

7805  
Library



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

July 12, 2004

The Honorable A. W. Flynn  
Chief Magistrate  
P. O. Box 485  
Williston, South Carolina 29853

Dear Magistrate Flynn:

In a letter to this office you raised questions regarding S.C. Code Ann. Sections 61-4-90 and 61-4-50 (Supp. 2003). Section 61-4-90 states that

It is unlawful for a person to transfer or give to a person under the age of twenty-one years for the purpose of consumption beer or wine at any place in the State. A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars or imprisoned not more than thirty days.

Various exceptions to the provision are set forth by the statute. Section 61-4-50 provides that

It is unlawful for a person to sell beer, ale, porter, wine, or other similar malt or fermented beverage to a person under twenty-one years of age. A person who makes a sale in violation of this section, must, upon conviction, be fined not less than one hundred dollars nor more than two hundred dollars or imprisoned not less than thirty days nor more than sixty days, in the discretion of the court.

You raised questions regarding which courts have jurisdiction of such offenses, the proper charging documents for such offenses, and the distinctions between such offenses. You also asked when should Section 61-4-90 be used in citing for violations as opposed to Section 61-4-50 since both offenses are so similar as to the actions prohibited.

As to which courts would have jurisdiction to try such offenses, generally, magistrates have jurisdiction pursuant to S.C. Code Ann. Section 22-3-550 (Supp. 2003) over all offenses subject to penalties of a fine of not more than five hundred dollars or imprisonment not

*quest*

The Honorable A. W. Flynn  
Page 2  
July 12, 2004

exceeding thirty days. Therefore, based on the penalty provisions of both statutes, Section 61-4-90 is a magistrate's court offense while Section 61-4-50 is a general sessions court offense.

As to the distinction between the two offenses, Sections 61-4-50 and 61-4-90, an opinion of this office dated May 25, 1993 noted that the term "transfer" as used in former Section 61-13-287, which prohibited actions similar to Section 61-4-90 but which has since been repealed and replaced by Section 61-4-90, was not expressly defined. The opinion noted that "in common usage the word 'transfer' includes sale" and concluded that "the 'sale' of beer or wine to an underage individual could constitute a 'transfer' for purposes of Section 61-13-287." Therefore, consistent with such opinion, a sale of beer or wine could constitute a "transfer" for purposes of Section 61-4-90 or a sale for purposes of 61-4-50. One real distinction between the two offenses is the fact that Section 61-4-90 is a magistrate's court offense while Section 61-4-50 is a general sessions court offense.

Without any meaningful distinction between the two statutes aside from the penalty, it would be a matter of prosecutorial discretion as to which offense to cite. I would only note the further provision of Section 61-4-90 that the transfer be "for the purpose of consumption". No such qualifier is set forth by Section 61-4-50 involving the sale of beer and wine.

As to your question regarding the proper charging document for each offense, pursuant to S.C. Code Ann. Section 56-7-15 (Supp. 2003), a uniform traffic ticket may be used by law enforcement officers to arrest an individual for an offense committed in the presence of the law enforcement officer if the punishment is within the jurisdiction of a magistrate's court. Therefore, an arrest for the offense of transferring for the purpose of consumption beer and wine to an individual under twenty-one years of age, Section 61-4-90, may be accomplished by the use of a uniform traffic ticket since it is a magistrate's court offense. A uniform traffic ticket could not be used in the arrest for a violation of Section 61-4-50 since it is a general sessions court offense. Instead, a warrant must be obtained to cite for a violation of Section 61-4-50 involving the sale of beer or wine to an individual under twenty-one years of age.

As to your question regarding what was the intent of the General Assembly in enacting two such similar provisions, there is no real legislative history with which I am familiar which would answer such question. I can only comment that the two provisions are similar as to the conduct prohibited. However, Section 61-4-50 is quite specific in prohibiting the sale of beer or wine to a person under twenty-one years of age. Section 61-4-90 is broader in prohibiting the transfer of beer or wine to a person under twenty-one years of age which presumably could encompass actions included within the definition of "transfer" beyond the sale of beer or wine. As noted in the previously referenced May 25, 1993 opinion, "...in common usage the word 'transfer' includes 'sale' - while transfer includes conveyance of property other than by sale...."

The Honorable A. W. Flynn  
Page 3  
July 12, 2004

As to Sections 61-4-90 and 61-4-50, you also asked whether pursuant to S.C. Code Ann. Section 22-3-740 (1989) does a magistrate choose under which statute to proceed in a particular case.. Such provision states:

Whenever a person be accused of committing an act which is susceptible of being designated as several different offenses the magistrate upon the trial of the person shall be required to elect which charge to prefer and a conviction or an acquittal upon such elected charge shall be a complete bar to further prosecution for such alleged act.

As referenced in a prior opinion of this office dated November 4, 1983,

This statutory provision requires an election in a factual situation...where a person is 'accused of committing an act'...which is susceptible of being designated as several different offenses...The legislative intent of Section 22-3-740 is evident in the title of the original act (Act No. 707 of 1928), 'An Act to Prevent Double Jeopardy and to Prevent Multiplication of Charges in Inferior Courts...' The purpose of similar statutes has been held to be the protection of citizens from repeated efforts to obtain a conviction and economy in judicial and professional resources...Examples given in the...(South Carolina Bench Book for Magistrates)...where an election must be made between offenses include speeding, reckless driving, drunk driving, driving left of center, and passing a stopped school bus. On the other hand, an election need not be made between offenses such as driving without a license and drunk driving or between not having a vehicle registration and speeding. Clearly these different offenses, where there is not a requirement to elect, also involve different acts.

Another opinion of this office dated April 6, 1995 commented that "...the constitutional protection against double jeopardy and Section 22-3-740...bar prosecutions for certain criminal offenses that arise out of the same incident." Other opinions of this office have construed Section 22-3-740 in the context of double jeopardy considerations. See, Ops. Atty. Gen. dated May 3, 1988 and July 13, 1981.

Therefore, as to your situation, in keeping with double jeopardy considerations, a magistrate must make an election when a defendant is charged with different offenses arising out of the same incident which involve the same act. As to your situation involving Sections 61-4-90 and 61-4-50, inasmuch as the same act may be construed as violating either of such offenses, an election would have to be made if a particular defendant was charged with both offenses. Of course, under double jeopardy considerations, a defendant may be convicted of two separate

The Honorable A. W. Flynn  
Page 4  
July 12, 2004

crimes arising from the same conduct without being subjected to double jeopardy, where the conduct "consists of two 'distinct' offenses." State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (Ct.App.1996).

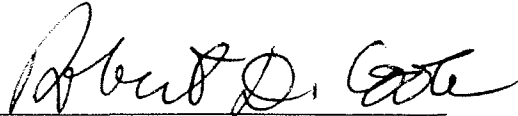
With kind regards, I am,

Very truly yours,



Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General