

COMMENTS

CONSTITUTIONAL LAW—CRIMINAL ENFORCEMENT OF A CIVIL OBLIGATION—IMPRISONMENT FOR DEBT IN SALES OF AGRICULTURAL PRODUCTS

By JOEL C. WILLIAM, JR.*

Any person, either on his own account or for others, who shall buy cotton, corn, rice, crude turpentine, rosin, pitch, tar, timber, pulpwood, poultry and poultry products, cattle, hogs, sheep, goats, horses, mules, pecans, peaches, apples, watermelons, cantalopes, or other products or chattels, and shall fail or refuse to pay therefor shall make way with and dispose of the same before he shall have paid therefor unless credit shall be expressly extended therefor, shall be guilty of a felony and upon conviction thereof, shall be imprisoned in the penitentiary for not less than one year nor more than 5 years.¹

The above quoted enactment was the product of nineteenth century agrarian power and influence in the Georgia Legislature. Although the Twentieth Century has wrought a change in our state's economy from predominantly agricultural to an ever increasing industrial prominence and the county unit system has submitted to the dominance of urban control, yet this law has, from its original enactment in 1853, withstood both the changes in economic development and the constitutional attacks that have accompanied this evolution.

The major grounds of attack by those who have been charged with the violation of these provisions are based on two guarantees of the Georgia Constitution. Those accused contend that these penal sanctions contravene the constitutional guaranty against deprivation of life, liberty or property except by due process of law² and the provision that "there shall be no imprisonment for debt."³

HISTORICAL DEVELOPMENT BY THE COURTS

The appellate courts of Georgia first considered this statute's purpose in the case of *Whitaker v. State*.⁴ The court construed the intent of the General Assembly in enacting the code section by stating:

The manifest purpose of . . . section 551 was to protect the producers and sellers of farm products from loss in disposing of the products of the farm. The law was designed primarily to protect farmers, who produced either farm, orchard, or dairy products;

*Third year student, Walter F. George School of Law, Mercer University. Member of the Georgia Bar.

1. GA. LAW 1854, pp. 56-57.

2. GA. CONST. art. I, §1, para. 3.

3. GA. CONST. art. I, §1, para. 21.

4. 9 Ga. App. 213, 40 S.E. 990 (1911).

and other sellers are also included, no doubt, because otherwise the statute would be class legislation.⁵

In discussing the essential elements of the statute, the court concluded that the common essential element necessary to constitute a crime under this section was loss resulting to the seller of certain designated products by reason of the purchaser's wrongful failure to pay for the same:

And so in section 551 there is superadded to the refusal to pay (which of itself could not be a crime) the element that it must appear that the purchaser made way with or disposed of the property before he paid for it. From this making way with or disposing of the property, and refusal to pay, the law conclusively presumes that loss has accrued to the seller; and the State is not required directly to prove loss, because loss is implied.⁶

In the case of *Cornell v. State*⁷ the appellate courts were again confronted with an appeal from a conviction based on this statute and in this case the court dealt specifically with the constitutional questions involved. In this case the defendant was convicted for buying 1,207 field boxes of peaches at fifty cents per box, and making way with them prior to paying therefor. The court in affirming the conviction construed the code section in the following manner:

Under Code §5-9914, the law condemns and makes criminal the failure to pay only where the contract with the planter is for cash and superadded to the failure or refusal to pay is the criminal element that the purchaser makes away with or disposes of the planter's property before he has paid therefor, and thus takes it out of the class of ordinary debts, for the failure to pay which there can be no imprisonment. Thus, it is unnecessary in order to uphold the constitutionality of the Code section in question, to read into it a specific intent to defraud, and all that is necessary to be proved here is that the defendant did the act prohibited by the legislature. The instant case may be comparable to a case of larceny after trust delegated.⁸

In 1959 the Georgia legislature repealed the original wording of GA. CODE ANN. section 5-9914 (1962 Rev.) and enacted in lieu thereof the provisions of this code section as it presently exists. The change that was made seemed minor at the time of its enactment but its impact can be seen by a consideration of the appellate decisions which have construed it. The Supreme Court of Georgia in its decision in *Plapinger v. State*⁹ effectively summarizes the change that was made:

As originally enacted (GA. LAWS 1853-54, pp. 56, 57), and until 1959, this statute stated conjunctively the acts declared criminal so

5. *Id.* at 217.

6. *Whitaker v. State*, *supra* n. 4 at 216.

7. 64 Ga. App. 202, 12 S.E.2d 37 (1940).

8. *Id.* at 206.

9. 217 Ga. 11, 120 S.E.2d 609 (1961).

that both acts were necessary to constitute the crime: ". . . and shall fail or refuse to pay for the same *and* shall make way with or dispose thereof before he shall have paid for the same . . ." (emphasis supplied). However in 1959 the statute was rewritten to state these acts alternatively so that either act alone constitutes an offense: ". . . and (1) shall fail or refuse to pay therefor *or* (2) shall make way with or dispose of the same before he shall have paid therefor unless credit shall be expressly extended therefor . . ." (emphasis supplied).

The *Plapinger* case was one of the first cases to construe the code section after the 1959 amendment. In this case the defendant was charged with "buying grapes and making away and disposing of same before the employee had paid therefor credit not having been expressly extended therefor." The indictment was under GA. CODE ANN. section 5-9914 (1962 Rev.). The defendant's contention on appeal was that section 5-9914 was void in that it violated the provisions of article I, section 1, paragraph 21 of the Constitution of Georgia which prohibits the imprisonment for debts. The court in this decision refused to rule as to that portion of the statute dealing with the prohibitive act—failing or refusing to pay for the products—since the defendants were not charged with that offense. The court used as authority for this action the rule of constitutional construction that a decision as to the constitutionality of the portion of the statute which was not applied against the defendant was not necessary and therefore no decision would be made as to the first portion of the statute under this appeal.

In dealing with the second portion of the statute under which the defendants were indicted the court set forth the rule that the constitutional provision prohibiting imprisonment for debt is not violated where the legislative purpose is to punish for an act declared criminal, not to enforce imprisonment for debt.¹⁰

The court stated that the real question in this case was whether the purpose of the second prohibited act of the statute was to imprison (1) for failure to pay a debt or (2) for the commission of an act which the statute makes criminal. In answering this question the court stated:

The fact that the legislature saw fit to change this statute so as to make the two prohibitive acts alternatively, and thus to make them two separate offenses, is significant. It indicates that *something more than* mere failure or refusal to pay is contemplated by the second prohibitive act. That something more is the making away with or disposing of the property while unpaid for. Thus, the gist of the second offense is disposal of the property, not the fact that it is not paid for . . . having bought the grapes, they could have either returned them or retained them and have been free from prosecution under this portion of the statute whether they

10. The court cited as its authority *Duncan v. State*, 172 Ga. 186, 190, 157 S.E.2d 670 (1930).

paid for them or not. Thus, it is clear that debt is not the gravamen of this second offense.¹¹

In the cases of *Coffee v. State*¹² and *Garmon v. State*¹³ the defendants were indicted under similar facts for buying agricultural products at a cash sale and making way with and disposing of said agricultural products before having paid therefor. Upon conviction in each case the defendant challenged the constitutionality of section 5-9914 on the grounds that this was a denial of equal protection under the guaranty of the fourteenth amendment of the United States Constitution. The answer to such an attack is found in the language of the court in *Garmon v. State* where the court stated: "Equal protection is secured by a law which operates on all alike, without discrimination. See *Lamar v. Prosser*, 212 Ga. 153 (4) (48 S.E. 977); *Meyers v. Whittle*, 171 Ga. 509 (3) (156 S.E. 120). Since this applies alike to all who purchase agricultural products at cash sales, there is clearly no merit in the contention that it is discriminatory."¹⁴

The most recent case to reach the appellate courts regarding this code provision was *Howard v. State*.¹⁵ The defendant was indicted under the second portion of the statute for buying corn on a cash sale and failing and refusing to pay to the seller the purchase price therefor. In this case the constitutionality of the code provision as a whole was questioned. The same constitutional objections as were raised on appeal in the cases of *Coffee v. State*¹⁶ and *Garmon v. State*¹⁷ were reiterated by the defendant in this appeal. The court summarily affirmed the conviction in this appeal basing its decision on the rule of construction that such an omnibus attack will necessarily fail unless the act is invalid in every part for some reason alleged.¹⁸

The result of this decisional and legislative development of the statute under consideration has been to leave the present law in a state of uncertainty. In following the reasoning of the court in *Plapinger*¹⁹ section 5-9914 now provides two separate offenses under which an indictment might be returned. At the present time the Appellate courts of Georgia have had no occasion to rule on the first portion of the statute which deals with the first prohibitive act—failing or refusing to pay for the products bought. As was seen in *Plapinger*, the court refused to rule on the constitutionality of this provision holding that it was unnecessary since the defendant was

11. *Plapinger v. State. supra* n. 9 at 13.

12. 219 Ga. 328, 133 S.E.2d 590 (1963).

13. 219 Ga. 575, 134 S.E.2d 796 (1964).

14. *Id.* at 577.

15. 222 Ga. 252, 150 S.E.2d 834 (1966).

16. *Supra* n. 12.

17. *Supra* n. 13.

18. The court cited the following cases as authority for this proposition: *Franklin v. Harper*, 205 Ga. 779, 55 S.E.2d 221 (1949); *Williams v. Ragsdale*, 205 Ga. 274, 277, 53 S.E.2d 339 (1949); *Dale County v. State*, 201 Ga. 380, 79 S.E.2d 864 (1946); *Stegall v. Southwest Georgia Regional Housing Authority*, 197 Ga. 571, 582, 30 S.E.2d 196 (1944); *Miller v. Head*, 186 Ga. 694, 198 S.E. 680 (1938).

19. *Supra* n. 9.

not indicted under this portion. This has also been the situation in the cases of *Coffee*,²⁰ *Garmon*,²¹ and *Howard*²² which were all decided following the 1959 amendment.

A BASIS FOR CONSTITUTIONALITY IN FUTURE CASES

If in the future a conviction is presented on appeal which has been based on an indictment charging the defendant with the violation of the first prohibition, *i.e.*, failing or refusing to pay for the products bought, then the appellate courts will be faced squarely with the challenge that this section of the statute provides for imprisonment for debt and for criminal enforcement of a civil obligation in contravention of the Constitution of Georgia. A sound basis for the State's argument in supporting the constitutionality of the provisions of section 5-9914 could be found in the reasoning of the Georgia Court of Appeals in *Whitaker v. State*.²³ The court concluded that the gravamen of the offense published by section 5-9914 was that of the fraud on the seller rather than for the imprisonment of the accused for the failure to pay his debts.

This analysis is further supported by a survey of the appellate courts' decisions when the same constitutional challenge has been raised on appeal from a conviction under similar penal statutes. An analogous situation was presented in the case of *Duncan v. State*²⁴ which involved the penal sanctions imposed on bank officials for wrecking a bank. In answer to the attack that this statute provided for criminal enforcement of a civil obligation the court stated: "the punishment imposed for wrecking a bank is not imprisonment for debt. It is not debt but fraudulent conduct which section 206 of the Penal Code seeks to punish. Though, in perpetrating a fraudulent purpose upon the victim, the perpetrator may become a debtor to the person defrauded, it is still within the province of the law to punish him."²⁵

A similar situation was presented in *Collins v. State*²⁶ in which a 1941 statute²⁷ declared that it would be a felony for any person with the intent to defraud, to use the funds of any payment made to him for the purposes of improving real property, otherwise than for the payment of labor and material costs, if there be any obligations outstanding, providing the failure to pay such labor and material cost would be prima facie evidence of intent to defraud. In dealing with the challenge that this statute was unconstitutional in that it imprisoned one for nonpayment of a debt, the court stated:

The Act does not violate the constitutional inhibition against imprisonment for debt . . . the Act here in question creates a form

20. *Supra* n. 12.

21. *Supra* n. 13.

22. *Supra* n. 15.

23. *Supra* n. 4.

24. 172 Ga. 186, 157 S.E. 670 (1930).

25. *Id.* at 189.

26. 206 Ga. 95, 55 S.E.2d 599 (1949).

27. GA. LAW 1941, p. 480.

of larceny after trust The object of the Act was to make penal the conversion of funds delivered for the purpose of applying to labor and material costs, with a provision that there would be a conversion when such funds were otherwise used while there remained any unpaid labor or material costs. The legislative purpose was to punish for the fraudulent conversion, and not for a failure to comply with a contractual obligation.

AN ARGUMENT AGAINST THE CONSTITUTIONALITY OF SECTION 5-9914

In attempting to predict how our appellate courts may respond when confronted with this question we must turn to other jurisdictions for persuasive authority. In the case of *Trujillo v. People*,²⁸ the defendant was a merchant engaged in the purchase of farm products for resale. The defendant had purchased potatoes from a vendor (the prosecutor in this case) and agreed to pay the next day. Upon failing to pay, the defendant was convicted under Colorado law which provided:

Any person is guilty of a misdemeanor and is punishable by a fine of not more than \$500.00 or by imprisonment in a county jail for not more than one year or both fine and imprisonment who assumes or attempts to act as a commissioned merchant, dealer, broker or agent without a license or who: (b) fails to properly, correctly, and fully and properly to make settlement for farm products as herein provided.²⁹

The provision which the defendant allegedly had violated is set out in the following:

Every dealer must pay for farm products delivered to him at the time and in the manner specified in the contract with the producer but if no time is set out by such contract with the producer or at the time of delivery, then within 30 days from the delivery or taking possession of such farm products.³⁰

The defendant claimed that the above quoted code sections contravened the Colorado Constitution which provides:

No imprisonment for debt. No person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law or in cases of tort or where there is a strong presumption of fraud.³¹

In reversing the decision of the lower court and holding for the defendant the Appellate Court for the State of Colorado held that the code sections under which the defendant had been indicted were unconstitutional and a nullity. The court held that the legislative act purporting to

28. 407 P.2d 36 (Colo. 1965).

29. C. R. S. '53, 7-5-15.

30. C. R. S. '53, 7-5-12 (3).

31. COLO. CONST., art. II, §12.

justify the imprisonment of a person for failure to pay for farm products delivered to him at the time and manner specified in the contract with the producer was a nullity.

As stated previously the decisions of the other states are only persuasive authority on our appellate courts. However, since the above cited case is similar on its face to the constitutional question involved herein, then this decision may provide a basis for a future appellant's argument that the statute *sub judice* violates the constitutional provisions against imprisonment for debt.