ALAN WILSON
ATTORNEY GENERAL

May 25, 2011

The Honorable Deborah A. Long
Member, House of Representatives
414-A Blatt Building
Columbia, SC 29201

Dear Representative Long:

In a letter to this office, you have requested an opinion regarding the following situation:

> A Courtesy Summons is issued based on a non-law enforcement Affiant's sworn statement. The form of the Summons is correct and it is properly delivered by law enforcement. The prosecuting attorney decides after some investigation that the charges on the Courtesy Summons cannot be supported at trial. Prosecutor moves, pre-trial, to have the charges amended.
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> Since the charges were derived from Affiant's original and standing sworn statement, is it permissible for the prosecution to amend the charges or should the unsupportable charges be dismissed and a new courtesy summons be issued with, if possible, a new affidavit which supports the amended charges?
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> Is it legal for a County Tax Auditor to hire a full-time non-law enforcement employee whose principal duties are to issue Courtesy Summonses, as the Affiant, to potential violators of the motor vehicle tax and registration statutes? Or, for that matter, for any Public Administrative Office to use the Courtesy Summons provisions to supplement/circumvent law enforcement duties and responsibilities?

Law/Analysis

A charging document referred to as a "courtesy summons" was created by 2002 Acts No. 348 ("the Act"). The Act added S.C. Code Ann. §22-5-115, which provides that:

> [n]otwithstanding any other provision of law, a summary court or municipal judge may issue a summons to appear for trial instead of an arrest warrant, based upon a sworn statement of an affiant who is not a law enforcement officer investigating the case, if the sworn statement establishes probable cause that the alleged crime was committed. The summons must express adequately

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> the charges against the defendant. If the defendant fails to appear before the court, he may be tried in his absence or a bench warrant may be issued for his arrest. The summons must be served personally upon the defendant.

An amendment to §22-5-110 was set forth in the Act. Such provision adds subsection (B) to the statute and states that

> [n]otwithstanding another provision of law, a person charged with any misdemeanor offense requiring a warrant signed by nonlaw enforcement personnel to ensure the arrest of a person must be given a courtesy summons.

As set forth, a courtesy summons is issued by a summary court judge based upon the sworn statement of an affiant "who is not a law enforcement officer" or is issued to "nonlaw enforcement personnel." See Op. S.C. Atty. Gen., December 16, 2008. Therefore, consistent with such, we have stated that a courtesy summons is to be utilized where an individual is charged with a misdemeanor offense and the affiant is nonlaw enforcement personnel.

In responding to your question, we assume that you are referring to amendments which specify offenses to try within the jurisdiction of the summary court. [1]

In a previous opinion of this office dated October 24, 1995, we addressed amendments to arrest warrants in magistrate's court to reflect a greater or a lesser crime before trial. We explained:

> [o]ur Supreme Court has recognized the significance of the arrest warrant in bestowing upon the magistrate jurisdiction to hear a criminal case and in providing notice to the defendant of the charges against him. In Town of Honea Path v. Wright, 194 S.C. 461, 468, 9 S.E.2d 924 (1940), the Court reasoned:
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> > [t]here is a marked difference between the arrest of an offender by an officer without a warrant, and proceedings before a magistrate which include formal charges supported by oath, bail, and trial. Nor does the provision . . . to the effect that proceedings before magistrates shall be summary, dispense with the very process which gives them jurisdiction. Without doubt, the administration of the law, and the rights of persons

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[1] Of course, if there is an amendment which specifies an offense within the jurisdiction of the Court of General Sessions, an indictment would serve as the charging paper and would be the instrument to give the Court of General Sessions jurisdiction. State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849, 852 (Ct. App. 2007); see S.C. Const. art. I, §11 ["No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed. . . ."]; §17-19-10 ["No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury. . . ."].

> charged with crime can best be served by a due observance of statutory requirements. It is the constitutional right of a person charged with a criminal offense to be fully informed of the nature and cause of the accusation. . . . When a warrant is issued, substantially setting forth the offense and the verdict of the jury, or that of the magistrate, is endorsed thereon, this paper becomes original evidence, and prevents any possibility of the prisoner being again tried for the same offense. And this was no doubt one of the reasons which moved the Legislature to require that all prosecutions be commenced by the issuance of a warrant. And because the rights of the accused are not only of interest to him, but concern the State, the statutory requirements may not be waived.

Against this background, we advise that the same concerns presented above should be considered regarding an amendment here. We further stated in that opinion:

> [t]he following statement recognizes the general rule concerning the amendment of information which forms the basis for the issuance of an arrest warrant:
>
> > [g]enerally, an information may be amended so long as the amendment is not prejudicial to the defendant and does not charge a different offense.
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> 42 C.J.S. Indictments and Informations, §195. The burden is usually placed upon the defendant to show he has been prejudiced by the amendment. Usually the rule is that the amended information vitiates the original information and has the legal effect of a *nolle prosequi*. Id.

In an opinion dated October 18, 1977, we recognized that:

> . . . a warrant may be amended upon motion of the State's representative and with the permission of the court, only when said amendment involves immaterial irregularities in the warrant. However, an amendment striking the offense charged and inserting another generally cannot be permitted unless authorized by statute and no prejudice to the accused results. 22 C.J.S. Criminal Law, Section [328], p. 839-840.

We note that §22-3-720 provides that "[t]he information may be amended at any time before trial." It thus appears a magistrate or municipal judge is granted broad authority to amend a warrant. In Town of Ridgeland v. Gens, 83 S.C. 562, 65 S.E. 828 (1909), the South Carolina Supreme Court applied this statute to a criminal case that was called for trial in municipal court charging the unlawful sale of whiskey. The defendant demurred to the warrant upon the ground that the warrant failed to allege the name of the person to whom the whiskey was sold or the price paid. The demurrer was sustained, and the warrant was amended and the case was set for trial. On appeal, the Court upheld the amendment of the

warrant. The Court concluded: "[t]here was, therefore, no error in amending the information and warrant and ordering the case to trial, especially as the defendant did not make it appear that he was surprised by the amendment, or would be prejudiced by an immediate trial." Town of Ridgeland, 65 S.E. at 829.

In State v. Nash, 51 S.C. 319, 28 S.E. 946 (1897), the Court sustained an amendment to a warrant which had resulted in a defendant being arrested for malicious trespass. Shortly before the defendant's trial, the words "wilfully, unlawfully" were inserted, as were certain words describing the trespass and quantifying the damages sustained. The defendant argued that the words inserted changed the offense originally charged. The Court disagreed, concluding:

> [i]t is true that the Constitution of this State does require that the accused shall be fully informed of the nature and cause of the accusation; but the accused in the case at bar was fully informed that he was charged with a malicious trespass upon the lands of Mary E. Nash after notice forbidding such trespass. The law in regard to information under oath, as the basis for a warrant of arrest, allows amendment before trial of such information. . . . The words "wilfully, unlawfully," inserted before the word "maliciously," already there, were inserted no doubt to incorporate the exact words of Section 166 of "The Criminal Statutes of South Carolina," in the information; but this was unnecessary care, for the legislature itself in the act of 1892 . . . both in the title and body of such act, has referred to this offense as "malicious trespass." This remark disposes of the other words added. Nor is there any virtue in the position that such amendments to the information were not sworn to anew. The prosecutrix was present when these words were added to the information to which she had already sworn, and I will assume that the same charges were made at her instance, or with full assent. The case shows that she, in her testimony, stated these facts.

Nash, 28 S.E. at 947.

Prior opinions of this office have addressed questions as to whether a summons issued by the State Highway Patrol is void if the wrong section of the Code is set forth on the summons. We opined that it was not. These opinions state:

> [a]ll that is required in a warrant or summons ticket is that the charge against the defendant be plainly and substantially set forth. Section 43-112 . . . (now §22-3-720) . . . permits amendment of the information at any time before trial. Even in the most serious cases in General Sessions Court, the law permits amendment of the indictment before trial . . . It is the opinion of this office that the summons in question may be amended before trial by the Patrolman to show the correct statute, and that the matter may be disposed of by the Magistrate.

See Ops. S.C. Atty. Gen., August 31, 2004; June 24, 1963.

Cases decided under §17-19-100 are useful when considering your question. This provision permits amendment of an indictment so long as the amendment does not change the nature of the offense charged.[2] In both the Town of Ridgeland and Town of Honea Path cases, however, the South Carolina Supreme Court was quick to emphasize the constitutional right of the defendant to notice of the charge and to stress that there must be no surprise to the defendant by any amendment. See Op. S.C. Atty. Gen., May 5, 1965 [a defendant may not be convicted in magistrate's court or municipal court of any offense not charged in arrest warrant or summons]. The Nash case also reiterates those principles and further suggests there is a need to swearing to the new information. In Nash, the defendant specifically argued that a new offense had been charged, but the Court rejected that argument on the facts.

"The indictment is a notice document." State v. Gentry, 363 S.C. 83, 610 S.E.2d 494, 500 (2005). If the defendant timely objects to the sufficiency of an indictment, the circuit court should judge its sufficiency by determining if (1) the indictment states the offense charged with sufficient certainty and particularity to enable the court to know what judgment to pronounce and for the defendant to know what he is called upon to answer; and (2) it apprises the defendant of the elements of the offense intended to be charged. Id.

An indictment is deemed legally sufficient if it charges the crime substantially in the language of the applicable statute, or so plainly that the nature of the offense charged may be easily understood. State v. Means, 367 S.C. 374, 626 S.E.2d 348, 384 (2006). In Evans v. State, 363 S.C. 495, 611 S.E.2d 510, 517 (2005), the Court stated: "[t]he primary purpose of an indictment [is] to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." In determining whether an indictment is sufficient, a court should review it with a practical eye in view of all the surrounding circumstances, which must be weighed to accurately determine whether the defendant was prejudiced by a lack of notice and an insufficient indictment. Id. Accordingly, the sufficiency of an indictment is examined objectively, from the viewpoint of a reasonable person, and not from the subjective viewpoint of a particular defendant. Means, 626 S.E.2d at 353-54. Further, whether the indictment could be more definite or certain is irrelevant. Gentry, 610 S.E.2d at 500; see also State v. Randolph, 239 S.C. 79, 121 S.E.2d 349, 350-51 (1961) (recognizing

[2]Section 17-19-100, states in pertinent part:

> If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged. . . .

that "in the preparation of warrants, [magistrates] are not required to conform to the technical precision required in indictments"). In South Carolina, an indictment

> shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

Section 17-19-20 (2003); see also State v. Pierce, 263 S.C. 23, 27, 207 S.E.2d 414, 416 (1974). Therefore, an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. State v. Ervin, 333 S.C. 351, 510 S.E.2d 220, 222 (Ct. App. 1998), *overruled on other grounds by* Gentry, 610 S.E.2d 494.

Further, it is well-established that amendments to an indictment are permissible if: (1) they do not change the nature of the offense; (2) the amended charge is a lesser included offense of the crime charged in the original indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty. Means, 616 S.E.2d at 385; State v. Sosbee, 371 S.C. 104, 637 S.E.2d 571, 575 (Ct. App. 2006); see also State v. Myers, 313 S.C. 391, 438 S.E.2d 236, 237 (1993) [an indictment may be amended if the substance and nature of the crime was not affected by the amendment to the indictment]

In contrast to §17-19-100 regarding an indictment in General Sessions Court, §22-3-720 places no explicit limitation upon the ability to amend information for a warrant so long as such amendment is made prior to trial. We also see no need to preclude an amendment after service of a courtesy summons. A court must be mindful, however, of the need to avoid surprise and of the defendant's constitutional right to notice in the amendment of the summons. See State v. Quarles, 261 S.C. 413, 200 S.E.2d 384, 386 (1973) [requiring a showing of both prejudice and abuse of discretion to reverse an amendment of the time frame in an indictment]; Randolph, 121 S.E.2d at 351 ["We think the Court erred in not requiring the State to make the charge more definite and certain by giving such information as would enable appellants to understand the nature of the offense named in the warrant"].

For example, in State v. Riddle, 301 S.C. 211, 391 S.E.2d 253 (1990), the Court held that a particular indictment could not be amended under §17-19-100. The Court concluded:

> [h]ere the amendment increases the lesser charge of assault with intent to commit third degree criminal sexual conduct to the greater charge of assault to commit first degree criminal sexual conduct. Punishment for third degree may not exceed ten years, while first degree is punishable by up to thirty years.

By way of further example, the Court held in State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (Ct. App. 2002), that amending the defendant's burglary indictment at trial by adding the additional aggravating

factor of two or more prior burglary convictions was a material change in the nature of the offense charged, because the proof required for the amended indictment was different from the proof required for the original indictment. Similarly, in State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001), and Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999), the amendments altered the aggravating circumstances of the offenses charged. In both cases, the resulting crimes were violations of different subsections of their respective statutes. Additionally, in Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003), *overruled on other grounds by* Gentry, 610 S.E.2d 494, the original indictment charged the defendant with possession with intent to distribute within proximity of a school. However, the indictment read within proximity of a church and was amended to read within proximity of a school. The Court concluded the amendment clearly altered the nature of the offense, because the original indictment failed to allege a material element of the crime charged - - the possession with intent to distribute was in proximity of a school. Likewise, in Clair v. State, 324 S.C. 144, 478 S.E.2d 54 (1996), and Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994), *overruled on other grounds by* Gentry, 610 S.E.2d 494, the amendments increased the possible punishment the defendant faced upon conviction.

By way of illustration we note several decisions upholding amendments to indictments where a warrant or information is amended to encompass previous convictions for the same offense, as such does not change the offense but merely enhances the punishment. State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002). An amendment of information charging a repeat offense or the offense of habitual offender is permissible because such charges the punishment and not the nature of the crime. State v. Scriven, 339 S.C. 333, 529 S.E.2d 71 (Ct. App. 2000). Additionally, amendments are generally permitted to correct an error of form, such as scrivener's errors. Sosbee, , 637 S.E.2d at 575. In State v. Horton, 209 S.C. 151, 39 S.E.2d 222, 223-24 (1946), the Court permitted the striking through of "surplusage" in an indictment where the amendment worked no prejudice on the defendant. In State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849, 855 (Ct. App. 2007), the Court determined that where a time frame is not material to committing a lewd act on a minor, enlarging the time frame of an indictment for this offense was not improper.

Cases decided under §17-19-100 are useful when considering your question. Although this provision relates to the Court of General Sessions rather than summary courts in this State, still, it is important to place considerable emphasis upon the need to avoid changing the nature of the offense charged against the defendant so that there will be no surprise in the charge made.

Of course, an alternate way of handling the situation noted by your request would be simply for the prosecuting officer to *nol prosse* the original summons and to seek a new one based upon the enhanced charge pursuant to §22-5-115 for nonlaw enforcement personnel, or as otherwise provided by law. This approach would remove any question in a particular situation regarding proper notice to the defendant. It is a general principle that a prosecuting officer has virtually unlimited authority to decide whether and how to prosecute a given case. Op. S.C. Atty. Gen, January 11, 2001. This tenet has been reiterated by our courts as well as opinions of this Office numerous times in a variety of contexts. With reference to the dismissing or *nol prossing* of cases, we have opined that this "broad prosecutorial discretion gives the prosecutor alone the authority to *nol prosse* a case at any time prior to the impaneling of the jury." See Ops. S.C. Atty. Gen., July 31, 2007; June 3, 1996. In State v. Ridge, 269 S.C. 61, 236

S.E.2d 401 (1977), the South Carolina Supreme Court stated that, except in cases where the prosecutor acts corruptly or capriciously, the rule in this State is:

> . . . the entering of a *nolle prosequi* at any time before the jury is impaneled and sworn is within the discretion of the solicitor; the trial judge may not direct or prevent a *nol pros* at that time.

Ridge, 236 S.E.2d at 402 [citing State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937)].[3]

We are unaware of any requirement that a prosecuting officer must wait until after service of a warrant before *nol prossing* the charge. We have previously advised that if, as you describe, the prosecution has determined a particular case lacks merit, allowing someone to be arrested based on such a charge is probably not advisable. In fact, this Office has stated on more than one occasion that ". . . if it appears that upon the face of the warrant that service is no longer justified or if any additional facts are brought to your attention which would indicate that service is no longer proper, service should not be made. This is a determination that would have to be made as to each individual arrest warrant." Ops. S.C. Atty. Gen., January 11, 2001; April 25, 1995; October 1, 1979; October 26, 1978.

In answer to your second question, we note a prior opinion of this office dated November 4, 1993, which addressed the issue of who may be an affiant on an arrest warrant. We stated that:

> . . . any citizen who has reasonable grounds to believe that the law has been violated has the right to cause the arrest of a person who he honestly and in good faith believes to be the offender . . . The affiant to an arrest warrant must be able to satisfy an inquiring magistrate that sufficient facts and information exist to support the warrant which determination is entirely within the magistrate's judgment. . . .

Furthermore, we recognized that probable cause expressed in the affidavit of an arrest warrant may be based on personal knowledge or hearsay. Ops. S.C. Atty. Gen., August 5, 1996; December 19, 1990; see also State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621, 623 (1976) [finding a search warrant affidavit may be based on hearsay information]. In State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615 (Ct. App. 2004), the South Carolina Court of Appeals determined that a search warrant for a motel room where defendant was staying was not supported by probable cause supported by oath or affirmation. There, the affiant had no firsthand knowledge of events leading to defendant's arrest, but he signed the

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[3]Citing In re Brittian, 263 S.C. 363, 210 S.E.2d 600 (1974), the Ridge Court also noted that absent a statute to the effect, "a court has no power . . . to dismiss a criminal prosecution except at the instance of the prosecutor." Further, concerning municipal court prosecutions, this Office has previously opined that we are ". . . unaware of any statutory authority which permits a municipal [judge] to *nol pros* or dismiss a particular case on his own motion. Therefore . . . a case triable in the municipal court may only be *nol prossed* in the discretion of the individual acting as the prosecutor." See Op. S.C. Atty. Gen., April 12, 1979. With the recognition of certain caveats, this opinion was reaffirmed in an opinion dated June 3, 1996. See Op. S.C. Atty. Gen., September 7, 2005. We are unaware of any recent changes in the law which would alter this opinion.

warrant without speaking either to defendant or confidential informant, and without relaying any information to the magistrate himself. Further, the arresting officer who supplied the additional information was not under oath when he spoke by phone with magistrate who issued the warrant.

In an opinion dated September 29, 1999, we discussed whether it was proper for a court employee to sign as the affiant on an arrest warrant for a person who willfully failed to appear before the court as required by a uniform traffic citation without having posted bond or been granted a continuance by the court, in violation of the law. We concluded that a court employee would be authorized to act as the affiant on a warrant, just as any other citizen would be authorized to act, who in good faith believed the individual violated the law. See Op. S.C. Atty. Gen, January 11, 2001 ["an arrest warrant can be based on probable cause established by any citizen"].

In an opinion dated August 18, 2008, we addressed the following:

> You have questioned whether the requirement for a courtesy summons applies to a business when the bad check itself represents prima facie evidence that a crime has been committed. You also questioned whether such requirement applies when an individual has been detained for shoplifting. You referenced that "[i]n each of these cases, it is not a private citizen who seeks the arrest warrant but a business that seeks the warrant through an employee or business owner in the name of and on behalf of the business effected." . . .
>
> [I]n the opinion of this office, as to your contention that in shoplifting and fraudulent check cases, it is not a private citizen who seeks an arrest warrant but, instead, it is a business that seeks the warrant through an employee or business owner "in the name of and on behalf of the business effected", such would not change the determination that it is an individual who serves as the affiant on an arrest warrant. Any assertion that the individual would not be considered as seeking the warrant but instead would seek the warrant "in the name of and on behalf of the business affected" would not change the result. A business could not considered in any respect as serving as the affiant on an arrest warrant. Inasmuch as subsection (B) of Section 22-5-110 provides that "...a person charged with any misdemeanor offense requiring a warrant signed by nonlaw enforcement personnel to ensure the arrest of a person must be given a courtesy summons", in the opinion of this office, a courtesy summons would be applicable in shoplifting and fraudulent check cases involving misdemeanor offenses where the warrant is signed by nonlaw enforcement personnel, including personnel associated with a business.

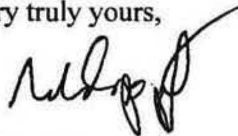
Conclusion

In summary, any sworn statement pursuant to §22-5-115 must establish probable cause that the alleged offense was committed. The summons must express adequately the charge against the individual.

Any person could act as an affiant, provided that person is in possession of evidence to support a good faith belief that the individual violated the law. The probable cause expressed may be based on personal knowledge or hearsay. Of course, it is within the discretion of the issuing judge as to whether probable cause has been shown and, therefore, whether any summons should issue. Other than correcting a scrivener's error or a technical mistake, we urge caution when considering an amendment to a charge based upon a sworn statement of an affiant who is not a law enforcement officer investigating the case. We further emphasize the need to avoid changing the nature of the offense charged so that there will be no surprise in the charge made. Again, there also exists the option of the prosecuting officer's nol prossing the present charge and then seeking a summons based upon probable cause to support the new charge. Individual cases may be handled differently depending on the circumstances and, therefore, we are unable to provide an absolute answer applicable to all situations.

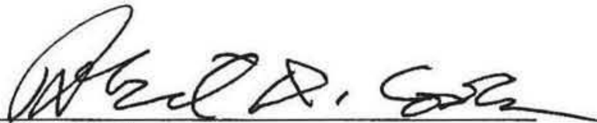
If you have any further questions, please advise.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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