**S T A T E O F T E N N E S S E E**
OFFICE OF THE
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Opinion No. 07-31

Worthless Checks/Contract with Private Company for Restitution and Diversion Program

## QUESTIONS

1. Under the Fraud and Economic Crimes Protection Act, codified at Tenn. Code Ann. § 40-3-201, is it permissible for a District Attorney General to contract with a private company to run a pretrial restitution/diversion program for worthless checks?

2. If contracting with a private company to operate such a program is permissible, is it also permissible for a District Attorney General to require a check writer who chooses not to participate in the pretrial diversion program and is later prosecuted to attend and pay the fee for the company's local class on financial responsibility as part of a voluntary plea agreement for dismissal, probation, or judicial diversion?

3. The pre-1989 worthless check statute, which was codified at Tenn. Code Ann. § 39-3-301, had a provision that made each instance of passing a worthless check a separate offense but also permitted the District Attorney to aggregate multiple checks from the same defendant to the same victim to charge a higher level offense. According to the Sentencing Commission Comments to the current worthless check statute, which is codified at § 39-14-121, the statutes contained in the pre-1989 statute were consolidated into our current statute. The current statute punishes worthless checks as thefts but does not specifically mention aggregation of checks. Is it permissible to aggregate worthless checks given by the same defendant to the same victim?

## OPINIONS

1. No. The Fraud and Economic Crimes Prosecution Act does not authorize a District Attorney General to contract with a private company to run a pretrial restitution/diversion program for worthless checks.

2. The answer to this question is pretermitted by the answer to the first question.

3. No. The value of worthless checks cannot be aggregated for the purpose of charging a greater offense.

## ANALYSIS

1. The Fraud and Economic Crimes Prosecution Act does not permit a District Attorney General to contract with a private company to run a pretrial restitution/diversion program for worthless checks under any circumstances. On the contrary, the Act, by its plain terms, is generally intended to provide district attorneys general with the resources necessary to prosecute fraud, economic, and other crimes and, more specifically, to provide a means for district attorneys general to obtain restitution in bad check cases prior to the institution of formal criminal charges. Tenn Code Ann. § 40-3-202; Tenn. Code Ann. § 40-30-203. Moreover, the "bad check restitution program" in the Act states that, upon receipt of the victim's application for participation in the program, "the district attorney general . . . shall then send a letter to the last known address of the alleged violator" in an attempt to collect restitution in lieu of prosecution. Tenn. Code Ann. § 40-3-203(a). Accordingly, the bad check restitution program is a prosecutorial function of the district attorney general that is subject to the statutory limits placed on the exercise of prosecutorial authority. The statutes governing district attorneys grant the authority to perform prosecutorial functions to the district attorneys general and places well-defined limits on the authority of the district attorneys general to delegate those functions to others. *See* Tenn. Code Ann. § 8-7-103; Tenn. Code Ann. § 8-7-106. However, these statutes provide no authority for a district attorney general to delegate a prosecutorial function to a private company. Accordingly, it is the opinion of this office that it is not permissible for a District Attorney General to contract with a private company to run a pretrial restitution/diversion program for worthless checks.

2. The answer to this question is pretermitted by the answer to the first question.

3. Whether multiple theft offenses may be aggregated into a single offense is a question controlled by the language of the relevant statute. *See State v. Cattone*, 968 S.W.2d 277, 279 (Tenn. 1998). Generally, aggregation is permitted under both the theft of property statute and the theft of services statute when separate acts of theft are: (1) from the same owner; (2) from the same location; and (3) part of a continuing criminal impulse or a single sustained larcenous scheme. *State v. Byrd*, 968 S.W.2d 290, 291 (Tenn.1998). Similarly, aggregating the value of stolen property taken from different owners is permitted under the theft of property statute when a defendant exercises simultaneous possession or control over stolen property belonging to different owners. *Byrd*, 968 S.W.2d at 292. However, aggregation of offenses is not permissible under the theft of services statute. *State v. Cattone*, 968 S.W.2d 277, 279-280 (Tenn. 1998). The difference between permissible aggregation under *Byrd* and impermissible aggregation under *Cattone* stems from the different language of the two statutes. In *Cattone*, the Tennessee Supreme Court distinguished aggregation of theft of property offenses from theft of services offenses because theft of property may be committed by "obtaining or exercising control" over property, but theft of services may only be accomplished by "obtaining" the service and does not include an "exercising control over" provision. *Id.*; *Compare* Tenn. Code Ann. § 39-14-103 (stating "obtains or exercises control over the property") *with* Tenn. Code Ann. § 39-14-104 (stating "obtains services by deception"). Accordingly, aggregation is only permissible if the statute at issue provides justification.

The worthless checks statute does not conceive of aggregation of offenses. This conclusion is dictated by the language of the statute, which provides that the offense is committed when a person "issues or passes *a check*." Tenn. Code Ann. § 39-14-121(a) (emphasis added). Moreover, the statute expressly provides that "[t]he offense of issuing or passing worthless checks (sic) is punishable as theft pursuant to § 39-14-105. Value shall be determined by the amount appearing *on the face of the check on the date of issue*." Tenn. Code Ann. § 39-14-121(f) (emphasis added). Because the offense must be graded according to this statutory provision, it is the opinion of this office that aggregation of offenses is not permissible for multiple worthless check offenses.

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