



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 13, 1995

The Honorable John T. Henry, Jr.
Sheriff, Horry County
P. O. Box 380
Conway, South Carolina 29526

Re: Informal Opinion

Dear Sheriff Henry:

You have asked how best to dispose of weapons which have been previously confiscated "for various offenses that occur within the unincorporated areas of Horry County." You note that these weapons have accumulated over a period of many years. A large percentage of the cases where these weapons were involved were adjudicated through the Pre-Trial intervention program (PTI) and thus there is now no way "to determine if consent orders were obtained for the offenders to relinquish the ownership of the weapons." In addition, in a number of the cases concerned, charges "were dismissed either outright or through a plea agreement." Finally, you indicate that a portion of the weapons accumulated are rifles and shotguns.

S.C. Code Ann. Section 16-23-50 is part of the Chapter of the Code entitled "Offenses Involving Weapons". Section 16-23-20 makes it unlawful to carry a pistol except pursuant to the exceptions enumerated therein. Section 16-23-30 proscribes the sale or exchange of a pistol to certain persons such as a person convicted of a crime of violence. Section 16-23-50 provides in pertinent part:

(B) In addition to the penalty provided in this Section, the pistol involved in the violation of this article must be confiscated. The pistol must be delivered to the chief of police of the municipality or to the sheriff of the county, if the violation occurred outside the corporate limits of a municipality. The law enforcement agencies that receive the confiscated pistols may use them within their department, transfer them to another law enforcement agency for their lawful use, transfer them to the clerk of court or mayor who shall dispose of them

as provided by Section 16-23-500, or trade them with a retail dealer licensed to sell pistols in this State for a pistol or any other equipment approved by the agency. If the State Law Enforcement Division seized the pistol, it may keep it for use by its forensic laboratory. Records must be kept of all confiscated pistols received by the law enforcement agencies under the provisions of this article.

Previously, this enactment provided that where a person had been "convicted of violating the provisions of this article", the pistol involved was to be confiscated. Pursuant to recent amendment, however, see Act No. 184 of 1993, § 189, the provision was changed to its present form, containing no express requirement of a "conviction".

In addition to the foregoing provisions, Section 23-31-110 et seq. provides for the regulations of pistols, the purchase thereof, the issuance of permits for, etc. The following provision is contained in Section 23-31-190:

[i]n addition to the penalty provided in this section, the pistol involved in the violation must be confiscated. The pistol must be delivered to the chief of police of the municipality or to the sheriff of the county, if the violation occurred outside the corporate limits of a municipality. The law enforcement agencies that receive the confiscated pistols may use them within their departments, transfer them to another law enforcement agency, or destroy them. Records must be kept of all confiscated pistols received by the law enforcement agencies under the provisions of this article.

Formerly, Section 23-31-190, like Section 16-23-50, expressly required that such forfeiture would occur upon "conviction", see Section 23-31-190 (main volume), but was amended in 1993 to its present form. See Act No. 184 of 1993, § 198. Moreover, Section 23-31-180 proscribes the so-called "Saturday night special" (has a die-cast metal, alloy frame or receiver which melts at a temperature of less than eight hundred degrees Fahrenheit") provides in pertinent part:

[a] pistol or other handgun possessed or sold by a dealer in violation of this article is declared to be contraband and must be forfeited to the municipality where seized or to the county where seized if outside a municipality. The weapon must be disposed of as provided by Section 16-23-500.

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However, any law enforcement agent may register and use these weapons in the line of duty.

Depending upon the particular statute involved, it "may be the legislature's intention that the mere commission of the offense shall work a forfeiture, and that a judicial proceeding establishing a violation of the law or resulting a conviction therefor shall not be required as a condition precedent." 94 C.J.S., Weapons, § 25. This Office has issued a number of opinions over the years concerning the disposition of pistols and rifles and shotguns which are lawfully confiscated by law enforcement officers which I am enclosing to you for your information.

In an opinion issued May 7, 1991, we addressed at some length the question of disposition where the owner had completed PTI. There we said:

[a] prior opinion of this Office dated October 13, 1988 ... dealt with a similar question concerning the possible return of a pistol to an individual who had been arrested for violations of Section 16-23-20, carrying a concealed weapon, and 16-23-430, carrying a weapon on school property. The opinion referenced that it was our interpretation that such provisions required confiscation of the weapons involved upon conviction. However, the opinion noted,

Section 17-22-150 of the Code states that "(i)n the event an offender successfully completes a pretrial intervention program, the solicitor shall effect a noncriminal disposition of the charge or charges pending against the offender." Therefore, [if] the individual in the situation you addressed has successfully completed his pretrial intervention program following his arrest for the referenced offenses, there would not be a conviction which would prevent the weapon involved in these violations from being returned.

The 1991 opinion further commented, however:

[a]s to an offender charged with a violation of Section 23-31-140, it is questionable whether the rationale of the referenced 1988 opinion would be applicable. While Section 23-31-190

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states "any person convicted of violating ... (Section 23-31-140) ... shall have the pistol involved in such violation confiscated" (which would be supportive of the conclusion of the 1988 opinion, were there is no conviction), Section 23-31-180 states

a pistol or other handgun possessed or sold by a dealer in violation of this article ... (which includes Section 23-31-140) ... is declared to be contraband and must be forfeited to the municipality where seized or to the county where seized if outside a municipality. The weapon must be disposed of as provided by Section 16-23-500.

Such provision as amended is later in time than Section 23-31-190 and therefore arguably could be construed as prevailing. As referenced, confiscation and disposal is not linked to a conviction.

Similarly, as noted above, recent amendments to Section 16-23-50(B) and 23-31-190 removed any express references formerly contained therein to a "conviction" in order for the weapon to be confiscated. Section 16-23-50(B) now simply provides that "the pistol involved in the violation of this article must be confiscated," rather than as formerly reading, "[a]ny person convicted of violating the provisions of this article, in addition to the penalty provided herein, shall have the pistol involved in such violation confiscated." If a conviction is now required in order for the pistol to be confiscated and forfeited pursuant to these provisions, such requirement would necessarily have to be inferred.

In United States v. One Assortment of 93 Firearms, 463 F.Supp. 365 (D. S. C., Cola. Div.), Judge Hemphill construed 18 U.S.C. § 924(d) which subjected to seizure and forfeiture "[a]ny firearm involved or used or intended to be used in, any violation of the provisions of this chapter ... or any other criminal law of the United States ...". The Court interpreted this provision, whose language is similar to Sections 16-23-50 and 23-31-190, as not requiring conviction for forfeiture, The Court stated as follows:

[w]here the property is lawfully seized as evidence in a criminal proceeding, it may be made the subject of a forfeiture proceeding It is clear that a claimant in a forfeiture proceedings is not entitled to the return of the defendant

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property on the ground he was acquitted in the related criminal proceeding.

463 F.Supp. at 368.

Thus, as we noted in the 1991 opinion referenced above, a court could determine that a conviction is not necessary in order to confiscate and forfeit pistols pursuant to Section 16-23-50 and 23-31-190. If that is the case, the fact that there was no "conviction" where the case had been disposed of pursuant to PTI, would not be determinative. Only a court could, of course, make that final determination.

Of course, Sections 16-23-50, 23-31-180 and 23-31-190 provide varying methods of disposition. While Section 23-31-180 mandates that any pistol possessed or sold by a dealer in violation of this article must be disposed of by Section 16-23-500 (auction), Section 16-23-50 and 23-31-190 provide for disposition through use by the law enforcement agency within the department, transfer to another law enforcement agency or destruction.

As to the disposition of rifles and shotguns, I am enclosing an opinion, dated January 3, 1979, which states that "the laws governing the disposition of pistols are inapplicable since the weapons [possessed] ... are rifles and shotguns. We noted that absent a specific statutory provision governing disposition of rifles and shotguns Section 27-21-20 might provide a method for disposition of such weapons where stolen from their owners and recovered by a Sheriff's Department from the person who stole them and the owner could not be located. I am enclosing that opinion for your review.

In a recent Order of the Honorable James E. Lockemy, Judge of the Fifteenth Judicial Circuit, dated March 29, 1995, the question of the authority of the Sheriff of Horry County with respect to the disposition of weapons confiscated for offenses occurring outside a municipality in the unincorporated areas of Horry County was addressed. Therein, it was ordered that Horry County and the Horry County Police Department, et al.

... is hereby permanently enjoined from disposing of any and all confiscated pistols now in its possession and to immediately deliver all pistols confiscated outside of a municipality to the Sheriff.

It was also ordered therein

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... that all pistols hereafter confiscated outside of a municipality by the Defendant be immediately delivered to the Sheriff of Horry County.

It is my understanding that the Order was not appealed and thus represents the law of the case as to this issue.

While it is my opinion that a conviction is probably no longer necessary in order to authorize you to dispose of these weapons in the manner set forth in the above statutes, still, the ultimate disposition of these weapons may have to be determined by judicial order. Owing to the uncertainty surrounding these guns, in that there has been no conviction in a number of instances, and apparently there is no indication as to the particular circumstances surrounding the seizure of the weapons, the safer course would be to obtain judicial guidance and would protect law enforcement agencies and officials. See, People v. Mudd, 54 Ill.App. 3d 603, 370 N.E.2d 67 (1977) [where statute requires a conviction for gun violation and there was no conviction, gun cannot forfeit to the State].

As you will note, we also suggested the seeking of judicial resolution as to property ownership in the May 7, 1991 opinion, referenced above. While there we advised that weapons not be turned over to the original owner without a judicial order, the same reasoning would apply here where no "owner" or purported owner is known. Moreover, in the past, law enforcement officials have frequently obtained a judicial determination as to property disposition in drug cases. See, e.g., Op. No. 89-42 (April 10, 1989) In an opinion dated February 21, 1974, we stated that it is "... the duty of the court -- not that of the police -- to make a finding of fact relative to the forfeiture of the impounded car."

Further, Long v. McMillan, 226 S.C. 598, 86 S.E.2d 477 (1955) provides guidance indicating that a court is the proper forum for determining disposition of weapons. Long was a case involving disposition of a pistol, seized from an individual in Horry County who was arrested for pointing a firearm. The officer kept the firearm although the individual, Huggins, was never charged with carrying a concealed weapon. Sometime after the imposition of sentence upon Huggins, the officer spoke to the presiding judge and asked him what to do with the weapon. He was verbally advised to keep the weapon until further order of the Court, but such statement by the Judge was not made in open court, put in writing or entered upon the records of the Court.

Huggins' attorney unsuccessfully sought the return of the pistol after the trial. Subsequently, following an investigation by the Highway Department, the officer who had seized the gun was disciplined for not turning the gun over to the Clerk of Court. The

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presiding Judge then held the Chief Highway Commissioner and the Patrol Captain in contempt for disobedience of his Order that the officer should keep the gun until further order of the Court.

The Supreme Court reversed the conviction for contempt because no written order had issued from the Court declaring the disposition of the weapon. With respect to the disposition of the pistol, the Court indicated the appropriate means to determine the disposition of confiscated pistols where there had been no conviction for carrying a concealed weapon:

[a] pistol of and by itself is not contraband and the owner may force its return when no longer required for the purposes of justice, unless such has been confiscated. In the instant case, Huggins was not charged with carrying concealed weapons in violation of Section 16-145 ... under which a pistol may be confiscated, neither was it introduced as evidence. After the case of State v. Stacey Huggins was ended, Cpl. Crawford inquired informally of the Judge as to what disposition should be made of the pistol he had seized from Huggins. The Judge's response can in no wise be considered a valid and binding Order of the Court in the Huggins case, as that case had been ended and there was nothing pending in Court relative thereto, but was more of an oral directive in the form of advice which Crawford sought for his own benefit. There was no open announcement in Court, no notation thereabout entered upon the minutes, or anything done which would make such a part of the records of the Court.

226 S.C. at 611. Based upon this language, it would appear that the Horry County Sheriff's Office should seek the guidance of the Court in determining the proper legal disposition of the weapons in question. While I can advise you that it is my belief that the current statutes may not require a conviction to enable you to dispose of the weapons in question, an order of the court to that same effect, thus allowing disposition of weapons, even where there has been no conviction, would still be advisable.

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.

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With kind regards, I remain

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an
Enclosures