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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 29, 1996

The Honorable Jack I. Guedalia
Charleston County Magistrate
P. O. Box 32412
Charleston, South Carolina 29417

Re: Informal Opinion

Dear Judge Guedalia:

You have referenced the Magistrates and Municipal Judges Bench Book, which states on p. III-54 with respect to a preliminary hearing:

> [i]f the magistrate or municipal court judge is not satisfied that probable cause has been shown, he must discharge the defendant from custody. Although the magistrate or municipal court judge can discharge the defendant from custody, this is not a final determination of the charge. Such a discharge is not an acquittal and jeopardy does not attach. The charge may still be submitted for grand jury consideration and the defendant indicted after such consideration. The defendant is bound by the terms of his bond, including appearance at trial, unless the case is dismissed at general sessions court. (emphasis added).

You wish to know what is meant by the phrases "discharge from custody" and "bound by the terms of his bond."

LAW/ANALYSIS

Rule 2 of the South Carolina Rules of Criminal Procedure concerns preliminary hearings and provides:

> (a) Notice of Right. Any defendant charged with a crime not triable by a magistrate shall be brought before a magistrate and shall be given notice of his right to a preliminary hearing solely to determine whether sufficient evidence exists to warrant the defendant's detention and trial. In the case of bailable offenses, the notice shall be given at the bond hearing. In the case of non-bailable offenses, the notice shall be given no later than would be required if the offense were bailable. Notice shall be given orally and also by means of a simple form providing the defendant an opportunity to request a preliminary hearing by signing the form and returning it to the advising magistrate. In all cases, the request for a preliminary hearing shall be made within ten days after the notice.
>
> ... (c) Probable Cause. If probable cause be found by the magistrate, the defendant shall be bound over to the Court of General Sessions. If there be a lack of probable cause, the defendant shall be discharged; but his discharge shall not prevent the State from instituting another prosecution for the same offense. (emphasis added).

Consistent with the foregoing Rule, the South Carolina Supreme Court commented at length upon the nature of dismissal of charges by a magistrate at a preliminary hearing in State v. Scott, 269 S.C. 438, 237 S.E.2d 438 (1977). In Scott, the City Attorney entered a nolle prosequi of certain charges immediately prior to a preliminary hearing. A preliminary was held as to other charges, but not the attempted armed robbery charges where a nolle prosequi had been granted. The defendant argued on appeal that the nolle prosequi did not extinguish his right to a preliminary hearing pursuant to Section 22-5-320, arguing that "any reinstatement of identical charge, absent a withdrawal of his request for a preliminary hearing, had to occur in the magistrate's (recorder's) court." The Court responded to this argument in the following way:

> [t]he fallacy in the foregoing argument of appellant lies in the fact that the nolle prosequi of the charge before the magistrate or recorder was not a final determination of the charge and did not bar a subsequent prosecution through indictment by the grand jury. State v. Gaskins, 263 S.C. 343, 210 S.E.2d 590; State v. Messervey, 105 S.C. 254, 89 S.E. 662.
>
> The indictment procedure used to reinstate the charge of attempted armed robbery is identical to the procedure which may be used in the situation where a magistrate has discharged a defendant pursuant to Code Section 22-5-320.

As stated by Judge Hemphill in Williams v. State of South Carolina, D.C., 237 F.Supp. 360, 370:

> Under South Carolina Law, Section 43-231, 1962 Code, (now Section 22-5-320, 1976 Code), a magistrate may discharge a defendant. This obviously means discharge from custody, since a magistrate does not have jurisdiction to acquit a defendant charged with murder.
>
> The defendant may be indicted and tried without regard to the finding of the hearing magistrate at a preliminary hearing. Indeed, a crime may be charged initially by indictment, in which case there is no right to a preliminary hearing at all. State v. Nesmith, 213 S.C. 60, 66, 48 S.E.2d 595.
>
> Accord, State v. Sanders, 251 S.C. 431, 163 S.E.2d 220.
>
> We, therefore, hold that Section 22-5-320 did not deprive the General Sessions Court of jurisdiction in this case, where a nolle prosequi was entered subsequent to the demand for a preliminary hearing and the charge was later reinstated through indictment by the grand jury. The indictment by the grand jury for attempted armed robbery was, in effect, an initial prosecution under which the defendant had no right to a preliminary hearing.

269 S.C. at 444. (emphasis added). Thus, the Court has held that "discharge" means a "discharge from custody".

Clearly, therefore, Rule 2 requires that where a magistrate finds no probable cause at a preliminary hearing, the defendant must be "discharged" from custody, meaning that he must be released from incarceration.

The principle issue which you raise is thus what is meant by the statement in the Bench Book, that the defendant "is bound by the terms of his bond, including appearance at trial, unless the case is dismissed at general sessions court." My research reveals that there is disagreement among the authorities as to the duration of an appearance bond where a magistrate dismisses charges at a preliminary hearing for want of probable cause. The general authorities on this subject appear to indicate that dismissal of charges exonerates the bond. It is generally stated that "[o]f course, a termination of the criminal

proceedings before a bail bond is forfeited ipso facto terminates the liability of the sureties of the bond." 8 Am.Jur.2d, Bail and Recognizance, § 125. This same authority states that "[i]t is fundamental that when a defendant is released from his obligation to appear, the bond for his appearance is automatically discharged, even though it is not so stated in the judgment." Id., n.37.

Likewise, in 8 C.J.S., Bail, § 128, it is observed:

> [i]n view of the fact that the giving of bail is in effect the entering of a contract with the state, whether or not proceedings adversely affecting the indictment discharge bail depends on the conditions of the particular bail bond or recognizance. Where the conditions may be so construed, the quashing of the indictment or information, a dismissal of the prosecution, or such other action discontinuing the prosecution as the entering of a nolle prosequi will operate as a discharge of bail; and liability is not revived by the finding thereafter of an information against the principal on the same charge.

The courts thus distinguish between dismissal of charges prior to any default on the bond and dismissal following; as to the latter situations, "where the condition of a bail bond has been broken by the nonappearance of the principal, a surety is not released by the later dismissal of the indictment." With respect to the former situation, however, the general law is that dismissal "will operate as a discharge of bail."

The South Carolina authorities appear to take a different tack, however. In Fitch ads. The State, 2 Nott and McCord 558 (1820), the Court had this to say:

> [b]y the condition of the recognizance entered into by the defendant, he is not only to appear to answer the specific charge exhibited against him, but is to do and receive what shall be enjoined by the court, and not to depart without license, and in the meantime to keep the peace of the citizens thereof, and especially towards the prosecutor. The terms of this recognizance are such as to leave it discretionary with the court to refuse the defendant's discharge, through no cause be shown by the solicitor why he intends to prefer a new bill. In 1 Comyns Digest 692, it is said, "if one be taken up for a libel and enters into recognizance to appear the first day of the term, and responds, and not to depart, and the attorney general then enters a nolle prosequi on it , and on the last day of the term files another information on the same libel, and another, and on this last information, defendant is convicted if he does not appear his recognizance is forfeited.

> In the instance given, the conviction may have been occasioned by the evidence given on the other libel, but yet, as the former was conjoined therewith in the information, the recognizance was deemed sufficient to compel the defendant's appearance.

2 Nott and McCord at 560.

The Court based its reasoning upon the fact that

> [i]t is the verdict of a petty jury alone, which can operate as a discharge of the defendant from the accusation against him. If, on trial, they find the party not guilty, he is then, says Blackstone, forever quit and discharged of the accusation. The implication is clear, that before then he is not so discharged.

2 Nott and McCord at 559.

Moreover, in State v. Haskett, 3 Hill 95 (1836), the defendant was charged with assault and the Attorney General subsequently entered a nol pros on the indictment. The surety made a motion, based upon the nol pros, to be discharged on the bail. The lower court did discharge the surety and the State appealed. Reversing, the South Carolina appellate court explained:

> [b]ut it seems to have been thought by the presiding judge, that the nol. pros. was an end of the case, as a non-suit would be in a civil action. This is a mistake. In a civil case a non-suit vacates all the previous proceedings and the plaintiff must begin de novo. In a criminal case the party is brought into Court by the warrant and recognizance. The indictment is one of the stages of the proceedings, and a discharge of that, by nol. pros. does not impair the previous proceedings. It is competent, and everday's practice, for the solicitor or attorney general to enter a nol. pros. on one indictment, and to prefer another; and to the effect of this is only to vary the form of the charge, and neither entitles the party to a discharge from custody, nor to have an exoneration entered on his recognizance. In actions for malicious prosecution, this question has frequently arisen, and it has been often held, that a nol. pros. is not an end of the case but that the attorney general may prefer a new bill.

In an Opinion of July 20, 1966, this Office referenced and quoted from the Haskett decision, concluding as follows:

> [b]ecause there has not been a final determination of the case herein, it is the opinion of this Office, in light of the foregoing authorities, that the entering of a nolle prosequi by the county solicitor neither operated to discharge either the defendant from custody or his bail from his recognizance ... .

Additionally, the following passage is quoted from Ledbetter and Myers, "Bail in South Carolina", 225 S.C. Law Rev. 182, 191-192 (1970) regarding a summary of the duration of bail pursuant to this State's Bail Reform Act:

> [i]f the case is not tried at the first term after the defendant is released on bail, he is under an obligation to attend future terms of court until there has been a final disposition of the case. The fact that the defendant's attorney fails to notify him that the case might come up at the next term does not relieve the defendant or his surety of the obligation to appear. A final disposition is not rendered until an order or discharge is issued by the court at which the party is bound to appear, and thus a finding of no bill by the grand jury or a nolle prosequi by the solicitor does not discharge the obligation.

Cited in support of this statement are the South Carolina cases State v. Williams, 84 S.C. 21, 65 S.E. 982 (1909) and Whaley v. Lawton, 57 S.C. 256, 35 S.E. 558 (1900).

The Court in State v. Williams, supra commented at considerable length regarding the continuing nature of an appearance bond, regardless of a dismissal of the case. Said the Court,

> [h]is Honor erred in holding that the continuance of the case released the surety. The condition of the recognizance is not only that the principal shall personally appear at the Court, and at the time therein specified, but also "to do and receive what shall be enjoined by the Court, and not depart the Court without license." In some of the cases it has been said that the words "to do and receive what shall be enjoined by the Court," refer to the sentence. While that is correct, they are comprehensive enough to embrace other matters also, and to require the attendance of the party bound from time to time, as ordered by the Court, and until the case if finally disposed of. It has been held in this State that an order of the Court, at which a party is bound to appear, is necessary to a final determination of the case, and that the finding of "no bill" by the grand jury or the entry of a nolle prosequi,

does not end the case or discharge the recognizance. Whaley v. Lawton, 57 S.C. 256, 35 S.E. 558.

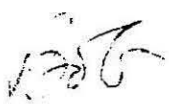
> "A recognizance binds the principal, not only to appear, but to abide the judgment of the Court, and not to depart thence without its leave; and if the principal be ordered to execute a new bond, either to keep the peace for a specified period, or for his appearance at a subsequent term, or before another court, and he depart without complying with the order, it is a breach of the recognizance." 3 A. & E. Enc., 715.

Clearly, prior to the adoption of Rule 2 of the Rules of Criminal Procedure, and more recent cases, it appears to have been the law in South Carolina that a surety is not exonerated upon the dismissal of a case by a magistrate at a preliminary hearing, but instead is relieved only upon final dismissal by the court which had jurisdiction to try the case, usually General Sessions. Rule 2 now clearly mandates discharge from custody with respect to physical incarceration. Our Courts, however, have never overruled or superseded the earlier cases holding that the conditions of bond continue until discharge or dismissal by the Court of General Sessions, which has jurisdiction to try the case. Thus, the statement in the Bench Book that, although the magistrate "must discharge the defendant from custody" upon a finding of no probable cause, nevertheless, "[t]he defendant is bound by the terms of his bond, including appearance at trial, unless the case is dismissed at general sessions court", appears consistent with and is supported by the Fitch, Haskett, and Williams cases, discussed above, as well as the 1966 opinion of this Office.

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/ph