05-6030 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 21, 1996

The Honorable Frances P. Smith
Magistrate, Edgefield County
P. O. Box 664
Edgefield, South Carolina 29824

Re: Informal Opinion

Dear Judge Smith:

You have attached a sample of a Bail proceeding Form 2, with Special Conditions for Defendant. You seek guidance as to the correct procedure to be followed if a defendant violates a bond containing such special conditions.

LAW / ANALYSIS

Art. I, Sec. 15 of the State Constitution provides for the right of bail except for capital offenses punishable by life imprisonment. Section 17-15-20 of the Code requires that

> [e]very appearance recognizance or appearance bond will be conditioned on the person charged personally appearing before the court specified to answer the charge or indictment and to do and receive what shall be enjoined by the court, and not to depart the State, and be of good behavior toward all the citizens thereof, or especially toward any person or persons specified by the court.

Section 17-15-30 also states that

> [i]n determining which conditions of release will reasonably assure appearance, or what release would constitute an

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, S.C. 29211-1549 • TELEPHONE: 803-734-3970 • FACSIMILE: 803-253-6283

Request Letter

> unreasonable danger to the community, the court may, on the basis of available information, take into account the nature and circumstances of the offense charged, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and any record of flight to avoid prosecution or failure to appear at other court proceedings.

In addition, it is well-settled that action may be taken with respect to a defendant released on bond who violates a condition of release. It has been stated that

> [a]ccused's violation of a condition of release is a legitimate reason to impose additional or more restrictive conditions, to increase the amount of bail or recognizance, even if the condition breached was imposed for a reason other than assuring accused's appearance at trial, unless the condition breached was imposed illegally.
>
> Whether to revoke bail or to impose more restrictive condition is discretionary with the judicial officer. The court's authority to place conditions on a bond and to revoke bail for a violation of those conditions does not preclude the court's revocation of bail have been placed on the bond.

8 C.J.S., Bail, § 83.

In Op. Atty. Gen., Op. No. 88-74 (September 29, 1988), we concluded that a magistrate or municipal judge could set reasonable conditions of bond in a criminal domestic violence case, for example. We opined as follows:

> [a]s to your specific question concerning whether a magistrate or municipal judge in setting a bond in a criminal domestic violence case could impose the conditions set forth above, it appears that a defendant could be restrained or enjoined from entering a domestic dwelling and be restrained from leaving the State of South Carolina. As noted, Section 17-15-10 authorizes as a condition of release restrictions on a defendant's "travel, association or place of abode of the person during the period of release." Also, the judge may impose any other condition considered "reasonably necessary to assure appearance as required." Such conditions would be

> consistent with the provisions of Section 17-15-30 which sets forth additional matters to be considered in determining conditions of release. Concerning your further question as to whether a defendant as a condition of bond can be restrained from using specified bank accounts, it appears that such a condition would similarly be appropriate in a criminal domestic violence case in certain circumstances. As noted, in setting a bond a court determines what conditions of release will reasonably assure an appearance. Also, as stated above, Section 17-15-30 referenced several criteria to be considered in determining conditions of release. A specific finding restraining the use of specified bank accounts therefore may be made in certain circumstances. However, such a restraint must be tied to a condition of a bail bond and could not be used to infringe on a matter that should be considered in typical domestic litigation. Therefore, a magistrate or municipal judge could impose such a condition in releasing a defendant on bond in a criminal domestic violence case.

Where a defendant fails to perform a condition required of him by a bond, the bonding judge may bring the defendant back before him for further action. Such is typically done by virtue of a bench warrant. In Op. Atty. Gen, Op. No. 78-179 (October 31, 1978), we stressed that a bench warrant may not be used to initiate a criminal charge, but instead

> such may be used to bring a defendant back before a particular court for a specific purpose after the court has acquired jurisdiction over the defendant by virtue of a proper charging document. For instance, if a defendant was released on bond and failed to appear at the proper time for trial, a bench warrant may be used to bring the defendant back before the court. However, if the defendant having been released on bond pursuant to Section 17-15-10 through 17-15-100 of the 1976 Code of Laws was charged with failing to appear before the court as required, pursuant to Section 17-15-90 of the Code, an arrest warrant would have to be issued to give a court jurisdiction to consider such a case. A bench warrant would not suffice as a charging document.

And in the Bench Book for Magistrates and Municipal Courts, III-16, it is stated that a common example of an instance where a bench warrant might be issued is where the defendant fails to appear for trial or a court proceeding as ordered.

I know of no reason why the issuance of a bench warrant would not be the appropriate procedural mechanism to bring the defendant back generally before the court where he or she has violated a special condition of his or her bond. It has been generally stated that "[t]he proper procedure is to require the defendant to appear before the court, by a bench warrant if necessary, in order for the court to review its release of the defendant on recognizance or bail." People ex rel. Shaw v. Lombard, 95 Misc.2d 564, 408 N.Y.S.2d 664 (1978). Such is consistent with Section 17-15-40 stating that "a warrant for the person's arrest will be issued immediately" upon violations of a condition of release.

Of course, it is generally recognized, that in order for bail to be revoked, amended or modified for violation of the conditions of release, the "accused must have notice and an opportunity to be heard." 8 C.J.S., Bail, § 84. While some courts disagree, " it has been held that accused may be committed to custody pending a revocation hearing, provided he is not held in excess of a specified time period ... ." prior to a hearing. Id. See also, Section 17-15-50 [after "notice and hearing, court may amend the order to impose additional or different conditions of release.].

Courts have consistently recognized that it does not violate a defendant's due process rights to have him arrested upon probable cause to believe he had violated his conditions of release, provided he is subsequently given the opportunity to be heard and present evidence contesting his violation of conditions of bond. In Lewis v. State of Maine, 736 F.Supp. 13 (D.Me. 1990), defendant was arrested for shooting his wife in the shoulder and was subsequently released on bail upon condition that he have no contact with his wife. Police arrested the defendant when he was seen approximately seventy feet from his wife's home with binoculars trained upon the dwelling. That same day he was arrested, defendant was given a hearing by the bonding court. The judge found that defendant has violated a condition of the bond by having indirect contact with his wife. In addition, the Court also found that if bond were not revoked, the defendant would again try to have contact with his wife.

Defendant contended that his preconviction bail revocation did not violate his federal constitutional rights. Said the Court,

> [t]he Court finds, however, no constitutional defect in the state's revocation of preconviction bail. Counsel for Petitioner requested and was granted, a prompt hearing on the issue

> of bail revocation. After an adequate evidentiary hearing, at which counsel for Petitioner was present and had the opportunity to examine witnesses on direct and cross examination the presiding judge concluded that Petitioner had violated a condition of bail, and that no condition or conditions of release would reasonably ensure the integrity of the judicial process.

736 F.Supp. at 15.

Moreover, in State v. Townsend, 167 Conn. 539, 356 A.2d 125 (1975), the Supreme Court of Connecticut rejected the argument that due process mandates a full hearing prior to issuance of a bench warrant. The Court emphasized that

> [i]mmediately after arrest an accused has the right to relief against excessive bail. He may be heard fully on all the facts and circumstances relevant to the amount of his bail ... . This procedure fully accords with any reasonable concept of due process of law.

356 A.2d at 135.

Instructive also is the case, United States v. Kripplebauer, 463 F.Supp. 291 (E.D. Pa. 1978). There, a condition of defendant's bail was that he remain in the Philadelphia area. Local authorities in Cherry Hill New Jersey arrested the defendant charging him with receiving stolen goods and unlawful possession of firearms. Based upon this information, the United States Attorney moved before the federal court to revoke defendant's bail for violation of its conditions. Accordingly, the District Court issued a bench warrant for defendant's arrest. Subsequent thereto, he was arrested and indicted.

Defendant contended that he was "denied due process in the proceedings which resulted in the issuance of Judge Huyetts' bench warrant." Disagreeing strongly, the Court concluded:

> ... [the defendant] asserts that there was an ex parte proceeding, i.e. that he was denied due process because he was not given notice and an opportunity to be heard. I reject the intriguing suggestion that the Government must stand helpless because it cannot give a bail jumper notice of the fact that he is being accused of jumping bail. The defendant's suggestion that there was no probable cause for the issuance of the bench

> warrant is equally without merit. As reported to Judge Huyett, Kripplebauer was found not to be at home, his wife professed to have been unaware of his whereabouts for several weeks, and he could not be found by state authorities. These facts constituted probable cause for Judge Huyett's action without even considering the tips supplied by the Government informant.

463 F.Supp. at 293. See also, State v. Workman, 274 S.C. 341, 263 S.E.2d 865 (1980) [court acted properly in revoking appeal bond for violation of condition of good behavior].

I note that the sample you have enclosed indicates that the defendant committed an offense within the jurisdiction of the Court of General Sessions to try. In an Informal Opinion, dated July 5, 1995, (enclosed) I addressed the issue of the jurisdiction of magistrates to amend, modify or revoke bond in criminal matters which were within the jurisdiction of the Court of General Sessions. There, I referenced Section 17-15-40 of the Code which provides as follows:

> [o]n releasing the person on any of the foregoing conditions, the court shall issue a brief order containing a statement of the conditions imposed, informing the person of the penalties for violation of the conditions of release and stating that a warrant for the person's arrest will be issued immediately upon any such violation. The person released shall acknowledge his understanding of the terms and conditions of his release and the penalties and forfeitures applicable in the event of violation thereof on a form to be prescribed by the Attorney General.

Such opinion also quoted Section 17-15-50 of the Code which provides that the "... court may, at any time after notice and hearing, amend the order to impose additional or different conditions of release." Referencing an Administrative Order for the Court of General Sessions, Ninth Judicial Circuit, dated May 9, 1995, I concluded, consistent with such Order, "that where no appeal is involved, the bonding magistrate possesses the jurisdiction to alter or amend its order setting bond and enforce the conditions thereof with respect to a General Sessions case, up until the time of indictment." The Opinion also noted that the common law had always given the justice of the peace the authority to summons a defendant released upon bail back before him to alter or modify the bail upon a showing that such is necessary to protect the public peace and security.

Accordingly, it is my opinion that:

1. A bonding magistrate possesses the authority to alter or amend bond, including the conditions thereof at any time prior to trial for an offense within the magistrate's jurisdiction to try. The magistrate possesses the jurisdiction to alter or amend bond for a General Sessions offense up until the time of indictment. Such authority includes the power to impose more restrictive conditions, if, in the discretion of the court, such are deemed necessary.

2. The proper mechanism for bringing the defendant back before the bonding magistrate for such purpose is the bench warrant, issued upon probable cause that a condition of bond has been violated or that such bond is in need of altering or amendment. The issuance of a bench warrant may be based upon hearsay information and may issue in that same way and pursuant to the same procedure as an arrest warrant.

3. Such bond may be altered or amended pursuant to Section 17-15-50 after notice and before the bonding magistrate.

4. The requirements of due process are met by the issuance of a bench warrant upon probable cause and a timely bond hearing before amendment or alteration of the bond, but after the defendant has been brought back into custody.

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