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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 22, 1996

Robert M. Stewart, Chief
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Re: Informal Opinion

Dear Chief Stewart:

You have sought an opinion concerning the following:

> Section 56-5-750 of the South Carolina Code of Laws was recently amended to allow expungement of a first offense of Failure to Stop for Siren or Blue Light, after a three year period in which the person has had no other convictions and certain terms or conditions are met.
>
> The South Carolina Law Enforcement Division's Central Record's Repository, which routinely receives expungement orders with various statutes, will need additional clarification concerning this amendment.
>
> My first question is whether this amendment is retroactive for expungement with all subjects who have been convicted of Failure to Stop or is it simply for individuals arrested or convicted after the date this legislation was amended?
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> The other question which needs clarification is, what terms and conditions must be completed? Must the subject only

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complete a probationary sentence of three years with no additional criminal activity?

Act No. 65 of 1995 amended S.C. Code Ann. Section 56-5-750 to read in pertinent part as follows:

Section 56-5-750.

(A) In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.

(B) A person who violates the provisions of subsection (A):

(1) for a first offense where no great bodily injury or death resulted from the violation, is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars or imprisoned for not less than ninety days nor more than three years. The person's drivers license may be suspended for a period not to exceed one year; or

(2) for a second or subsequent offense where no great bodily injury or death resulted from the violation, is guilty of a felony and, upon conviction, must be imprisoned for not more than five years. Notwithstanding any other provision of law, the person's driver's license

> must be suspended for a period of one year from the date of the conviction ... .
>
> (G) After a conviction pursuant to subsection (B) (1) for a first offense, the person may, after three years from the date of completion of all terms and conditions of his sentence for the first offense, apply, or cause someone acting on his behalf to apply, to the court for an order expunging the records of the arrest and conviction. This provision does not apply to any crime classified as a felony. If the person has had no other conviction during the three-year period following the completion of the terms and conditions of the sentence, the court shall issue an order expunging the records. No person has any rights under the section more than one time. After the expungement, the South Carolina Law Enforcement Division is required to keep a nonpublic record of the offense and the date of its expungement to ensure that no person takes advantage of the rights permitted by this subsection more than once. This nonpublic record is not subject to release under the Freedom of Information Act or any other provision of law except to those authorized law or court officials who need to know this information in order to prevent the rights afforded by this subsection from being taken advantage of more than once.

LAW / ANALYSIS

In interpreting a statute, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987); Multi-Cinema, Ltd. v. South Carolina Tax Comm'n., 292 S.C. 411, 357 S.E.2d 6 (1987). The legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in the light of the intended purpose of the statutes. Gambrell v. Travelers Ins. Co., 280 S.C. 69, 310 S.E.2d 814 (1983).

The retrospective operation of a statute is not favored by the courts. Sutherland, Statutory Construction, § 41.04 (4th ed. 1986). Statutes are presumed to be prospective in effect. U.S. Rubber Co. v. McManus, 211 S.C. 342, 349, 45 S.E.2d 335, 338 (1947). Accordingly, our Supreme Court has frequently recognized that "[a] statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for

doubt." Am. Nat. Fire Ins. Co. v. Smith Grading and Paving, _____ S.C. _____, 454 S.E.2d 897 (1995).

The only exception to the rule of prospective operation is where the statute is remedial or procedural in nature. However, as our Court recognized in Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978), "[t]his exception for remedial or procedural statutes is generally considered inapplicable ... to a statute that supplies a legal remedy where formally there was none." The Court quoted Judge Cardoza in Jacobus v. Colgate, 217 N.Y. 235, 111 N.E. 837 (1916) as follows:

> [t]he general rule is that statutes are to be construed as prospective only. It takes a clear expression of the legislative purpose to justify a retroactive application. Changes of procedure i.e., of the form of remedies are said to constitute an exception, but that exception does not reach a case where before the statute there was no remedy whatever. To supply a remedy where previously there was none of any kind is to create a right of action. 111 N.E. at 838-839 (citations omitted).

245 S.E.2d at 125.

The expungement of a record is not a remedy frequently granted. U. S. v. Friesen, 853 F.2d 816 (10th Cir. 1988). Where the right to expungement is not specifically granted by the relevant statute, no expunction may occur. State v. Salmon, 279 S.C. 344, 306 S.E.2d 620 (1983). Only where the statutory conditions are met, may expungement be granted. State v. Millsap, 702 S.W.2d 741 (Tex. 1985). Expungement of a criminal record is a privilege, not a right and the requirements of the expungement statute must be strictly adhered to. State v. Thomas, 64 Ohio App.2d 141, 411 N.E.2d 845 (1979).

As a general matter, courts have concluded that expungement statutes should not be retroactively applied. In State v. Rapacchia, 124 N.J.Super., 306 A.2d 498 (1973), for example, the Court addressed the issue of "whether a 21-year-old defendant who has pleaded guilty and been sentenced for possession of marijuana prior to the effective date of the expungement statute can have that statute retroactively applied in order to avail himself of its provisions." Id. Holding that the defendant could not, the court concluded:

> ... generally, all legislation operates prospectively unless a contrary legislative intent is clearly expressed. ... Clearly, no contrary intent has been expressed in N.J.S.A. 24:21-1 et seq.

> This court recognizes that the failure to apply N.J.S.A. 24:21-28 retroactively will have many harsh results in that a youthful, one-time marijuana user will not be able to expunge this stigma from his record for ten years. ... However, in view of ... the lack of any express legislative intent to apply the expungement statute retroactively, this court is led to the necessity of holding that N.J.S.A. 24:21-28 cannot be applied retroactively to this defendant.

Id. at 499.

Likewise, in Warren v. State, 632 S.W.2d 67 (Mo. App. 1982), the Court noted that "[a]ppellant's only point on appeal is that it was error to apply [the expungement statute] ... prospectively only. He argues [the statute] ... should be applied to arrests which occurred prior to ... the effective date of the statute." However, the Court rejected the argument, noting:

> [n]o legislative intent for retroactive application appears anywhere in the statute ... . The trial court therefore properly ruled that § 610.100 should be applied only prospectively and denied the motion.
>
> Appellant argues, though, that applying § 610.100 prospectively violates his right to equal protection under the Missouri constitution. ... He reasons that such a determination makes an unreasonable and unconstitutional distinction between those persons arrested before September 28, 1973 and those arrested after that date ... .
>
> In this case, applying § 610.100 prospectively only does not unreasonably distinguish between those arrested before and those arrested after the effective date. All persons arrested or charged, either before or after the effective date, are subjected to the law in effect on the date of the arrest or charge. It is reasonable for the state to apply to an accused only those statutes in effect on the date of the arrest or charge. Such a policy provides certainty for both law enforcement officials and those accused of crimes. Both parties know that the substantive and procedural effects of their actions will not be changed by a subsequent decision of the legislature. Applying

> § 610.100 prospectively, therefore, does not violate appellant's right to equal protection.

632 S.W.2d at 68. Those cases which hold that expungement laws are to be retroactively applied, base such conclusions upon clear legislative intent. See, State v. Arellano, 801 S.W.2d (Tex. App. 1990).

Act No. 65 of 1995 "takes effect upon approval by the Governor" (June 12, 1995). Nothing in the statute indicates an intent to apply the expungement portion of the enactment to offenses committed prior to this effective date. Indeed, the 1995 amendment to Section 56-5-750 constitutes a major revision of the Section. Previously, Section 56-5-750 had provided that a violation of the section was a misdemeanor, carrying a fine of not less than $500 and imprisonment of not less than 90 days nor more than three years. No right to expunction was created in the former version. The 1995 amendment, in addition to providing for a right of expungement in certain circumstances, created separate penalties for first offense and second or subsequent offenses. Of course, expungement in the revised statute is made applicable only to convictions "for a first offense", which were not separately recognized in the previous Section 56-5-750. Thus, it would seem incongruous that the Legislature intended the newly created right of expungement to attach to earlier convictions for failure to stop in light of such a major overhaul in the law by virtue of the 1995 amendment. Accordingly, based upon our Supreme Court decisions, the presumption against retroactive application of statutes and the fact that the remedy of expungement is a new remedy created by the 1995 Act, it is my opinion that Section 56-5-750 should not be retroactively applied to expunge convictions for crimes committed prior to the effective date of the statute, absent a court determination to such effect.

You have also asked what is meant by the phrase "following the completion of the terms and conditions of the sentence." A "sentence" is that part of a judgment which describes the punishment imposed by the court following the accused's conviction. 24 C.J.S. Criminal Law § 1458. Generally, the words "terms" and "conditions" are used synonymously and interchangeably in statutes. Morris Tp. v. Town of Morristown, 49 N.J. 194, 229 A.2d 516 (1967). A "term" or "condition" of a sentence pertains to the particular sentence structure imposed by the trial judge. State v. Aytah, 154 Wis.2d 508, 453 N.W.2d 906 (1990). Of course, a sentencing judge possesses broad discretion in sentencing a defendant within the limitations set by law. He must provide the sentence he thinks appropriate based upon the facts before him. State v. Sidell, 262 S.C. 397, 205 S.E.2d 2 (1974). Thus, as I read the statute, three years after the completion of the last term and condition imposed by the sentencing judge for the first offense violation, then "[i]f the person has had no other conviction during the three year period (again, dating from the completion of "all" terms and conditions of sentence) the court "shall issue an

order expunging the records." Each and every one of these requirements must be met before expungement may occur. For example, if the court imposed as a condition of probation, the attendance of traffic school, the sentence must have been completed in its entirety and three years from that date, if the individual has no other convictions, expungement may occur.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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