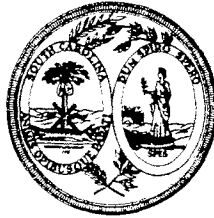


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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

November 29, 1999

The Honorable Ernest M. Spong, III
Municipal Judge, Town of Winnsboro
P.O. Box 209
Winnsboro, South Carolina 29180

Re: Informal Opinion

Dear Judge Spong,

Thank you for your letter of November 1, 1999, requesting an opinion of the Office of the Attorney General. You ask if a municipal court "has any authority to require an explanation from the officer as to the reason for requesting a dismissal" of a case brought before the court. For purposes of this opinion, I will assume you refer to situations in which the arresting officer is serving as the prosecutor for misdemeanor traffic violations.

In South Carolina, the Attorney General is "the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." S.C. Const. Art. V, Sec. 24. The Attorney General's prosecutorial duties are carried out not only through him and his immediate staff, but also through "his constitutional authority to supervise and direct the activities of solicitors or prosecuting attorneys located in each judicial circuit of the State." Ex parte McLeod, 272 S.C. 373, 252 S.E.2d 126 (1979). Thus, in misdemeanor traffic violations, the prosecutor who carries out the delegated duties of the Attorney General is the arresting or ticketing officer.

In South Carolina, the prosecuting officer has almost unfettered discretion in the decision to prosecute or bring a criminal case to trial. An opinion of this Office, dated December 4, 1980, emphasized:

... the prosecutor is allowed wide discretion in whether or not to bring charges against an individual and if he so decides he is again allowed discretion as to what charges to prefer. State v. Simmons, 264 S.C. 417, 215 S.E.2d 883 (1975).

Furthermore, the determination to proceed with criminal charges is a function of the executive branch of government, not the judicial branch. State v. Tootle, 330 S.C. 512, 500 S.E.2d 481 (1998) (stating that "judicial discretion cannot be substituted for that of an executive body.") Regarding the

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dismissal of a criminal charge, the Court has also recognized that a statutory enactment is necessary to empower a judge with such authority. In State v. Brittan, 263 S.C. 363, 210 S.E.2d 600 (1974) the Court said:

A statute may authorize the court, either of its own motion or on the application of the prosecuting officer, to order an indictment or prosecution dismissed. But in the absence of such a statute, a court has no power ... to dismiss a criminal prosecution except at the instance of the prosecutor."

Thus, as a general rule, the prosecuting officer's decisions to prosecute and dismiss are almost entirely within his discretion.

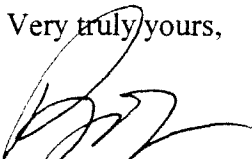
The South Carolina Supreme Court cases cited above involve issues about the discretion of the solicitors or the Attorney General, himself, and have not addressed whether this discretion extends to an arresting officer. Though the officer performs a function of the executive branch in the prosecution of misdemeanor traffic violations, it remains unclear whether the officer is cloaked with all the discretionary authority of a prosecutor. However, given South Carolina's consistent deference to prosecuting officers in determining when to bring and dismiss charges, it would appear that a municipal judge would have not have the authority to require the officer to provide a reason for his request for a dismissal. In effect, by demanding a reason for the dismissal, the judge substitutes his judicial discretion for that of the officer's. As the matter is within the prerogative of the prosecuting officer, the judge should defer to his discretion.

It must be cautioned, however, that the discretion of the officer is not boundless. There are some limitations on the inherent authority of the prosecutor, assuming the arresting officer, indeed, has this inherent authority. All prosecutors are subject to any directives of the Attorney General as Chief Prosecutor regarding the prosecution of particular cases. There is also a general limitation that a case cannot be dismissed through the corrupt or capricious action of a prosecutor. Thus, the actions of the prosecutor are subject to some review.

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