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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 22, 1997

Captain Rick Burgess
Cherokee Metro Narcotic Unit
Cherokee County Sheriff's Office
125 E. Baker Boulevard
Gaffney, South Carolina 29340

Re: Informal Opinion

Dear Captain Burgess:

You have asked for information concerning the following:

(a) Seizure of money at cockfighting. Is it permissible to seize monies of those attending cockfights and have that money forfeited either voluntarily or through court proceedings? (We have raided numerous cockfights in the Upstate area in the past and have found that those attending cockfights always have large sums on their persons for the purpose of betting on the cockfights. One individual usually holds the wagers and records those wagers on notepads.)

(b) Gambling money seized and voluntarily forfeited ... Can monies that have been seized from raids on illegal gambling and voluntarily forfeited by those arrested be assigned to the arresting agency by the signature of a Circuit Judge?

(c) Distribution of drugs with proximity of schools, etc. We are unable to get our Solicitor's Office to prosecute

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Request Letter.

> proximity charges that we make. Our resident Circuit Judge ruled in 1993 that charging a defendant with distribution of a controlled substance within proximity of a school, public playground, etc. comes under the double jeopardy rule. Also, our Solicitor's Office says that "Proximity" statutes can be completely suspended. I read it as saying that mandatory sentencing applies when crack cocaine is involved. Give us some clarification on this statute, 44-53-445.

Law / Analysis

S.C. Code Ann. Sec. 16-19-80 provides as follows:

> [a]ll and every sum or sums of money staked, betted or pending on the event of any such game or games as aforesaid are hereby declared to be forfeited.

This provision was interpreted in State v. Petty, 270 S.C. 206, 241 S.E.2d 561 (1978). There, pursuant to a search warrant, AFT and SLED agents searched the residence of the appellant. Found was gambling paraphernalia, as well as checks and cash. The lower court concluded that the currency and cash was forfeited to the State because it was money "staked, betted or pending" within the meaning of Section 16-19-80. The Supreme Court upheld the ruling of the Circuit Court, describing the proceeding as follows:

> [a]n action for forfeiture of property is civil in nature. $3,265.28 In U.S. Currency v. District of Columbia, D.C. App., 249 A.2d 516 (1969); 36 Am.Jur.2d Forfeitures and Penalties, § 17 s. 17 (1968). It is an in rem proceeding against the property itself. U.S. v. Three Thousand Two Hundred Thirty-Six Dollars, 167 F.Supp. 495 (D. Alaska 1958); 36 Am.Jur.2d, supra. Being civil in nature, it is only necessary that the State prove its case by a preponderance of the evidence. $3,265.28 In U.S. Currency v. District of Columbia, supra. In a civil action at law, on appeal of a case tried without a jury, this Court's scope of review is limited to a determination of whether there is evidence which reasonably supports the challenged findings of the judge ... .

241 S.E.2d at 562. Thus, the Court concluded:

> [f]rom the evidence it is reasonable to conclude that the appellant was conducting a substantial gambling operation from his residence. Given the scale of this operation as evidenced by the variety of quantity of gambling devices found in various locations in the appellant's residence and their close proximity to the large sums of money, it is not unreasonable to infer that the substantial and unexplained amounts of money seized were an integral part of or derived from these gambling activities.

Cockfighting is, of course, proscribed by Section 16-17-650 which states that

> [i]t shall be a misdemeanor for any person to engage in or be present at cockfighting in this State and any person found guilty shall be fined not exceeding one hundred dollars or imprisoned for not exceeding thirty days. (emphasis added).

I have located several cases in other jurisdictions which have upheld the forfeiture of various property seized as part of the betting operations at a cockfight. See, U.S. v. Real Property, Titled In the Names of Godfrey Soon Bong Kong and Darrell Lee, ___ F.3d ____, 1997 WL 393084 (9th Cir. 19997); In The Matter of Property Seized From Ernie Edward Aronson, 440 N.W.2d 394 (Iowa 1989). The entity (state, county or municipality) seeking to forfeit the property, be it proceeds, paraphernalia or whatever, must prove by a preponderance of the evidence that "the object seized must be 'an integral part of' or 'fruit of' a gambling operation. Petty, supra.

In my view if the money or property seized at a cockfight can be shown to be an "integral part of" or the "fruits of gambling" it is subject to seizure and forfeiture pursuant to Section 16-19-80. I would suggest that you consult with your County Attorney regarding any civil forfeiture action to be brought on behalf of the county and in the name of the county for forfeiture of property which is related to a gambling operation. The distribution of such proceeds is governed by Section 14-1-205 et seq. as recently amended by At No. 141 of 1997.

You have also asked what distinction there is between property disposed of pursuant to court-ordered forfeiture proceedings and property voluntarily forfeited by consent agreement. This issue is addressed in Op. Atty. Gen., Op. No. 89-42 (April 10, 1989) where we commented upon this same situation with respect to drug forfeitures. There, we stated:

> Your third question sought a distinction between the use of property obtained pursuant to court ordered forfeiture proceedings and property obtained by the consent of the owners. Section 530(a) provides that "[a]ny forfeiture may be affected by consent order approved by the court without filing or serving pleadings or notices provided that all owners and other persons with interest in the property [are] entitled to notice under this section, except lienholders and agencies, consent to the forfeiture." Though there is no specific forfeiture proceeding in these instances, the property is still obtained pursuant to the forfeiture Act. Therefore, the law regulation forfeiture proceeds is applicable to property obtained pursuant to a consent forfeiture order. In other words, the local law enforcement agency must treat property obtained pursuant to a consent order just as if it had been obtained in a contested forfeiture proceeding.

I would also call your attention to the case of Moore v. Timmerman, 276 S.C. 104, 276 S.E.2d 290 (1981). In that instance, two persons were arrested and charged with night hunting of deer in violation of § 50-11-20. Two rifles, a shotgun and truck were seized from the defendants pursuant to their arrest. Subsequent to conviction, the rifles and shotguns were sold at public auction pursuant to statute. The defendants contended that their property had been taken without due process in that they received no notice of the forfeiture of any opportunity to be heard prior to sale.

The statute involved in Moore was similar to the type of statute contained in Section 16-19-80. It [§ 50-11-2090] declared forfeited to the State "[e]very vehicle, boat, animal and firearm used in the hunting of deer at night" and permitted any peace officer to confiscate such property. The Supreme Court concluded, based upon the statute, that the forfeiture and sale was legal. The Court's reasoning was based upon the fact that the defendants were first convicted of night hunting prior to the forfeiture and thus the criminal proceeding gave the defendants sufficient notice and opportunity to be heard. In addition, the Court upheld the trial judge's conclusion that the criminal proceeding was insufficient with respect to innocent property owners. Concluded the Court,

> Section 50-11-2090 is a penal statute and as such is subject to strict construction. Commercial Credit Corporation v. Webb, 245 S.C. 53, 138 S.E.2d 647 (1964). The section cannot be construed alone, however, but must be read in the context of the game protection chapter of which it is a part.

Forfeiture results from the hunting of deer at night. But Section 50-11-2090, alone, contains no method for determining whether the night hunting has, in fact, occurred. It is therefore clear that Section 50-11-2090 must be construed specifically in relation with Sections 50-11-20 and 50-11-25 which make night hunting unlawful and provide sanctions for violation of the law. Section 50-11-2090 adds to the general sanctions that of forfeiture whenever the arrestee is convicted for the night hunting of deer.

In an analagous situation in Shipman v. Dupre, 222 S.C. 475, 73 S.E.2d 716 (1952), we held that confiscation of commercial fishing equipment as a punishment additional to other statutorily provided for penalties did not violate due process where the confiscation was contingent upon a prior conviction for operating without a license. In the Shipman case, the statute at issue, Section 3379, Code of Laws of South Carolina (1942) (now Section 50-17-410), made the prior conviction an explicit requirement. The same requirement here, while not made explicit, is clearly implicit upon a reasonable reading of the statutes. We therefore find that Moore and Preston Powell were in no way deprived of a due process opportunity to be heard under these circumstances.

Since the legislature has elected to make forfeiture a punishment contingent upon a criminal conviction for night hunting, it is clear that only the seized property belonging to the criminal defendants is subject to forfeiture. This result must follow because the statutes provide only the criminal defendants with notice and an opportunity to be heard.

The result we reach is compelled by the nature of the statutes before us. In fact, property used in the commission of crimes and which is therefore otherwise subject to forfeiture is not necessarily protected merely because it is owned by an innocent third party. Calero-Toledo v. Pearson Yacht Leasing Company, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452, petition for rehearing denied, 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed.2d 1148 (1974); United States v. One 1975 Mercedes 280 S, 590 F.2d 196 (6th Cir. 1978); United

States v. Marathon Pipe Line Company, 589 F.2d 1305 (7th Cir. 1978); United States v. One 1973 Pace Arrow M 300 Motor Home, 379 F.Supp. 223 (D.Cal. 1974); 36 Am.Jur.2d Forfeitures and Penalties s 18, p. 624. It is clear however that if all property seized is intended to be subject to forfeiture, then the parties claiming an interest in the property must be afforded the basic due process notice and hearing rights. 36 Am.Jur.2d Forfeitures and Penalties s 36, at 634-635. As stated at 37 C.J.S. Forfeitures s 5 b, at pp. 11-12:

> "Notice must be given to the owner of the property seized and those claiming an interest therein of the proceedings; there must be either personal notice to the owner, or at least a proceeding in rem with notice by publication; and a hearing must be had at which they can be heard, except in a few cases of necessity. A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial officers without inquiry before a court or an opportunity of being heard in his own defense is a violation of the elementary principles of law and the constitution."

A party with an interest in the seized property must be given the opportunity to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law.

Thus, the Court has approved forfeiture following conviction of a criminal statute without an additional forfeiture proceeding so long as notice and an opportunity to be heard is given. The Court concluded that the criminal proceeding is sufficient notice to criminal defendants but that innocent third parties must be given notice and an opportunity to be heard.

Based upon the foregoing, it is probably the better course to forfeit property used in gambling or gambling upon cockfights in a separate civil proceeding in order to insure notice and an opportunity to be heard to every person. Those forfeitures by consent could thus be approved by the court which would provide an additional validating authority. The Moore case could be used as guidance where only those who have been convicted

have had their property forfeited; however, all legal challenges could be dealt with if a civil forfeiture is initiated. In my judgment, this is the better course and, again, you may wish to consult with the county attorney or Solicitor in this regard.

As to your third question, Section 44-53-445 prohibits distribution of a controlled substance within the proximity of a school. Such Section states that

> (A) It is a separate criminal offense for a person to distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school ... . (emphasis added).

A violation of this offense is made a felony pursuant to Subsection B. Section 44-53-445 makes it a "separate criminal offense" to convict under this statute.

In State v. Brown, 319 S.C. 400, 461 S.E.2d 828 (1995), the Court of Appeals implicitly approved a charge for possession with intent to distribute crack cocaine and possession with intent to distribute within proximity of a school. The defendant was convicted for possession with intent to distribute, distribution and school proximity charges on both. While the Court held that Double Jeopardy precluded conviction for distribution and the related school charge, because one charge merged with the other, the Court also approved the conviction for possession with intent to distribute and possession with intent to distribute in proximity to a school. The Court noted that "the trial court properly denied the motion for directed verdict of acquittal on the charge of possession with intent to distribute, and the related school proximity charge. (emphasis added). No Double Jeopardy argument appears to have been raised with respect to these charges, but it is clear that the Court upheld both convictions.

In Missouri v. Hunter, 459 U.S. 359, 365, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), the United States Supreme Court stated that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." There must be an intent by the Legislature "to provide cumulative punishment ... when they constitute a single act." Inasmuch as § 44-53-445 makes distribution or intent to distribute a "separate criminal offense," it is my opinion that a good argument can be made that conviction for distribution and distribution in proximity to a school do not constitute Double Jeopardy. Of course, on the question of what charges are to be made or whether these offenses are to be charged cumulatively, I would defer to the Solicitor who is in the

best position to know what charges to bring and who is aware of any contrary rulings by the Circuit Court in your Circuit.

With respect to suspension of sentences in terms of proximity to a school, again, the statute makes such a "separate criminal offense." Therefore, any violation of this statute would be most likely controlled by the language of Section 44-53-445 regardless of the type of drug involved. While it is true that many offenses involving crack, ice and crank are not suspendable, see § 44-53-375 (D), such language does not appear in § 44-53-445. Thus, again, I would defer to the Solicitor and to the sentencing judge in this regard.

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/an