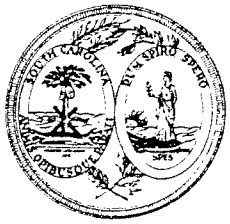

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

April 7, 1999

The Honorable J. Gary Simrill
Member, House of Representatives
326B Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Simrill:

Attorney General Condon has forwarded your opinion request to me for reply. You have asked for an opinion on the constitutionality of per se blood-alcohol offense statutes involving the operation of a motor vehicle.

Per se blood-alcohol offense statutes are statutes directly proscribing driving or being in control of a motor vehicle while having a blood-alcohol level in excess of some established percentage. For example, the statute may read "it is unlawful for any person who has a 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." The term "per se blood-alcohol offense statutes" (hereinafter "per se statutes") is a generic name for these types of statutes as most also prohibit driving with an alcohol level in excess of some established percentage in the breath or urine. Virtually every state has now adopted per se statutes. As to be expected, these statutes have been the subject of numerous constitutional attacks. Per se statutes have withstood these attacks as the courts have, with virtually no exception, rejected the defendants' constitutional claims and upheld the statutes. In light of these cases, it is safe to say that per se statutes are constitutional.

Defendants have shown great imagination in challenging per se statutes and I will not repeat all of those challenges here. Instead, this opinion will only discuss the most common constitutional challenges; that per se statutes violate the due process and equal protection clauses and exceed the state's police power. A more detailed discussion of the variety of challenges rejected by the courts can be found in 54 ALR4th 149.

1) Due Process

Many challenges to per se statutes have been based on the Due Process Clause. Often times these challenges have alleged that per se statutes violate due process because of at least one of the following: (A) vagueness or lack of notice, (B) creation of a conclusive or irrebuttable presumption, (C) impermissible shifting of the burden of proof. I will briefly discuss each one of these issues.

A) Vagueness or lack of notice

One of the most common arguments raised by defendants is that per se statutes violate the Due Process Clause because they are void for vagueness. This argument, which has been routinely rejected by the courts, is based on the contention that individuals have no way of knowing the level of alcohol in their system and, therefore, do not have fair warning when they have crossed the threshold alcohol concentration. State v. Howren, 323 S.E.2d 335 (N.C. 1984); Lester v. State, 320 S.E.2d 142 (Ga. 1984); Burg v. Municipal Court, 673 P.2d 732 (Cal. 1983); State v. Franco, 639 P.2d 1320 (Wash. 1982); State v. Thompson, 674 P.2d 895 (Ariz. Ct. App. 1984).

Courts have found that per se statutes meet the Due Process Clause's requirement that the law must give sufficient warning to an individual so that the individual may avoid the proscribed conduct. Lester v. State, supra, citing Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975); Burg v. Municipal Court, supra; State v. Franco, supra; State v. Thompson, supra. Sufficient warning to an individual does not come from knowing the exact level of alcohol in his system prior to getting into his vehicle but comes from the very fact that he has consumed a quantity of alcohol. See Burg v. Municipal Court, supra (the fact that an individual has consumed a quantity of alcohol should notify a person of ordinary intelligence that he is in jeopardy of violating the statute). Those who drink a substantial amount of alcohol within a relatively short period of time are given clear warning that to avoid possible criminal behavior they must refrain from driving. Id. Thus, recognizing that defendants have been sufficiently warned, courts have concluded that defendants who have had enough drinks to surpass the legal

blood-alcohol level can hardly be called an "innocent," trapped by an arbitrary, vague statute. Id.; Lester v. State, supra.

B) Conclusive or irrebuttable presumption.

Another common argument is that per se statutes violate the Due Process Clause because they establish a conclusive or irrebuttable presumption of impaired driving ability which relieves the State of the burden of proving every element of the offense beyond a reasonable doubt. State v. Vogel, 467 N.W.2d 86 (N.D. 1991); Lester v. State, supra; Burg v. Municipal Court, supra; State v. Howren, supra. This argument has also been routinely rejected by the courts. Courts have determined that per se statutes do not create a conclusive or irrebuttable presumption, but only define, in precise terms, the conduct proscribed. State v. Vogel, supra; Burg v. Municipal Court, supra; State v. Howren, supra. In other words, in enacting per se statutes, the legislature has merely stated the elements of the offense. The prosecution must still prove every element of the crime beyond a reasonable doubt. State v. Vogel, supra. In rejecting a defendant's challenge to its per se statute on this ground, the North Carolina Supreme Court in State v. Howren, supra, summed up its view as such: "[I]f this statute is unconstitutional then so is any statute that makes the doing of a particular act illegal."

C) Shifting the burden of proof

Defendants have also argued that per se statutes impermissibly shift the prosecutions's burden of proof to the defendants in violation their due process rights. State v. Vogel, supra; Commonwealth v. Hernandez, 488 A.2d 293 (Pa. Super. Ct. 1985); People v. Ziltz, 455 N.E.2d 70 (Ill. 1983). This argument is similar to defendants' arguments regarding creation of conclusive or irrebuttable presumptions. As they did there, courts have also concluded that per se statutes do not shift the burden of proof as the State still has the burden of proving all of the essential elements of its case. People v. Ziltz, supra.

2) Equal Protection

Another popular argument raised by defendants is that per se statutes violate the Equal Protection Clause. As with due process challenges, these claims are also routinely rejected by the courts. Equal protection challenges come in a variety of forms and I will not attempt to discuss each and every one here. I will, however, address three common equal protection challenges to per se statutes.

First, in State v. Howren, supra, defendant argued that he was denied equal protection because prior to January 1, 1985, an individual charged with driving while impaired was given two chemical breath analyses. After that date, the requirement was changed to one breathalyzer test. Defendant claimed this change resulted in an arbitrary and capricious classification between similarly situated individuals. The court rejected this claim finding that the statute treated all those charged before January 1 the same way and all those charged after January 1 the same way. Thus, the equal protection clause was not violated because the statute treated all those in each group in an identical manner.

Second, in State v. Thompson, supra, appellant argued the per se statute violated equal protection because it did not permit plea bargaining, whereas plea bargaining was recognized for other more serious crimes. The court found that the legislative classification of the statute consisted of all persons in control of a motor vehicle with .10% or more by weight of alcohol in their blood. The court rejected appellant's equal protection claim concluding the statute did not create a separate classification of offenders since the statute applied to all person who are driving or in control of a motor vehicle.

Finally, in State v. Gerdes, 252 N.W.2d 335 (S.D. 1977), the law provided that the prosecutor had the choice of charging under the per se statute or the driving while under the influence statute, which placed a greater burden of proof on the state. Defendant claimed that this choice violated equal protection. The court rejected defendant's claim finding that the prosecutor is granted very broad discretion without violating the equal protection clause. Without any evidence that the prosecutor charged the defendant in some discriminatory manner, such a complaint cannot stand.

3) Police Power

The final common challenge to per se statutes is that they exceed the state's police power. It is really too late in the day to argue that per se statutes exceed the state's police power to enact laws to protect the public's welfare as the statutes have withstood this challenge on numerous occasions. Courts have concluded that per se statutes, like driving while impaired or intoxicated statutes, promote the health, safety and welfare of the citizens. State v. Tanner, 472 N.E.2d 689 (Ohio 1984); State v. Rose, 323 S.E.2d 339 (N.C. 1984); Burg v. Municipal Court, supra; People v. Ziltz, supra; State v. Franco, supra. If it were found that per se statutes did exceed the state's police power, then so to would driving while impaired or intoxicated statutes and statutes setting speed limits.

People v. Ziltz, supra. Such is clearly not the case.

Conclusion

The law regarding per se statutes is well settled. These statutes have been the subject of endless legal attack and, for the most part, have escaped unscathed. Therefore, I believe it is safe to say that per se statutes are constitutional.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General