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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 19, 1996

The Honorable John Milton Knotts, Jr.
Member, House of Representatives
500 West Dunbar Road
West Columbia, South Carolina 29169

Re: Informal Opinion

Dear Representative Knotts:

You have asked for an interpretation of S.C. Code Ann. Sec. 56-7-80. Your question is whether an officer must observe the offense in order to issue the county ordinance summons, pursuant to said statute.

Section 56-7-80 provides as follows:

> (A) Counties and municipalities are authorized to adopt by ordinance and use an ordinance summons as provided herein for the enforcement of county and municipal ordinances, upon adoption of the ordinance summons, any county or municipal law enforcement officer or code enforcement officer is authorized to use an ordinance summons. Any county or municipality adopting the ordinance summons is responsible for the printing, distributing, monitoring, and auditing of the ordinance summons to be used by that entity.
>
> (B) The uniform ordinance summons may not be used to perform a custodial arrest. No county or municipal ordinance which regulates the use of motor vehicles on the

public roads of this State may be enforced using an ordinance summons.

(C) An ordinance summons must cite only one violation per summons and must contain at least the following information:

(1) the name and address of the person or entity charged;

(2) the name and title of the issuing officer;

(3) the time, date, and location of the hearing;

(4) a description of the ordinance the person or entity is charged with violating;

(5) the procedure to post bond; and

(6) any other notice or warning otherwise required by law. ...

(D) Service of a uniform ordinance summons vests all magistrate's and municipal courts with jurisdiction to hear and dispose of the charge for which the ordinance summons was issued and served.

(E) Any law enforcement officer or code enforcement officer who serves an ordinance summons must allow the person to proceed without first having to post bond or to appear before a magistrate or municipal judge. Acceptance of an ordinance summons constitutes a person's recognizance to comply with the terms of the summons.

(F) Any person who fails to appear before the court as required by an ordinance summons, without first having posted such bond as may be required or without having been granted a continuance by the court, is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars or imprisoned for not more than thirty days.

> Any law enforcement agency processing an arrest made pursuant to this subsection must furnish such information to the State Laws Enforcement Division as required by Chapter 3 of Title 23.
>
> (G) This statute does not prohibit a county or municipality from enforcing ordinances by means otherwise authorized by law.

Several principles of statutory construction are pertinent here. First and foremost, is the rule that the intention of the General Assembly is the primary guide in interpreting a statute. Helfrich v. Brasington Sand and Gravel Co., 268 S.C. 236, 233 S.E.2d 291 (1977). A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the legislation. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). The full effect must be given to each section of a statute, giving the words used their plain meaning, and in absence of ambiguity, words must not be added or taken from the statute. Home Bldg. & Loan Assn. v. City of Sptg., 185 S.C. 313, 194 S.E. 139 (1938). In construing a statute, it is appropriate to consider cognate legislation. Arkwright Mills v. Murph, 219 S.C. 438, 65 S.E.2d 665 (1951). Moreover, it is a well-recognized rule of statutory construction that the enumeration of certain things in legislation excludes the idea of something else not mentioned. Pa. Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). Finally, any legislation which is in derogation of the common law must be strictly construed and not extended in application beyond the clear legislative intent. Crowder v. Carroll, 251 S.C. 192, 161 S.E.2d 235 (1968).

While it is well-established at common law that a peace officer can arrest a person without warrant for a felony upon probable cause that the offense has been committed, it is "fundamental law in South Carolina that, in order to arrest for a misdemeanor not committed in the officer's presence, either a warrant must be obtained or there must be probable cause that the offense has been freshly committed." Op. Atty. Gen., February 14, 1995. As our Supreme Court stated in State v. Clark, 277 S.C. 333, 287 S.E.2d 143 (1982),

> *[w]e held in* State v. Martin, *275 S.C. 141, 268 S.E.2d 105,* that a highway patrolman (and subsequently in State v. Retford, S.C., 281 S.E.2d 471, that a town policeman) had the right to make a warrantless arrest for a misdemeanor not committed in his presence, if the facts and circumstances

> observed by the officer provided probable cause to believe a crime had been freshly committed.

See also, Section 17-13-30; State v. Mims, 263 S.C. 45, 208 S.E.2d 288 (1974). ["(u)nder the common law a conservator of the peace has authority to make an arrest without a warrant for a misdemeanor involving a breach of the peace committed in his presence, or within his view." Citing 5 Am.Jur.2d, Arrest, Section 27, p. 717.]

Prior to the enactment of Section 56-7-80, it was necessary to have either the issuance of an arrest warrant or a uniform traffic ticket, where applicable, to confer jurisdiction upon magistrates and municipal courts. Section 56-7-15, which became effective June 25, 1990, permits the use of the uniform traffic ticket for any offense including an ordinance violation which falls within the jurisdiction of magistrate's court and municipal court when the offense is committed in the presence of a law enforcement officer. Thus, in an opinion of December 10, 1990, we concluded that in order to charge a violation of a county litter ordinance in magistrate's or municipal court, we advised that

> ... the uniform arrest warrant should be utilized unless the offense is a violation of S.C. Code Ann. 16-11-700 or was committed in the presence of the law enforcement officer, then use of the uniform traffic ticket would be appropriate pursuant to S.C. Code Sec. 56-7-10 and 56-7-15.

Section 56-7-80 was enacted subsequent to the 1990 opinion in 1992 and, as noted above, expressly provided that "service of a uniform ordinance summons vests all magistrates' and municipal courts with jurisdiction to hear and dispose of the charge for which the ordinance summons was issued and served." We have concluded that this summons may be used only to enforce county and municipal ordinances. Op. Atty. Gen., No. 94-67 (November 7, 1994). Thus, the issue here is whether this statute authorizing a uniform ordinance summons, was intended to incorporate the general common law and statutory rule that an arrest for a misdemeanor without warrant must be only where the offense was committed in the officer's presence or was "freshly committed."

In Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the United States Supreme Court held that the initial arrest of an individual without warrant, but with probable cause, was all that was required under the federal Constitution, so long as law enforcement authorities subsequently provided a "prompt" judicial determination of probable cause before there occurred any extended pretrial detention. See also, Co. of Riverside v. McLaughlin, 500 U.S. _____, 111 S.Ct. _____, 114 L.Ed.2d 49 (1991); Op. Atty. Gen., July 10, 1995 (Informal Op.). Thus, any distinction between a felony and a

misdemeanor is a matter of state law. Since no such distinction is made under the South Carolina Constitution, the issue is one of statutory construction.

It is important that the General Assembly placed no requirement in Section 56-7-80 that the county ordinance offense was committed in the officer's presence. Significantly, Section 56-7-15 (uniform traffic ticket) expressly requires that the ticket be "committed in the presence of a law enforcement officer if the punishment is within the jurisdiction of magistrate's court and municipal court." Moreover, Section 56-7-15 authorizes the uniform traffic ticket to "arrest" a person for such an offense. It has been stated generally that "[t]here can be no arrest where there is no restraint." 5 Am.Jur.2d, Arrest, § 2. This Office has previously written that

> "Arrest involves the authority to arrest, the assertion of that authority with the intent to effect an arrest, and the restraint of the person to be arrested. All that is required for an 'arrest' is some act by [an] officer indicating his intention to detain or take [a] person into custody and [thereby] ... subject that person to the actual control and will of the officer." Citations omitted. Black's Law Dictionary, 110 (6th Ed. 1990). Under the above facts, your officers would detain and subject a person to their control in order to obtain the wanted photographs. Therefore, their actions would be an arrest.

Op. Atty. Gen., October 31, 1990.

As noted above, Section 56-7-80 states that "[t]he uniform ordinance summons may not be used to perform a custodial arrest." Nowhere else in the statute is the word "arrest" used; instead the words "cite[d]", "charged" and "issued" are employed throughout the Act. While it can be argued that the issuance of the citation is an "arrest" in the technical sense, see, People v. Sup. Ct. of LA County, 496 P.2d 1205 (Cal. 1972), courts have refrained from characterizing citations as "arrests" where no physical restraint or custody is invoked. State v. Frost, 179 N.E.2d 564 (Ohio 1961); Harper v. Commonwealth Bd. of Prob. and Parole, 520 A.2d 518, 521 (Pa. Commonwealth 1987); Jones v. State, 167 N.Y.S.2d 536, 538 (1957); State v. Grady, 548 S.W.2d 601 (Mo. 1977). As the Court concluded in Jones,

> [t]he issuance of a 'traffic ticket' ... is not an arrest; rather it is a notice to appear in a given court on a given day, at which time and place a specific charge will be made.

And in State v. Frost, supra the Court reasoned:

> [a]n examination of the undisputed facts in this case discloses that a citation was issued at the scene. The defendant was not seized, taken or detained and in no manner was he deprived of his liberty or taken into custody by the officer entire actually or constructively. The citation is issued under authority of 2935.10 O.R.C. is an invitation to appear, not an arrest and its issuance is not tantamount to an arrest.

Moreover, in State v. Grady, supra, the Court recognized that "[t]he issuance of a traffic citation unaccompanied by actual restraint or taking into custody at the scene or elsewhere does not constitute an arrest under § 544.180 RS Mo. 1969."

There is authority which has concluded that the rule requiring that the misdemeanor offense must have been committed in the presence of the officer is inapplicable where no custodial arrest is made. In State v. Stoddard, 352 N.W.2d 413, 415 (Minn. 1984), for example, the Court concluded that "... the limitation [of the rule] applies to arrests, not to police investigatory conduct short of arrests." Moreover, in Adams v. Williams, 407 U.S. 151, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612 (1972), the Court stated that "we reject respondent's argument that reasonable cause for stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person." And in Op. No. 494a-1 (April 15, 1993), the Minnesota Attorney General concluded that the issuance of a traffic ticket where no custodial arrest was involved did not invoke the requirement that the offense must have been committed in the officer's presence in order to issue the citation. Noting that Minnesota law "only addresses the procedures to be followed when a warrantless arrest has been made for a misdemeanor violation ...", the Attorney General believed there was a substantive distinction between "the procedures to be followed upon arrest from those procedures available for charging a suspect with a misdemeanor offense." Concluded the Attorney General

> ... [s]ubsequent statutory and decisional law have further defined the function of the uniform traffic ticket in ways which further negate any implied nexus between issuance of citations and the need for actual custodial arrest. ... We, therefore, conclude that an officer may, upon probable cause, issue a uniform traffic ticket for a misdemeanor traffic violation not occurring in the officer's presence where the officer does not subject the person charged to an arrest.

Admittedly, this issue has not yet been decided by our courts. For that reason, the question should be adjudicated by the court to obtain final resolution. However, the General Assembly had the opportunity to include the requirement in Section 56-7-80 that the ordinance summons must only be written for offenses which occur in the presence of the officer, as it had done previously with respect to Section 56-7-15 (uniform traffic ticket). Yet, it did not do so. Section 56-7-80 was enacted after Section 56-7-15 and must be read consistent therewith. I cannot imply the existence of such requirement when it is not contained therein. Accordingly, I would advise that, in my judgment, Section 56-7-80 does not contain a requirement that the uniform ordinance summons be written for an offense that occurs in the presence of the officer. As stated above, final resolution of this issue should be sought in court.

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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