,' since the offense defined is based upon fraud."

In the case of *State v. Yarboro*, 194 N.C. 498, 140 S.E. 216, the court held:

"A statute providing that 'it shall be unlawful for any person -- to draw, make, utter, or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing, and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation,' was not in conflict with a constitutional provision prohibiting imprisonment for debt except in cases of fraud. The position taken by the court was that, while the statute did not expressly make use of the word 'fraud' in stating the elements of the offense of giving a worthless check, the use of such word was not necessary to define a fraudulent act, and that there would be fraud in fact within the meaning of the term as used in the constitutional provision, in the issue of a check under the circumstances prescribed in the statute."

Also, in the case of *People v. Russell*, 156 Cal. 450, 105 Pac. 416, the Court said:

"The intent of the legislature evidently was to make it a crime to draw and utter a draft or check upon a bank or depository for the payment of money, for the reason that such drafts or checks are not usually drawn unless the drawer has funds in such bank or with such depository to meet the check or draft. Such check or draft, drawn upon such banker or depository for the payment of money, is regarded somewhat in the nature of a circulating medium. It is generally supposed, when the check is drawn upon a bank, that the drawer has funds in such bank to meet it. It was to prevent the fraudulent making and uttering of such drafts or checks that the section was enacted. The act applies to the whole class of persons who draw and utter checks or drafts with intent to defraud, upon the persons named in the section. It is uniform, and applies alike to all persons who wilfully violate it. The defendant cannot complain because persons who draw drafts or checks upon persons other than those named in the statute are not made subject to its provisions."

From the facts stated in your letter, this check was not postdated. I have not found any New Mexico cases directly in point but in view of the above, it is my opinion that this statute is constitutional as all knowledge of the maker of the check, when he issued the check, that he had no funds can be construed as being fraudulent in itself even though the statute does not mention fraud in any particular.

Trusting that this fully answers your inquiry, I remain