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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 21, 1995

The Honorable Robert K. Whitney
Municipal Court Judge, City of Westminster
P. O. Box 399
Westminster, South Carolina 29693

Re: Informal Opinion

Dear Judge Whitney:

Attorney General Condon has referred your letter to me for reply. You have asked a number of questions regarding operation of the municipal court. I will address each in turn.

1. There are outstanding criminal warrants from this Court which are quite old. Is there a statute of limitations that would cause old warrants to be void or voidable? At what point should a warrant be recalled because of age.

This Office has consistently advised that arrest warrant should be served within a period of reasonable time. See, e.g., Op. Atty. Gen., June 17, 1970; Op. No. 1789 (January 26, 1965). However, in an opinion, dated October 1, 1979, we also concluded:

> [t]his Office in a previous opinion ... dated October 26, 1978, stated in part that "... once an arrest warrant is issued, such warrant does not 'grow stale' by virtue of an inability to immediately execute it." Therefore, all reasonable attempts should be made to serve any arrest warrant previously issued. However, of course, 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.

This remains the opinion of this Office.

> 2. The check list for Magistrates and Municipal Judges indicates "failure to appear ... will result in additional criminal charges." Who brings these charges and how does that process take place?

This is a reference to S.C. Code Ann. Section 17-15-90, which provides:

> [i]t is unlawful for a person who has been released pursuant to Sections 17-15-10 through 17-15-100, to wilfully fail to appear before the court as required. A person who violates the provisions of these sections, upon conviction, forfeits any security given or pledged for his release and is guilty of a:
>
> > (1) felony if he was released in connection with a charge of felony, or while awaiting sentence after conviction. The person must be fined not more than five thousand dollars or imprisoned not more than five years, or both.
> >
> > (2) misdemeanor if he was released in connection with a charge of misdemeanor. The person must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

You will note that Section 17-15-90 is an offense which would fall within the jurisdiction of the Court of General Sessions. See, Section 22-3-550; Section 14-25-45. As such, it would be a matter for handling within the discretion of the Circuit Solicitor as prosecutor. Moreover, in an opinion, dated February 13, 1980, we said:

> [a]s to who would institute criminal proceedings against a defendant who fails to appear after release presumably any individual familiar with such failure to appear could serve as the affiant on an arrest warrant charging such violation.

> Section 17-15-90 Code of Laws of South Carolina, 1976, provides the penalties for the offense of failing to appear after release.

In addition, as we noted in another opinion of November 1, 1979, referencing a previous opinion, dated October 31, 1978:

> [t]his Office in such opinion referenced, for instance, that if a defendant had been released on bond and was later charged for failing to appear before the court as required pursuant to Section 17-15-90, Code of Laws of South Carolina, 1976, an offense for which a criminal penalty is provided, an arrest warrant would have to be issued to give a court jurisdiction to consider such a case. A bench warrant would not suffice as a charging document in that instance.

See also, State v. Parker, 267 S.C. 317, 227 S.E.2d 677 (1976) [case brought pursuant to Section 17-15-90 is properly initiated upon indictment by a grand jury].

Therefore, since Section 17-15-90 establishes a General Sessions offense, separate and apart from any previous proceedings in magistrate's court or municipal court, any prosecution thereunder would be initiated upon indictment by a grand jury. Frierson v. State of South Carolina, Florence County., 314 F.Supp. 444 (D. S. C. 1970) [in South Carolina, a General Sessions offense can be initiated by proper indictment of grand jury without issuance of arrest warrant]; State v. Parker, supra [Section 17-15-90 establishes separate criminal offense and is initiated "through an indictment of the grand jury ..."] If an arrest warrant is sought, any individual familiar with the facts could serve as affiant, and the case would be one within the control of the Solicitor just as is any other General Sessions offense.

3. If a person is tried in his absence, how is the defendant to be notified of the sentence? Is the sentence supposed to be sealed? Is it reported in the monthly reports of the Court to the Court Administration?

This question is answered in an opinion dated October 25, 1991. There, we stated:

> As to the manner of proceeding in a trial in absentia, the South Carolina Bench Book for Magistrates and Municipal Court Judges states at pages III 77-78:

> ... an accused may be tried in absentia if he has been properly notified as to the time and place of trial and does not appear at the appointed time ...
>
> When a defendant who has been properly notified does not appear when the trial is scheduled, the magistrate or municipal court judge should call his name, or direct that the constable call his name, three times from the courthouse door. After waiting a reasonable time, the magistrate or municipal court may proceed.

A trial in absentia, as a procedural matter, is only slightly different from a trial at which the defendant appears. The complaining citizen or law enforcement officer is placed under oath and allowed to present his evidence. Other witnesses, if any, are permitted to testify under oath. Additionally, the constable is summoned to testify that he called the defendant's name from the courthouse door and that there was no response. In those cases where the magistrate or municipal court judge himself called the defendant's name, he lets the record show that the defendant's name was called and that he did not respond.

When the evidence is complete, the magistrate or municipal court judge makes his findings. If the defendant is found guilty, the magistrate or municipal court judge imposes sentence, according to the penalty allowed for the offense by law. He may use the testimony presented, and any other facts at his disposal, in determining the sentence to be imposed. If the sentence is a fine, the judge may (but does not have to) apply the forfeited bond to the sentence; if the sentence is a jail term, a bench warrant is issued for the arrest of the defendant.

> The Bench Book comments that although the foregoing procedure is more complicated than simply declaring that a defendant's bond is forfeited where there is a failure to appear, such method is preferable because it results in a "final determination." The Bench Book comments further:
>
> > Where there is a forfeiture of bond and nothing more, the defendant is entitled to a trial at a later date if he demands it.
>
> p. III-79.
>
> Pursuant to Section 56-25-20 of the Code, when a court in this State notifies the Highway Department that a resident of this State or an individual possessing a South Carolina driver's license has failed to comply with a traffic citation, the individual's driver's license should be suspended. Where a nonresident who is licensed in a compact jurisdiction fails to comply with a citation, the Highway Department is to notify the licensing authority in the compact jurisdiction for appropriate action.
>
> ... Referencing the above, the better procedure in the circumstances described by you would be to hold a bench trial in the manner set forth in the Bench Book and not simply sign off on a traffic citation. Following a conviction, procedures could be instituted under the NRVC (Nonresident Violator's Compact] or a bench warrant could be issued where appropriate. ...

Moreover, in Op. No. 90-65 (November 16, 1990), we noted that following a trial <u>in absentia</u>,

> ... a judge may apply any forfeited bond to the sentence if the sentence is a fine .... [I]f the sentence is a term of imprisonment, a judge typically issues a bench warrant which requires the defendant to be brought before the court to comply with the sentence .... Also, if forfeiture of a bond is not adequate as to any fine imposed, or if no bond has been posted, a bench warrant could similarly be issued.

With respect to the sealing of a sentence, although I am not aware of any legal requirement for this procedure, it is the usual practice, apparently based upon custom, for our courts to seal the sentence where a defendant is tried in his absence. See, State v. Johnson, 213 S.C. 241, 49 S.E.2d 6 (1948) [... the trial judge, according to custom, filed with the Clerk of Court a sealed sentence and issued a bench warrant for the arrest of the appellant."] See also, State v. Hightower, 33 S.C. 598, 11 S.E. 579, 580 (1890).

Our Supreme Court noted in Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991) that there exists a presumption of access to judicial records, but this presumption may be rebutted where "countervailing interests outweigh the public interest in access." 304 S.C. at 505-506. Accordingly, in South Carolina, the sentence is usually sealed by the trial court, presumably to guard against the risk of flight by the absent defendant among other reasons. See, e.g., State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991); State v. Washington, 285 S.C. 457, 330 S.E.2d 289 (1985), (in both these cases, the sentence was sealed).

In order to proceed with a trial in the defendant's absence requires the following test to be met:

> [a] person may voluntarily waive their right to be present and may be tried in their absence upon a finding by the court that such person has received notice of his or her right to be present ..." South Carolina Criminal Practice Rule 3. "[A] valid waiver [of an accused's right to be present at trial] presupposes notice to the accused. Without notice of the charges, the accused cannot be deemed to have made a 'knowing' and 'voluntary' election to be absent." State v. Green, 269 S.C. 657, 662, 239 S.E.2d 485, 487 (1977). General notice given by courts ... as to which term an individual will be tried in, is sufficient to enable that individual to effectively waive his right to be present. Ellis v. State, 267 S.C. 257, 227 S.E.2d 304 (1976).

Further, the Court held in State v. Williams, supra, that where the sentence has been sealed, judgment is not final until the sealed sentence is opened and read to the defendant. See also, State v. Robinson, 287 S.C. 173, 337 S.E.2d 204 (1985). See also, State v. Ritch, 292 S.C. 75, 354 S.E.2d 909 (1987); State v. Jackson, 290 S.C. 435, 351 S.E.2d 167 (1986). Thus, once the defendant is brought before the Court by bench warrant, the Court is required to open the sealed sentence and inform the defendant of the sentence in order for the judgment to be final.

As to whether such sentences (as a result of trials in absence) are reported in the monthly reports of Court Administration, I would suggest you check with that agency as that is a question of policy for Court Administration to provide you guidance.

4. I tell defendants when I set Court they have a right to jury trial. Is there a set time limit they have to request a jury trial? Can I tell them they have to notify the Court within ten days or five days before Court or they will have waived the right to a jury trial? Can they wait until their court appearance and then request a jury trial?

Of course, Section 14-25-45 states that a municipal court has no jurisdiction in civil matters. Section 14-25-125 provides in pertinent part:

> (a) any person to be tried in a municipal court may, prior to trial, demand a jury trial ... The right to a jury trial shall be deemed to have been waived unless demand is made prior to trial. (emphasis added).

The statute is clear on its face that a jury trial may be requested "prior to trial." In Opinion No. 89-60, p. 149 (May 16, 1989) we concluded that Section 14-25-125 is consistent with Article I, Section 14 of the South Carolina Constitution, preserving the right to a jury trial, and that the right to a jury trial in municipal court is governed by Section 14-25-125, thus requiring that a jury trial be requested prior to trial. Further, an Order of former Chief Justice Littlejohn, dated April 17, 1985, stated "that a person charged with a criminal or traffic offense triable in a magistrate or municipal court may make written demand for jury trial prior to the time and date set for bench trial, and the case shall forthwith be continued until the next available time reserved for jury trials, thereby relieving defendant of the responsibility for appearance at the originally scheduled bench trial." The Order goes on to say that such demand "... must be made by the defendant or his attorney, and must be received by the trial court prior to the time and date set for trial." (emphasis added). Thus, based upon the foregoing statutory provisions and Order, it would appear that no shortening of the time to request a jury trial in municipal court which is inconsistent with the foregoing authorization would be valid.

5. Can I issue a bench warrant for failure to appear in Court at the appointed time? If they are arrested on the bench warrant, can I sentence them for failure to appear

> or am I limited to the sentence imposed at the trial in absence.

These questions have been answered above. As previously stated, the purpose of the bench warrant is simply to bring the defendant before the Court to comply with the sentence previously rendered. As also discussed, failure to appear is a separate offense pursuant to Section 17-15-90, and is a General Sessions offense within the control of the Solicitor. Thus, a municipal court would not have jurisdiction to sentence for such offense.

6. Can a Municipal Court Judge order counseling for habitual offenders who are regularly before the Court for disorderly conduct, which is often gross public intoxication?

7. Can I order counseling or rehabilitation for any offender?

Section 14-25-75 authorizes a municipal judge to "suspend sentences imposed by him upon such terms and conditions as he deems proper, including, without limitation, restitution or public service employment." Pursuant to this delegation of broad discretion, we have concluded that a municipal judge may order community service upon a suspended sentence. Op. Atty. Gen., August 30, 1993. In another previous opinion, No. 90-24 (February 27, 1990), we opined that a municipal judge "would be authorized to impose work details or public service work as part of the suspended sentence of a fine imposed ... subject, of course, to ... minimum sentence requirements."

The Bench Book, III-102, further states that

> [t]he suspension of sentence upon appropriate terms and conditions, if any, is generally unrestricted except, as noted above, that a sentence cannot be suspended below a minimum when such is provided by statute ....
>
> A good example of the suspension of a sentence upon the performance of certain conditions is when a defendant is convicted of first offense of simple possession of marijuana and the sentence is suspended upon the defendant's successful completion of a specific drug program. Failure to complete the program subjects the defendant to being called back to court on a bench warrant to pay the suspended portion of the

> sentence. Successful completion of the program relieves the defendant of the obligation to pay or serve that suspended portion. (emphasis added).

Thus, it is clear to me that the Municipal Court may order that a sentence be suspended upon completion of a counseling program in accordance with the broad discretion given the Court pursuant to Section 14-25-75.

8. Can I order restitution for damages done to victim? If so, who is responsible for seeing that they are paid? If the defendant pays a fine, but not the restitution, what do we do?

9. On a bad check case, if restitution is ordered, and the defendant does thirty days instead of paying a fine, is there a way to force payment of restitution.

The Bench Book states:

> [i]n addition to any sentence imposed, a magistrate, pursuant to § 22-3-550, may order a criminal defendant to make restitution to the victim of the crime for any monetary or property loss that resulted from the crime. § 14-25-45 grants to municipal courts "... all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates." Therefore, the authority to order restitution pursuant to § 22-3-550 applies to municipal courts also.

This Office has also concluded that a magistrate may impose a fine or jail sentence as well as order restitution in bad check cases. Op. No. 93-54 (August 25, 1993).

The lawful orders of a court must be promptly complied with. McLean v. Central States, Southeast and Southwest Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985). As to who is responsible for seeing that restitution is paid where the court has so ordered, it would, of course, be ultimately a matter for the court to insure that its orders are enforced. Willful disobedience of any valid court order is contemptuous of the court's dignity. Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982). The general rule is that where a defendant fails to pay a fine or otherwise comply with a sentence, a bench warrant is issued for his arrest and he is brought back before the court to comply with the sentence. Bench Book, III-16.

In addition, it is well-recognized that the failure to pay money in compliance with an order of the court may also constitute contempt of court. See, e.g., Western Carolina Regional Sewer Authority v. Bell, 285 S.C. 375, 329 S.E.2d 763 (1985). In previous opinions of this Office, we have concluded that failure to pay court-imposed assessments could, upon a proper showing, constitute contempt of court. Op. Atty. Gen., September 30, 1981. This opinion was expressly made applicable to municipal courts. Moreover, in a letter, dated September 17, 1981, we noted that with respect to the possibility of collecting court-imposed assessments where a defendant refused to pay them,

> ... failure to pay any assessment properly imposed could, upon proper showing, constitute contempt of court. While the possibility of a finding of contempt of court, with penalties being imposed as a result, may be of some assistance in collecting an assessment imposed upon an individual who previously received a sentence of a fine after determination of guilt was made, obviously such would not be of much assistance in collecting on an assessment imposed on a defendant who received a sentence of imprisonment, especially where the sentence was lengthy. Therefore, it appears that such assessments may in some instances be quite difficult to collect. This is an area where further legislation would be helpful.

Regardless of the difficulties in collecting, we advised a Clerk of Court in an opinion dated January 18, 1994, that "no time limit exists on the collection of fines imposed by the Court of General Sessions." We noted further that the authorities cited appeared to "support the same conclusion as to fees and restitution." Where a defendant is indigent, we noted that the Court could set up a fee schedule for payment.

Should the Court order a fee schedule for payment of restitution by an indigent, the schedule could be similar to that authorized for the payment of fines in Section 17-25-350 of the Code. In Op. No. 87-78 (August 27, 1987), we concluded that the fee charged for the administration of a breath test for DUI could not be waived, and, in addition, determined that a fee schedule for indigents could be established similar to that authorized in Section 17-25-350, referencing the September 4, 1985 opinion cited above. The September 4, 1985 opinion also noted that a magistrate or municipal judge could establish a fee schedule for an indigent person who could not pay the court-imposed assessments for conviction. Again, Section 17-25-350 was deemed the analogous provision for guidance.

Thus, court-ordered restitution imposed in addition to a fine or imprisonment should be paid by a defendant. There is no time limit for collection thereof and it would appear that all possibilities should be explored and perseverance maintained. If a defendant is indigent and cannot pay, the Court could establish a fee schedule for payment using Section 17-25-350 as an analogy. The Court maintains jurisdiction to monitor the progress of payment, and based upon all the facts and circumstances could modify the schedule See, Op. Atty. Gen., July 30, 1981, or, if necessary, where the defendant failed to pay pursuant to the schedule, contempt of court would be a remedy, just as it is with Section 17-25-350. If the defendant were not indigent, and simply refused to pay, again, contempt of court would appear to be an option for enforcement.

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 questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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