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CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 25, 1996

The Honorable Dennis E. Phipps
Chief Magistrate, Horry County
1201 21st Avenue North
Myrtle Beach, South Carolina 29577

Re: Informal Opinion

Dear Judge Phipps:

Referencing S.C. Code Ann. Sec. 44-53-391, you note that you have been contacted by the City of Myrtle Beach Police Department about bringing cases before your Court regarding drug paraphernalia. You state the following:

> [a]fter reading the Section, it only provides that if someone is found guilty, that only a civil fine up to Five Hundred Dollars ($500.00) may be assessed. There is nothing in this code that provides for enforcing payment.
>
> Would you please review this section and render an opinion of how this code may be enforced. It is the opinion of this Court that we do not have the authority or power to enforce payment of this code. I feel that the General Assembly should review this code and make such provisions.

Law / Analysis

Section 44-53-391 provides that:

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Request Letter.

(a) It shall be unlawful for any person to advertise for sale, manufacture, possess, sell or deliver, or to possess with the intent to deliver, or sell paraphernalia.

(b) In determining whether an object is paraphernalia, a court or other authority shall consider, in addition to all other locally relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) The proximity of the object to controlled substances;

(3) The existence of any residue of controlled substances on the object;

(4) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of law; the innocence of an owner, or of anyone in control of the object, as to a direct violation of law; the innocence of an owner, or of anyone in control of the object, as to a direct violation of law shall not prevent a finding that the object is intended for use, or designed to use as drug paraphernalia;

(5) Instructions, oral or written, provided with the object concerning its use;

(6) Descriptive materials accompanying the object which explain or depict its use;

(7) National and local advertising concerning its use;

(8) The manner in which the object is displayed for sale;

> (9) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
>
> (10) Director or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;
>
> (11) The existence and scope of legitimate uses for the object in the community;
>
> (12) Expert testimony concerning its use.
>
> (c) Any person found guilty of violating the provisions of this section shall be subject to a civil fine of not more than five hundred dollars except that a corporation shall be subject to a civil fine of not more than fifty thousand dollars. Imposition of such fine shall not give rise to any disability or legal advantage based on a conviction for a criminal offense.

Section 44-53-391 designates the violation of this section as being subject to a "civil fine". In general, a "fine" is deemed to be a

> ... sum of money exacted of a person guilty of a crime or contempt as a pecuniary punishment, the amount which may be fixed by law or left to the discretion of the court.

36 Am.Jur.2d, Forfeitures and Penalties, § 4. However, the use of the word "fine" in a statute does not inevitably lead to the conclusion that a criminal proceeding is contemplated. In S.C. State Hwy. Dept. v. Southern Ry. Co., 239 S.C. 227, 122 S.E.2d 422 (1961), for example, our Supreme Court construed a statute related to grade crossings making the operators of railroads subject to a fine of ten dollars per day for every day the railroad failed to comply with the requirements of the Act. The Highway Department commenced a civil action in the Court of Common Pleas against the railroad for recovery of the fine. The defendant railroad moved to strike all allegations in the Complaint relative to the fine on the grounds that such fine "can only be levied after the conviction of the defendant in a criminal prosecution instituted in the Court of General Sessions." 239 S.C. at 230. The defendant relied upon use of such language in the statute as "upon

conviction" while the plaintiff Highway Department contended that the fine imposed by the Act was in the nature of a penalty, enforceable in a civil action.

The Supreme Court agreed with the Highway Department. Said the Court,

> Section 3 of the Act, provides that upon failure of any person to comply with the provisions thereof, upon conviction, a fine of ten dollars per day for each day's delay shall be imposed, but does not make the violation of its terms a criminal offense. While this section provides for the imposition of a fine, we do not think that the word is used in the sense of punishment for violation of a criminal statute. Rather, the word "fine" is used in the broader sense of the penalty. A fine is usually a sum of money exacted from a person guilty of a crime as pecuniary punishment; while a penalty is a sum of money exacted, by way of punishment for some act that is prohibited, or omitting to do some act that is required to be done, which may or may not be a crime. State v. Liggett and Myers Tobacco Co., 171 S.C. 511, 172 S.E. 857; 70 C.J.S. Penalties, p. 387, Section 1; 23 Am.Jur. 624, Sec. 28. The failure to make a violation of the terms of the Act a criminal offense is indicative of the legislative intent to use the word "fine" in the sense of a penalty, and not in its restricted sense as a punishment for a crime. A similar conclusion was reached in the foregoing case of State v. Liggett & Myers Company.

The Supreme Court also enunciated the general rules of construction with respect to the imposition of penalties by the General Assembly. The Court stated:

> [p]roceedings for the recovery of penalties can be either civil or criminal in nature, and the mode in which penalties shall be enforced is a matter resting within the discretion of the legislature, in each case to be determined from the provisions of the particular statute in question. 70 C.J.S., Penalties, p. 397, Section 8; 23 Am.Jur. 627, Section 34. However, where the statute fails to designate the procedure for collection of the penalty, it may be collected by a civil action. State v. Mathews, 3 S.C.L. (2 Brev.); 23 Am.Jur. 644, Section 54; 70 C.J.S. Penalties, p. 398, Section 8(e).

Thus, concluded the Court

> [t]he imposition of penalties under the Act does not require the conviction of a violator for the commission of a crime, for no crime is created by its terms, but simply requires a judicial determination that the railroad involved has failed to comply with the statutory notice by the State Highway Department with reference to the particular grade crossing. This question may be determined in a civil action such as is here instituted. If, upon trial, it is found as a fact that there has been a violation then the court can impose the penalty.

239 S.C. at 232.

It is also generally recognized that "[w]here a penalty is created by statute but no provision is made as to whom it shall be paid or by whom it shall be sued for, it may, according to the generally accepted rule, be recovered only by the state or the United States." 70 C.J.S. Penalties, § 8. The form of action brought for the recovery of such penalties is often an action qui tam or one for debt. Id. at § 11; State v. Mathews, 2 Brev. 82 (1806). Such actions may be brought by the state or other body politic and, therefore, must remain "within the absolute control of its officers, no matter what interest an informer may have in the penalty." Id. Finally, as concluded by our own Supreme Court in the Southern Railway case, referenced above,

> [a] previous conviction on an indictment for violation of a statute is not necessary to sustain a qui tam action or action of debt for a penalty unless expressly made such a condition by the statute imposing the penalty.

Id.

Here, the relevant statute, § 44-53-391, imposes a "civil fine". Typically, where a "civil fine" is authorized, such sanction is enforced in a civil proceeding. See, State ex rel. McLeod v. C and L Corporation, 280 S.C. 519, 313 S.E.2d 334 (1984) [pursuant to Unfair Trade Practices Act, Attorney General brought action in Court of Common Pleas against corporation, officers and agents for recovery of "civil fine"]. In Sanders v. Pacific Gas and Electric Company, 53 Cal.App.3d 661, 126 Cal.Reptr. 415 (1975), the Court concluded that a statute which authorized the imposition of a "civil fine" for a violation of law did not contemplate that a qui tam action could be brought by private citizens so as to retain for themselves a portion of the statutory penalty. A qui tam action must be

authorized by a statute which expressly permits all or part of the penalty to be given to the citizen bringing the action, concluded the Court. Instead, the particular statute in question simply authorized any person to bring the action to recover the penalty, but did not specify that such person could retain the penalty as a reward. Thus, the "civil fine" belonged to the State, held the Court. The Court concluded:

> [w]hile the terms 'fine' and 'penalty' are frequently used synonymously to refer to forms of pecuniary punishment ..., the use of the term 'fine' imports a punitive assessment payable to the public treasury: 'By the common law all fines belong to the crown, or in this country to the state as succeeding the prerogative of the crown.' (36A C.J.S. Fines s 19, p. 460.) ....
>
> While we find no direct statement of California law in support of the rule that civil penalties should go to the state in the absence of express provision to the contrary, we find authority for that proposition in other jurisdictions. (In re Burk (1918) 66 Ind. App. 435, 118 N.E. 540, 542; Brownell v. Old Colony R.R. (1895) 164 Mass. 29, 41 N.E. 107, 108-109; Petersen v. J. F. Cunningham Co.(1896) 77 F. 211, 215-216 (N.D. Cal.); Bryant v. Rich's Grill (1914) 216 Mass. 344, 103 N.E. 925; see also 36A. C.J.S. Fines s 20, p. 465; 70 C.J.S. Penalties s 21, p. 419.
>
> We hold that, absent a specific provision in the Coastal Act designating any person other than the State to be a recipient of a part or all of the civil penalties recovered under the act, the statute is not a Qui tam statute and all the penalty must be paid to the State.

126 Cal. Reptr. 425-426.

Section 44-53-391 does not make the acts forbidden therein subject to criminal penalties. Instead, the Act speaks of the imposition of a "civil fine" for violation thereof. Moreover, the Act makes clear that imposition of the civil fine "shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense." However, it is also clear that the legislative intent of the Act is to impose punishment upon those who violate the terms of the Act, notwithstanding that neither a criminal offense nor a criminal prosecution is mentioned.

It is not unusual for the Legislature to impose civil fines for violation of the drug laws either in addition to or notwithstanding the particular criminal penalties imposed. For example, at Section 44-53-310 of the Code, authorization is given to DHEC to "levy a civil fine" upon an applicant for registration to manufacture, distribute or disperse controlled substances who commits certain acts. Moreover, Section 44-53-380(b) authorizes the imposition of a civil fine for violation of the provisions of that Section relating to the distribution of controlled substances. By comparison, that subsection permits a criminal prosecution for knowing or intentional violations as well as the imposition of civil penalties.

Likewise, other jurisdictions often utilize civil penalties to enforce drug paraphernalia laws, notwithstanding any other penalties involved.

In Jackson County v. Roark, 863 P.2d 491 (Or. 1994), the Court reviewed a civil action filed by a local prosecutor for recovery of a civil penalty for violation of a drug paraphernalia statute. The defendant raised as an affirmative defense that such an action was "criminal" in nature and thus the standard of "beyond a reasonable doubt" was required to impose the penalty.

The Court rejected the defendant's argument. Said the Court,

> [s]elling or delivering drug paraphernalia is not a crime under any Oregon statute. Accordingly, a person is not "convicted" of violating ORS 475.525, but any person found to have violated that statute "shall incur a civil penalty in an amount of at least 2,000[.]." ... [S]tatutes are silent with respect to the degree of proof required to show a violation of ORS 475.525. ... [W]e conclude that ... the greater weight supports a determination that a penalty proceeding under Oregon's Drug Paraphernalia Law does not possess the traits that would more properly characterize it as a criminal prosecution. Accordingly, we hold that the trial court did not err in treating this proceeding as a civil action and requiring the county to prove its case by a preponderance of the evidence.

Thus, based upon the foregoing, it is my opinion that Section 44-53-391 could most probably be enforced by some form of civil action for collection of the civil fine. Such an action is in the "absence of statutory provisions to the contrary, governed by the rules applicable to the particular civil action brought and not by those which are applicable only to criminal prosecutions ...." 70 C.J.S., Penalties, § 10. Some courts have deemed the

action as "based on contract rather than on tort." Id. at § 14. As noted above, this is consistent with the State v. Mathews case, supra which suggests that the civil action is one for debt.

In my judgment, the action for enforcement would need to be brought by a public official. Certainly, the Circuit Solicitor could bring such an action. Arguably, as well, a law enforcement agency such as a Sheriff or Chief of Police would have standing to bring such an action for enforcement.

With respect to your question as to whether the Magistrate's Court has jurisdiction with respect to enforcement of Section 44-53-391, I would note that Section 22-3-10(3) vests a Magistrate with concurrent civil jurisdiction "in actions for a penalty, fine, or forfeiture, when the amount claimed or forfeited does not exceed five thousand dollars." On the other hand, Section 22-3-20 states that no magistrate has jurisdiction in any civil action wherein the State is a party "except an action for a penalty and not exceeding one hundred dollars ...". Thus, the question of whether a civil enforcement action could be brought in Magistrate's Court is problematical and, at best, is probably limited. It would appear to me that the Court of Common Pleas would be preferable for such an action.

In terms of legislative strengthening of the drug paraphernalia law, I agree with you that the law is outdated and inadequate. This Office receives inquiries continuously regarding so-called "head shops" and establishments which sell and distribute drug paraphernalia. There have been attempts to enact a comprehensive new Paraphernalia Law in the General Assembly, but these have failed. In Op. No. 84-47 (April 24, 1984), we reviewed such a proposed Bill seeking to provide a criminal penalty rather than a civil fine for constitutionality. We concluded that "the proposed amendments were constitutional and specifically that the criminal penalty does not violate the Constitutions of the United States or South Carolina." Therein, we noted that the proposed legislation "is virtually identical to the Model Drug Paraphernalia Act, which has been upheld by every federal circuit court considering its constitutionality." We also recognized that states and cities have usually passed one of three drug paraphernalia statutes or ordinances. We noted that

> [s]ome jurisdictions prohibit the sale and possession of paraphernalia, typically enforced by civil penalties like our present statute Sec. 44-53-391. Other ordinances merely regulate the sale of paraphernalia, rather than banning it outright. Finally, other statutes and ordinances, tracking the Model Drug Paraphernalia Act (Model Act) prohibit the sale and possession of drug paraphernalia and enforce it with

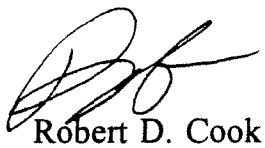
criminal penalties, similar to the proposed amendments in Senate Bill 97.

In conclusion, I agree with you that legislative strengthening of the Drug Paraphernalia Act would be helpful. Absent such, I am of the opinion that a civil action would lie for recovery of the civil fine. Such an action would probably best be brought in circuit court, in the Court of Common Pleas.

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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