

OPINION NO. 2001-030**Syllabus:**

1. Questions of venue are judicially determined. Whether venue is proper in particular circumstances is subject to determination in light of the facts of a specific case and cannot be determined by an opinion of the Attorney General.
2. Criminal prosecution of a person who passed a bad check to Child Support Payment Central in violation of R.C. 2913.11 may be brought in a court with subject matter jurisdiction in any location that has sufficient connection with the offense, as provided in R.C. 2901.12. Depending upon the circumstances and consistent with prosecutorial discretion, those locations might include both the county in which the check was written and the county in which the check was received by Child Support Payment Central.

To: Greg Moody, Ohio Department of Job and Family Services, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, July 25, 2001

We have received from the Ohio Department of Job and Family Services (ODJFS), a request for an opinion concerning the county in which prosecution should be brought against an individual who submits to Child Support Payment Central (CSPC) a check that is dishonored. The question is whether the matter should be prosecuted in the county in which the obligor wrote the check or the county in which CSPC received the check.

The question has arisen because the processing of child support payments in Ohio was recently converted to a system under which payments are made to the CSPC system, which is part of ODJFS, instead of to individual county child support enforcement agencies. Under the current system, an obligor (payer) makes a child support check payable to CSPC and sends it to Franklin County, where it is received and processed by Bank One on behalf of ODJFS. *See* R.C. 3125.03; 12 Ohio Admin. Code 5101:1-31-12; *see also* R.C. 3121.71; R.C. 3125.07; R.C. 3125.28. The request letter indicates that ODJFS takes the position that, if the check is dishonored, prosecution should take place where the check was written (generally the payer's home county), whereas certain counties argue that payers who pass bad checks to CSPC should be prosecuted in Franklin County.

A determination as to the appropriate location for criminal prosecution requires findings regarding both the subject matter jurisdiction of the court (that is, the court's power to hear and decide a given case) and the appropriate venue (that is, the appropriate place of trial as selected among courts that have jurisdiction). *See, e.g., State v. Grinnell*, 112 Ohio App. 3d 124, 135, 678 N.E.2d 231, 238 (Franklin County 1996); *Black's Law Dictionary* 1553 (7th ed. 1999) (defining "venue"); *see also Industrial Addition Ass'n v. Comm'r*, 323 U.S. 310, 313 (1945). It is clear that within each county there will be one or more courts with jurisdiction to hear and decide prosecutions for passing bad checks, and that prosecutions may be brought in those courts by appropriate public officials. *See, e.g.,* R.C. 309.08; R.C. 1901.20; R.C. 1901.34; R.C. 1907.02; R.C. 2931.03; R.C. 2938.10; R.C. 2938.13; Ohio R. Crim. P. 2(E) and (G); Ohio R. Crim. P. 18; 1999 Op. Att'y Gen. No. 99-042. The concern is how to select an appropriate county within which a particular prosecution may be brought in a court with jurisdiction of the subject matter, and that is a question of proper venue.

Questions of venue are judicially determined. *See, e.g., State v. Headley*, 6 Ohio St. 3d 475, 453 N.E.2d 716 (1983); *City of Toledo v. Taberner*, 61 Ohio App. 3d 791, 573 N.E.2d 1173 (Lucas County 1989). Whether venue is proper in particular circumstances is subject to determination in light of the facts of a specific case and cannot be determined by an opinion of the Attorney General. *See, e.g., State v. Chintalapalli*, 88 Ohio St. 3d 43, 723 N.E.2d 111 (2000); *State v. Smith*, 87 Ohio St. 3d 424, 435-37, 721 N.E.2d 93, 107-08 (2000). *See generally* 1983 Op. Att'y Gen. No. 83-027, at 2-97 n.2.¹ Therefore, we are unable to provide a definitive answer to the question here presented. However, we have considered the issues raised in the opinion request and we are able to provide a general discussion of applicable principles.

¹Even if prosecution of a particular case may be permitted in a given location, the prosecutor has discretion to determine whether to prosecute that case. *See generally State ex rel. Master v. City of Cleveland*, 75 Ohio St. 3d 23, 27, 661 N.E.2d 180, 184 (1996) ("the decision whether to prosecute is discretionary"); 1990 Op. Att'y Gen. No. 90-069, at 2-295. We do not purport to advise a prosecutor on matters involving the exercise of discretion. *See, e.g.,* 2000 Op. Att'y Gen. No. 2000-008; 1983 Op. Att'y Gen. No. 83-027, at 2-97 n.2.

Let us consider first the appropriate location for prosecution of a criminal offense. Under the Ohio Constitution, a person accused of a crime has the right to be tried in the county in which the offense is alleged to have been committed. Ohio Const. art. I, § 10. The statute governing prosecution in a criminal case states that “[t]he trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed.” R.C. 2901.12(A). The elements of an offense are “the constituent parts of an offense which must be proved by the prosecution to sustain a conviction.” *State v. Draggio*, 65 Ohio St. 2d 88, 91, 418 N.E.2d 1343, 1346 (1981). Accordingly, venue is proper under R.C. 2901.12(A) if at least one element of the offense was committed in the court’s jurisdiction. *Id.* at 90-91, 418 N.E.2d at 1345.

The venue statute also contains various provisions that are applicable to particular types of situations. R.C. 2901.12; *see, e.g., State v. Smith; State v. Tinch*, 84 Ohio App. 3d 111, 119-120, 616 N.E.2d 529, 534 (Warren County 1992); Ohio R. Crim. P. 18(A). For example, if an offense or any element of an offense was committed in any of two or more jurisdictions and it cannot reasonably be determined in which of the jurisdictions it was committed, the offender may be tried in any of those jurisdictions. R.C. 2901.12(G). Further, if an offender commits offenses in different jurisdictions as part of a course of criminal conduct, the offender may be tried for all those offenses in any jurisdiction in which one of the offenses, or an element of one of the offenses, occurred. A course of criminal conduct may be demonstrated if the offenses involved the same victim, were committed in the offender’s same capacity or relationship, were committed in furtherance of the same purpose, objective, or conspiracy, involved the same modus operandi, or were committed along a line of travel in Ohio. R.C. 2901.12(H).

Thus, criminal prosecution of bad check charges may be brought in a court with jurisdiction of the subject matter in any location that has sufficient connection with the offense, as provided in R.C. 2901.12. *See State v. Chintalapalli*, 88 Ohio St. 3d at 45, 723 N.E.2d at 114 (venue in a criminal case is satisfied “where there is a sufficient nexus between the defendant and the county of the trial”). “Basically, the importance of venue is to give the defendant the right to be tried in the *vicinity* of his alleged criminal activity; the need to have venue is to limit the state from indiscriminately seeking a favorable location for trial or selecting a site that might be an inconvenience or disadvantage for the defendant.” *State v. Gentry*, 61 Ohio Misc. 2d 31, 34, 573 N.E.2d 220, 222 (Hamilton County Mun. Ct. 1990).

Venue is not a material element of an offense, but it is a fact that must be proved in criminal prosecutions, unless it is waived by the accused. *State v. Smith; State v. Headley; State v. Draggio*, 65 Ohio St. 2d at 90, 418 N.E.2d at 1345. Even if venue is proper, it may, upon motion, be changed to another court having jurisdiction of the subject matter in the interests of a “fair and impartial trial” or “for the convenience of the parties and in the interests of justice.” R.C. 2901.12(K); *see also* Ohio R. Crim. P. 18. *See generally, e.g., State v. Fox*, 69 Ohio St. 3d 183, 189, 631 N.E.2d 124, 129-30 (1994).

Let us look next at the nature of the criminal offense under consideration. When a payer submits a check that is dishonored because there are not sufficient funds in the account, the payer may be prosecuted for passing a bad check in violation of R.C. 2913.11, which states, in part: “No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored.” R.C. 2913.11(A). The offense is classified as a misdemeanor or felony, depending upon the amount of the check or other negotiable instrument. R.C. 2913.11(D).

The bad check statute prohibits the act of issuing or transferring a check, or causing a check to be issued or transferred, with purpose to defraud, knowing that the check will be dishonored. R.C. 2913.11(A). The statute does not define the terms "issue" and "transfer." However, the 1974 Committee Comment to H.B. 511² states that the meaning and effect of those terms are covered in R.C. Chapter 1303, which is part of Ohio's version of the Uniform Commercial Code. In R.C. Chapter 1303, the term "issue" is defined to mean "the first delivery of an instrument by the maker or drawer to a holder or nonholder for the purpose of giving rights of the instrument to any person." R.C. 1303.01(A)(5). A transfer occurs when an instrument "is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." R.C. 1303.22(A). Thus, the offense of passing a bad check includes the delivery of the check. *See generally Ins. Co. of N. Am. v. Knight*, 8 Ill. App. 3d 871, 875, 291 N.E.2d 40, 43 (1972) (under Uniform Commercial Code, "[a]llegations of the 'issue' of drafts or checks, without more, denotes delivery").

Support for this conclusion is found in the fact that, along with the definition of "issue" to mean "first delivery," *see* R.C. 1303.01(A)(5), the statute defines "issuer" to mean "a maker or drawer of an issued or unissued instrument," *see* R.C. 1303.01(A)(6). Read together, the two definitions make it clear that a person can make an unissued instrument, and that an instrument is not issued until it is delivered.

The statute does not specify whether delivery includes receipt of the check, and our research has disclosed no Ohio case that definitively addresses that question. However, the common understanding of delivery is that it is not complete until the item delivered reaches its intended destination. *See, e.g., Black's Law Dictionary* 440 (7th ed. 1999) (defining "delivery" to mean "the giving or yielding possession of control of something to another"); *Webster's New World Dictionary* 374 (2nd college ed. 1978) (definitions of "delivery" include: "a giving or handing over" and "the transfer of goods or interest in goods from one person to another"). *See generally State v. Athans*, 490 S.W.2d 25, 26 (Mo. 1973) ("in common understanding, an instrument deposited in the mails is not delivered until it is received by the addressee").

A reasonable interpretation of the bad check statute thus is that its elements include both writing or otherwise acquiring a check and delivering or causing the check to be delivered to another person, with purpose to defraud and knowing that the check will be dishonored. The check is not considered issued until delivery is complete and the check has been received. *See* R.C. 1303.01(A)(5); R.C. 1303.22(A). Under this interpretation, the offense takes place both in the location in which a person writes a bad check and in the location in which a person receives the bad check, and prosecution may take place in either of those locations. R.C. 2901.12(A); *see State v. Draggio*. *See generally State v. Lyons*, No. CA-476, 1993 Ohio App. LEXIS 5171 (Ct. App. Holmes County Oct. 13, 1993); *Commonwealth v. Fiantaca*, 6 Pa. D. & C.4th 266 (Pa. C.P. Lycoming County 1990) (under Uniform Commercial Code, a check is issued when it is received by the payee, and venue lies in that location).

The conclusion that prosecution for the offense of passing a bad check may be brought either in the county in which the check is written and mailed or in the county in which it is received is consistent with case law of various jurisdictions throughout the country. *See, e.g., State v. Athans*, 490 S.W.2d at 26 ("when an insufficient funds check is drawn in one county and then by the maker placed in the mail, through which it is delivered to the payee in another county, venue for the offense of issuing the check with insufficient

²*See* 1971-1972 Ohio Laws, Part II, 1866, 1928 (Am. Sub. H. B. 511, eff. Mar. 23, 1973, with some provisions eff. Jan. 1, 1974) (enacting R.C. 2913.11, eff. Jan. 1, 1974).

funds lies in either of such counties"); *People v. Parker*, 51 Misc. 2d 843, 845, 274 N.Y.S. 2d 38, 41 (Ct. Spec. Sess. 1966) ("prosecution may be conducted either in the county of mailing or in the county of receipt"); *see also McKenzie v. State*, 145 Ga. App. 224, 243 S.E.2d 646 (1978) ("[v]enue in a bad check case is in the county in which the check is delivered"); *State v. Beam*, 175 Kan. 814, 267 P. 2d 509 (1954); *State v. Libero*, 91 N.M. 780, 581 P. 2d 873 (Ct. App. 1978); *Commonwealth v. Fiantaca*.

As discussed above, we cannot use an opinion of the Attorney General to make a conclusive determination on questions of venue. In the instant case, however, we find, on the basis of the authorities discussed above, that it cannot be concluded as a matter of law that it would never be proper to prosecute the offense of passing a bad check in a location in which the only connection with the bad check was its receipt. Accordingly, we find support for the conclusion that, in appropriate circumstances, a criminal prosecution for passing a bad check may be brought either in the location in which the check was written or in the location in which the check was received as payment.

We conclude, in general, that criminal prosecution of a person who passed a bad check to CSPC in violation of R.C. 2913.11 may be brought in a court with subject matter jurisdiction in any location that has sufficient connection with the offense, as provided in R.C. 2901.12. Depending upon the circumstances and consistent with prosecutorial discretion, those locations might include both the county in which the check was written and the county in which the check was received by CSPC. As noted above, however, even if venue is proper, a court may, upon motion, change the place of trial in the interests of a fair and impartial trial or for the convenience of the parties and in the interests of justice. R.C. 2901.12(K).

Therefore, it is my opinion, and you are advised, as follows:

1. Questions of venue are judicially determined. Whether venue is proper in particular circumstances is subject to determination in light of the facts of a specific case and cannot be determined by an opinion of the Attorney General.
2. Criminal prosecution of a person who passed a bad check to Child Support Payment Central in violation of R.C. 2913.11 may be brought in a court with subject matter jurisdiction in any location that has sufficient connection with the offense, as provided in R.C. 2901.12. Depending upon the circumstances and consistent with prosecutorial discretion, those locations might include both the county in which the check was written and the county in which the check was received by Child Support Payment Central.