



HENRY MCMASTER
ATTORNEY GENERAL

August 12, 2009

The Honorable Garry R. Smith
Member, House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Smith:

In a letter to this office you questioned whether language added by Act No. 36 of 2009 requires summary court judges to expunge criminal records that arise out of cases involving Title 56, which deal with motor vehicle violations, and Title 50, which deal with Natural Resources or wildlife violations of the Code of Laws. Specifically, you note that pursuant to Act No. 36, Section 17-22-950 was added to the Code. Such provision states that:

(A) [w]hen criminal charges are brought in a summary court and the accused person is found not guilty or if the charges are dismissed or nolle prossed, pursuant to Section 17-1-40, the presiding judge of the summary court, at no cost to the accused person, immediately shall issue an order to expunge the criminal records of the accused person unless the dismissal of the charges occurs at a preliminary hearing or unless the accused person has charges pending in summary court and a court of general sessions and such charges arise out of the same course of events. This expungement must occur no sooner than the appeal expiration date and no later than thirty days after the appeal expiration date. Upon issuance of the order, the judge of the summary court or a member of the summary court staff must coordinate with SLED to confirm that the criminal charge is statutorily appropriate for expungement; obtain and verify the presence of all necessary signatures; file the completed expungement order with the clerk of court; provide copies of the completed expungement order to all governmental agencies which must receive the order including, but not limited to, the arresting law enforcement agency, the detention facility or jail, the solicitor's office, the magistrates or municipal court where the arrest warrant originated, the magistrates or municipal court that was involved in any way in the criminal process of the charge sought to be expunged, and SLED. The judge of the summary court or a member of the summary court staff also must provide a copy of the completed expungement order to the applicant or his retained counsel. The prosecuting agency or appropriate law enforcement agency may file an objection to a summary court expungement. If an objection is filed by the prosecuting

agency or law enforcement agency, that expungement then must be heard by the judge of a general sessions court. The prosecuting agency's or the appropriate law enforcement agency's reason for objecting must be that the:

- (1) accused person has other charges pending;
- (2) prosecuting agency or the appropriate law enforcement agency believes that the evidence in the case needs to be preserved; or
- (3) accused person's charges were dismissed as a part of a plea agreement.

(B) If the prosecuting agency or the appropriate law enforcement agency objects to an expungement order being issued pursuant to subsection (A)(2), the prosecuting agency or appropriate law enforcement agency must notify the accused person of the objection. This notice must be given in writing at the address listed on the accused person's bond form, or through his attorney, no later than thirty days after the person is found not guilty or his charges are dismissed or nolle prossed.

S.C. Code Ann. § 17-1-40, cited in such provision, was amended to read

(A) [a] person who after being charged with a criminal offense and the charge is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, the arrest and booking record, files, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge may be retained by any municipal, county, or state law enforcement agency. Provided, however, that local and state detention and correctional facilities may retain booking records, identifying documentation and materials, and other institutional reports and files under seal, on all persons who have been processed, detained, or incarcerated, for a period not to exceed three years from the date of the expungement order to manage their statistical and professional information needs and, where necessary, to defend such facilities during litigation proceedings except when an action, complaint, or inquiry has been initiated. Information retained by a local or state detention or correctional facility as permitted under this section after an expungement order has been issued is not a public document and is exempt from disclosure. Such information only may be disclosed by judicial order, pursuant to a subpoena filed in a civil action, or as needed during litigation proceedings. A person who otherwise intentionally retains the arrest and booking record, files, mug shots, fingerprints, or any evidence of the record pertaining to a charge discharged or dismissed pursuant to this section is guilty of contempt of court.

You referenced that many cases involving Title 56 regarding traffic law violations and Title 50 dealing with Natural Resources violations are handled by summary court judges and individuals

accused of such violations may be found not guilty or have their charges dismissed or nolle prossed. You stated that “[i]n many of these cases, there is no ‘criminal record’ other than the ticket that was issued to the individual.” You have questioned whether or not it is necessary for summary court judges, specifically magistrates and municipal court judges, to initiate the expungement process as to such violations.

As provided in Section 17-22-950(A), “[w]hen criminal charges are brought in a summary court and the accused person is found not guilty or if the charges are dismissed or nolle prossed, pursuant to Section 17-1-40, the presiding judge of the summary court, at no cost to the accused person, immediately shall issue an order to expunge the criminal records of the accused person....” (emphasis added). Section 17-1-40(A) states in part that “[a] person who after being charged with a criminal offense and the charge is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, the arrest and booking record, files, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge may be retained by any municipal, county, or state law enforcement agency.” (emphasis added). Therefore, in both instances, reference is made to “criminal charges” instituted in a summary court or charges of a “criminal offense.” These provisions are absolute and statutorily do not require that the defendant request the expungement. An Order of the Chief Justice dated July 20, 2009 issued subsequent to Act No. 36 deals with summary court expungement orders. These orders refer to charges disposed of by either a magistrate’s court or municipal court and reference a “warrant/ticket/courtesy summons.” A memorandum issued by the State Court Administration office states that “[c]riminal cases’ has been interpreted to include Title 56 (traffic) and Title 50 (DNR) which are disposed of pursuant to Section 17-1-40.”

A prior opinion of this office dated July 22, 1980 dealt with the question of whether or not traffic offenses are “criminal offenses” for purposes of Section 17-1-40. The opinion stated that

...violations of virtually all of the laws of Title 56 of the South Carolina Code are classified as misdemeanors...It therefore seems clear that traffic violations are criminal offenses within the meaning of § 17-1-40.

See also: Ops. dated February 17, 1993 (reference to “...speeding or any other traffic or criminal offense.”); September 27, 1989 (“...generally traffic offenses should be considered criminal offenses since virtually all traffic provisions in Title 56 are classified as misdemeanors....”); April 16, 1968 (“...violation of a municipal traffic ordinance would, in my opinion, be in the nature of a criminal offense”); May 9, 1967 (“...all traffic violations are criminal offenses.”); April 20, 1966 (“whether...(a state)...creates a criminal offense depends upon whether there is a penalty that is prescribed for its violation. A penal statute is one which imposes punishment...”). Similarly, the State Court of Appeals in State v. Padgett, 354 S.C. 268, 273, 580 S.E.2d 159, 162 (2003) made reference to a motorist “...committing a criminal act, which includes the violation of a traffic law....”

As referenced, provisions of Chapter 5 of Title 56 which establish statutory traffic offenses typically categorize such offenses as misdemeanors. See, e.g., S.C. Code Ann. § 56-5-1520(G) “[a]

person violating the speed limits established by this section is guilty of a misdemeanor and, upon conviction for a first offense, must be fined or imprisoned as follows:...(with a maximum penalty)...by a fine of not less than seventy-five dollars nor more than two hundred dollars or imprisoned for not more than thirty days.”; S.C. Code Ann. § 56-5-6190 (“[i]t is a misdemeanor for any person to violate any of the provisions of this chapter unless such violation is by this chapter or other law of this State declared to be a felony. Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days.” As to violations of Title 50 dealing with fish, game and watercraft violations, typically first offense violations of such provisions are classified as misdemeanor offenses within the jurisdiction of a magistrate’s court. See, e.g., S.C. Code Ann. §§ 50-5-330; 50-11-340; 50-11-1450; 50-13-1195; 50-18-290; 50-19-590; 50-19-2650; 50-21-150; 50-23-280; 50-25-1130. These violations would be within the trial jurisdiction of a magistrate or municipal court inasmuch as S.C. Code Ann. § 22-3-550 provides that magistrates have jurisdiction of all offenses subject to penalties of a fine not exceeding five hundred dollars or imprisonment not exceeding thirty days, or both. Pursuant to S.C. Code Ann. § 14-25-45, a municipal court has “...all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates.”

Admittedly, some of the provisions of Sections 17-22-950(A) and 17-1-40 are inconsistent with typical traffic or wildlife violations. For instance, such cases typically do not involve a booking record, mug shots, and fingerprints of the person arrested. Section 17-22-950(A) makes reference to the fact that

[u]pon issuance of the order, the judge of the summary court or a member of the summary court staff must coordinate with SLED to confirm that the criminal charge is statutorily appropriate for expungement; obtain and verify the presence of all necessary signatures; file the completed expungement order with the clerk of court; provide copies of the completed expungement order to all governmental agencies which must receive the order including, but not limited to, the arresting law enforcement agency, the detention facility or jail, the solicitor's office, the magistrates or municipal court where the arrest warrant originated, the magistrates or municipal court that was involved in any way in the criminal process of the charge sought to be expunged, and SLED.

Involvement with SLED, the clerk of court, a detention facility or jail and the solicitor’s office is not typical for most traffic and wildlife cases.

Moreover, we have been advised by the Executive Director of the Prosecution Coordination Commission, the State Municipal Association and the State Association of Counties that it was never intended that traffic cases be included in the offenses for which expungement is authorized. While this may be the understanding, nevertheless, Sections 17-22-950(A) and 17-1-40 are quite specific in referencing that “[w]hen criminal charges are brought in a summary court and the accused person is found not guilty or if the charges are dismissed or nolle prossed, pursuant to Section 17-1-40...”

and when “[a] person who after being charged with a criminal offense and the charge is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge,....” records are to be expunged and destroyed. (emphasis added). When interpreting the meaning of a statute, certain basic principles must be observed. The cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Typically, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance. Martin v. Nationwide Mutual Insurance Company, 256 S.C. 577, 183 S.E.2d 451 (1971). Resort to subtle or forced construction for the purpose of limiting or expanding the operation of a statute should not be undertaken. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). Courts must apply the clear and unambiguous terms of a statute according to their literal meaning and statutes should be given a reasonable and practical construction which is consistent with the policy and purpose expressed therein. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991); Jones v. South Carolina State Highway Department, 247 S.C. 132, 146 S.E.2d 166 (1966).

The expungements provided for by Sections 17-22-950 and 17-1-40 are, of course, applicable only to offenses when the accused is found not guilty or the charges are dismissed or nolle prossed. Such expungements are distinguishable from the expungement provided by S.C. Code Ann. § 22-5-910(A), also included in Act No. 36, which provides that

[f]ollowing a first offense conviction for a crime carrying a penalty of not more than thirty days imprisonment or a fine of five hundred dollars, or both, the defendant after three years from the date of the conviction may apply...for an order expunging the records of the arrest and conviction. (emphasis added).

Specific exceptions are made as to “an offense involving the operation of a motor vehicle” or “a violation of Title 50 or the regulations promulgated pursuant to Title 50 for which points are assessed, suspension provided for, or enhanced penalties for subsequent offenses are authorized....” Therefore, when the General Assembly has exempted traffic and wildlife convictions from consideration for expungement, it has expressly done so.

The Order of the Chief Justice dated December 20, 2005, which preceded the adoption of the most recent Order issued following the passage of Act No. 36 of 2009, provided for expungements pursuant to the following statutory provisions: S.C. Code Ann. § 34-11-90(e) (first offense misdemeanor fraudulent check), S.C. Code Ann. § 44-53-450(b) (conditional discharge for simple possession of marijuana or hashish), S.C. Code Ann. § 22-5-910 (first offense conviction in magistrates court), S.C. Code Ann. § 22-5-920 (youthful offender act), S.C. Code Ann. § 56-5-750(f) (first offense failure to stop when signaled by law enforcement vehicle), S.C. Code Ann. § 17-22-150(a) (pretrial intervention), S.C. Code Ann. § 17-1-40, S.C. Code Ann. § 20-7-8525 (juvenile expungements). The form Order for Destruction of Arrest Records which preceded the most recent form Order which allows for the issuance of such Order by a summary court judge was to be signed by a circuit court judge. As noted previously, Section 17-22-950(A) authorizes that “[w]hen criminal charges are brought in a summary court and the accused person is found not guilty or if the

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charges are dismissed or nolle prossed, pursuant to Section 17-1-40, the presiding judge of the summary court, at no cost to the accused person, immediately shall issue an order to expunge the criminal records of the accused person....” Therefore, there is a specific expansion of the circumstances, i.e., “criminal charges...brought in a summary court”, for which expungement is authorized. There was no exclusion as set forth in previously-referenced Section 22-5-910 for traffic offenses or Title 50 violations.

Consistent with the above, in the opinion of this office, newly-enacted Section 17-22-950(A) and amended Section 17-1-40 require summary court judges to expunge criminal records that arise out of cases involving Title 56, which deal with motor vehicle violations, and Title 50, which deal with Natural Resources or wildlife violations of the Code of Laws, as to cases brought in summary courts.

With kind regards, I am,

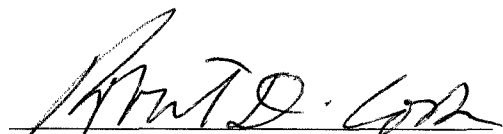
Very truly yours,

Henry McMaster
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