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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 9, 1996

Paul S. League, Esquire
Assistant Chief Counsel
South Carolina Department of Natural Resources
Post Office Box 167
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Mr. League:

You have asked our opinion concerning the proper application of S.C. Code Ann. § 50-1-136 (Supp. 1995) in relation to S.C. Code Ann. § 16-17-410 (Supp. 1995). You indicate that a question has been raised concerning the Department of Natural Resources' past policy of bringing cases arising pursuant to § 50-1-136 in Magistrates Court. You state the legal issue as follows:

> On the one hand, if a literal reading is given to the direction in § 50-1-136(A) that charges under that Code section be made and disposed of notwithstanding the provisions of § 16-17-410, then all cases arising under § 50-1-136 would be in the Court of General Sessions. This conclusion is based on a construction of the statutes wherein § 50-1-136(A) forecloses consideration of the third paragraph of § 16-17-410. That paragraph is quoted above and limits the final sentence that may be imposed for conspiracy.
>
> On the other hand, if § 50-1-136(A) can be read in a manner not to foreclose consideration of the third paragraph of § 16-17-410, then the limitation of the final sentence for conspiracy to violate most provisions of Title 50 would not exceed the exclusive or concurrent jurisdiction of the Magistrate's Courts.

Request Letter

In that event, the Department could and would continue bringing such cases directly to the Magistrate's Courts.

The Department is aware of S.C. Code Ann. § 22-3-545 (Supp. 1995); however, that statute requires the consent of both the Solicitor and a particular defendant prior to transferring jurisdiction of certain cases to the Magistrate's Court. Also, that statute does not in any way clarify the proper penalty for conviction of conspiracy to violate a provision of Title 50.

Law / Analysis

Section 16-17-410 is a "codification of the common law of conspiracy", State v. Bendoly, 273 S.C. 47, 254 S.E.2d 287 (1979), and provides as follows:

> [t]he common law crime known as "conspiracy" is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means.
>
> A person who commits the crime of conspiracy is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisonment not more than five years.
>
> A person who is convicted of the crime of conspiracy must not be given a greater fine or sentence than he would receive if he carried out the unlawful act contemplated by the conspiracy and had been convicted of the unlawful acts contemplated by the conspiracy or had he been convicted of the unlawful acts by which the conspiracy was to be carried out or effected.

Section 50-1-136 provides:

> (A) Notwithstanding the provisions of Section 16-17-410 a person who conspires to violate any provision of the game and fish laws of this State or other provision of Title 50, except the provisions of the Federal Migratory Bird Treaty Act

> or its regulations is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Several rules of statutory construction are pertinent to your question. Of course, 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. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). In construing a statute, the presumption is that the General Assembly did not intend to do a futile thing. Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938). Sections which are part of the same general statutory law of the state must be construed together. In Interest of Keith Lamont G., 304 S.C. 456, 405 S.E.2d 404 (1991). However, where an act of the legislature is complete and independent in itself, it may change, repeal or modify the provisions of existing statutes. 73 Am.Jur.2d, Statutes, § 140. Generally speaking specific laws prevail over general laws. Lloyd v. Lloyd, 295 S.C. 55, 367 S.E.2d 153 (1988).

As you suggest in your letter, a literal reading of Section 50-1-136 appears to make this Section exclusive with respect to a conspiracy to violate provisions of Chapter 50. Section 50-1-136 is, moreover, clearly the specific statute in this instance and thus would normally prevail over the general conspiracy provision. Moreover, the Legislature's intent seems to be aimed at exclusive treatment under Section 50-1-136 because of the use of the phrase "notwithstanding Section 16-17-410." In the past this Office has read the use of the word "notwithstanding" as indicating exclusivity. For example, in Op. Atty. Gen., March 24, 1989, we interpreted the relationship between Code Sections 2-7-35 and 43-33-560. There, we stated:

> Section 2-7-35 specifically defines the term "handicapped person" wherever it appears in the laws of this State, "unless it is stated to the contrary ... . Section 43-33-560 specifically defines "handicap" and "handicapped" as used in that article, "n]otwithstanding the provisions of Sec. 2-7-35 ... . "Based upon the clear and unambiguous language of Sec. 2-7-35 and 43-33-560 concerning their application, Sec. 43-33-560 (not Sec. 2-7-35) controls the use of the terms "handicap" and "handicapped" in article Seven (7) of Chapter Thirty-Three (33) of the Code of Laws of South Carolina. See Duke Power Co. v. South Carolina Tax Commn. [292 S.C. 64, 354 S.E.2d 902 (1987)] ... .

See also, Op. Atty. Gen., Op. No. 3860 (September 18, 1974) [statute using the term "(n)otwithstanding the provisions of Sections 55-321 of the 1962 Code or any other provision of law" is exclusive as to the custody of the Department of Corrections]. Since Section 50-1-136 appears to be a self-contained provision, narrowly drawn and very specific, it would appear that there is a strong argument that the General Assembly intended such provision to be controlling with respect to conspiracies to violate Chapter 50.

There is authority elsewhere that construes language such as that contained in Section 50-1-136 as non-exclusive. For example, in State v. Wrotny, 221 N.J. Super. 226, 534 A.2d 87 (1987), the court construed a statute which, in paragraphs a through e, imposed penalties upon a person who violated the provision prohibiting the operation of a motor vehicle while the license was revoked. Included therein were penalties for repeat offenders, as well as for the situation where a person is involved in an accident resulting in an injury to another person. A subsequent portion of the same statute provided that "[n]otwithstanding paragraphs a through e, any person violating this section while under suspension ... shall have his license to operate a motor vehicle suspended for an additional period of not less than one year nor more than two years and may be imprisoned in the county jail for not more than 90 days." The defendant argued that, based upon the language of the provision and the word "notwithstanding", the 90 day non-mandatory penalty was exclusive. On the other hand, the State argued that paragraphs a through e could still be applicable, including the mandatory 45 day provision contained therein.

The Court held that the 45-day mandatory provision could be applied, as well as a supplementary non-mandatory penalty up to the 90 day limit. Concluded the Court,

> [r]ather than reach an absurd, illogical result we read the language in the statute "notwithstanding paragraphs a. through e." to mean simply "without prevention or obstruction from or by" or "in spite of". Webster's Third International Dictionary 1545 (1966). See also Oliver v. Ledbetter, 821 F.2d 1507, 1511-1512 (11th Cir. 1987) ... .
>
> Moreover, interpreting "notwithstanding" as appellant urges would result in an implied repealer of the penalties set out in subsection (a) through (e) when a violator has a prior DWI violation. The presumption is against implied repealers unless the terms are inconsistent or indeed, repugnant.

In Williamson v. Schmid, 237 Ga. 630, 229 S.E.2d 400 (1976), the Georgia Supreme Court similarly analyzed a constitutional provision in a different context. A constitutional provision provided that "[n]otwithstanding provisions contained in ... [§ 2-6801 of this Constitution" local laws affecting school boards may be made only upon approval in a referendum. The Court read such language as not exclusive, concluding:

> [t]he natural and ordinary meaning of the word "notwithstanding" is "without obstruction from" or "in spite of." .... Application of this definition to Code Ann. § 2-6802 would mean that it was not intended as the exclusive method for effecting changes in school board terms. The word "notwithstanding" does not indicate here any repugnancy among the constitutional provisions.

229 S.E.2d at 402-403. Other courts have reached various conclusions regarding the meaning of "notwithstanding". Compare, Matter of Oswego Barge Corp., 664 F.2d 327, 340 (2d Cir. 1981) [exclusive] with U.S. v. Dixie Carriers, 627 F.2d 736, 739 (5th Cir. 1980) [language "notwithstanding any other provision of law" alone cannot resolve the controversy about whether the remedy is exclusive].

Section 16-17-410 codifies the common law of conspiracy, and there is a presumption against abrogation of the common law, McLellan v. Hammond, 12 Col.App. 82, 54 P. 538 (1898); See, State v. McAdams, 167 S.C. 405, 166 S.E. 405 (1932); State v. Ameker, 73 S.C. 330, 53 S.E. 484 (1905) [common law of conspiracy survives in addition to statute proscribing conspiracy to violate political rights].

On the other hand, "the legal consequences of a conspiracy to commit a crime are separate and distinct from the commission of the crime itself." 15 Am.Jr.2d, Conspiracy, § 5. Prior to the adoption of § 16-17-410, conspiracy was a common law misdemeanor and was punished pursuant to § 17-25-30. McAninch and Fairey, The Criminal Law of South Carolina (2d ed. 1989) p. 217.[1] In fact, in State v. Ferguson, 221 S.C. 300, 70 S.E.2d 355 (1952), prior to the enactment of § 16-17-410, the Court noted that "varying sentences have been imposed for conspiracy" because "[w]e have no statute in this State providing that the punishment for conspiracy to commit a crime shall not exceed the

[1] Section 17-25-30 provides that where no punishment is provided by the statute, the court shall sentence "as is conformable to the common usage and practice in this State, according to the nature of the offense and not repugnant to the Constitution."

penalty for the completed offense." Only with the passage of § 16-17-410, the general conspiracy statute, was such a requirement put into place.

However, in State v. Ferguson, supra, the Court, citing 15 C.J.S., Conspiracy, Sec. 96, p.1165, stated that

> "... the legislature has the undoubted power to enact statutes which impose a heavier punishment for conspiracy than for the offense which it is the object of the conspiracy to commit, and that a sentence in conformity with legislation of this character is unobjectionable and valid. The sentence of one convicted of conspiracy to violate a particular statute and to commit a certain crime is not illegal because of any difference in the maximum length of imprisonment authorized for the substantive offenses."

In view of the foregoing authority, it would appear that the Legislature sought to override the general limitation it had previously imposed with respect to other conspiracies - that the punishment could be no greater than the underlying offense. While it can be argued that use of the phrase "notwithstanding Section 16-17-410" is merely supplemental to Section 50-1-136, the fact that the Legislature went to considerable length to enact a statute imposing a greater punishment than the underlying offense is persuasive. Thus it is my opinion that the General Assembly intended Section 50-1-136 to be the exclusive punishment for conspiracies to violate Title 50, thus making this offense a General Sessions offense. For conspiracy to violate Title 50 cases to continue to be brought in magistrate's court would likely require legislative amendment.

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