4978 / 5269

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 10, 1995

The Honorable Roderick M. Todd, Jr.
Associate Municipal Judge
Municipal Court, City of Camden
P. O. Box 7002
Camden, South Carolina 29020-7002

Re: Informal Opinion

Dear Judge Todd:

You have asked the following question:

> May a detention center detain a person who has been arrested, but not yet charged with a criminal offense, pursuant to an "administrative detainer", like that which is attached to this letter? If one accused may be detained administratively pending service of a warrant, for how long may the accused be detained before service of the warrant? May the detention center book and detain an accused without a criminal charge or offense being lodged against the accused at the time of booking?

In an opinion of this Office, dated April 8, 1980, we stated in response to the question of the detention of a prisoner who is arrested without a warrant:

> [a] law enforcement officer of this State may without a warrant arrest an individual who commits an offense in the presence of that officer. Section 17-13-30 of the South Carolina Code of Laws (1976). He may also arrest an individual for the commission of a felony without a warrant. Section 17-13-10. Once such an arrest is made Section 22-5-200 provides that the arrestee may be taken <u>forthwith</u> before

> a magistrate at which time a warrant of arrest shall be procured and disposed of as the Magistrate might direct (emphasis added). The term forthwith for the purposes of Section 22-5-200 has been held to provide that the individual be taken before a magistrate within a reasonable time. 1962 Ops. Attorney General No. 1314B, p. 77; Westbrook v. Hutchinson, 195 S.C. 101. While the definition of a reasonable period of time may not be given with any precision, it may be said that the rule does not prohibit delay, but rather prohibits only unnecessary delays. For example, the unavailability of a committing Magistrate, the extent of the delay before the arrested person is taken before a Magistrate, and the police justification, if any, for the delay may be considered in determining the length of delay in procuring a warrant. 6A C.J.S. Arrest, Section 64 at 147, 148.
>
> If no warrant is procured by the arresting officer and no justification for such a delay is offered by the arresting officer, then the jail administrator may not release the prisoner but rather shall take the prisoner before a Magistrate forthwith. That is to say, that once the jail administrator learns that a warrant has not been procured and cannot establish a reason for the delay in procuring he warrant, then the jailer's only alternative is to then immediately take the prisoner before a Magistrate to seek the prisoner's arrest or release, as the Magistrate might determine.
>
> Last, if such a prisoner is served with lawful process and procures bond, he should then, upon proof of process ordering his release, be released. You should bear in mind that such an individual may not necessarily be immediately released if his condition should pose a threat to the safety of the public or himself, i.e. an intoxicated condition. See 1967 Ops. Attorney General, No. 2268, p. 79; Attorney General's Opinion (December 5, 1974).

See also, Op. Atty. Gen., May 2, 1979 (when a suspected felon is arrested without warrant, "one should be obtained as soon as is reasonably possible", but no rigid rule of thumb can be set out "since circumstances in each case control what constitutes reasonable time in which to obtain a warrant.")

Since these opinions were written, the United States Supreme Court has more definitively set the limitation for detention of a suspect without a warrant. In County of Riverside v. McLaughlin, 500 U.S. _____, 111 S.Ct. _____, 114 L.Ed.2d 49 (1991), the Court clarified its earlier decision in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) which had held that the 4th Amendment requires a "prompt" determination of probable cause by a judicial official as a prerequisite to any extended pretrial detention following a warrantless arrest.

McLaughlin rejected the idea that there must be such a judicial determination immediately following completion of administrative procedures after arrest. Said the Court:

> [i]nherent in Gerstein's invitation to the States to experiment and adapt was the recognition that the Fourth Amendment does not compel an immediate determination of probable cause upon completing the administrative steps incident to arrest. Plainly, if a probable cause hearing is constitutionally compelled the moment a suspect is finished being "booked," there is no room whatsoever for "flexibility and experimentation by the States." ... Incorporating probable cause determinations "into the procedure for setting bail or fixing other conditions of pretrial release"--which Gerstein explicitly contemplated ... --would be impossible. Waiting even a few hours so that a bail hearing or arraignment could take place at the same time as the probable cause determination would amount to a constitutional violation. Clearly, Gerstein is not that inflexible.

114 L.Ed.2d at 61.

Noting however, that Gerstein "is not a blank check", the Court further elaborated as to "what is permissible under the Fourth Amendment."

> Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds. Taking into account the competing interests articulated in Gerstein, we believe that a jurisdiction that provides judicial determinations of probable cause within 48

> hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein. For this reason, such jurisdictions will be immune from systemic challenges.

114 L.Ed.2d at 63.

Pursuant to this rule, a particular prisoner who was delayed in receiving a probable cause determination by as much as 48 hours, was required to prove that his or her determination "was delayed unreasonably" in that particular instance.

> Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, or other practical realities.

Supra.

Finally, Justice O'Connor stated that where the delay in a probable cause determination is greater than 48 hours, "the calculus changes."

> In such a case, the arresting individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

Supra.

The following sets forth the state law and constitutional guidelines applicable to a warrantless arrest and any delay prior to a judicial determination of probable cause following arrest. I trust the foregoing responds to your question.

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/an