



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 5, 1996

Robert E. Guess, Esquire
Union County Attorney
Post Office Box 278
Union, South Carolina 29379-0278

Re: Informal Opinion

Dear Mr. Guess:

You wish to know the applicability of S.C. Code Ann. Sections 24-5-10 and 24-5-12 to the following situation:

[i]n 1986 under pressure from the S.C. Department of Corrections, Union County closed its jail. The County Council negotiated an agreement with the City of Union to house all County prisoners in the City jail. Union County pays the City of Union a fee for this service. All personnel of the jail are City employees. The Union County Sheriff has no active part in the operation of the jail. The sheriff who was in office in 1986 did not offer for re-election in 1992 and was replaced by the current sheriff.

Union County has contracted for the construction of a new jail facility which will comply with Department of Correction regulations. When the new jail is completed, the arrangement with the City will end and all County prisoners will be returned to the custody of the County.

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You have asked the following questions:

1. Did the events of the closing of the Union County jail and the housing of County prisoners in the City of Union jail by agreement as described amount to a devolution of the sheriff's duties concerning the jail under Section 24-5-12?
2. If a devolution did occur, is the devolution binding on the current sheriff?
3. Can the current sheriff rely on the mandatory language of 24-5-10 and take custody of the new jail when completed?

LAW / ANALYSIS

Section 24-5-10 provides as follows:

[t]he sheriff shall have custody of the jail in his county and, if he appoint a jailer to keep it, the sheriff shall be liable for such jailer and the sheriff or jailer shall receive and safely keep in prison any person delivered or committed to either of them, according to law.

Section 24-5-12 also states:

[n]otwithstanding the provisions of § 24-5-10 or any other provision of law, the sheriff of any county may, upon approval of the governing body of the county, devolve all of his powers and duties relating to the custody of the county jail and the appointment of a jailer on the governing body of the county; provided, a sheriff who has been defeated in a primary or general election may not devolve said duties on the governing body of the county.

Several rules of statutory construction are useful to assist in resolving these questions. First and foremost, in interpreting a statute, the primary purpose is to determine the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers. Browning v. Hartvigsen, 414 S.E.2d 115 (1992). The words of an enactment must be given their plain and

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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). A statute in derogation of common law rights is to be construed strictly to preserve vested rights. Hoogenbroom v. City of Beaufort, 433 S.E.2d 875 (1993); Crowder v. Carroll, 251 S.C. 192, 161 S.E.2d 235 (1968) [it is elementary that statutes in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent.]

Traditionally, the Sheriff was jailer of the county and could commit the custody and charge of prisoners to a jailer of his appointment who became his deputy or substitute. 60 Am.Jur.2d, Penal and Correctional Institutions, § 23. It has been held that care and custody of the jail is "within the common-law powers of the sheriff" People v. Bd. of Commrs. of Cook Co., 74 N.E.2d 503 (Ill. 1947), citing Co. of McDonough v. Thomas, 84 Ill.App. 408. See also, State v. Sellers, 7 Rich. 368 (1854) (Act of 1938 providing that when the sheriff does not himself exercise the functions of jailer he shall appoint "a proper and discreet person to be jailer."). Further, it is generally stated that

[a]t common law, the sheriff is jailer ex officio and has the right to the custody and control of the common or county jail and of the prisoners confined therein. A statute may, either expressly or by implication, confer virtually the same rights on a sheriff, and some statutes have made provision to such effect. However, control of the county jail, and of custody of accuseds, may be transferred from the sheriff to the county jail warden.

72 C.J.S., Prisons, § 14. And, in Brunson v. Hyatt, 409 F.Supp. 35 (D.S.C. 1976), Judge Hemphill recognized that "[i]n most counties in South Carolina, the sheriff is responsible and potentially liable for the actions of the county jailer whom he appoints." Thus, Section 24-15-10 is merely a codification of the common law. That being the case, departure therefrom by virtue of Section 24-15-12 would be strictly construed.

Section 24-5-12 provides that the sheriff, upon approval of the governing body of the county is authorized to "devolve" all powers and duties relating to the custody of the county jail and the appointment of a jailer "on the governing body of the county". The phrase "devolve" means to transfer from one person to another, to deliver over, or to hand down. People ex rel. Robin v. Hayes, 149 N.Y.S. 250, 252, 163 App.Div. 725. It is said that the term "devolve" means "[t]o pass or be transferred from one person to another; to fall on, or accrue to, one person as the successor of another; as a title, right, office liability." The word "devolution" means the transference of property from one person to another." Hermann v. Crossen, 160 N.E.2d 404, 408 (Ohio, 1959).

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Based upon these authorities, I would analogize Section 24-5-12 to a transfer or conveyance of property. Our Court has said repeatedly that there can be no delivery or transfer of a conveyance without a clear intent by the parties. Coln. v. Coln, 24 S.C. 596 (1885). The delivery of a deed of conveyance is composed of two concurrent parts: (1) an intention to deliver, and (2) an act evincing a purpose to part with control of the instrument. Neither of these parts by itself is sufficient to part with the instrument. Likewise, acceptance by the grantee is deemed essential to delivery, and without it a deed does not take effect. Walker v. Frazier, 2 Rich. Eq. 99 (1845). These principles were summarized by the Court in Ott v. Ott, 182 S.C. 135, 188 S.E. 789 (1936) relating to an inter vivos transfer of property:

[a] gift inter vivos as its name imports, is a gift between the living. It is a contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title of it to the donee gratuitously, and the donee who accepts and acquires the legal title to it.

Thus, in my judgment, Section 24-5-12 would require, as with any contract, a clear manifestation of intent on the part of the sheriff to transfer the duties of jailer to the governing body of the County as well as a clear manifestation of acceptance of those duties by the county governing body in the form of its "approval" of the transfer.

Consistent therewith, where the jail has been transferred from the Sheriff's control in South Carolina, it has generally been done clearly and with specificity. See, e.g., Act No. 187 of 1951 ["... that in the Court of Richland the Board of County Commissioners shall have the custody and keeping of the County Jail and the Supervisor of Richland County shall, by and with the consent of a majority of the Board of County Commissioners appoint a jailor, who shall be responsible to the Supervisor for safely keeping the jail any person delivered or committed to said jail according to law."]; Op. Atty. Gen., May 13, 1980 [construing Act. No. 187 of 1951; "[h]ere, the General Assembly has seen fit to make the management and supervision of the County Jail the responsibility of the governing body of Richland County."]; Brunson v. Hyatt, *supra*, [reciting S.C. Code Ann. §55-410; "[i]n Sumter County the governing body of the county shall have the custody of the jail of the county and may appoint a jailer to keep it. The sheriff of said county shall be under no duty of keeping safely in prison any person delivered or committed to the jail or prison of the county according to law."]; Carraway v. Debruhl, 993 F.2d 228 (4th Cir. 1993, unpublished opinion).

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In Carraway, the Fourth Circuit described the devolution of authority by the Sheriff of Kershaw County to the County governing body pursuant to Section 24-5-12 as consisting of the following factual situation:

[i]t is also undisputed that before 1987, in accord with S.C. Code Ann. § 24-5-12, the Kershaw Sheriff had devolved official responsibility for operation of the jail to the governing body of Kershaw County. The jail was housed in facilities independent of the Sheriff's office, and was operated by a jail administrator and staff employed and controlled by the Kershaw County Manager and the Kershaw County Council.

The Court added that "it is undisputed that the Sheriff of Kershaw County has invoked this statute before 1987 and that thereafter the county government had assumed the sheriff's responsibilities for operation of the county jail." Id.

By itself, the fact that there has been in your situation a contract to house prisoners in the municipal jail due to the fact that the county jail could not be operated consistent with applicable regulations would not, to my mind, be necessarily determinative. For example, in Pons v. State, 278 So.2d 336 (Fla. 1973), because of overcrowding conditions, prisoners were transferred to the municipal jail pursuant to intergovernmental agreement. Pursuant to that agreement, the sheriff retained the power and ability to control the continued incarceration of prisoners. The Court held that "[t]his retained control by the Sheriff satisfied the requirements of lawful custody, albeit constructive in nature" Id. at 338.

Moreover, in State v. Heckman, 518 S.W.2d 100 (Mo. 1974), the Court similarly emphasized:

[t]he crowded condition of the Jackson County jail is a well-known fact, and the intergovernmental contract is obviously entered into to alleviate the situation. Following the Pons case, it must be held that MCI is but an extension of custody, or constructive custody of those in charge of the Jackson County Jail, and vice versa. To hold otherwise would tend to be destructive of the salutary purposes of the contract between Jackson County and Kansas City, which is authorized by the constitutional and statutory provisions.

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518 S.W.2d at 103. It is also well-recognized that "[p]risoners who are temporarily outside their usual place of confinement for limited purposes are still in the custody of the penal institution where they were previously confined." 72 C.J.S., Prisons § 20.

Ultimately, your inquiries involve mixed questions of law and fact as such relate both to the contract between the city and county and the intentions of all the parties. For a devolution to have occurred pursuant to Section 24-5-12, the Sheriff must have intended, based upon all the evidence, to transfer his duties and responsibilities over the county jail to the county governing body and, based upon all the evidence, the county governing body must have "approved" such devolution. Almost always, a contract involves issues of fact which must ultimately be resolved by a jury. Hendrix v. Eastern Distrib., 446 S.E.2d 440 (1995). Here, in addition to the contract itself, would be the issues of what formal action County Council may have taken and whether such constituted an "approval" of the devolution, if any. Moreover, if there is ambiguity, as is likely, the issue of the Sheriff's course of conduct as well as the Council's would come into play. You have indicated that the Sheriff, after 1986, exercised no control whatever over the jail, but it would also be highly relevant as to what control the county governing body has since exercised. Intent of both the Sheriff in effectuating a transfer of power over the jail, as well as Council in accepting or approving such a transfer, would be critical. All the facts and circumstances, relevant documents, as well as testimony of the witnesses, would be required.¹

Based upon the information provided, I question whether any devolution has occurred. As indicated earlier, I believe such devolution must be clear and manifest, much like the language contained in the statutes, cited above. Any purported devolution would have to be strictly construed. See also, Op. Atty. Gen., July 13, 1988 ["(o)fficial powers cannot be assumed..."] You have referenced no transfer language either in the contract itself (or any other document), nor have you referenced any formal action by County Council in the form of an ordinance, resolution, or otherwise in approving the devolution.

In the end, however, an opinion of this Office cannot resolve the many factual issues which would be necessary to finally answer your questions. Op. Atty. Gen., December 12, 1983. As we recognized in Op. No. 85-132 (November 15, 1985) questions involving contract are primarily fact-oriented and thus require a court to determine. Thus, in the absence of a clear devolution, as evidenced by an Ordinance, Resolution or

¹ I have not examined any relevant documents and am relying herein only upon the information provided.

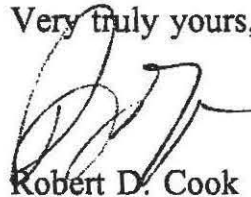
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agreement, I am of the opinion that a declaratory judgment action should be sought to resolve your questions with absolute finality.

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,

A handwritten signature in black ink, appearing to read 'RDC', is written over the typed name 'Robert D. Cook'.

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph