

1979 WL 42933 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 17, 1979

***1 RE: Inquiry regarding venue of fraudulent-breach-of-trust case**

The Honorable William W. Wilkins, Jr.
Solicitor
Thirteenth Judicial Circuit
County Courthouse
Greenville, South Carolina 29601

Dear Solicitor Wilkins:

You recently asked the opinion of this office concerning proper venue of a possible fraudulent-breach-of-trust case.

The facts of the case supplied by you are as follows: In May of 1978 a Mr. McCain entered into an agreement with Linder Beaty of Union County in Union for the sale of a hearse. This sale included a trade-in of Mr. Beaty's old hearse, a \$2,000.00 cash payment by Beaty to McCain, who delivered the money to Nicholson, in a representation by McCain to Beaty that the balance would be paid in monthly installments of \$134.00. Nicholson, a resident of Winder, Georgia, alleges that McCain had Beaty sign the installment sale/security agreement in blank, but submitted the form to Nicholson reflecting a \$173.00 per month payment. Nicholson assigned the mortgage to Borg-Warner Acceptance Corporation of Illinois.

When Beaty was billed by Borg-Warner for the first \$173.00 installment, Beaty called McGain, who was living in Greenville, concerning the discrepancy. McGain went to Union and there it was agreed between Beaty and McCain that Beaty would pay off the outstanding balance on the hearse in full. Beaty then borrowed from a bank in Union the sum of \$2,680.00 and made a check payable to McGain for that amount. Will Lucius of your office informs me that McCain waited for Beaty to go to the bank and obtained the check from Beaty at that time.

Some time later, Beaty received a past-due notice from Borg-Warner and, thereafter, wrote a letter to Nicholson concerning the previous arrangement with McCain. Nicholson then traveled from Winder to Union and discussed the matter with Beaty and discovered he had never received the \$2,680.00 which Beaty had paid to McGain by check. The check was negotiated by McCain through his account at Southern Bank in Greenville in August of 1978.

Under the facts supplied there are several crimes possibly committed, depending on the time of conception of the fraudulent intent.

(1) Breach of trust with fraudulent intent is defined in [State v. Shirer, 20 S.C. 392 \(1884\)](#) as occurring 'where personal property of appreciable value and of which larceny may be committed is put into possession of another; and when it is so put into his possession it becomes a trust, and while it so remains, if he conceives the purpose to convert that property to his own use, and does it with intention to deprive the owner of the use of the property, then that is a breach of trust with fraudulent intent.' The only distinction with larceny is that the initial possession in the case of a trust is lawful. [State v. Owings, 205 S.C. 314, 31 S.E.2d 906 \(1944\)](#).

If McCain took Beaty's money in good faith with intention to turn it over to Nicholson, later converting it to his own use, he is guilty of breach of trust with fraudulent intent. Beaty entrusted him with the money with which to pay off the obligation on the hearse. Although my colleague, Mr. Mabry, of this office (Prosecution Support Section) differs with me on this point, I

think that Beaty is the victim. Not only is he the person who entrusted the funds but the person out-of-pocket. Nicholson has discounted Beaty's note to Borg-Warner and under the facts presented is not out-of-pocket. (The assignment itself would have to be looked at to determine if Nicholson would have to re-purchase the note if Borg-Warner could not collect). From your viewpoint, I don't see that it really matters who the victim is.

*2 Venue lies where the fraudulent intent was conceived. In this case, venue could lie in either Union or Greenville for breach of trust. Venue is a jury issue, [State v. Jordan](#), 255 S.C. 86, 177 S.E.2d 464 (1970), but an indictment may lie in the county where the defendant refuses to account or in which he receives the money. [Jordan](#), *supra*. Most of these cases are prosecuted where the money was received, probably because the victim is the one complaining. However, the check was negotiated in Greenville and I feel an indictment could properly lie there. Further investigation into the facts might help clarify where McCain initially conceived the criminal intent.

(2) Larceny—If McCain went down to Union with a scheme in mind to defraud Beaty of his money, then the crime of larceny as the initial taking was by artifice and trick and initial possession unlawful as it was gained through fraud. See [State v. McCann](#), 167 S.C. 393, 166 S.E. 411 (1932). Venue for larceny would lie in Union as the taking occurred there.

(3) Section 16-13-240 Obtaining property by false pretenses. The facts outlined might possibly support an indictment for this crime. It is a lesser included offense of larceny. Further investigation into McGain's reason for going to Union, accompanying Beaty to the bank in order to wait for the check, and his knowledge of the negotiation of Beaty's note already sent to Nicholson is necessary. Again venue would lie in Union for this offense.

Conclusion: Beaty would be indicted for all three offenses but convicted only of one. Venue is properly laid in Union on all three counts but an indictment for breach of trust could lie in Greenville on account of the negotiation of Beaty's check at a Greenville bank (fraudulent appropriation of funds to his own account occurred there).

If I may be of further assistance, please call.

Yours very truly,

Sally G. Young
Assistant Attorney General

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