05-5833 Libra

The State of South Carolina
# OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 7, 1996

The Honorable C. David Stone
Sheriff, Pickens County
216 L.E.C. Road
Pickens, South Carolina 29671

Re: Informal Opinion

Dear Sheriff Stone:

You have asked a number of questions concerning S. C. Code Ann. Section 56-5-6240. Such provision deals with the confiscation of motor vehicles for a "fourth or subsequent violation within the last five years of operating a motor vehicle while the license is cancelled, suspended or revoked (DUS), or a fourth or subsequent violation within the last ten years of operating a motor vehicle while under the influence of intoxicating liquor or drugs (DUI) ... ." You wish to know the following:

> Question #1 - Is our interpretation of the wording "must" correct in that a law enforcement agency has no discretion in which vehicles to seize if the confiscation prerequisites described in 56-5-6240 are met.
>
> Question #2 is related - Three times the statute refers to forfeiture of a vehicle is subordinate in priority to all valid liens, however no mention is made as to what point in the proceedings a valid lienholder may be given the confiscated vehicle:
>
> A. Is a law enforcement agency mandated to confiscate a vehicle when the [lien] ... and cost will likely [outweigh] ... the value of the vehicle.
>
> B. Does the designated hearing officer have authority to award the vehicle to the [lienholder] ... at the ten day hearing.

C. What other methods should be employed by a law enforcement agency to protect the lienholder without incurring undue cost to the agency in proceeding to a circuit court hearing when the [lienholder] will obviously be awarded the car to protect his interest.

As written, Section 56-5-6240 in summary requires the following sequence of events:

Confiscation / Return of Vehicle

1. For a fourth or subsequent offense within last 5 years for DUS or a fourth or subsequent offense within last 10 years for DUI, persons must have their vehicle they drove during this offense forfeited if the offender is the owner of record or resident of household of owner of record under the terms and conditions in Subsections (B) and (C). At the time of arrest for a fourth or subsequent conviction of DUI or DUS, the arresting officer or other law enforcement officer of that agency "must confiscate" the vehicle.

2. Officer "shall deliver" immediately the vehicle to the sheriff or chief of police of the jurisdiction where vehicle was seized or by his authorized agent.

3. Sheriff or chief of police by certified mail "shall notify" the registered owner of the confiscation within seventy-two hours.

4. Upon notification, registered owner has 10 days to request a hearing before the presiding judge of the judicial circuit or his designated hearing officer within 10 days of receipt of the request.

5. Vehicle "must" be returned to owner of record if owner can show by preponderance of evidence that (a) the use of the vehicle was not either expressly or impliedly authorized; (b) owner of record did not know the driver had no valid license.

6. Sheriff or chief "shall" provide notice by certified mail of the confiscation to all lienholders of record within 10 days of confiscation.

## Forfeiture of Vehicle

1. Upon conviction of driver [for 4th DUS or DUI], sheriff or chief "shall" initiate an action in circuit court of county where vehicle was seized to accomplish forfeiture.

2. Notice must be given to owners of record, lienholders of record and "other persons claiming an interest in the vehicle" to provide an opportunity to "appear and show why" vehicle should not be forfeited and disposed of.

3. Failure to appear by a "person claiming an interest in the vehicle" after having been given notice constitutes a waiver of the claim; but failure to appear does not alter or affect the claim of a lienholder of record.

4. Hearing by court held.

5. Court disposes of vehicle, either by ordering vehicles forfeited to sheriff or chief and sold in "the manner provided in this section" or returning it to the owner of record.

6. Court orders a vehicle forfeited unless (1) the use of the vehicle on the occasion of arrest was not either expressly or impliedly authorized; or (2) the owner of record did not know the driver had no valid license; in either event, the court shall order vehicle returned to owner.

7. Forfeiture is subordinate in priority to all valid liens and encumbrances.

## Abandonment

1. If person fails to appeal conviction within 10 days thereof, the forfeited vehicle is considered abandoned and must be disposed of as provided by Section 56-5-5640.

2. But if the fair market value of vehicle is less than $500, vehicle must be sold as scrap to highest bidder after receiving at least two bids.

Your first question relates to the degree of discretion which a law enforcement officer has in deciding which vehicles to seize once the confiscation prerequisites described in Section 56-5-6240 are met.

Several rules of statutory construction are pertinent here. In interpreting any statute, the primary purpose is to ascertain the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). The court must apply the clear and unambiguous terms of the statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

As you correctly note, the statute speaks in terms of mandatory duties placed upon the law enforcement officer in confiscating the vehicle at the time of arrest. Subsection (A) states that the motor vehicle "... must be confiscated by the arresting officer or other law enforcement officer of that agency at the time of the arrest, which officer shall deliver it immediately to the sheriff or chief of police of the jurisdiction where the motor vehicle was seized ... ." As we stated in Op. Atty. Gen., Op. No. 94-13 (Feb. 1, 1994), [b]oth 'shall' and 'must' as ordinarily used indicate a mandatory duty. Use of the word "shall" in a statute generally connotes mandatory compliance. S.C. Dept. of Highways and Pub. Transp. v. Dickinson, 288 S.C. 189 341 S.E.2d 134 (1986). Likewise, "must" when used by the Legislature to impose a duty is considered mandatory. Merchants Credit Serv. v. Chouteau Co. Bank, 112 Mont. 229, 114 P.2d 1074, 1076 (1941). There is nothing in the language of Section 56-5-6240 to indicate that an arresting officer possesses any discretion as to which vehicles he may confiscate and which he may not. While clearly, the confiscation must occur at the time of the arrest, Op. Atty. Gen., Op. No. 94-35 (June 2, 1994), if the statutory conditions are met, the officer possesses no discretion with regard to the duty to confiscate the vehicle and "deliver it immediately to the sheriff or chief of police of the jurisdiction where the motor vehicle was seized ... ."

You next ask whether a law enforcement agency is mandated to confiscate a vehicle when the lien and cost will likely outweigh the value of the vehicle. The answer is "yes". Nothing in the statute makes an exception based upon these factors. It is well-recognized that an action for forfeiture is one in rem, not against the owner of the property, but against the property itself which is treated as the real offender. 37 C.J.S., Forfeitures, § 1. As the Court stated in State v. One 1978 Chevrolet Corvette, 667 P.2d 893, 897 (Kan. App. 1983),

> [f]orfeiture statutes are premised on the notion that the thing to be forfeited has itself offended society, either because it is

> contraband, or has been used to violate laws deemed of special social importance.

In this instance, the Legislature has deemed the vehicle which was used in the fourth offense DUI or DUS, itself to be the instrument of wrongdoing. The General Assembly seeks to deprive the owner of record of the property upon conviction subject only to the defenses of lack of knowledge or authority of the driver's conduct. Moreover, the Legislature has protected the rights of innocent persons with an interest or lien or encumbrance in the property. However, the statute does not permit the law enforcement agency to "weigh" the costs of confiscation and forfeiture in choosing whether to carry out these duties. Again, the statute is mandatory with respect to the duties placed upon the law enforcement agency.

You next ask whether the designated hearing officer has the authority to award the vehicle to the lienholder at the ten day hearing. I see no such authority in the statute. As I read the law, the hearing which may be requested by the owner of record within ten days of confiscation is intended only to protect the innocent owner of record at that point. The statute allows the owner of record to show, if possible, that either the use of the vehicle was not authorized or that the owner did not know the driver had no valid license. If the owner of record makes such showing to the court, the vehicle is returned to him. Regardless of the outcome of the ten-day hearing, however, the lienholder remains protected because his interest is in satisfaction of the lien and, by virtue of the statute, his interest remains superior in priority to any forfeiture which may occur.

Finally, you ask what other methods should be employed by a law enforcement agency to protect the lienholder without incurring undue cost to the agency in proceeding to a circuit court hearing when the lienholder "will obviously be awarded the car to protect his interest." Unless the statute is amended, I see no alternative to compliance therewith. Again, the Legislature's purpose is to confiscate the vehicle from its owner and to remove title from him for the wrongdoing committed by him by virtue of the vehicle unless he can show the use of the vehicle was unauthorized by or unknown to him. Such cannot be done without giving all interests full due process of law.

A closely analogous situation is the case of Moore v. Timmerman, 276 S.C. 104, 276 S.E.2d 290 (1981). There, Moore and Powell were charged with night hunting for deer. Two rifles, a shotgun and truck were seized from the defendants pursuant to Section 50-11-2090. Moore and Powell were convicted. Subsequent to their conviction being upheld by the Supreme Court, the rifles and shotguns were sold at public auction pursuant to § 50-11-2100. However, the shotgun belonged to an innocent owner who lacked any knowledge of the unlawful use of the weapon.

The innocent owner then brought an action challenging the constitutionality of the forfeiture procedure, alleging the property had been taken without due process. No notice of the forfeiture or any opportunity to be heard was given.

Our Supreme Court noted that "Section 50-11-2090 adds to the general sanctions that of forfeiture whenever the arrestee is convicted for the night hunting of deer." The Court determined that with respect to giving the criminal defendants due process, "these matters were settled at the criminal trial. A civil action brought to determine the issue of forfeiture could accomplish no more." 276 S.E.2d at 292.

However, other parties with an interest in the property must be protected as well, concluded the Court. Said the Court:

> [i]t is clear however that if all property seized is intended to be subject to forfeiture, then the parties claiming an interest in the property must be afforded the basic due process notice and hearing rights ... . As stated at 37 C.J.S. Forfeitures s 5 b, at pp. 11-12:
>
> > "Notice must be given to the owner of the property seized and those claiming an interest therein of the proceedings; there must be either personal notice to the owner, or at least a proceeding in rem with notice by publication; and a hearing must be had at which they can be heard, except in a few cases of necessity. A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial inquiry without inquiry before a court or an opportunity of being heard is his own defense is a violation of the elementary principles of law and the constitution."
>
> A party with an interest in the seized property must be given the opportunity to come forward and show , if he can, why the res should not be forfeited and disposed of as provided by law.

Id.

Thus, unlike the statute at issue in Moore, the General Assembly has established in Section 56-5-6240, an elaborate structure for insuring that not only the owner of record, but lienholders as well as "other persons claiming an interest "in the vehicle are given notice and an opportunity to be heard. The statute expressly states that the vehicle must be forfeited if "the offender is the owner of record, or a resident of the household of the owner of record under the terms and conditions as provided in subsection (B) and (C) ...". The registered owner, if not the offender or a member of his household, is given ten days after confiscation to request a hearing before the circuit court to show he either did not know the driver was unlicensed or the use of the vehicle was unauthorized. The law enforcement agency must notify all lienholders of record within ten days of confiscation. Then, upon conviction, the sheriff or chief of police must give notice to owners of record, lienholders of record and "other persons claiming an interest" in the vehicle. A full hearing is held before the court to give all these interested persons the opportunity to present evidence regarding the matter. In other words, the General Assembly has gone to considerable lengths to provide the kind of due process required by our Supreme Court in Moore v. Timmerman, supra.

If the Court then determines that the owner of record is not entitled to return of the vehicle by virtue of the criteria set forth in Subsection (B), the Court orders the vehicle forfeited to the sheriff or chief of police and "sold in the manner provided in this section." This procedure appears to be according to Section 56-5-5640 (the procedure for abandoned vehicles). Section 56-5-5640 provides in pertinent part as follows:

> [i]f an abandoned vehicle has not been reclaimed as provided for in § 56-5-5630, the sheriff or chief of police shall sell the abandoned vehicle at a public auction.

Again, however, the statute makes explicit that the lienholder of record possesses priority. This means, of course, his interest must be satisfied first from the proceeds.

Subsection (C) of Section 56-5-6240 does appear to provide one alternative. That provision states:

> [i]f the person fails to file an appeal within ten days after the conviction, the forfeited vehicle is considered abandoned and must be disposed of as provided in Section 56-5-5640. However, if the fair market value of the vehicle is less than five hundred dollars, it must be sold as scrap to the highest bidder after first receiving at least two bids.

Notwithstanding Subsection (C), however, Moore as well as other cases, make it clear that persons with an interest in forfeited property, such as lienholders must be protected. See, Commercial Credit Corp. v. Webb, 245 S.C. 53, 138 S.E.2d 647 (1964) and the numerous cases cited therein. As the Court stated in Commercial Credit,

> [i]t is here stipulated that the respondent had no notice that the automobile in question would be used for any illegal purpose. There is nothing in the record to show that the respondent knew or had any reason to know that the automobile in question would be used in hunting deer at night. There is nothing in the record that would make the respondent anything but an innocent mortgagee and, as such, it is entitled to protection.

245 S.C. at 58-59. Thus, even though Subsection (C), read in isolation, appears to authorize sale of the vehicle upon failure to appeal within ten days after conviction, the kind of notice to persons with an interest in the property such as contained in Subsection (B) still must be provided consistent with Moore and other Supreme Court cases. I note the Section 56-5-5630 [which accompanies Section 56-5-5640] also provides notice to lienholders and owners of record.

In short, while I sympathize with your efforts and concerns about the costs involved, absent a change in the statute, it would appear that the provisions of Section 56-5-6240 are written in mandatory language and must be followed by your department. Moreover, it is further evident that our Supreme Court has mandated that the persons with an interest in the vehicle such as innocent owners of record, lienholders and others must be given notice and an opportunity to be heard prior to forfeiture and disposition of the proceeds of the property. The General Assembly has established this procedure in Section 56-5-6240 and, thus, I would advise that for this reason also the statute should be adhered to.

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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