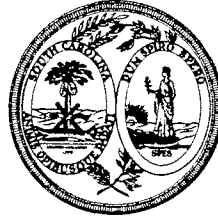


6242 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 19, 1997

Thomas E. Atkins, Deputy County Administrator
Darlington County
200 Camp Road
Darlington, South Carolina 29532

Re: Informal Opinion

Dear Mr. Atkins:

You have sought an opinion regarding the Darlington County Ordinance Summons. You state the following:

[a]s it stands, our method of addressing litter law violations is as follows: the Litter Control Officer investigates reported violations and/or witnesses the evidence of the violations. If sufficient evidence is collected to support a violation, the officer researches to find owner of the litter, and issues a summons identical to the one enclosed as an arrest document.

However, these arrests are being dismissed in Magistrate's Court as unlawful. According to the magistrate, in order for a summons to be a valid document, the actual violation must take place in the presence of and be witnessed by the arresting officer. If the violation is not actually witnessed by the officer, a warrant must be issued.

My question is this: is this summons legal to serve and use in magistrate's court, even though the violation did not occur in the presence of the officer, i.e., do my officers have to obtain a warrant and serve... it each and every time a violation of this type occurs?

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LAW / ANALYSIS

Your question was addressed by me in an Informal Opinion dated July 19, 1996 which I enclose for your review. There, I concluded that S.C. Code Ann. Sec. 56-7-80, part of the authorizing statute for the Uniform Ordinance Summons, makes it clear that the "uniform ordinance summons may not be used to perform a custodial arrest." The opinion thus distinguished a custodial arrest from a charge or citation, as used with the Ordinance Summons, and concluded that the "misdemeanor in the presence" rule applied only to custodial arrests, not to citations. Referenced was a recent Opinion of the Minnesota Attorney General, Op.No. 494a-1 (April 15, 1993), which concluded that "an officer may, upon probable cause, issue a uniform traffic ticket for a misdemeanor violation not occurring in the officer's presence where the officer does not subject the person charged to an arrest." Accordingly, I concluded:

[a]dmittedly, this issue has not yet been decided by our courts. For that reason, the question should be adjudicated by the court to obtain final resolution. However, the General Assembly had the opportunity to include the requirement in Section 56-7-80 that the ordinance summons must only be written for offenses which occur in the presence of the officer, as it had done previously with respect to Section 56-7-15 (uniform traffic ticket). Yet, it did not do so. Section 56-7-80 was enacted after Section 56-7-15 and must be read consistent therewith. I cannot imply the existence of such requirement when it is not contained therein. Accordingly, I would advise that, in my judgment, Section 56-7-80 does not contain a requirement that the uniform ordinance summons be written for an offense that occurs in the presence of the officer.

I continue to adhere to this conclusion that the Ordinance Summons need not be limited to offenses which occur in the officer's presence. Indeed, in the case of Gramenos v. Jewel Companies, 797 F.2d 432 (7th Cir.1986), the Court stated that the misdemeanor-in-the presence rule

... reflects a widely-held belief that misdemeanors should be prosecuted by citation unless officer has seen the crime committed, greatly reduces the chance of mistaken arrest. Those stopped for misdemeanors such as traffic offenses

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usually are cited and released on the spot after posting bond.
(emphasis added).

Id. at 440. This is additional authority for the proposition that where the statute prohibits custodial arrests and authorizes a citation, the "misdemeanor in the presence" rule is not applicable.

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