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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 7, 1996

Denice M. Schwerin-Whisenant, Police Officer
Town of Ridge Spring
Post Office Box 215
Ridge Spring, South Carolina 29129

Re: Informal Opinion

Dear Officer Schwerin-Whisenant:

You have sought advice with respect to charges made for DUI. You state that you have

> arrested several individual's for DUI. My question lies in the fact that a few of the individuals arrested for DUI did not blow a .10% or higher on the Breathalyzer. The County and Town Officers, as well as, the Highway Patrol have been insisting that I do not have to write the individual a traffic summons for driving under the influence. They insist that I only need to write the individual for the reason that I stopped them. I have been writing the individual for Driving Under the Influence (municipal court) and then dismissing it at court for lack of evidence. To me, the individual has been placed under arrest for Driving Under the Influence and I do not see where the law gives me the power to "un"arrest the individual when they do not blow above a .06% (.06% to .09% being the officer's discretionary powers as to whether or not they want to charge the individual with the other circumstances that they have). I repeatedly stated that this type of situation is a law suit waiting to happen. The Troopers tell me the subject is under arrest for DUI, and also for what the probable cause

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> was that made me stop the vehicle. On the Breathalyzer check sheet it clearly ask[s], "Is the individual arrested for Driving Under the Influence statute 56-5-2930 ... ." ... If the arresting officer does not answer yes to that question, then the Breathalyzer operator does not run the test on the individual. To me it is pretty clear, cut, and dry.

LAW \ ANALYSIS

S.C. Code Ann. Sec. 56-5-2950 (b) sets forth certain operating presumptions in a prosecution for driving under the influence. Said Subsection provides as follows:

> [i]n any criminal prosecution for the violation of Section 56-5-2930 or 56-5-2945 relating to operating a vehicle under the influence of alcohol, drugs, or a combination of them, the amount of alcohol in the person's blood at the time of the alleged violation, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following inferences:
>
> > (1) If there was at that time five one-hundredths of one percent or less by weight of alcohol in the person's blood, it is conclusively presumed that the person was not under the influence of alcohol.
> >
> > (2) If there was at that time in excess of five one-hundredths of one percent but less than ten one-hundredths of one percent by weight of alcohol in the person's blood, that fact does not give rise to any inference that the person was or was not under the influence of alcohol, but that fact may be considered with other competent evidence in determining the guilt or innocence of the person.
> >
> > (3) If there was at that time ten one-hundredths of one percent or more by weight of alcohol in the person's blood, it may be inferred that the person was under the influence of alcohol.

(emphasis added). Thus, where the blood alcohol level is between .05% and .10, such level may be considered by a jury along with other competent evidence in determining that an individual was guilty of driving under the influence. For example, in State v. Mendros, 622 A.2d 1178 (Me.1993), the Court upheld a DUI conviction where the breathalyzer reading was .09. There, the Court said that

> [i]n reviewing the sufficiency of the evidence supporting defendant's conviction, we view the evidence in favor of the State to determine whether the factfinder rationally could find every element of the offense beyond a reasonable doubt. State v. Webber, 613 A.2d 375, 377 (Me.1992). The officer's testimony of defendant's physical condition, defendant's poor performance on two of the three field sobriety tests administered by the officer, and defendant's testimony provide ample support for the court's finding.

622 A.2d at 1179. Accordingly, a breathalyzer reading of .10 or above is not essential to securing a conviction for DUI.

Your specific question is what is the appropriate and proper method of changing the charge when the prosecuting officer deems there is not sufficient evidence to go forward with a DUI charge because of a breathalyzer reading below .10. Again, where the reading is between .05 and .10 other competent evidence may be used. Notwithstanding that however, the decision whether to proceed on a particular charge is a matter within the prosecutor's discretion. We have recognized this general rule in a number of previous opinions of this Office and have found that certain procedures should be followed in this respect.

In an Opinion dated April 12, 1979, for example, we concluded that we were "unaware of any statutory authority which permits a municipal recorder to nol pros or dismiss a particular case on his own motion. Therefore, with reference to the above, a case triable in the municipal court may only be nol prossed in the discretion of the individual acting as the prosecutor."

And in an Opinion dated November 1, 1974, we commented upon the effect of State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974). There, the Court held that the offense of reckless driving was not a lesser included offense of driving under the influence and, therefore, absent the issuance of a uniform traffic ticket or warrant charging the defendant with reckless driving, the magistrate was without jurisdiction to accept a plea of guilty for such offense. In analyzing Fennell, we stated:

> [i]t is the opinion of this Office that the Fennell case says that a magistrate or municipal judge is not empowered to reduce or change a DUI charge preferred by the arresting officer. He must dispose of the case upon the charge presented by the arrest warrant or uniform traffic ticket.
>
> Fennell does not affect the authority of an arresting officer, if the policy of his Department permits such action, to nol pros the original charge and issue another uniform traffic ticket or obtain another arrest warrant preferring another charge. Such action has always been the prerogative of the State, represented in General Sessions Court and County Courts by the Solicitor, and, in magistrate's and municipal courts by the arresting officer, or a city or county attorney.

And in an Opinion dated May 22, 1967, we also stated similarly:

> [i]n the event it is decided that the facts do not support the first charge made, but that they do support another charge, whether the penalty for the other charge is lesser than the first or not, the first warrant should be nol prossed and another warrant issued. The same thing applies to any traffic summons that can by statute be used in lieu of a warrant, such as a summons issued by the Highway Patrol or Wildlife Department in certain circumstances. ... In such cases the words 'NOL PROS' (nolle prosequi) should be written in heavy pencil or ink across the face of the first ticket and the name of the responsible prosecuting officer or police officer signed underneath. The ticket should then be accounted for in the regular manner.

Similarly, in an Opinion of May 3, 1973, we stated that "[t]he Department, upon the advice of this Office, requests that when the original charge is dropped upon lawful authority and another charge substituted therefore, the arresting officer nol pros the original ticket and write another ticket making the second charge, and that he refer on the nol prossed ticket to the number of the second ticket. In this way, proper accounting can be made for both tickets."

Finally, with respect to an initial charge of driving under the influence, an Opinion of May 15, 1978 is dispositive. There, we addressed the question whether the arresting

officer has the authority to change the charge of driving under the influence to another charge such as driving left of center "following the administration of the breathalyzer test with a low reading." We advised the following:

> Assuming the existence of probable cause to support either charge in a given situation, the manner in which charges may be altered such as you describe is governed by the procedure contained in Directive No. 2 issued by the Attorney General and dated March 29, 1977. ... Compliance with the procedure outlined therein should insure proper prosecution in accordance with accepted criminal justice procedures.
>
> Additionally, it should be noted, however, that the practice outlined in Directive No. 2 concerns those instances in which a defendant has already been charged with driving under the influence and the initiating process (the Uniform Traffic Ticket or arrest warrant) has been issued prior to the desired change in charge. Presumably, such a procedure would not be necessary were the officer to refrain from serving the Uniform Traffic Ticket on a lawfully arrested defendant until after the administration of the breathalyzer test, thereby avoiding the problems inherent in subsequently nullifying judicial process. However, such a procedure is at all times subject to the individual department's procedures and the foregoing is merely a suggestion submitted for your consideration.

The foregoing Directive has been reaffirmed both by Attorneys General Medlock and Condon. A copy is enclosed for your information. I would urge that this Directive be followed in a DUI case.

Thus, based upon the foregoing, it is my opinion that once a ticket for DUI is issued, the charge can only be changed by nol prossing the original ticket and issuing a new one on the alternative charge. However the Directive of this Office setting forth the procedure in DUI cases should be followed.

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

Enclosure