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IMPRISONMENT FOR DEBT

Civil debt collection in the criminal courts

By Joel M. Androphy

During the 18th century, imprisonment for debt became so commonplace that debt led to more imprisonment than any other crime. A century later, the Republic of Texas, and many other jurisdictions, abolished imprisonment for debt.[1] The reasoning was clear: it is uncivilized to incarcerate or threaten to incarcerate an individual embroiled in a good faith debtor-creditor dispute.

Despite the efforts of the state to deter enforcement of criminal laws in civil cases, state prosecutors have declared war against businessmen involved in contract disputes. This was is not motivated by any desire to seek justice. It is merely an effort to assist in private debt collection. The result is extortion from the honest businessman who cannot afford to be tarnished with an indictment. This counterpart will offer another perspective on the prosecution of worthless check cases.

TREATMENT OF THE HONEST BUSINESSPERSON

Assume for example, that your law firm has had a long-term relationship with XYZ Travel. On February 25, 1998, your firm requested airline tickets (value: $5,000) from XYZ Travel for a trip to the Far East. In that regard, it is always the custom and practice of XYZ Travel to bill your firm for tickets on a 30-day revolving account and not demand payment for the tickets when purchased. Before it would issue the $5,000 worth of tickets, however, XYZ Travel asked that you arrange to pay your outstanding indebtedness. XYZ Travel requested that your firm immediately pay in full the December 31, 1987, closing statement in the amount of $5,000, and make arrangements to pay the January 31, 1988, statement in the amount of $2,000. You advised XYZ Travel that your firm did not have sufficient funds to cover a check for $5,000, but, because of 90-day receivables due, it was anticipated that there would be enough money in the account on March 1, or shortly thereafter, to cover the $5,000 check for the December 31, 1987, balance. No assurances were given.

XYZ Travel understood, and offered, due to the firm's past good standing and reliability, to accept and hold a February 25, 1988, check for $5,000 until March 5, 1988. Despite this agreement, the check was deposited before March 5, 1988. It was returned for insufficient funds.

On March 14, 1988, your firm received a demand letter from XYZ Travel. You contacted the manager of XYZ Travel and asked why he would threaten legal action with the District Attorney's office when he knew that there were insufficient funds in the account, and that your firm was relying upon anticipated, but questionable, receivables in order to cover the check. You also explained that because your receivables are still outstanding you would execute a promissory note for the entire indebtedness.

Two weeks later, your firm receives a letter from the D.A.'s office. After a meeting with an assistant D.A., you discover that XYZ Travel misrepresented the facts and advised the D.A.'s office that the check for $5,000 was for the newly issued tickets and not for the outstanding indebtedness represented by

the December 31, 1987, statement. No mention was made of the agreement to hold the check or the representation that the receivables were questionable. The assistant D.A. explains that unless payment is made, this is a factual dispute for a criminal jury to decide. For you, it is more than a factual dispute; it is your career. The assistant D.A. gives you one week to contact a criminal attorney for advice.

LEGAL ANALYSIS

For purposes of theft conviction, the relevant intent to deprive the owner of property is the accused's intent at the time of taking.[2] In that regard, the state would have to show proof beyond a reasonable doubt that the $5,000 was a simultaneous exchange for the newly issued tickets. Based upon XYZ Travel's version of the facts, a presumption of theft by check would then follow.[3] Alternatively, because you will argue that the check was for a past due invoice and based upon questionable receivables, the state will attempt to prove beyond a reasonable doubt that your firm unlawfully appropriated the tickets by employing some form of deception that caused XYZ Travel to depart with property.

Deception is defined as the creation or maintenance of a false impression likely to affect the judgment of another person in a transaction.[4] Evidence indicating that a defendant did not create or maintain a false impression until after the victim had surrendered the property, or performed the service, is not sufficient to prove deception.[5] Thus, the mere failure to perform a contractual obligation is not theft by deception.

In *Phillips v. State*,[6] a couple contracted with the appellant to build an addition to their house for $20,791.00 with a $6,6930.33 down payment. The down payment was the property allegedly stolen. Although the down payment was voluntarily delivered to the appellant, he failed to perform as per the contractual agreement. The record did not reveal any deception by false impression of law or fact. The only evidence presented was the appellant's failure to perform, which under Section 31.01(2)(E), Tex. Penal Code, is not sufficient to prove deception.

False promises or representations as to future happenings by which a person is induced to part with his property may also form the basis of the offense of theft by false pretext so long as the proof shows that such promises were false *ab initio*.[7] The mere fact that a person may pay a business debt with a bad check and then fail to pay it off does not, without more, show theft by deception.[8] If the injured party knows, or by the exercise of ordinary prudence should know, at the time he parts with possession of the property that the pretext is in fact false, he cannot rely on it. Thus, the offense of theft by false pretext cannot arise.[9]

Your attorney explains that the State's burden will be to prove beyond a reasonable doubt that at the time the check was issued there were no outstanding and collectible receivables and that your firm had no intent to pay off the obligation. He also advises you that, based upon your representations, you have a good chance to be vindicated by a jury. On the other hand, the remainder of this advice is confirmed by letter that includes the following:

> There are no guarantees as to the outcome of a criminal proceeding. The mere fact of being indicted may be ruinous to your name, reputation and professional standing. I expect that, based upon the representations of XYZ Travel and the prosecutorial inclination of the assistant D.A., the grand jury will indict you for theft . . .. *The decision is yours*.

Feeling no comfort from his opinion, you decide to borrow $5,000 to pay XYZ Travel. It is difficult to rationalize risking a criminal felony conviction and possible disbarment over a $5,000 dispute.

TREATMENT OF THE DISHONEST BUSINESSPERSON

Granted, there are many situations where the actions of businessmen transcend the civil border into the criminal arena. Indeed, they should be prosecuted. However, if they are able to pay restitution before the matter is taken to the grand jury, or even after an indictment, the charges may be dismissed. This results in discriminatory enforcement of the criminal laws.

Assume for example, that Joe and Bob have been approached by a creditor with regard to merchandise paid for with "hot checks." The creditor threatens to take both matters to the D.A. Joe is unable to cover the check due to his business failures. Acting upon advice of counsel, Joe calls the D.A.'s office and explains his financial problems. The D.A.'s office tells Joe to either pay or the matter will be taken to the grand jury. Joe has no option. He must await indictment, post a bond, and face possible imprisonment.

On the other hand, Bob calls the D.A.'s office and makes arrangements to immediately cover the check. He may avoid indictment solely because of his financial resources.

After Joe is indicted he retains your services. Still unable to pay the indebtedness, he inquires whether there is any defense to prosecution. You explain to Joe that although he is guilty of theft, he may have some grounds to attack the indictment.

LEGAL ANALYSIS

It is settled law that the Constitution prohibits discriminatory enforcement of criminal laws.[10] An indictment is also invalid pursuant to the Fifth and Fourteenth Amendments if it was influenced by an "unjustifiable standard" or "arbitrary classification."[11]

To support a defense of selective or discriminatory prosecution, a defendant must establish that: (1) while others similarly situated have not generally been prosecuted because of conduct of the type forming the basis of the charge against him, he has been *singled out* for prosecution, and (2) the state's discriminatory selection of him for prosecution has been invidious or in *bad faith*, i.e., based upon impermissible considerations.[12]

With respect to the first prong of the test that defendant has been intentionally singled out for prosecution, there can be no question that Joe was prosecuted in part because of his financial status. Although equally culpable, Bob was able to avoid liability because of his ability to pay his creditor. In considering the second prong of the test, selection on an impermissible basis, there is no question that it is bad faith to indict if one of the considerations is one's inability to pay an indebtedness.[13]

In a recent article in the *Prosecutor Magazine* entitled, "Caveat Prosecutor: Criminal Process and Civil Debt Collection,[14] the issue of imprisonment for debt was discussed. The article quoted from a recent decision of the West Virginia Supreme Court of Appeals in *State v. Orth*,[15]:

> The assistant prosecutor's agreement with Orth to forestall presentment of the bad check warrant to the grand jury, so long as Orth made restitution to Wheeling Downs, cannot be disguised as some sort of plea bargaining arrangement. The restitution arrangement, in fact, constituted debt collection by a government official for a private party and borders on malfeasance in office.
>
> [T]he prosecutor's

> practice was not an exercise of prosecutorial discretion, because such discretion applies only where a prosecutor, in good faith, doubts the guilt of the accused or feels the case is not capable of adequate proof.

This general principle was addressed over a hundred years ago by the U.S. Supreme Court in *Yick Wo v. Hopkins*.[16] The Court stated:

> Though the law itself be fair on its face and impartial in appearance . . . if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, . . . the denial of equal justice is still within the prohibition of the Constitution.

Under these circumstances, Joe has been denied "equal justice."

CONCLUSION

The judiciary's basic responsibility for protecting individuals against unconstitutional invasions of their rights may be of some comfort to Joe. The members of the law firm, however, will find no comfort in setting foot in criminal court. The problem would be exacerbated if the law firm, Joe or Bob had legitimate complaints with service or the merchandise. They would be forced to waive offsets and credits rather than risk conviction. Legislative guidelines need to be enacted so that individuals are not forced to "pay or play."

FOOTNOTES

1. Article 1, §18, Texas Constitution, Interpretive Commentary.
2. *Wilson v. State*, 663 S.W.2d 834, 836-837 (Tex. Crim. App. 1984).
3. TEX. PENAL CODE ANN. §31.06 (Vernon 1974).
4. TEX. PENAL CODE ANN. §31.02(2)(A)-(E) (Vernon 1974).
5. *Cortez v. State*, 582 S.W.2d 119, 120-121 (Tex. Crim. App. 1079).
6. 640 S.W.2d 293, 294 (Tex. Crim. App. 1982).
7. *Kinder v. State*, 477 S.W.2d 584, 586 (Tex. Crim. App. 1972).
8. *Wilson v. State*, 477 S.W.2d at 836-837.
9. *Kinder v. State*, 477 S.W.2d at 586.
10. *Wayte v. United States*, 470 U.S. 598 (1985); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Crowthers*, 456 F.2d 1074, 1080 (4th Cir. 1972).
11. *Bordenkircher v. Hayes*, 434 U.S. 357, 365-366 (1978).
12. *United States v. McDonald*, 553 F.Supp. 1003, 1006 (S.D. Tex 1983), citing *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974).
13. 28 U.S.C. §2007 (imprisonment for debt); Tex. Const. Art. 1, §18 (imprisonment for debt).
14. Vol. 21 (Spring 1988), National District Attorneys Association.
15. 359 S.E.2d 136 (W. Va. 1987).
16. *Yick Wo v. Hopkins*, 118 U.S. at 373-74.