Opinion No. 65-197

October 12, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

TO: Mr. E. H. Williams, District Attorney, County Court House, Las Cruces, New Mexico

QUESTION

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May the written notice described in Section 40-49-1, et seq., N.M.S.A., 1953 Compilation (P.S.) that a check returned unpaid for lack of funds or credit contain a statement that the District Attorney has been contacted and that criminal proceedings will be instituted unless the check is paid within said period of time.

CONCLUSION

No.

OPINION

*{*321}* ANALYSIS

The Worthless Check Act is found in Section 40-49-1, N.M.S.A., 1953 Compilation, et seq and 40-49-1, N.M.S.A., 1953 Compilation (P.S.), et seq. In general the act makes it a crime to issue, in exchange for anything of value, with intent to defraud, any check, draft or order knowing that the person issuing such has insufficient funds or credit with the bank or depository for payment in full at the time of presentment. The intent to defraud and the knowledge of insufficient funds on deposit is prima facie established under the provisions of the 1965 amendment (Section 40-49-7, N.M.S.A., 1953 Compilation (P.S.) by the giving of notice to the maker or drawer that such check has not been honored and his failure thereafter to pay the same in full within 10 days after such notice.

It is emphasized that the Worthless Check Act nowhere expressly authorizes the payee or anyone else to threaten criminal action unless payment is made. There is, therefore, no express language that would nullify Section 40A-22-6, N.M.S.A., 1953 Compilation which makes it a misdemeanor to compound a crime. The action reads as follows:

"Compounding a crime consists of knowingly agreeing to take anything of value upon the agreement or understanding, express or implied, to compound or conceal a crime or to abstain from a prosecution therefor, or to withhold any evidence thereof.

For purposes of this section, a person may be prosecuted and convicted of compounding a crime though the person guilty of the original crime has not been charged, indicted or tried.

Whoever commits compounding a crime is guilty of a misdemeanor."

Section 40A-22-6, supra and the Worthless Check Act were both passed at the same legislative session with the Worthless Check Act being passed somewhat later in point of time than the criminal code. Although the criminal code specifically stated that the Worthless Check Act would, upon enactment to law, supersede the Worthless Check provisions of the code, there is no specific language by which it would supersede other provisions of the criminal code.

There being no specific amendment or repeal of Section 40-22-6 by the Worthless Check Act, any modification thereof must be found under the rules governing statutory construction.

It is a general rule of construction *{*322}* that effect must be given to both of two statutes covering the same subject matter, if not absolutely irreconcilable and that, if they are both passed at the same legislative session, they are considered to be in pari materia and construed together the same as if different sections of the same statute. **A.T. & S.C. Ry. Co., v. Silver City,** 40 N.M. 305; **State ex rel Hed River Valley Co. v. District Court,** 39 N.M. 523.

The Worthless Check Act does not require the notice as a condition precedent to maintaining the criminal action. It contains no language which can reasonably be interpreted as requiring language to the effect that criminal action will be instituted unless payment is received. Under the language of the Act the purpose of the notice and of the ten day period is to make it easier for the state, upon prosecution, to prove the necessary knowledge and intent. Such knowledge and intent can, however, be proved without use of the statutory act if desired.

Another applicable rule of statutory construction is that, where two statutes cover the same subject matter and one is general and the other specific, the specific language will control if there is any conflict. **State v. Spahr,** 64 N.M. 395.

The language of the section of the Worthless Check Act setting out what the notice should contain is general. The only specific language contained there in is that a notice must be given that the check was not honored. It could be inferred that the language should also contain a demand that the check be paid in full, together with any protest fees or costs, within ten days of receipt of the notice. The failure to so respond does not give rise to the action so as to warrant an inference that a threat of prosecution could also be contained in the notice. The failure to respond merely creates a presumption of knowledge and fraudulent intent if a criminal proceeding is instituted. Since the language of Section 40A-22-6, supra, specifically makes it a crime to use such a threat under the circumstances here present, its specific language controls over the more

general language of the Worthless Check Act even if it could by implication be construed to authorize such a threat.

Under all of the above rules of Statutory Construction the language of the Worthless Check Act does not authorize the giving of a notice to the drawer of a check not honored by reason of insufficient funds or credit that criminal charges will be filed at the end of the ten day period unless payment is made within such time.