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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 24, 1995

The Honorable Mickey Burriss
Richland County Magistrate
5241 Bluff Road
Hopkins, South Carolina 29061

Re: Informal Opinion

Dear Judge Burriss:

You have asked our advice concerning the following situation:

> [a] warrant or ticket is on the Bond Court Docket for Bond Setting, the charge is either DUI, DUS or Shop Lifting. The warrant is served. During the Bond Setting process the Presiding Judge is informed by the Assistant Solicitor the charge should be greater, example; DUI III, DUS II or Shop Lifting III. The information is based on the defendants Rap Sheet which was obtained by the Assistant Solicitor during the normal routine of their duty.
>
> As Presiding Judge should I amend the warrant or ticket to a greater charge and set bond on the [g]reater Offense? Should I set bond as the Charging Paper exists? Would the same procedure you recommend also apply when going to a Lesser Charge example; Shop Lifting III to Shop Lifting?

In responding to your question, I am assuming that you are referring to amendments which specify offenses still within the magistrate's jurisdiction to try. Of course, if there is an amendment which specifies an offense within the jurisdiction of the

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Court of General Sessions, an Indictment would serve as the charging paper and would be the instrument to give the Court of General Sessions jurisdiction. See, S.C. Const. Art. I, Sec. 11 ["(n)o person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed"].

With that caveat in mind, I note that it is well recognized that

> [a] warrant is a written mandate in the name of the State, based on a complaint or affidavit, or on an indictment, proceeding from the court and directed to an officer or other proper person, commanding him to arrest and return before the court the person named therein. The purpose of a warrant is to give accused notice that he is charged with an offense, to bring him before the court and to secure jurisdiction of his person.

22 C.J.S. Criminal Law, § 334.

S.C. Code Ann. Sec. 22-3-710 provides for the initiation of criminal proceedings in Magistrate's court. That Section states:

> [a]ll proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue.

Our Supreme Court has recognized the significance of the arrest warrant in bestowing upon the magistrate jurisdiction to hear a criminal case and in providing notice to the defendant of the charges against him. In Town of Honea Path v. Wright, 194 S.C. 461, 468, 9 S.E.2d 924 (1940), the Court reasoned:

> [t]here is a marked difference between the arrest of an offender by an officer without a warrant, and proceedings before a magistrate which include formal charges supported by oath, bail, and trial. Nor does the provision ... to the effect that proceedings before magistrates shall be summary, dispense with the very process which gives them jurisdiction. Without doubt, the administration of the law, and the rights of persons charged with crime can best be served by a due

> observance of statutory requirements. It is the constitutional right of a person charged with a criminal offense to be fully informed of the nature and cause of the accusation.... When a warrant is issued, substantially setting forth the offense and the verdict of the jury, or that of the magistrate, is endorsed thereon, this paper becomes original evidence, and prevents any possibility of the prisoner being again tried for the same offense. And this was no doubt one of the reasons which moved the Legislature to require that all prosecutions be commenced by the issuance of a warrant. And because the rights of the accused are not only of interest to him, but concern the State, the statutory requirements may not be waived.

Thus, the Court in Wright concluded that a conviction in municipal court was a nullity because it had not been commenced with the issuance of an arrest warrant.

By virtue of Section 56-7-10 and 56-7-15, the General Assembly has also employed the Uniform Traffic Ticket as a charging document. Where the ticket is applicable, therefore, it can also be used to vest jurisdiction upon a magistrate's and municipal court. See, e.g. State v. Prince, 262 S.C. 89, 202 S.E.2d 645 (1974).

Against that background, I turn now to your specific question, the amendment of the warrant or ticket. The following statement recognizes the general rule concerning the amendment of information which forms the basis for the issuance of an arrest warrant:

> [g]enerally, an information may be amended so long as the amendment is not prejudicial to the defendant and does not charge a different offense.

42 C.J.S. Indictments and Informations, § 195. The burden is usually placed upon the defendant to show he has been prejudiced by the amendment. Usually the rule is that the amended information vitiates the original information and has the legal effect of a nolle prosequi. Id.

This Office has also recognized these general principles in Op. Atty. Gen. No. 77-324 (October 18, 1977). Therein, we stated the well-understood law concerning the amendment of arrest warrants in the following passage:

> ... a warrant may be amended upon motion of the State's representative and with the permission of the court, only when said amendment involves immaterial irregularities in the warrant. However, an amendment striking the offense charged and inserting another generally cannot be permitted unless authorized by statute and no prejudice to the accused results. 22 C.J.S. Criminal Law, Section [328], p. 839-840. Parenthetically, it should be noted that since shoplifting and larceny, petit or grand, are separate and distinct offenses, separate process charging the individual with larceny would be necessary in order to vest the appropriate court with jurisdiction once an indictment has been nol prossed or a warrant dismissed. Nevertheless, there appears to be no legal prohibition against initially charging both offenses in the same or companion process.

Section 22-3-720 provides that "[t]he information may be amended at any time before trial." It would appear that this Section provides a magistrate or municipal judge with broad authority to amend a warrant.

In Town of Ridgeland v. Gens, 83 S.C. 562, 65 S.E. 828 (1909), our Supreme Court applied this statute to a specific fact situation. There, a criminal case was called for trial in municipal court, charging the unlawful sale of whiskey. The defendant demurred to the warrant upon the ground that the warrant failed to allege the name of the person to whom the whiskey was sold or the price paid. The demurrer was sustained, the warrant was amended and the case was set for trial. On appeal, the Court upheld the amendment of the warrant. Concluded the Court:

> [t]here was, therefore, no error in amending the information and warrant and ordering the case to trial, especially as the defendant did not make it appear that he was surprised by the amendment, or would be prejudiced by an immediate trial.

And in State v. Nash, 51 S.C. 319 (1897), the Court sustained an amendment to a warrant which had resulted in a defendant being arrested for malicious trespass. Shortly before trial, the words "wilfully, unlawfully" were inserted as well as certain words describing the trespass and quantifying the damages which resulted therefrom. The defendant argued that the words inserted changed the offense but the Court rebuffed these contentions. Stated the Court,

> [i]t is true that the Constitution of this State does require that the accused shall be fully informed of the nature and cause of the accusation; but the accused in the case at bar was fully informed that he was charged with a malicious trespass upon the lands of Mary E. Nash after notice forbidding such trespass. The law in regard to information under oath, as the basis for a warrant of arrest, allows amendment before trial of such information .... The words "wilfully, unlawfully," inserted before the word "maliciously," already there, were inserted no doubt to incorporate the exact words of Section 166 of "The Criminal Statutes of South Carolina," in the information; but this was unnecessary care, for the legislature itself in the act of 1892 ... both in the title and body of such act, has referred to this offense as "malicious trespass." This remark disposes of the other words added. Nor is there any virtue in the position that such amendments to the information were not sworn to anew. The prosecutrix was present when these words were added to the information to which she had already sworn, and I will assume that the same charges were made at her instance, or with full assent. The "Case" shows that she, in her testimony, stated these facts.

51 S.C. at 320-321.

In a previous opinion of this Office, we addressed the question of whether a summons issued by the Highway Patrol is void "if the wrong section of the Code is set forth therein." Op. Atty. Gen., June 24, 1963. We opined that it was not.

> All that is required in a warrant or summons ticket is that the charge against the defendant be plainly and substantially set forth. Section 43-112, 1962 Code (now Section 22-3-720) permits amendment of the information at any time before trial. Even in the most serious cases in General Sessions Court, the law permits amendment of the indictment before trial. Sec. 17-410, 1962 Code [now Section 17-19-100].

Our Court has never squarely addressed the limits of Section 17-19-100, if any. In both the Town of Ridgeland case and the Town of Honea Path cases, however, the Court was quick to emphasize the constitutional right of the defendant to notice of the

charge and to stress that there must be no surprise to the defendant by any amendment. See, 1964-65 Ops. Atty. Gen. 110 (defendant may not be convicted in magistrate's court or municipal court of any offense not charged in arrest warrant or summons). So too does the Nash case reiterate those principles and as well suggests that there is a need to swearing to the new information. In Nash, the defendant specifically argued that a new offense had been charged, but the Court rejected that argument on the facts.

Cases recently decided by the Court under Section 17-19-100 also provide a useful guide. As noted above, this Section permits amendment of an indictment so long as the amendment does not change the nature of the offense charged. While such provision relates to General Sessions Court, rather than magistrate's court, still, the Court places considerable emphasis upon the need to avoid changing the nature of the offense charged so that there will be no surprise in the charges made.

For example, in State v. Riddle, 301 S.C. 211, 391 S.E.2d 253 (1990), the Court held that a particular indictment could not be amended under Section 17-19-100. Said the Court:

> [h]ere the amendment increases the lesser charge of assault with intent to commit third degree criminal sexual conduct to the greater charge of assault to commit first degree criminal sexual conduct. Punishment for third degree may not exceed ten years, while first degree is punishable by up to thirty years.

And in State v. Myers, _____ S.C. _____, 438 S.E.2d 236 (1993), the Court had this to say regarding the lower court's amendment of an indictment to charge arson of personal property:

> [t]he trial court amended the indictment to charge Myers with arson under S.C. Code Ann. 16-11-140 (1985). Amendments to an indictment are permissible if they do not change the nature of the offense; the charge is a lesser included offense of the crime charged on the indictment; or the defendant waives presentment to the grand jury and pleads guilty. S.C. Code Ann. Sec. 17-19-100 (1985); State v. Murdock, 308 S.C. 143, 417 S.E.2d 543 (1992); State v. Riddle, 301 S.C. 211, 391 S.E.2d 253 (1990).

> Myers did not plead guilty and the crime of burning the type of personal property set forth under 16-11-140 is not a lesser included offense of arson under Sec. 16-11-110(B). The two statutes distinguish between two different types of property and therefore the nature of the offense is different. Therefore, we find the trial court erred in amending the indictment.

While in contrast to Section 17-19-100 (indictment), Section 22-3-720 places no explicit limitation upon the ability to amend information for a warrant so long as such amendment is made prior to trial, clearly the magistrate must be mindful of the need to avoid surprise and of the defendant's constitutional right to notice in the amendment of a warrant. See, State v. Randolph, 239 S.C. 79, 85, 121 S.E.2d 349 (1961) ["We think the Court erred in not requiring the State to make the charge more definite and certain by giving such information as would enable appellants to understand the nature of the offense named in the warrant."] However, courts have held that where a warrant or information is amended to encompass previous convictions for the same offense, such does not change the offense, but merely enhances the punishment. It is well-recognized that the amendment of information charging a repeat offense or the offense of habitual offender is permissible "since the amendment charges the punishment and not the nature of the crime." 41 Am.Jur.2d, Indictments and Informations, § 197.

In State v. Shumate, 516 S.W.2d 297 (Mo. 1974), the Court upheld the amendment of an information on the day of trial. The amendment charged the defendant under the Second Offender Act when it was discovered that he had a previous conviction of robbery in the first degree. The Court refused to grant defendant a continuance and the appellate court upheld the trial court's exercise of discretion, stating that

> [a]n amendment which involves the second offender act does not change an offense different from that originally charged.

516 S.W.2d at 299. In essence, the Court concluded that the nature of the offense had not been altered, but the punishment had been upgraded. The fact that the defendant had been previously convicted was not something that would unduly surprise the defendant by amending the information to conform to that fact. See also, State v. Wilburn, 575 S.W.2d 914 (Mo. 1978).

And in Gilmore v. State, 415 N.E.2d 70 (Ind. 1981), the Supreme Court of Indiana reached the same conclusion. There the Court stated:

> [s]ince the habitual criminal statute does not impose punishment for a separate crime but provides a more severe penalty for the crime charged and since defendant was given adequate time to prepare a defense, an amendment to add the habitual criminal count did not prejudice the substantial rights of the defendant.

415 N.E.2d at 73. Therefore, assuming no undue surprise to defendant, an amendment of information for a warrant to encompass an enhanced penalty based upon the fact that there is discovered a previous conviction or convictions of defendant for the same offense would be permissible. Such would not as a general rule change the nature of the offense.

Of course, an alternate way of handling this situation would be simply for the prosecuting officer to nol prosse the original warrant and to seek a new one based upon the enhanced charge. This approach removes any question in a particular situation.

As to the issue of amending a warrant in the other direction, e.g. Shoplifting 3d to Shoplifting, I presume that this is being done either as a result of some charging error or as part of a plea agreement. Again, as stated above, such an amendment would relate only to changing the punishment rather than the nature of the offense.

While there would be no prohibition regarding such amendment downward, I would suggest that the court proceed with caution in this regard. It is well established that

> [b]efore permitting a prosecutor to amend charges to allege a less serious offense and before accepting a defendant's guilty or no contest plea to the amended charges, the court must satisfy itself that the amended charges fit the crime and they are in the public interest.

41 Am.Jur.2d, Indictment and Informations, § 195.

State v. Lima, 144 N.J. Super. 263, 365 A.2d 222 (1976) illustrates the Court's obligation to insure that its sentences conform with the facts as they exist. In Lima, the defendant pled guilty to operating a motor vehicle without liability coverage. However, at sentencing, the trial court sentenced him as a second offender because he had a previous conviction on his record. The defendant contended "that he should not have been sentenced as a second offender because the complaint filed against him in municipal

court did not charge him as such and did not allege a prior conviction under the statute." 365 A.2d at 223.

Nevertheless, the Court upheld the municipal judge's sentencing decision. The appellate court noted that at the guilty plea the defendant had stipulated that he had previously been convicted of the same offense. Thus, even though the charging document did not mention the previous conviction, the sentencing judge property sentenced the defendant as a second offender. Said the Court:

> [w]e are satisfied from our study of the entire record that considerations of fundamental due process and requirements of basic fairness have been fully observed. Defendant was given adequate notice and afforded an ample opportunity to be heard prior to entering a plea to the charge and the imposition of sentence. In the circumstances, defendant was not prejudiced in any way by the failure to be formally charged in the complaint as a second offender, and we find no justification of disturbing the imposition of a mandatory sentence upon defendant as such under [New Jersey law].

365 A.2d at 224. Accordingly, even though the charging document reflected only a first offense, the Court was free to consider the facts as they truly existed. In essence, the Court could ignore the charging document in sentencing the defendant, so long as there had been no surprise to the defendant regarding the earlier offense.

In another context, our Supreme Court has also recognized that the fact that earlier convictions for the same offense exist, cannot be ignored by the Court. In State v. Sarvis, 266 S.C. 15, 221 S.E.2d 108 (1975), the defendant had been convicted of driving under the influence and appealed his conviction thereunder. Pending appeal, the defendant was charged with DUI again. A second offense DUI was triable in General Sessions Court rather than magistrate's court. Defendant sought to have the second DUI disposed of in magistrate's court as a first offense. When no quick disposition of the second DUI resulted, he sought to have the case dismissed for lack of speedy trial.

The Court concluded that the first DUI conviction could not be ignored. The Court reasoned:

> [i]n view of respondent's prior conviction for a first offense, the Magistrate's Court had no jurisdiction to grant respondent's request. In substance, the contention of

> respondent is that he is entitled to have the second charge against him tried in Magistrate's Court as a first offense while the appeal from the first offense conviction was pending. If this had been done and respondent had been convicted on the second charge, he would have had two convictions for first offense driving under the influence, since his first conviction was affirmed.

221 S.E.2d at 110.

In summary, in the absence of a charging error or a technical mistake, I could not approve any amendment of a charging document downward, particularly where there exists a record of a previous conviction or convictions for the same offense. I am particularly concerned where a charging document is amended to reflect a first offense when such is not in fact the case, i.e. the present charge is, in fact, defendant's second or third offense. I advise that the Court maintains the responsibility to act in accordance with the facts as they actually exist.

Again, there would also exist the option of the prosecuting officer's nol prossing the present charge and seeking a new warrant.

As heretofore noted, absent any undue surprise, there would be no prohibition against amending upward to reflect previous convictions for the same offense. (e.g. shoplifting 1st to 2d).

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

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