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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON  
ATTORNEY GENERAL

August 1, 2000

The Honorable Jennifer L. Presnell  
Administrative Judge  
Greenville Municipal Court  
P.O. Box 488  
Greenville, South Carolina 29602

**Re: Informal Opinion**

Dear Judge Presnell,

Thank you for your letter of February 22, 2000, which has been referred to me for a response. You ask for an opinion on misdemeanor arrests when the arresting officer has not yet obtained a warrant.

By way of background you write that the following situation is of particular concern: In breach of trust cases involving local merchants, the store's loss prevention agents have been investigating an employee suspected of stealing merchandise or money. The employee may have been under surveillance for weeks while the agent has observed and documented incidents of theft, but has not taken any action. At some point the store's agent interviews the employee, who then admits to the theft and signs a confession. The agent then calls the police, an officer is dispatched to the store, and the employee is placed under arrest. The handcuffed employee is then transported to the detention center and placed in a holding cell until the store's agent obtains an arrest warrant from an Administrative Judge. You also note that the merchandise usually amounts to less than one thousand dollars.

South Carolina Code Section 16-13-30 defines the larceny of goods with a value of less than one thousand dollars as petit larceny, a misdemeanor. Larceny of goods totaling a value of more than one thousand dollars is grand larceny, a felony. Similarly, S.C. Code Ann. § 16-13-110 makes shoplifting a misdemeanor if the merchandise is valued under one thousand dollars and a felony if over a thousand dollars. The Code also provides specific authority for police officers to perform an arrest upon commission of a crime:

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The sheriffs and deputy sheriffs of this State may arrest without warrant any and all persons who, within their view, violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter.

S.C. Code Ann. § 17-13-30. An officer may arrest a person without a warrant for any crime committed in his view, which the courts have extended to include crimes freshly committed. See State v. Martin, 268 S.E.2d 105 (1980), State v. Clark, 287 S.E.2d 143 (1981).

Based, in part, on this case law, this Office has previously opined that an officer may arrest without a warrant an individual for shoplifting upon probable cause that the crime is freshly committed. See Op. Atty. Gen. May 21, 1997. In the circumstances you describe, however, the officer is called to the store after the detention of the employee and the signing of a confession for thefts committed earlier. The crime was not committed in the officer's view, and in this case, was neither freshly committed before the officer's arrival. Thus, the officer could not initiate a valid arrest without first obtaining an arrest warrant.

Although the officer may not perform the arrest, the officer may take custody of an individual lawfully detained pursuant to a valid citizen's arrest, subject to the limitation that the officer reasonably believe in the legality of the citizen's arrest. See Op. Atty. Gen. Oct. 25, 1995. Here, if the loss prevention agent detains the employee until the officer arrives, he has performed an arrest. See Terry v. Ohio, 392 U.S. 1 (1968). The citizen who performs the arrest only transfers custody of the detainee to the officer.

The South Carolina Code provides specific authority for citizen's arrest in certain circumstances. S.C. Code Ann. § 17-13-10 states:

Upon (a) view of a felony freshly committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law.

The statute clearly authorizes the loss prevention agent to make the arrest immediately upon viewing the larceny, but the statute remains silent on the length of time between when the citizen views the larceny and when he may arrest the suspect. In other words, the statute is unclear whether the loss prevention agent may lawfully arrest the employee without a warrant days, or even weeks, after witnessing the commission of the crime.

Generally, "promptness in taking action is also a requirement of a valid citizen's arrest." 6A C.J.S. Arrest § 15. If a private citizen "fails to make an arrest immediately after commission of an offense, his power to do so is extinguished and a subsequent arrest is illegal." *Id.* While there appears to be no applicable case law in South Carolina, other jurisdictions have held that the arrest for a misdemeanor committed within the citizen's presence must occur immediately after the perpetration

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of the offense. See e.g., McWilliams v. Interstate Bakeries, Inc., 439 F.2d 16 (5<sup>th</sup> Cir. 1971) (stating that store employee falsely imprisoned suspect she recognized as having indecently exposed himself before her four days earlier). Thus, it is the opinion of this Office that the detention of the employee by the loss prevention agent days or weeks after the agent views the commission of the crime would likely constitute an invalid citizen's arrest. Indeed, the arrest may expose the loss prevention agent, or his employer, to liability for false imprisonment. See McWilliams v. Interstate Bakeries, 439 F.2d 16 (1971).

The illegality of the arrest, however, does not necessarily preclude the subsequent prosecution of the employee for the offense charged. See Town of Mount Pleasant v. Jones, 516 S.E.2d 468 (1999), State v. Biehl, 271 S.C. 201, 246 S.E.2d 859 (1978). In Mount Pleasant, a private citizen, who was also a volunteer fireman and private detective, noticed the defendant driving erratically. The citizen turned on his emergency lights, which he used for his firefighting duties. The driver pulled over, believing an emergency vehicle wanted to pass her. The citizen then shouted at the defendant to remain there, while he called the police. The police arrived and later took her into custody. After she was officially charged with driving under the influence, she moved to dismiss the case on the basis of the citizen's unlawful arrest. The trial court dismissed the conviction. On appeal, the Town did not challenge the validity of the citizen's arrest, but argued that the Fourth Amendment's protections against unreasonable searches and seizures apply only to government actors. The Court of Appeals said, as indicated above, that the illegality of the citizens arrest presented no bar to the prosecution of the defendant for the crime. *Id.* at 470.

Thus, although the actions of the loss prevention agent in detaining the store employee would probably also constitute an invalid arrest, the employee may still be prosecuted for the larceny.

Of course, the preferred practice would be for the loss prevention agent to obtain the warrant before arresting the individual. In addition to protecting the employer from civil liability, this may avoid certain evidentiary complications arising out of the unlawful detention. From the background information you provided, the loss prevention agent apparently obtains the confession after interviewing the employee and before releasing the employee to the custody of the police. Depending on other circumstances, when the confession is not given voluntarily it is not admissible against the employee. State v. Rabon, 275 S.C. 469, 272 S.E.2d 634, 635 (1980). In determining the voluntariness of the statement, courts consider custody as a factor. See State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993). "In determining whether a suspect is 'in custody,' the totality of the circumstances, including the individual's freedom to leave the scene and the purpose, place, and length of questioning must be considered." State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997). Furthermore, the trial judge must evaluate the evidence in each circumstances to determine whether the confession is truly voluntary. Rabon, at 635.

Therefore, in response to your questions about the use of the confession in the prosecution of the employee, you must determine, based on the totality of the circumstances whether the

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confession was given freely. If voluntary, the confession may be used to support the charge, or charges, against the employee.

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 question asked. It has not, however, been personally scrutinized by the Attorney General not officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General