IO 5112/5776

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 4, 1995

The Honorable David P. Schwacke
Solicitor, Ninth Judicial Circuit
2144 Melbourne Avenue
North Charleston, South Carolina 29405

Dear Solicitor Schwacke:

In your letter of October 18, 1995, you note that your office prosecuted Yolanda M. Simmons for Breach of Trust with a fraudulent intent. You further advise that upon her sentencing, the Honorable William Howell ordered the payment of Eight Thousand Seven Hundred Nineteen Dollars ($8,719.00) restitution to the victim, Rainbow International Carpet, during her five year probation. To date, Ms. Simmons has paid approximately five thousand dollars towards restitution and she is scheduled to be terminated from probation in July of 1996. Your letter further states:

> [t]he purpose of this letter is two-fold. The first is to request, in the nature of an advisory opinion, whether S. C. Code of Laws §§ 17-25-323 and 17-25-325 may be applied to court orders for restitution which preceded the effective date of the statutes. That is, would there be an improper ex post facto application in seeking the Court to enforce and execute upon its restitution order by this statutory procedure?
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> The second purpose is to request, should the Title Seventeen Chapter Twenty-five remedies be unavailable, for the Attorney General to undertake activities, pursuant to S. C. Code of Laws § 16-3-1270, to file and enforce the appropriate lien against this particular defendant at the appropriate time.

South Carolina Code Ann. Sec. 17-25-323 provides as follows:

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(A) The trial court retains jurisdiction of the case for purpose of modifying the manner in which court-ordered payments are made until paid in full, or until the defendant's active sentence and probation or parole, if any, expires.

(B) When a defendant has been placed on probation by the court or parole by the Board of Probation, Parole and Pardon Services, and ordered to make restitution, and the defendant is in default in the payment of them or of any installment or of any criminal fines, surcharges, assessments, costs, and fees ordered, the court, before the defendant completes his period of probation or parole, on motion of the victim or the victim's legal representative, the solicitor, or a probation and parole agent, or upon its own motion, must hold a hearing to require the defendant to show cause why his default should not be treated as a civil judgment and a judgment lien attached. The court must enter (1) judgment in favor of the State for the unpaid balance, if any, of any fines, costs, fees, surcharges, or assessments imposed; and (2) judgment in favor of each person entitled to restitution for the unpaid balance if any restitution ordered plus reasonable attorney's fees and cost ordered by the court.

(C) The judgments may be enforced as any civil judgment.

(D) A judgment issued pursuant to this section has all the force and effect of a final judgment and, as such, may be enforced by the judgment creditor in the same manner as may other civil judgment; enforcement to take place in court of common pleas.

(E) The clerk of court must enter any judgment issued pursuant to this section in the civil judgment records of the court. No judgment issued pursuant this section is effective until entry is made in the civil judgment records of the court as required under this subsection.

(F) Upon full satisfaction of any judgment entered under this section, the judgment creditor must record such satisfaction on the margin of the copy of the judgment on file in the civil judgment records of the court.

Section 17-25-325 further provides:

> [t]he sentence and judgment of the court of general sessions in a criminal case against an individual may be enforced in the same manner by execution against the property of the defendant as is provided by law for enforcing the judgments of the courts of common pleas in civil actions. Before a general sessions court may enter a judgment against a defendant's property as authorized by this section, the judge must make findings of fact as to the amount of the judgment to be entered against the defendant. These findings must be supported by the preponderance of the relevant evidence as is offered by the parties.

LAW\ANALYSIS

Several principles of statutory construction are pertinent here. The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980), appeal after remand, 283 S.C. 408, 323 S.E.2d 523 (1984). The statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers. Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 424 (1980).

Moreover, in Smith v. Eagle Const. Co., Inc., 282 S.C. 140, 318 S.E.2d 8 (1984), our Supreme Court recognized the interpretative rules governing the retroactive construction of statutes. There the Court stated:

> "[i]n the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in the operation unless" the statutes are remedial or procedural in nature. Hercules, Inc. v. South Carolina Tax Commission, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980). "Statutes are remedial and [retroactive], in the absence of directions to the contrary, when they create new remedies for existing rights . . . enlarge the rights of persons under disability, and the like, unless [they] . . . violate some contract obligation.... Statutes directed to the enforcement of contracts, or merely providing an additional remedy, or enlarging or making more efficient an existing remedy, for their enforcement, do not impair the obligation of the con-

tracts." Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843, 846 (1941).

Sections 17-25-322 through -326 were enacted in 1993 as parts of Act No. 140. Section 17-25-322 provides the procedure for the trial court to determine the amount of restitution due to the victim or victims "[w]hen a defendant is convicted of a crime which has resulted in pecuniary damages or loss to a victim." In such circumstances, "restitution hearings must be held as a matter of course, unless the defendant in open court agrees to the amount due ...". This Section further provides that, in addition to any other sentence which the court may impose, "the court shall order the defendant make restitution or otherwise compensate the victim for any pecuniary damages." In addition to providing as to who has the right to be present at the restitution hearing, the Section provides the method for the court's determining restitution. Obviously, this procedure was not in existence in 1991 at the time of sentencing in your situation.

Section 17-25-323(B) provides that where the court has placed the defendant on probation and ordered restitution and the defendant is in default of payment of any installment, or in default "of any criminal fines, surcharges, costs and fees ordered", the procedure provided in that Section [17-25-323] may be used in order to reduce the debt to judgment, attach a lien thereupon and provide for enforcement thereof. In other words, Section 17-25-323 is much broader in scope than Section 17-25-322. To my mind, if the General Assembly had intended Section 17-25-323 (and -325) enforcement procedures to be applicable only to the restitution ordered pursuant to Section 17-25-322, it could obviously have said so. Compare, Section 17-25-326 ("any court order issued pursuant to the provisions of this article").

When Sections -322 and -323 are contrasted, however, the language used is considerably different, thus indicating different applicability of the two sections. Section-322 references defendants "convicted of a crime which has resulted in pecuniary damages or loss to a victim", while -323(B) refers to defendants placed on probation by the court or parole by the Board of Probation, Parole and Pardon Services. In conjunction with the fact that -323(B)'s scope expressly includes not only debts owed for restitution, but debts for fines, surcharges, assessments, costs and fees, it is further evident that the Legislature meant to apply -323 and -325 to all prisoners, not just those committing offenses after the effective date of the Act.[1]

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[1] Section -322 establishes the procedure for the court's ordering restitution "in addition to any other sentence which it may impose ...". It would seem superfluous to spell out "fines, surcharges, assessments, costs and fees" in Section -323 if its scope is

(continued...)

Obviously, South Carolina trial courts had been ordering restitution long before Act No. 140's existence as part of their discretionary sentencing authority. See, e.g. Section 16-3-1530(D)(3). The purpose of Section 17-25-322 appears to require the trial court to hold a hearing in every case which has resulted in pecuniary damages or loss to a victim and to establish the procedure for the ordering of such restitution. The applicability of Sections 17-25-323 and -325 would thus fall into the category of the Legislature's enacting "new remedies for existing rights" or "enlarging or making more efficient an existing remedy" as referenced in Smith v. Eagle Const. Co., supra.

With respect to the ex post facto argument you raise, our Supreme Court has stated in State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990) that

> [n]o ex post facto violation occurs if a change does not alter "substantial personal rights', but merely changes 'modes of procedure which do not affect matters of substance'." Miller v. Florida, 482 U.S. at 430, 107 S.Ct. at 2451, 96 L.Ed. at 360 (citations omitted). Even though a procedural change may have a detrimental impact on a defendant, a mere procedural change which does not affect substantial rights is not ex post facto. Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). Further, in order for the ex post facto clause to be applicable, the statute or provision in question must be criminal or penal in purpose and nature. Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960).

394 S.E.2d 487. In Huiett, the Court held that the application of a statute to the defendant after commission of the offense which changed the mode of procedure for commitment proceeding did not constitute an ex post facto violation. Particularly, the Court found persuasive that the statutory change is "not designed as a punishment or punishment enchancer', and also "merely changes the mode of procedure for commitment proceedings . . .". 394 S.E.2d at 489. And recently in California Dept. of Corrections v. Morales, ____ U.S. ____, 115 S.Ct. 1597, ____ L.Ed.2d ____ (1995), the United States Supreme Court reiterated that "[j]ust as '[t]he inhibition upon the passage of ex post facto laws does

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[1](...continued)
limited only to Section -322. If such limitations were indeed intended, it would have been much simpler for the Legislature to have merely referred back to Section -322 in defining the scope of Section -323, rather than enumerating so specifically "fines, surcharges, assessments, costs and fees."

not give a criminal a right to be tried, in all respects by the law in force when the charge was committed,' . . . neither does it require that the sentence be carried out under the identical legal regime that previously prevailed." 115 S.Ct. 1603.

A case from the Arizona courts, State v. O'Connor, 171 Ariz. 19, 827 P.2d 480 (1992) is particularly helpful. In O'Connor, a prisoner was convicted of violating the fraudulent schemes and artifices statute. In 1983, the trial court sentenced him to a term of imprisonment of thirty-four years and $336,000 in fines and restitutions. The state, in 1988, filed a writ of garnishment against the prisoner's trust account to collect the judgment debt.

The prisoner argued that the restitution lien statute, which had been enacted in 1986, three years after the commission of the offense, could not be applied to him, lest such application be an unconstitutional ex post facto law. Specifically, the prisoner contended that "because the lien statutes subjects his property to an encumbrance that did not exist at the time of the commission of his offense, the lien statute is an additional disadvantage to him, not existing at the time of his conviction." 827 P.2d at 483.

The Court rejected any ex post facto argument.

> We hold that the restitution lien statute does not violate the ex post facto prohibitions . . . . [citations omitted]. Clearly, the restitution lien statute does not subject Vigliotto to criminal liability for an act that was innocent when committed, nor does it deprive him of a previously available defense. The inquiry, then, is whether the statute makes Vigliotto's punishment more burdensome.
>
> Vigliotto became obligated in 1983, to pay the 336,000.00 fine that included 42,739.09 in restitution. The statute in effect in 1983 provided for the enforcement of payment of the restitution. The perfection of the lien neither increased Vigliotto's obligation nor made his punishment more burdensome. Finally, we acknowledge that the purpose of restitution is to make the victim whole; it is not punishment enacted by the state. State v. Faucher, 169 Ariz. 266, 267, 818 P.2d 251, 252 (App. 1991). For the above reason, we hold that the application of a statute that the legislature designed to facilitate the collection of previously existing, independent, court-ordered debts owed by criminal defendants

> as a result of their criminal acts does not increase punishment. (emphasis added).

Likewise in Burns v. State, 303 Ark. 64, 793 S.W.2d 779 (Ark. 1990), a prisoner convicted of numerous property offenses, inherited a large sum of money while serving time. The State, pursuant to a newly enacted statute filed suit against the prisoner to recover the State's expenses for his upkeep as prisoner. The Act went into effect after the prisoner's conviction.

The prisoner asserted that application of the Act to him deprived him of due process, equal protection and constituted an ex post facto law. The Court concluded that there was no evidence that the prisoner was "singled out", and that the new statute was facially neutral. Consequently, concluded the Court "the State's pursuit of reimbursement of the cost of Burn's care under the Code provisions is not violative of Burn's due process or equal protection rights." 793 S.W.2d at 780.

Additionally, the prisoner argued that "the act adds a new punishment to his conviction, in the form of a forfeiture of his estate, by reaching back in time to punish acts that occurred before the enactment of the law", thereby constituting an ex post facto enactment. Concluding that the argument was without merit, the Court relied upon Peeler v. Heckler, 781 F.2d 649 (8th Cir. 1986). In Peeler, the Eighth Circuit Court of Appeals had concluded that a federal statute suspending social security benefits for incarcerated felons was valid. The Burns Court stated that in Peeler the Court had reasoned that ". . . people in prison have their subsistence needs taken care of by the imprisoning jurisdiction; for such reason, it was entirely rational for Congress to suspend federal disability payments to prisoners." Therefore,

> [i]n this case, too, there is a rational connection between the act provisions and the nonpunitive goal of reimbursement to the State for care and custody expenses from state prison inmates. Act 715 is not unconstitutional as an ex post facto law as it is not focused on the crimes committed by Burns,

Id. at 781

Based upon the foregoing, it is my opinion that application of Sections 17-25-323 and -325 to your situation would not increase or enhance the inmate's punishment, and would, instead simply be a change in procedure. Thus, in my view such would not be an ex post facto violation.

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 am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph