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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 6, 1995

Corporal Gary W. Lee
State Transport Police Division
South Carolina Department of Public Safety
220 Executive Center Drive
Winthrop Building, Suite 200
Columbia, South Carolina 29210-8422

Re: Informal Opinion

Dear Corporal Lee:

You have asked several questions regarding the South Carolina Commercial Driver License Act. S.C. Code Ann. Sec. 56-1-2010 et seq. Particularly, your concern relates to Section 56-1-2120, driving with a measurable amount of alcohol in one's body. You present the following questions:

1. Is § 56-1-2120 a criminal offense to be charged and fined, an administrative section of law or both?

2. If a subject is arrested for measurable amount and not read the standard implied consent warning, only the CDL (Commercial Drivers License) warning, can the subject be charged for DUI even though standard consent was not given by the test operator?

3. A subject is routinely checked at a weigh station and suspected of drinking, no improper driving is noted. The results of the breath test show in excess of .10%, should the proper charge be measurable amount if the

arresting officer does not think a guilty verdict could be reached with no improper driving?

In 1989, by Act No. 151, the General Assembly enacted the South Carolina Commercial Driver License Act. The Act was further amended in 1993 by Act No. 149. Section 56-1-2110 states in pertinent part as follows:

> (A) A person is disqualified from driving a commercial vehicle for not less than one year if convicted of a first violation of:
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> (1) driving a commercial motor vehicle under the influence of alcohol, a controlled substance, or a drug which impairs driving ability;
>
> (2) driving a commercial motor vehicle while the alcohol concentration of the person's blood or breath or other bodily substance is four-one hundredths or more ....

Section 56-1-2120 further provides:

> (A) A person may not drive a commercial vehicle in this State while having a measurable amount of alcohol in his body.
>
> (B) A person who drives a commercial motor vehicle within this State while having a measurable amount of alcohol in his system or who refuses to submit to an alcohol test under Section 56-1-2130 must be placed out of service for twenty-hour hours.
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> (C) A person who drives a commercial motor vehicle in this State with an alcohol concentration of four one-hundredths of one percent or more must be disqualified from driving a commercial vehicle under Section 56-1-2110.

The "implied consent" provision of the Act is set forth at § 56-1-2130. That Section reads as follows:

> (A) A person who drives a commercial motor vehicle is considered to have given consent, subject to provisions of Section 56-5-2950, to take a test of that person's blood, breath, or urine for the purpose of determining that person's alcohol concentration or the presence of other drugs.
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> (B) Tests may be administered at the direction of a law enforcement officer, who after stopping or detaining the driver of a commercial motor vehicle, has probable cause to believe that the driver was driving a motor vehicle while having a measurable amount of alcohol in his system.
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> (C) A person requested to submit to a test as provided in subsection (A) must be warned by the law enforcement officer requesting the test, that a refusal to submit to the test must result in that person being placed out of service immediately for twenty-four hours and being disqualified from operating a commercial motor vehicle for not less than one year under Section 56-1-2110.
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> (D) If the person refuses testing, or submits to a test which discloses an alcohol concentration of four one-hundredths of one percent or more, the law enforcement officer shall submit a request to the Department of Public Safety certifying that the test was requested pursuant to subsection (A) and that the person refused to submit to testing, or submitted to a test which disclosed an alcohol concentration of four one-hundredths of one percent or more.
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> (E) Upon receipt of the report of a law enforcement officer submitted under subsection (D), the Department of Public Safety shall notify the department that the driver is disqualified from driving a commercial motor vehicle under Section 56-1-2110.

With respect to penalties, Section 56-1-2160 provides that "[a]n offense for which no specific penalty is provided by this article must be punished in accordance with Section 56-5-6190."

The General Assembly has established the rules of construction which must be given the Act. Section 56-1-2020 states that

> [t]his article is a remedial law and must be construed liberally to promote the public health, safety and welfare. To the extent that this article conflicts with the general driver licensing provisions, this article prevails. Where this article is silent, the general driver licensing provisions apply.

Your first question is whether the Legislature intended to make criminal a violation of Section 56-1-2120, or whether its violation is exclusively administrative in nature, or whether both criminal and administrative penalties are prescribed therefor.

Our Supreme Court has, in State v. Parker, 267 S.C. 317, 227 S.E.2d 677, 679 (1976) previously recognized that a crime can be created by the Legislature without explicitly characterizing it as such. There, the Court stated:

> [a] crime is generally defined as an act which is committed or omitted in violation of a public law commanding or forbidding the act. To this definition the authorities generally add the requirement that there be some punishment attached to a violation of law. 21 Am.Jur.2d Criminal Laws S 1 (1965). The following language from State v. Brown, 221 N.C. 301, 20 S.E.2d 286, 289 (1942), is helpful on this issue:
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> > "The doctrine is well settled that where the statute either makes an act unlawful, or imposes a punishment for its commission, such act becomes a crime, without any express declaration that it shall be a crime or of its grade."

Section 56-1-2120(A), the one provision in the Act written in prohibitory terms, mandates that a person "may not" drive a commercial vehicle in South Carolina" while having a measurable amount of alcohol in his body. Referring to Section 56-1-2110, we note that such section provides for administrative sanctions when a person is "convicted" of a first violation of commercial vehicle DUI or driving a commercial vehicle with a blood alcohol content of four one-hundredths or more. Since no other provision in the Act appears to relate to a "conviction" for driving a commercial vehicle with a blood

alcohol content of four one-hundredths or more,[1] it could be inferred that the "conviction" referenced in Section 56-1-2110 is the violation of Section 56-1-2120. Such is consistent with the requirement contained in Section 56-1-2020 that the Act be liberally construed as well as Section 56-1-2160's requirement that "[a]n offense for which no specific penalty is provided by this article must be punished in accordance with Section 56-5-6190." While no South Carolina case has addressed the question of whether Section 56-1-2120 is a criminal violation, it appears that such is a reasonable interpretation based upon the foregoing analysis. Of course, we will have to await a definitive ruling by our Supreme Court for a final interpretation, but it is my opinion that Section 56-1-2120 establishes a criminal offense in addition to the administration sanction of removal from service for 24 hours.

You next ask what happens if a subject ultimately charged with DUI is not given the "standard" implied consent warning, but only the Commercial Drivers License warning (CDL). I assume what you are asking is what is the result when the officer gives the subject only the CDL advisory, the subject takes the breathalyzer, and has a sufficient blood alcohol content to then be charged with DUI, and is so charged.

The SLED Order authorizing the Commercial Drivers License warning states that "[t]he arresting officer will read the Commercial Driver's License (CDL) warning before administration of an implied consent breath alcohol test for a CDL violation." Further, the warning "is to be read to subjects given breath alcohol tests for CDL violations ...". Moreover, if a DUI or Felony DUI charge is also involved "the standard implied consent warning is printed on the breath test form should also be read." However, the Order provides that "if no DUI or Felony DUI charge is involved, only the CDL warning should be read." Pursuant to the Order, the CDL warning consists of the following:

> "Implied Consent Warning: Subject Advised: I must advise you that I am a law enforcement officer and I have probable cause to believe that you have a measurable amount of alcohol in your body while driving a commercial motor vehicle. This is a violation of Section 56-1-2120, 1976 Code of Laws, as amended. At this time, I am requesting that you submit to a test of your breath to determine the presence of alcohol in your body. The test operator is trained and certified

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[1] Indeed, for purposes of DUI, it is conclusively presumed that a reading of five one-hundredths or less establishes conclusively that a person was <u>not</u> driving under the influence. Section 56-5-2950(B)(1).

> by the South Carolina Law Enforcement Division - SLED - to give this test. If you take the test and have any measurable amount of alcohol in your body, you will immediately be placed out of service for 24 hours. If you take the test and have an alcohol concentration of 0.04 percent or more, you will be disqualified from operating a commercial motor vehicle for not less than one year. You have the right to refuse the test. If you do refuse to submit to the test, you will be immediately placed out of service for 24 hours, and you will be disqualified from operating a commercial motor vehicle for not less than one year.
>
> In addition, whether or not you submit to the test, you may ultimately also be charged with driving under the influence (DUI) or Felony DUI. Also whether or not you submit to the test, you will be given a reasonable assistance in contacting a qualified person of your own choosing to conduct any additional independent tests which you may want. You will have to pay for any additional tests."

The case, Town of Mount Pleasant v. Shaw, 432 S.E.2d 450 (1993) is instructive with respect to the issue you raise. In Shaw, a DUI case, the question before the Supreme Court was whether "the advisory which was read to Shaw prior to administration of the breathalyzer [adequately advised] ... him of his option to refuse the test." 432 S.E.2d at 450. Unlike the CDL advisory, the advisory in Shaw did not expressly advise the suspect that he had the right to refuse the test. Instead, that advisory told the suspect that if he did not take the test, his license would be suspended for 90 days pursuant to Section 56-5-2950(a) [DUI provision]. The Court, however, rejected the contention by Shaw that the advisory given him was inadequate, noting that:

> Shaw claims that the advisory he received was insufficient to place him on notice that he was not required to take the test. A common sense reading of the advisory makes clear the consequences of both taking the test and refusing to take the test.

The Court further elaborated:

> [w]e are unpersuaded by Shaw's contention that the legislature, in passing Sec. 56-5-2950(a), intended any

> particular verbiage in the breathalyzer advisory. "The purpose of the advisory is not to persuade a driver to refuse testing, but to let a driver know the serious consequences of refusal." McDonnell v. Commissioner of Public Safety, 460 N.W.2d 363, 371 (Minn. App. 1990); see also, State v. Deets, 234 Neb. 307, 450 N.W.2d 696 (1990).
>
> We agree with those jurisdictions which hold that an advisory is sufficient if, construed as a whole, it provides the driver adequate notice that he may, if he so elects, to refuse the test. See State v. DeGrier, 387 N.W.2d 227 (Minn. App. 1986); Olson v. State, 698 P.2d 107 (Wyo. 1985).
>
> We concur wit the rule laid down in Olson:
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> > [I]f the arrested person is reasonably informed of his rights, duties and obligations under our implied consent law and he is neither tricked nor misled into thinking he has no right to refuse the test to determine the alcohol content in his blood, urine or breath, the test will generally be admissible.
> > 698 P.2d at 113 (Emphasis supplied).

It would appear to me that the CDL advisory is well-worded. The advisory specifically informs the subject that he or she "has the right to refuse the test." The subject is informed of the administrative sanctions that will occur pursuant to the Commercial Drivers License Act if certain blood alcohol contents are found in the system, i.e. placement out of service for 24 hours if a measurable amount of alcohol is found or disqualification for not less than year if there is a 0.04 percent level in the system. Importantly, the subject is told that "[i]f you do refuse to submit to the test, you will be immediately placed out of service for 24 hours, and you will be disqualified from operating a commercial motor vehicle for not less than one year."

Moreover, the subject is specifically informed that "whether or not you submit to the test, you may ultimately also be charged with driving under the influence (DUI) or Felony DUI." In addition, the subject is told that whether or not he or she submits to the test, "you will be given reasonable assistance in contacting a qualified person of your own choosing to conduct any additional, independent tests which you may want" and that the individual "will have to pay for any additional tests."

Clearly, this advisory lets the driver know "the serious consequences of refusal of the test." Shaw, supra. The driver is provided "adequate notice that he may, if he so elects, to refuse the test." Id. He is neither "tricked, nor misled into thinking he has no right" to refuse the test, but is, instead, specifically told that he may refuse. In my view this advisory meets the Shaw standard with respect to the legal requirements for informing the commercial driver not only of the right to refuse the breathalyzer, but what happens to him should he refuse.

I note that the CDL is not identical to the standard DUI advisory. The CDL relates to the commercial driver and the ramifications of refusal of the breathalyzer in that capacity and the standard advisory relates to the ordinary driver. One particular difference between the two is that the standard advisory warns the ordinary driver that refusal to submit to the test results in a 90 day suspension; the CDL advises that the commercial driver's refusal means disqualification from commercial driving for no less than one year. The SLED Order itself states that where a DUI or Felony DUI charge is involved, "the standard implied consent warning as printed on the breath test form should also be read." I believe this is a good idea. If there is any question, the suspect should be informed of both sanctions [90 day and 1 year] and thus the content of both advisories.

Finally, you wish to know whether a person could be charged with "measurable amount" even if the breathalyzer test shows a reading of in excess of .10%, where the "officer does not think a guilty verdict could be reached with no improper driving."

S.C. Code Ann. Sec. 56-5-2930 states:

> [i]t is unlawful for any person who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquors, narcotic drugs, barbiturates, paraldehydes or drugs, herbs or any other substance of like character, whether synthetic or natural, to drive any vehicle within this State.

Our Supreme Court has stated, with respect to the offense of driving under the influence that:

> S.C. Code Ann. Sec. 56-5-2930 prohibits driving any vehicle while under the influence of either alcohol or drugs - or a combination of both. In South Carolina, the offense of DUI must be established by proof that a person's ability to drive had been materially and appreciably impaired by the use

of alcohol and/or drugs. City of Orangeburg v. Carter, 303 S.C. 290, 400 L.E.2d 140 (1991).

Beyond establishing impairment at the level of materiality and appreciability, the South Carolina DUI law makes no differentiation within the offense concerning degrees of impairment.

Przybyla v. S.C. Dept. of Highways and Public Transportation, ___ S.C. ___, 437 S.E.2d 70 (1993).

Section 56-5-2950(b) further provides:

> [i]n any criminal prosecution for the violation of § 56-5-2930 or 56-5-2945 relating to operating a vehicle under the influence of alcohol, drugs, or a combination of them, the amount of alcohol in the person's blood at the time of the alleged violation, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following inferences:
>
> (1) If there was at the time five one-hundredths of one percent or less by weight of alcohol in the person's blood, it is conclusively presumed that the person was not under the influence of alcohol.
>
> (2) If there was at that time in excess of five one-hundredths of one percent but less than ten one-hundredths of one percent by weight of alcohol in the person's blood, that fact does not give rise to any inference that the person was or was not under the influence of alcohol, but that fact may be considered with other competent evidence in determining the guilt or innocence of the person.
>
> (3) If there was at that time ten one-hundredths of one percent or more by weight of alcohol in the person's blood, it may be inferred that the person was under the influence of alcohol.

> The provisions of this section must not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the person was under the influenced of alcohol, drugs, or a combination of them.

Of course, the State is not required to rely upon the breathalyzer results in any DUI prosecution. State v. Baker, ___ S.C. ___, 427 S.E.2d 670 (1993). Moreover, the decision as to what charge to bring rests within the sound discretion of the prosecuting officer based upon the facts and circumstances. Cf. State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977); State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937); 1977 Op. Atty. Gen. 257 (October 18, 1977). There is no language in Section 56-5-2950(B) that mandates a case of DUI where the breathalyzer results are in excess of .10; the statute simply states that from such results "it may be inferred that the person was under the influence of alcohol."

Nevertheless, even though a charge could be brought for a measurable amount, I would call to your attention a previous opinion/directive of this Office concerning DUI, which states as follows:

> [w]ith respect to DUI prosecutions [alcohol or drugs] in magistrates' or municipal courts, the person in charge of the prosecution, whether such person be the arresting officer, municipal or county prosecuting attorney, representative of the circuit solicitor, representative of the Attorney General, or special prosecutor, is prohibited from plea bargaining to reduce the charge of DUI to another offense.
>
> If the evidence available to the prosecution is of sufficient substance to justify the arrest of the defendant and the preferring of the DUI charge by the arresting officer, subsequent prosecution shall be for the DUI charge made originally by the traffic officer. No such charge will be changed to another offense for the purpose of obtaining a plea and avoiding trial.

Op. Atty. Gen. (March 29, 1977) [Directive No. 2]. This policy was reaffirmed by this Office on August 21, 1990 and remains the policy of the Office. I have enclosed copies for your review. Thus, this Office firmly takes the position that where there is "sufficient" evidence of driving under the influence, such should be the charge. The question as to

what the jury may or may not do with the case is thus not controlling. Whether there is, in fact, sufficient evidence to support a charge of DUI is, of course, a matter for the prosecuting officer to determine. However, the statute [56-5-2950(B)] clearly states that a reading of ten one-hundredths or more enables there to be the inference that the individual was driving under the influence.

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
Enclosures