

ANALYSIS

A proposed worthless check program has been described in the opinion request as follows: The person holding a worthless check issued by a local maker delivers it to the district attorney and fills out the report set forth in appendix A. Sheriff's records are checked to determine if there is an outstanding arrest warrant for the maker. If no warrant is found the form letter set forth in appendix B is sent to the maker. If the money is received, it is sent to the complainant and the district attorney's file is closed. If there is no response for ten days, the citation set forth in appendix C is sent to the maker. If payment for the check is received, it is forwarded to the complainant and the district attorney's file is closed. If there is no response from the citation for ten days, a criminal complaint is filed. The question presented relates to the propriety of statements made in appendices B and C.

Subdivision (a) of Penal Code section 476a provides:

“Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depository, or person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depository, or person, or firm, or corporation, for the payment of such check, draft or order and all other checks, drafts or orders upon such funds then outstanding, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison.”

The district attorney is the public prosecutor. (Gov. Code, § 26500.) The district attorney's duty as public prosecutor includes instituting “proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed.” (Gov. Code, § 26501.) The statute requires that the district attorney make the decision to prosecute based on “information that such offenses have been committed.” The prosecutor is free to obtain that information by any lawful means.

In *People v. Municipal Court* (1972) 27 Cal. App. 3d 193, the court described the authority of the district attorney to initiate criminal prosecutions in the following terms. “The prosecution of a case by the district attorney involves an exercise of executive power.” (*Id.*, at p. 203, citing *Esteybar v. Municipal Court*, 5 Cal. 3d 119, 127.) “Both cases [*Esteybar*, *supra*, and *People v. Tenorio*, 3 Cal. 3d 891 recognized that the charging

process is a matter committed to the discretion of the district attorney, a part of the executive branch of government.” (*Id.*, at p. 204.) “As concerns the enforcement of the criminal law the office of district attorney is charged with grave responsibilities to the public. These responsibilities demand integrity, zeal and conscientious effort in the administration of justice under the criminal law. . . . Nothing could be more demoralizing to that effort or to efficient administration of the criminal law in our system of justice than requiring a district attorney’s office to dissipate its effort on personal grievance, fanciful charges and idle prosecution.” (*Id.*, at p. 205, citing *Taltaferro v. Loche*, 152 Cal. App. 2d 752, 755–756.) “Thus the theme which runs throughout the criminal procedure in this state is that all persons should be protected from having to defend against frivolous prosecutions and that one major safeguard against such prosecutions is the function of the district attorney in screening criminal cases prior to instituting a prosecution.” (*Id.*, at pp. 205–206.) “Due process of law requires that criminal prosecutions be instituted through the regular processes of law. These regular processes include the requirement that the institution of any criminal proceeding be authorized and approved by the district attorney.” (*Id.*, at p. 206.) “The district attorney’s function is quasi-judicial in nature [citing *Pearson v. Reed*, 6 Cal. App. 2d 277, 286], and as we have already stated, he is vested with discretionary power in determining whether to prosecute in any particular case. An unbroken line of cases in California has recognized this discretion and its insulation from control by the courts through the writ of mandamus. [Citing *Board of Supervisors v. Simpson*, 36 Cal. 2d 671 and *People v. Vatelli*, 15 Cal. App. 3d 54, 58, 59.]” (*Id.*, at p. 207.) “Except for the situation where the district attorney is himself charged with a crime, his failure to act, even if improperly or corruptly motivated, is not a matter for the courts. In the final analysis, the district attorney, like a judge, is answerable to the electorate for the manner in which he conducts his office.” (*Id.*, at p. 208.)

The proposed worthless check program includes elements extraneous to the exercise of prosecutorial discretion and the prosecution of criminal cases. A principal object of the program is restitution to the victim holding the worthless check. The public prosecutor represents all of the people of the state in their sovereign capacity and does not represent the victim of the crime any more than he represents the defendant. (*Flemming v. Hance* (1908) 153 Cal. 162, 167; *People v. Bail* (1914) 25 Cal. App. 342, 358.) The public prosecutor has no duty to obtain restitution for the victims of crime. His duty is to determine whether to institute criminal charges in the courts and to prosecute those charges on behalf of the people. The fact of restitution may be considered in determining whether criminal charges should be instituted but the public prosecutor has no obligation to make that fact occur. Restitution is not a defense to the commission of a crime. (*People v. Wynn* (1944) 44 Cal. App. 2d 723, 729.)

The Uniform Crime Charging Standards prepared and published by the California District Attorneys Association in 1974 refer to restitution. Standard III, A, 1, c (at p. 43)

states:

c. Victim requests no prosecution

“It would be proper to decline to charge because the victim does not wish the prosecutor to file criminal charges and the case involves the following crimes or situations:

“1) In assault or battery cases where the victim has suffered little or no injury and where the accused’s conduct is not likely to be repeated;

“2) In crimes against property, not involving violence, where no major loss was suffered and where the accused’s conduct is not likely to be repeated. The fact of restitution may be considered in applying this Standard.

“Commentary

“Crimes are prosecuted on behalf of all citizens of the state not on behalf of particular individuals. The victim is not a party to a criminal prosecution. He is not the prosecutor’s client. (See *People v. Municipal Court*, 27 Cal. App. 3d 193, 207 [1972].) Crimes are committed primarily against society and only secondarily against individual members of society. There are rare situations, set forth here, in which the secondary interest of the individual outweighs the primary interest of society. This primary interest is outweighed because none of the four purposes of a criminal sentence are particularly applicable while non-prosecution would serve interests like family harmony, good employment relations, the promotion of individual friendships, and the personal privacy of the victim. . . .”

Standard III, A. 2, a (at p. 47) states:

“a. Restitution

“It would be improper to decline to charge simply because the accused made or tendered restitution to the victim.

“Commentary

“The mere fact of restitution should -not justify declining to charge. If it did, the accused would in effect be buying his way out of prosecution at no additional cost. He would have no incentive for not committing a crime.

On the other hand, the fact of restitution in conjunction with legitimate factors like the victim's request not to prosecute or the existence of a de minimus situation might justify a decision not to prosecute."

A consideration of the proposed worthless check program in the light of the duties of the public prosecutor reveals a fundamental legal flaw in the program. Both the letter set forth in appendix B and the citation set forth in appendix C conveys to the maker of the check a threat to charge him with a crime if he does not pay the amount of the check to the district attorney for restitution. Obtaining restitution by means of such a threat would be improper under the rationale of *People v. Beggs* (1918) 178 Cal. 79.

We do not mean to suggest that a public prosecutor may not contact the maker of a worthless check and indicate his intention to initiate a prosecution under Penal Code section 476a. Such indications may take letter form or even a citation to show cause why the maker should not be prosecuted.¹ Such a communication advises the maker that prosecution is being considered and provides: him with an opportunity to present any facts which might indicate no crime was committed or indicate a defense to the charge. This would be entirely consistent with the public prosecutor's duty to investigate the charges to acquire the information necessary to determine whether criminal proceedings should be instituted.

The problem in the documents set forth in appendices B and C is that the threat to prosecute is coupled with a demand for restitution. That restitution rather than information is the principal object of these threats to prosecute is made clear by the statements that, "You may settle this matter" and "I will return your check to you" if you send a money order or cashier's check payable to the district attorney.

Another problem we see in the proposed worthless check program is the apparent substitution of a clerical procedure for the exercise of prosecutorial discretion by the public prosecutor. As the proposed program has been explained, the filing of criminal charges will depend on whether restitution is made or not, rather than upon any weighing of appropriate factors by the public prosecutor or his deputy. We have serious doubts that such a substitution of a criterion based solely on the fact of restitution for the exercise of prosecutorial discretion on a case-by-case basis will produce the kind of screening that due process requires. (See *People v. Municipal Court*, *supra*, 27 Cal. App. 3d at p. 206.)

¹ This statement should not be read as an approval of the wording of either appendix H or appendix C. We do not address the propriety of the use of the caption or such words as "complaint has been filed," "ordered to appear" or other language which might be interpreted to mean that court proceedings had already been commenced.

Finally, the routing of the money paid as restitution under the proposed worthless check program would not comply with Government Code sections 26503 and 26504 which provide:

“§ 26503.

“The district attorney shall deliver receipts for money or property received in his official capacity and file duplicates with the county treasurer.”

“§ 26504.

“On the first Monday of each month, or at more frequent intervals as may be directed by the board of supervisors, the district attorney shall account for all money received by him in his official capacity and pay it over to the treasurer upon a deposit permit issued by the auditor.”

It seems clear that any restitution received by the district attorney under the program would be money received in his official capacity and thus must be paid to the county treasurer for appropriate disbursement rather than be paid directly to the holder of the worthless check. We conclude that the district attorney may not properly state to the maker of the worthless check that he will institute criminal prosecution for issuing worthless check if the maker does not pay the full amount of the check to the district attorney to reimburse the holder.²

² We are also asked whether a district attorney may collect a fee to pay for the costs of the worthless check program either by way of an additional amount to be paid by the maker of the worthless check or by way of a deduction from the amount of restitution received before it is paid to the holder of the worthless check. Since we have concluded that a district attorney is not authorized to obtain restitution for worthless checks in the manner contemplated by the proposed worthless check program, the second question is moot.

APPENDIX A

REPORT OF RECEIPT OF FRAUDULENT CHECK

I. Person making report _____

Business name: _____

Business or other address _____

Address where check accepted: _____

What steps have you, as the victim, taken to contact the suspect and/or recover your loss?

Date: _____ How contacted? _____ By whom? _____

Where? _____ How many times? _____

Results _____

II. Person who accepted check: _____

Address: _____ Phone: _____

Can you identify the check issuer? _____

Was the issuer known to you? Yes ____ No ____ How? _____

What was the check used for? (i.e., merchandise, payment on account, services, etc.) _____

Did you see the suspect write or endorse the check? Yes ____ No ____

What initial or mark did you place on the check at the time accepted?

III. Name of person who issued check:

Address:

Driver's License # _____ State _____ Other I.D. _____

Check number _____ Date check was accepted: _____ Amount: \$ _____

Was the check postdated or was a request to hold made by suspect? Yes ____ No ____

Date: _____

Signature of person making report

NOTE: If the person who issued the check reimburses you directly, please notify this office immediately.

APPENDIX B

[Letterhead of District Attorney's Office]

RE: Your Check No. _____ Amount \$ _____

Dear Sir or Madam:

Your check, listed above, has been referred to this office for criminal prosecution.

Normally, this would mean that a complaint would be filed with the Municipal Court and a warrant issued for your arrest. It is the policy of this office, however, to allow the accused an opportunity to explain a situation such as this as there may well have been a banking error or some other unavoidable circumstance. You are requested therefore to contact me within five (5) days from the date of this letter in order that we may discuss this problem.

If you would prefer to handle this matter with the utmost simplicity, you should forward a money order or cashier's check in the amount stated above, to this department, made payable to the _____ County District Attorney. Upon receipt, I will return your check to you.

Very truly yours,

District Attorney Investigator

cc: To merchant or other person

APPENDIX C

OFFICE OF THE DISTRICT ATTORNEY

COUNTY OF _____, STATE OF CALIFORNIA

The People of the State of California,
Plaintiff

vs.

Defendant

CITATION-CRIMINAL

A complaint has been filed with _____, District Attorney of the County of _____, State of California, alleging that the above defendant on _____ in County of _____, State of California, did willfully and unlawfully write a check in the amount of \$_____ in violation of Section 476a of the California Penal Code.

You are hereby ordered to appear at the _____ County District Attorney's Office, _____, California, to answer this charge on _____, 1980, at _____ M.

Failure to appear will result in the issuance of a warrant of arrest.

You may settle this matter by sending to this office a money order or cashier's check made payable to the _____ County District Attorney for the full amount of this check.

DISTRICT ATTORNEY

By:

D.A. Investigator

cc: Merchant or other person.