ALAN WILSON
ATTORNEY GENERAL

May 18, 2012

The Honorable P. J. Tanner
Sheriff, Beaufort County
P.O. Box 1758
Beaufort, SC 29901

Dear Sheriff Tanner:

In a letter to this office you have raised a question related to the prosecution of cases within the jurisdiction of the magistrates' courts by deputy sheriffs with Beaufort County Sheriff's Department (the "Department). By way of background, you present a situation where a deputy sheriff investigated an incident and obtained an arrest warrant for a subject, charging him with simple assault. The warrant was then served on the subject by another deputy sheriff, who was assigned to the Warrants Service Section of the Department and had no other connection with the case other than to serve the arrest warrant. Specifically, you ask whether a deputy sheriff who conducts the investigation should be the officer prosecuting the case in magistrate's court and should be considered the "arresting officer," although he/she did not serve the arrest warrant.

As a preliminary note, State law does not authorize this office, by issuing an opinion, to attempt to supersede a decision or to attempt to supersede or intervene in any pending litigation in a court of competent jurisdiction. Op. S.C. Atty. Gen., November 17, 2000. Therefore, this opinion will only attempt to provide some general clarification to your question. Although we will attempt to provide you with as much guidance as possible, our answers must be tempered by this limitation. Ops. S.C. Atty. Gen., October 15, 1999; October 11, 1996.

In considering your question, it must be acknowledged that, as set forth in In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 422 S.E.2d 123, 124 (1992), Article V, §4 of the South Carolina Constitution declares that it is the duty and the right of the South Carolina Supreme Court to regulate the practice of law in this State. See also S.C. Code Ann. §40-5-10; In re Richland County Magistrate's Court, 389 S.C. 408, 699 S.E.2d 161, 164 (2010). We note that no South Carolina statute addresses the ability of law enforcement officers to present cases on behalf of the State at the magistrate's court level. This issue is controlled principally by three decisions of the South Carolina Supreme Court: State v. Messervy, 248 S.C. 110, 187 S.E.2d 524 (1972); State *ex rel.* McLeod v. Seaborn, 270 S.C. 696, 244 S.E.2d 317 (1978); and State v. Sossamon, 298 S.C. 72, 378 S.E.2d 259

(1989). These authorities provide guidance with respect to the prosecution of cases in magistrate's and municipal court by a person other than an attorney.[1]

In Messervy, the defendant appealed his DUI conviction on the grounds that it was improper as a matter of law for a state trooper to act as his own prosecutor in his own case, because the trooper would have an opportunity to both testify as a witness and to argue the inferences from that testimony in his closing argument. The defendant claimed that a jury would be likely to confuse the facts of the witness' testimony with the arguments of the closing. The Court noted that, ideally, "the State's case would be presented by a prosecuting attorney, but . . . such is not practicable because of the large number of traffic court violations." Id., 187 S.E.2d at 525. The Court upheld the conviction and gave its stamp of approval to the practice of allowing officers to act as prosecutors at the summary court level. The Court declared that it was not particularly concerned with the defendant's objections, because adequate safeguards existed in the form of magistrates who would be vigilant to prevent such impermissible blending of argument and testimony.

While in Messervy the issue of whether state troopers prosecuting their own cases constituted the unlawful practice of law was not raised, it was the central issue in Seaborn. Again, in this case the Court upheld the practice, and extended its holding in Messervy to include the practice of allowing a supervisory officer to assist a new or inexperienced officer in prosecuting a case. The Court noted that the policy of preventing laymen from practicing law is intended to protect the public from being represented by incompetents. The Court reasoned that this concern was not implicated by the practice of allowing police officers to act as prosecutors, because when they do so they do not hold themselves out to the public as attorneys, but rather as law enforcement officers and they act on behalf of the State. Whether the officer/prosecutor is the arresting officer or a supervisor of the arresting officer, their activities do not subject the public to exposure from incompetent individuals practicing law. In fact, the Court found that this practice "renders an important service to the public by promoting the prompt and efficient administration of justice." Seaborn, 244 S.E.2d at 318.

In Sossamon a defendant was stopped and arrested by deputy sheriffs for an open container violation. A state trooper appeared at the scene of arrest and later prosecuted the case on behalf of the deputies, securing a conviction. On appeal, the Court reversed the conviction. Although the Court recognized the necessity and value of allowing officers to act as prosecutors in summary courts, the Court declined to extend its previous holdings in Messervy and Seaborn to include the practice of allowing a police officer who was neither the arresting officer nor a supervisor of the arresting officer to act as a prosecutor. Sossamon, 378 S.E.2d at 260.

The Court recently explained its Sossamon decision in State v. Rainwater, 376 S.C. 256, 657 S.E.2d 449 (2008). In Rainwater, a magistrate determined that a state trooper could not prosecute a

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[1]These cases regarding the authority of a law enforcement officer to prosecute cases involve traffic or traffic-related offenses. However, in Easley v. Cartee, 309 S.C. 420, 424 S.E.2d 491, 492 n.2 (1992), the Court stated that prosecutorial authority granted to law enforcement officers "applies with equal force to non-traffic misdemeanors within the jurisdiction of a magistrate's or municipal court."

defendant's DUI case after the officer transferred to another law enforcement agency. The magistrate's ruling was reversed by the circuit court. The Court affirmed the circuit court, noting that Sossamon did not distinguish between the agencies, but instead focused on the fact that the state trooper prosecuting the case was neither an arresting officer nor a supervisor of the arresting officer. By contrast, the Rainwater Court noted that the trooper was the arresting officer "and the person able to testify regarding the events surrounding the arrest." Rainwater, 657 S.E.2d at 450.

Addressing you question, we also must refer to §22-5-180, which provides that:

> [n]o magistrate shall deputize the person swearing out a warrant in any case to serve it.

This office has consistently advised that pursuant to §22-5-180, a magistrate should not authorize, and a law enforcement officer should not serve, an arrest warrant issued upon such officer's affidavit. See Ops. S.C. Atty. Gen., April 21, 1998, May 11, 1966. Early opinions of the South Carolina Supreme Court have also recognized this principle. See, *e.g.*, State v. DuPre, 134 S.C. 268, 131 S.E. 419 (1926); State v. Prescott, 125 S.C. 22, 117 S.E. 637 (1923) (Watts, J., dissenting); State v. Culbreath, 121 S.C. 89, 113 S.E. 476 (1922); State v. Williams, 76 S.C. 135, 56 S.E. 783 (1907). This remains the opinion of this office. Accordingly, pursuant to § 22-5-180, ". . . the law enforcement officer who acts as the affiant in obtaining an arrest warrant should not serve such warrant." See Op. S.C. Atty. Gen., May 22, 1980 [advising that §22-5-180 applies only to arrest warrants].

Consistent with the above authority, provided a law enforcement officer is not seeking to prosecute a case made by another officer and is seeking to prosecute his/her own case, such would fall within the guidelines established by the South Carolina Supreme Court allowing the officer to prosecute on behalf of the State, would not endanger the public since he/she would not be holding him/herself out as an attorney, and would promote the administration of justice by allowing cases to be disposed of in a timely manner. As previously noted, the Court retains the ultimate authority to determine what constitutes the unauthorized practice of law. With this caveat in mind, it is the opinion of this office based on the deciding cases, the Court would probably hold that an "arresting officer" would be the law enforcement officer who makes the case to arrest the subject or procures the arrest warrant. This officer is the person who is able to testify regarding the events surrounding the investigation and prosecute the case on behalf of the State. Pursuant to §22-5-180, the affiant for the arrest warrant should not serve the arrest warrant. By contrast, it is likely the Court would find that an officer who merely serves the arrest warrant on a subject, has no other connection with the investigation of the case, and is not a supervisor, would appear to have no standing to prosecute a case in magistrate's court made by another officer. Of course, we cannot opine with certainty whether a court will necessarily concur with our opinion. Ops. S.C. Atty. Gen., June 5, 2008; November 17, 2000. Such a determination must be made on a case-by-case basis. This office is not a fact-finding entity and any determination, therefore is beyond the scope of an opinion of this office. See Op. S.C. Atty. Gen., April 6, 2006 ("[T]he investigation and determination of facts are matters beyond the scope of an opinion of this office"). Ultimately, clarification from the appellate courts

would be necessary to determine your question with finality. Ops. S.C. Atty. Gen., March 9, 2012; January 10, 2012.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General