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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 10, 1996

The Honorable Joe C. Cantrell
Chief Magistrate, Greenwood County
Room 106
Greenwood County Courthouse
Greenwood, South Carolina 29646

Re: Informal Opinion

Dear Judge Cantrell:

You note that your court is concerned with the following problem:

> [t]he driver of a vehicle is arrested for DUI; the passenger has been drinking and is asked to exit the vehicle. When he does so he is charged with PDC (public disorderly conduct) and/or drunk on the highway, even though he may have had less alcohol in his system than required for a DUI charge or conviction.
>
> The officer must have the vehicle towed and inventoried and, therefore, could not allow the passenger(s) to remain at the roadside nor could they given them a ride to the jail, or wherever. Most wrecker services are not allowed to give rides to passengers.
>
> Since the officer will not allow the passenger(s) to remain in the car and when they are ordered to exit the car they are subsequently arrested I would like to know if this constitutes entrapment.

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Request Letter

> Clearly a person who has the odor of alcoholic beverage about his person cannot be automatically adjudged drunk, or intoxicated, without due process.
>
> His rights are clearly violated by such an action and it behooves the State to come up with a solution so that innocent citizens are not unjustly treated.

LAW/ANALYSIS

S.C. Code Ann. Sec. 16-17-530 provides that

> [a]ny person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, ... shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days. (emphasis added).

Several principles of statutory interpretation are applicable here. First and foremost, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). The words of an enactment must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackman, 304 S.C. 270, 403 S.E.2d 660 (1991).

This Office has previously addressed the question of whether a grossly intoxicated passenger in an automobile may be charged with a violation of Section 16-17-530 and concluded that he may. In Op. Atty. Gen., Op. No. 1102 (May 3, 1961), we stated:

> Section 16-558, 1952 Code (Now Section 16-17-530) makes it a crime for any person to be on any highway or at any public place in a grossly intoxicated condition or otherwise conducts himself in a disorderly or boisterous manner. This Section is not related in anyway to the use of a motor vehicle while under the influence of intoxicating liquor. The gravamen of the offense is not the operation of a motor vehicle or

> the presence of the defendant in the motor vehicle while intoxicated, but is the act of being at any public place in a grossly intoxicated condition ... .
>
> If a defendant then is grossly intoxicated while riding in an automobile on a public highway he is guilty of a violation of Section 16-558.

This Opinion was reiterated in an Opinion dated March 6, 1963 where it was stated that "[t]he fact that these people were not driving the automobile does not affect the charge" under Section 16-17-530. And in Op. Atty. Gen., July 11, 1969, it was stated that "an individual may be charged with Disorderly Conduct whether he be a pedestrian or a passenger if the individual is grossly intoxicated."

Likewise, in State v. Galloway, 305 S.C. 258, 407 S.E.2d 662 (Ct.App. 1991), our Court of Appeals upheld the applicability of the Public Disorderly Conduct statute to an intoxicated passenger riding in an automobile. In Galloway, a sheriff's deputy stopped a vehicle after he observed the vehicle weaving and crossing the center line. Galloway a passenger in the car began shouting obscenities at the deputy. Continuing after being warned to stop, the passenger was advised he was under arrest for public drunkenness and disorderly conduct. Galloway did not cease hurling epithets at the deputy, however, and refused to get out of the car. Only after assistance from a second officer, was Galloway forcibly taken out of the vehicle and he was then charged with resisting arrest.

On appeal, Galloway argued that he was entitled to a directed verdict because the officer had no probable cause to arrest him for disorderly conduct. However, the Court of Appeals concluded that

> [v]iewed in the light most favorable to the State, the officers' testimony established the existence of probable cause to arrest Galloway. See State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979). Their evidence showed that Galloway was not only on the highway in a grossly intoxicated state, but also that he was conducting himself in a boisterous manner and using obscene and profane language. The judge, therefore, properly denied the motion for directed verdict.

305 S.C. at 263 (emphasis added).

The term "gross" typically means "out of all measure, beyond allowance, not to be excused, flagrant, etc." Williamson v. McKenna, 223 Or. 366, 354 P.2d 56, 66 (1960). Gross behavior exemplifies conduct which is wilful and flagrant. Gordon v. Dept. of Registration and Ed., 264 N.E.2d 792 (Ill. 1970).

In Op. Atty. Gen., Op. No. 3828 (July 26, 1974), we stated with respect to the term "grossly intoxicated condition" that

> [t]he crucial word here seems to be 'grossly'. Apparently mere drunkenness, without more, is insufficient to sustain a conviction under Section 16-558 for public disorderly. Whether or not a man is 'grossly' drunk as opposed to simply 'drunk' is a matter requiring the exercise of judgment on the part of the police officer, and should be handled with care. It is my belief that all public roads, rights of way, and parking lots would come within the ambit of the Act. (emphasis added).

One Court has recently characterized "gross intoxication" as indicated by glassy, bloodshot eyes, incoherence, head bobbing, blurred, speech, inability to walk when awakened, being passed out in a vehicle or swaying. Davis v. State of Texas, 1996 WL 477009 (Tex.App.-Hous.1 Dist. 1996). We also suggested in Op. No. 1102, supra, that the blood alcohol content above the level required for DUI (.10) was an indicator of gross intoxication, although I know of no mandate from our Court to this effect. Another court has stated that a blood alcohol reading of .20 constitutes gross intoxication, but the Court in that case did not indicate what the minimum content for such level of intoxication would be. Walker v. Firestone Tire and Rubber Co., 412 F.2d 60, 64 (2d Cir. 1969). Another court has observed that "'drunkenness' is not the same as being 'under the influence,' the former being gross impairment and the latter being less debilitating." People v. Shelton, 198 Cal.Reptr. 589 (1984). The Court in Shelton quoted one study as follows:

> "All of these indicate that at levels of 0.15 percent ... or over, more than 50 percent of persons are grossly intoxicated. A very few persons are drunk at blood-alcohol levels of 0.05 ... while practically all people are drunk at levels above 0.35 percent ... . Persons with histories of long use of alcohol are less likely to show signs of gross intoxication at lower levels, since they have learned to control their behavior. They deliberately attempt to conceal their intoxication and have a

> greater degree of tolerance than persons with less experience in repeated alcoholic consumption.

With respect to the constitutionality of that portion of Section 16-17-530(a) relating to gross intoxication in public, I would note that a number of decisions have upheld public drunkenness statutes against a variety of constitutional challenges. See, Quittner v. Thompson, 309 F.Supp. 684 (S.D.Fla. 1970)[statute being drunk or intoxicated in public place not unconstitutionally vague]; Holmes v. State, 795 S.W.2d 815 (Ct.App. Tex-Houston 1990)[public intoxication statute not unlawfully vague]; Findlay v. City of Tulsa, 561 P.2d 980 (Okl. 1977)["... the symptoms of intoxication are also a matter of common knowledge and understanding ... ."; word "drunk" is a synonym of the word "intoxicated"]; Cross v. State, 374 So.2d 519 (Fla.1979).

Our Court has consistently taken the position that the words "drunk" and "intoxication" are relative terms. In Easterlin v. Green, 248 S.C. 389, 396, 150 S.E.2d 477 (1966), the Court rejected the idea that a blood alcohol reading of .17 would necessarily make a person "drunk". Said the Court,

> [t]he expert's testimony that the alcoholic content of the blood sample would make a person drunk was not conclusive. The word "drunk" is a relative term which does not suggest an exact degree of intoxication. It was for the jury to weigh and evaluate this testimony with the other evidence bearing on the issue. We cannot say that the only reasonable inference from the evidence is that the defendants met their burden of proof with respect to this affirmative defense [of contributory negligence].

Likewise, in Reeves v. Carolina Foundry & Machine Works, 194 S.C. 403, 408, 9 S.E.2d 919 (1940), the Court opined:

> [t]he word "intoxicated is a relative term. When applied to Section 13 of the Act, we would say that it (intoxication) was intended to denote a condition produced by the use of some stimulant rendering an employee impaired in his faculties to the extent that he is incapable or carrying on his accustomed work without danger to himself.

In an analogous case the North Carolina Court of Appeals, in State v. Harvey, 336 S.E.2d 857 (N.C.App. 1985) refused to apply a "bright line" test to define the term "gross impairment".

Ultimately, the issue was a question for the jury, concluded the Court,

> 'Gross" is susceptible to a range of meanings: "great, culpable, general, absolute"; out of all measure .. flagrant, shameful." ... . Our courts have defined it as meaning "out and out, complete, utter, unmitigated." ... . They have also defined "gross negligence" as ordinary negligence magnified to a high even shocking, degree ... .
>
> It appears that "gross impairment" is a high level of impairment, higher than that impairment which must be shown to prove the offense of DWI. As demonstrated by the foregoing discussion, where the BAC [Blood Alcohol Content] is below 0.20, we do not draw a bright line which will mark once and for all where "impairment" ends and "gross impairment" begins. That determination must depend on the facts of each individual case. In other situations where various levels of culpability are presented, the finder of fact ordinarily decides what level the evidence shows. See Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971) (no negligence, negligence, or willful and wanton negligence) State v. Stanley, 310 N.C. 331, 312 S.E.2d 393 (1984) (sufficiency of evidence that a killing was especially atrocious discussed).

336 S.E.2d at 855-856.

In conclusion, it has been the consistent opinion of this Office that Section 16-17-530(a) may be applied to the situation of a passenger in an automobile on a public highway who is grossly intoxicated. It is also my opinion that such statute is constitutional. The question of whether an individual is "grossly intoxicated" depends upon the circumstances and is ultimately a question for the jury. Typically, as we indicated in Op. No. 1102 (1961), a blood alcohol content of greater than .10 would be necessary to constitute gross intoxication, although I do not think this in mandatory in every situation.

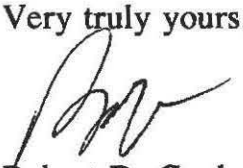
As to the practical problems which you reference, I am unaware of a situation where the individual who is charged with a violation of Section 16-17-530(a) is not

arrested and taken to jail. I cannot imagine an officer leaving an individual who is "grossly intoxicated" alongside the highway or that some provision would not be made for insuring that the person was gotten off the road. In any event, this would be a matter for the General Assembly to address.

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