

1977 WL 37244 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 10, 1977

*1 Honorable P. P. Leventis, Jr.
Post Office Box 1178
Columbia, South Carolina 29202

Dear Pete:

Thank you for your letter of January 24, 1977.

I assume from your letter that the term of office of councilmen begins on January 1 and I assume further that the new council did not begin to function until January 5. If these facts are correct, the old council may have been serving in a holdover capacity as de facto officers and there is authority in this State that de facto officers are entitled to the compensation attaching to the office.

I am not advised, however, of the precise factual circumstances and therefore cannot express an opinion on the matter. I suggest that it be referred to the new County Attorney, Mr. Charles Porter, who can ascertain the precise factual situation.

With best wishes,
Cordially,

Daniel R. McLeod
Attorney General

ATTACHMENT

OPINION NO. 77-53

February 11, 1977

Hearsay evidence may be used at preliminary examinations to establish the existence of probable cause.

Solicitor

Thirteenth Judicial Circuit

You have asked whether hearsay evidence may be used at preliminary examinations to establish the existence of probable cause.

A preliminary examination, as provided by Section 43-232, serves the purpose of determining whether the State can show the existence of probable cause. *State v. White*, 243 S. C. 238, 133 S. E. 2d 320 (1963). If such a showing is not made to the satisfaction of the magistrate, the defendant is released from custody until indicted by the Grand Jury. *Williams v. South Carolina*, 237 F. Supp. 360 (EDSC 1965), vacated and remanded in *Morris v. South Carolina*, 356 F. 2d 432 (4th Cir. 1966). The requisite showing at a preliminary hearing is the same as that required to support the issuance of a warrant by a magistrate or of an indictment by the Grand Jury. In that showing the State is not required to produce all of its evidence, but only enough to establish probable cause to believe the defendant guilty of the offense charged. 1970 Op. A. G. No. 2869, page 106. It is in no way a miniature trial, though the defendant has the rights both to cross-examine all witnesses presented and to be represented by counsel if desired. *State v. White, supra*; *Coleman v. Alabama*, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970).

You have asked if in a preliminary examination the State may use hearsay evidence. The point appears to be so well established in this State that our research has disclosed no statutes or cases directly on the point. However, the South Carolina Supreme Court has said that an indictment based upon hearsay testimony violates no constitutional right of the defendant. *State v. Williams*, 263 S. C. 290, 210 S. E. 2d 298 (1974). Likewise, it is recognized that hearsay may be used to establish probable cause for the issuance of a warrant where there is a substantial basis for crediting the hearsay testimony. *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). It would indeed be incongruous for hearsay evidence to be appropriate in warrant and Grand Jury proceedings but not at preliminary examinations. Since the burden of proof at each is identical, it follows that the evidentiary standards involved would likewise be the same.

*2 Hearsay evidence, as you note, is customarily used in this State to establish probable cause at preliminary examinations. Since there appears to be no rational basis for imposing a higher standard at preliminary hearings, absent statute or case law, it is our opinion that hearsay evidence may be used to establish the existence of probable cause at preliminary examinations.

BY: Richard P. Wilson
Assistant Attorney General

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