ALAN WILSON
ATTORNEY GENERAL

January 31, 2013

Robert L. McCurdy, Assistant Director
S.C. Court Administration
1015 Sumter Street, Ste. 200
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Dear Mr. McCurdy:

We received your letter requesting an opinion of this Office regarding procedures to be followed when a magistrate or municipal court judge finds no probable cause at a preliminary hearing on a general sessions charge.

Rule 2(c), SCRCrimP provides:

> [i]f probable cause be found by the magistrate, the defendant shall be bound over to the Court of General Sessions. If there be a lack of probable cause, the defendant shall be discharged; but his discharge shall not prevent the State from instituting another prosecution for the same offense.

You reference the opinion of this Office dated January 22, 1997 (1997 WL 207994), where we determined, pursuant to Rule 2(c), that when a magistrate or municipal judge finds no probable cause at a preliminary hearing, the defendant must be "discharged" from custody, meaning that the defendant must be released from incarceration. This Office further advised that, although the defendant is released from custody, the defendant remains bound by the terms of his/her bond, including appearance at trial, until the case is dismissed at General Sessions Court.

By way of background, you have expressed concern about the process employed by some summary court judges in the state, because:

> [they] are re-incarcerating defendants after a finding of no probable cause at preliminary hearings until charges are dismissed at general sessions court, which typically takes several days. Their doing so is based on language found in the Magistrate and Municipal Court Bench Book providing that after a finding of no probable cause, the defendant remains bound by the terms of his bond until the case is dismissed at general sessions court.[1]

[1]The South Carolina Bench Book for Magistrate and Municipal Court Judges (the "Bench Book") provides, in part, that:

With this background in mind, you ask whether a defendant, who has no other charges pending which require incarceration, should be released from custody after a finding of no probable cause at a preliminary hearing and prior to dismissal of the charge at General Sessions Court? You further ask whether the defendant is bound by the terms of his/her bond, other than custody, until the charge is dismissed in General Sessions Court?

Law/Analysis

We stated in the 1997 opinion that, consistent with Rule 2(c), the South Carolina Supreme Court in State v. Scott, 269 S.C. 438, 237 S.E.2d 438 (1977), *rev'd on other grounds by*, State v. Faust, 325 S.C. 12, 479 S.E.2d 50 (1996), discussed the nature of the dismissal of charges by a magistrate at a preliminary hearing. In Scott, the City Attorney entered a *nolle prosequi* of certain charges immediately prior to a preliminary hearing. A preliminary hearing was held as to other charges, but not the attempted armed robbery charges where a *nolle prosequi* had been granted. On appeal, the defendant argued that the *nolle prosequi* did not extinguish his right to a preliminary hearing pursuant to S.C. Code Ann. §22-5-320,[2]

> . . . [i]f the magistrate or municipal judge is not satisfied that probable cause has been shown, he must discharge the defendant from custody. Although the magistrate or municipal judge can discharge the defendant from custody, this is not a final determination of the charge. Such a discharge is not an acquittal and jeopardy does not attach. The charge may still be submitted for grand jury consideration and the defendant indicted after such consideration. The defendant is bound by the terms of his bond, including appearance at trial, unless the case is dismissed at general sessions court.

See http://www.sccourts.org/summaryCourtBenchBook/Criminal #F 9.

[2]This provision states that:

> [a]ny magistrate who issues a warrant charging a crime beyond his jurisdiction shall grant and hold a preliminary hearing of it upon the demand in writing of the defendant made within twenty days of the hearing to set bond for such charge; provided, however, that if such twenty-day period expires on a date prior to the convening of the next term of General Sessions Court having jurisdiction then the defendant may wait to make such request until a date at least ten days before the next term of General Sessions Court convenes. At the preliminary hearing, the defendant may cross-examine the state's witnesses in person or by counsel, have the reply in argument if there be counsel for the State, and be heard in argument in person or by counsel as to whether a probable case has been made out and as to whether the case ought to be dismissed by the magistrate and the defendant discharged without delay. When such a hearing has been so demanded the case shall not be transmitted to the court of general sessions or submitted to the grand jury until the preliminary hearing shall have been had, the magistrate to retain jurisdiction and the court of general sessions not to acquire jurisdiction until after such preliminary hearing. Provided, however, that the defendant shall not be required to appear

arguing that "any reinstatement of identical charge, absent a withdrawal of his request for a preliminary hearing, had to occur in the magistrate's (recorder's) court." Id., 237 S.E.2d at 888-89.

The Scott Court rejected the defendant's argument, stating:

> [t]he fallacy in the foregoing argument of appellant lies in the fact that the *nolle prosequi* of the charge before the magistrate or recorder was not a final determination of the charge and did not bar a subsequent prosecution through indictment by the grand jury. State v. Gaskins, 263 S.C. 343, 210 S.E.2d 590 [(1974)]; State v. Messervey, 105 S.C. 254, 89 S.E. 662 [(1916)].
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> The indictment procedure used to reinstate the charge of attempted armed robbery is identical to the procedure which may be used in the situation where a magistrate has discharged a defendant pursuant to Code Section 22-5-320.
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> As stated by Judge Hemphill in Williams v. State of South Carolina, D.C., 237 F. Supp. 360, 370 [(D. S.C. 1965)]:
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> > Under South Carolina Law, Section 43-231, 1962 Code, (now Section 22-5-320, 1976 Code), a magistrate may discharge a defendant. This obviously means discharge from custody, since a magistrate does not have jurisdiction to acquit a defendant charged with murder.
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> > The defendant may be indicted and tried without regard to the finding of the hearing magistrate at a preliminary hearing. Indeed, a crime may be charged initially by indictment, in which case there is no right to a preliminary hearing at all. State v. Nesmith, 213 S.C. 60, 66, 48 S.E.2d 595 [(1948)].
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> Accord, State v. Sanders, 251 S.C. 431, 163 S.E.2d 220 [(1968)].
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> We, therefore, hold that Section 22-5-320 did not deprive the General Sessions Court of jurisdiction in this case, where a *nolle prosequi* was entered subsequent to the demand for a preliminary hearing and the charge was later reinstated through indictment by the grand jury. The indictment by the grand jury for attempted armed robbery was, in effect, an initial prosecution under which the defendant had no right to a preliminary hearing.

Scott, 237 S.E.2d at 889. We thus concluded the Scott Court held that "discharge" means a "discharge from custody." Op. S.C. Atty. Gen., January 22, 1997; accord Op. S.C. Atty. Gen., May 29, 1996 (1996 WL 452796).

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in person at the appointed time, date and place set for the hearing if he is represented by his attorney.

We therefore reaffirm our 1997 opinion advising that Rule 2(c) requires that where a summary court judge finds no probable cause at a preliminary hearing, the defendant must be "discharged" from custody, meaning that he/she must be released from incarceration, provided the defendant has no other charges pending which require incarceration.

We also addressed your second question in the 1997 opinion. The crux of the issue there was what was meant by the statement in the Bench Book that the defendant "is bound by the terms of his bond, including appearance at trial, unless the case is dismissed at general sessions court." Although the general authorities indicated that dismissal of charges would exonerate the bond, we concluded that "South Carolina authorities appear to take a different tack, however." We explained:

> [i]n Fitch ads. The State, 2 Nott and McCord 558 (1820), the Court had this to say:
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> > [b]y the condition of the recognizance entered into by the defendant, he is not only to appear to answer the specific charge exhibited against him, but is to do and receive what shall be enjoined by the court, and not to depart without license, and in the meantime to keep the peace of the citizens thereof, and especially towards the prosecutor. The terms of this recognizance are such as to leave it discretionary with the court to refuse the defendant's discharge, through no cause be shown by the solicitor why he intends to prefer a new bill. In 1 Comyns Digest 692, it is said, "if one be taken up for a libel and enters into recognizance to appear the first day of the term, and responds, and not to depart, and the attorney general then enters a *nolle prosequi* on it, and on the last day of the term files another information on the same libel, and another, and on this last information, defendant is convicted if he does not appear his recognizance is forfeited. In the instance given, the conviction may have been occasioned by the evidence given on the other libel, but yet, as the former was conjoined therewith in the information, the recognizance was deemed sufficient to compel the defendant's appearance.
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> 2 Nott and McCord at 560.
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> The Court based its reasoning upon the fact that
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> > [i]t is the verdict of a petty jury alone, which can operate as a discharge of the defendant from the accusation against him. If, on trial, they find the party not guilty, he is then, says Blackstone, forever quit and discharged of the accusation. The implication is clear, that before then he is not so discharged.
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> 2 Nott and McCord at 559.

> Moreover, in State v. Haskett, 3 Hill 95 (1836), the defendant was charged with assault and the Attorney General subsequently entered a *nol pros* on the indictment. The surety made a motion, based upon the *nol pros*, to be discharged on the bail. The lower court did discharge the surety and the State appealed. Reversing, the South Carolina appellate court explained:
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> > [b]ut it seems to have been thought by the presiding judge, that the nol. pros. was an end of the case, as a non-suit would be in a civil action. This is a mistake. In a civil case a non-suit vacates all the previous proceedings and the plaintiff must begin de novo. In a criminal case the party is brought into Court by the warrant and recognizance. The indictment is one of the stages of the proceedings, and a discharge of that, by *nol. pros.* does not impair the previous proceedings. It is competent, and every day's practice, for the solicitor or attorney general to enter a *nol. pros*. on one indictment, and to prefer another; and to the effect of this is only to vary the form of the charge, and neither entitles the party to a discharge from custody, nor to have an exoneration entered on his recognizance. In actions for malicious prosecution, this question has frequently arisen, and it has been often held, that a *nol. pros.* is not an end of the case but that the attorney general may prefer a new bill.

We also referenced a prior opinion dated July 20, 1966 (1966 WL 12106), where this Office referenced and quoted from the Haskett decision, concluding that:

> [b]ecause there has not been a final determination of the case herein, it is the opinion of this Office, in light of the foregoing authorities, that the entering of a *nolle prosequi* by the county solicitor neither operated to discharge either the defendant from custody or his bail from his recognizance ... .

In addition, we quoted the following passage from Ledbetter and Myers, "Bail in South Carolina," 225 S.C. Law Rev. 182, 191-192 (1970), regarding a summary of the duration of bail pursuant to this State's Bail Reform Act:

> [i]f the case is not tried at the first term after the defendant is released on bail, he is under an obligation to attend future terms of court until there has been a final disposition of the case. The fact that the defendant's attorney fails to notify him that the case might come up at the next term does not relieve the defendant or his surety of the obligation to appear. A final disposition is not rendered until an order or discharge is issued by the court at which the party is bound to appear, and thus a finding of no bill by the grand jury or a *nolle prosequi* by the solicitor does not discharge the obligation.

In support of this statement, we therein referenced State v. Williams, 84 S.C. 21, 65 S.E. 982 (1909), and Whaley v. Lawton, 57 S.C. 256, 35 S.E. 558 (1900). In Williams, the South Carolina

Supreme Court commented at considerable length regarding the continuing nature of an appearance bond, regardless of a dismissal of the case. The Court stated:

> [h]is Honor also erred in holding that the continuance of the case released the surety. The condition of the recognizance is not only that the principal shall personally appear at the Court, and at the time therein specified, but also "to do and receive what shall be enjoined by the Court, and not depart the Court without license." In some of the cases it has been said that the words "to do and receive what shall be enjoined by the Court," refer to the sentence. While that is correct, they are comprehensive enough to embrace other matters also, and to require the attendance of the party bound from time to time, as ordered by the Court, and until the case if finally disposed of. It has been held in this State that an order of the Court, at which a party is bound to appear, is necessary to a final determination of the case, and that the finding of "no bill" by the grand jury or the entry of a *nolle prosequi*, does not end the case or discharge the recognizance. Whaley v. Lawton, 57 S.C. 256, 35 S.E. 558.
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> "A recognizance binds the principal, not only to appear, but to abide the judgment of the Court, and not to depart thence without its leave; and if the principal be ordered to execute a new bond, either to keep the peace for a specified period, or for his appearance at a subsequent term, or before another court, and he depart without complying with the order, it is a breach of the recognizance." 3 A. & E. Enc., 715.

Id., 65 S.E. at 983.

Based upon our review of the law and the apparent absence of a judicial decision superseding our analysis, we reaffirm the 1997 opinion and reiterate the conclusions stated therein, as follows:

> [c]learly, prior to the adoption of Rule 2 of the Rules of Criminal Procedure, and more recent cases, it appears to have been the law in South Carolina that a surety is not exonerated upon the dismissal of a case by a magistrate at a preliminary hearing, but instead is relieved only upon final dismissal by the court which had jurisdiction to try the case, usually General Sessions. Rule 2 now clearly mandates discharge from custody with respect to physical incarceration. Our Courts, however, have never overruled or superseded the earlier cases holding that the conditions of bond continue until discharge or dismissal by the Court of General Sessions, which has jurisdiction to try the case. Thus, the statement in the Bench Book that, although the magistrate "must discharge the defendant from custody" upon a finding of no probable cause, nevertheless, "[t]he defendant is bound by the terms of his bond, including appearance at trial, unless the case is dismissed at general sessions court," appears consistent with and is supported by the Fitch, Haskett, and Williams cases, discussed above, as well as the 1966 opinion of this Office.

See Op. S.C. Atty. Gen., August 14, 1995 (1995 WL 803683) [where conclusions reached in a previous opinion have not been amended or superseded by judicial decision or act of the Legislature, the authority cited therein still represents the current state of the law in this State].

Conclusion

Accordingly, we reaffirm our opinion dated January 22, 1997, advising that Rule 2(c), SCRCrimP requires that where a summary court judge finds no probable cause at a preliminary hearing on a general sessions charge, the defendant must be "discharged" from custody, meaning that he/she must be released from incarceration, provided of course the defendant has no other charges pending which require incarceration. The conditions of the defendant's bond continue, however, until discharge or dismissal (as soon as practicable) in the Court of General Sessions, which has jurisdiction to try the case.

Another issue to consider from the facts presented by your letter is possible civil liability from the continued incarceration of defendants once a summary court judge finds no probable cause at a preliminary hearing. Any determination of liability, however, would require us to evaluate and determine factual issues which are beyond the scope of an opinion of this Office. See Op. S.C. Atty. Gen., January 31, 2012 (2012 WL 440537).

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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