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OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

September 15, 1998

The Honorable Llewellyn Hiott Hames
Magistrate, Lexington County District #2
108 Harbison Boulevard
Columbia, South Carolina 29212-2204

Re: Informal Opinion

Dear Judge Hames:

You note that a defendant pled guilty in Magistrate's Court as to the charge of possession of beer by a minor pursuant to S.C. Code Ann. 20-7-370. You reference § 22-5-910, as amended, which took effect on May 21, 1997, and allows expungements after three years. By way of background, you also state that

> [o]n July 15, 1998, the defendant's attorney requested me to sign an expungement order under the one-year time period basing his request on the fact that the conviction occurred prior to the time the three-year period became effective.
>
> Because a year had not passed after the defendant's guilty plea and before the date the three-year period became effective, I told the attorney I could not sign the expungement order, and that his client would have to maintain a clear record for three years. However, I agreed to look at any legal support the attorney could furnish for his position. The only legal support the attorney could furnish was a copy of a letter written September 12, 1997 by Lt. Joe Means with SLED for use in a case in the municipal court in Florence, in which Lt. Means stated that in his opinion a defendant needed to wait

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one year if the offense was committed prior to May 21, 1997.

Although the law is clear for offenses occurring after May 21, 1997, the expungement period for offenses occurring prior to the effective date is questionable. I could find no case law or attorney general's opinion on this. Therefore, I am asking for your opinion.

Law / Analysis

S.C. Code Ann. Sec. 22-5-910 provides in pertinent part as follows:

> [f]ollowing a first offense conviction in a magistrate's court or a municipal court, the defendant after three years from the date of the conviction may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction. However, this section does not apply to an offense involving the operation of a motor vehicle, to a violation of Title 50 or the regulations promulgated under it for which points are assessed, suspension provided for, or enhanced penalties for the subsequent offenses authorized, or to an offense contained in Chapter 25 of Title 16. If the defendant has had no other conviction during the three-year period following the first offense conviction in a magistrate's court or a municipal court, the circuit court may issue an order expunging the records. No person may have his records expunged under this section more than once. **A person may have his record expunged even though the conviction occurred prior to June 1, 1992.** (emphasis added).

In interpreting a statute, 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); Multi-Cinema v. South Carolina Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). The legislative intent must prevail if it can be reasonable discovered in the language used, which must be construed in the light of the intended purpose of the statutes. Gambrell v. Travelers Ins. Co., 280 S.C. 69, 310 S.E.2d 814 (1983).

The retrospective operation of a statute is not favored by the courts. Sutherland, Statutory Construction, § 41.04 (4th ed. 1986). Statutes are presumed to be prospective

in effect. U.S. Rubber Co. v. McManus, 211 S.C. 342, 349, 45 S.E.2d 335, 338 (1947). Accordingly our Supreme Court has frequently recognized that "[a] statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt." Am. Nat. Fire Ins. Co. v. Smith Grading and Paving, ___ S.C. ___, 454 S.E.2d 897 (1995).

The only exception to the rule of prospective operation is where the statute is remedial or procedural in nature. However, as our Court recognized in Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978), "[t]his exception for remedial or procedural statutes is generally considered inapplicable to a statute that supplies a legal remedy where formally there was none." The Court quoted Judge Cardoza in Jacobus v. Colgate, 217 N.Y. 235, 111 N.E. 837 (1916) as follows:

> [t]he general rule is that statutes are to be construed as prospective only. It takes a clear expression of the legislative purpose to justify a retroactive application. Changes of procedure i.e., of the form of remedies are said to constitute an exception, but that exception does not reach a case where before the statute there was no remedy whatever. To supply a remedy where previously there was none of any kind is to create a right of action. 111 N.E. at 838-839 (citations omitted).

245 S.E.2d at 125.

The Office has often noted in its opinions that only a circuit court possesses the authority to expunge a criminal record. Section 22-5-910 specifically so states. For example, in an Opinion dated September 23, 1991, we quoted from the South Carolina Bench Book for Magistrates and Municipal Court Judges, p. III-106 [now, p. 90] which states as follows:

> [a]n individual seeking to expunge criminal records information must petition the circuit court for an order of expungement and give the solicitor notice of the petition. Magistrates and municipal judges do not have the authority to order the expungement of any records. Only a circuit judge may order the destruction of any records.

With that issue in mind, I turn to your specific question: whether § 22-5-910 now requires a three year time period before criminal records may be expunged pursuant

thereto even though at the time the individual was convicted, a three year period was not required? The statute was amended in 1997, inserting two major changes. The General Assembly changed the period necessary for to wait before applying for expungement pursuant to the statute from one year to three. Secondly, the Legislature inserted the last sentence of the enactment's first paragraph: "A person may have his record expunged even though the conviction occurred prior to June 1, 1992." The apparent reason for the second change regarding convictions occurring "prior to June 1, 1992" was that, previously, there had been considerable doubt whether the Legislature had intended that persons convicted prior to the earlier version's effective date (June 1, 1992) would have qualified to have their records expunged because such had not been stated in the statute which became effective on June 1, 1992. In response to this ambiguity in this regard, it is evident that the Legislature decided to clarify that this expungement statute allowed expungement for those convicted prior to the statute's effective date.

Thus, the question is whether, by amending § 22-5-910 to make it clear that the statute was retroactive prior to June 1, 1992, in order to give everyone convicted prior to that time the right to expungement, it would also be reasonable to think that the Legislature intended to make the statute's now three-year waiting period equally retroactive to cover persons convicted prior to the statute's effective date of May 21, 1997? Put another way, did the Legislature intend to create dual standards for expungement, requiring all persons convicted after the amendment's effective date to wait three years for expungement, while others convicted prior thereto would have to wait only one year? Such a reading would also be inconsistent with the plain statutory language making the expungement law apply retroactively. In other words, the Legislature did not indicate in this statutory amendment that while it wished to make the law retroactive to June 1, 1992 when providing an expungement remedy, that it did not intend that persons convicted prior to the amendment's effective date would now have to wait three years before applying for expungement as others convicted after the amendment's effective date must do.

A statute must be interpreted in a common sense, logical manner. Hay v. S.C. Tax Commission, 273 S.C. 269, 255 S.E.2d 837 (1979). Thus, without any language to the contrary, it is difficult to perceive that the Legislature intended to make the statute retroactive to insure that all persons possessed the expungement remedy thereunder regardless of when convicted, but did not intend retroactivity in terms of the three year waiting period's applicability.

Decisions in other jurisdictions have concluded that the alteration of an expungement statute, including lengthening its waiting period, is procedural in nature, and is thus to be interpreted retroactively, regardless of the date of conviction. See, State v.

Burr, 696 A.2d 1114 (N.H. 1997); State v. Comeau, 697 A.2d 497 (N.H. 1997); State v. Hartup, 1998 WL 108142 (Ohio App. 8 Dist. 1998); State v. T.P.M., 460 A.2d 167 (N.J. 1983); State v. Link, 225 Mich. App. 211, 570 N.W.2d 297 (1997).

In the T.P.M. case, the defendant contended that he had a constitutional right to have an expungement statute which had been repealed applied to him. In rejecting this contention, the Court concluded that

> ... the Legislature had a right to overhaul the statutory expungement scheme in 1979 and make the new law retroactive in the interest of uniformity and efficiency without treading on the Due Process or Ex Post Facto Clauses of the Federal Constitution.

460 A.2d at 169. In Link, under the law existing at the time defendant committed his offense, he would be entitled to expungement of second and third degree sexual conduct where a five-year conviction-free period had elapsed before the application for expungement was filed. Subsequently, the right to expungement was removed for third-degree sexual conduct. The Court disagreed that the defendant was entitled to the "right" provided at the time of conviction. Noting that an exception to the general rule of prospective application of statutes was the one that "'statutes that operate in furtherance of a remedy already existing and that neither create new rights or destroy rights already existing are held to operate retrospectively unless a different intention is clear.'" Thus, the Court concluded that

> ... the expungement statute is remedial and that it does not create new or destroy exiting rights. Under the terms of the expungement statute (both before and after the April 1, 1997, amendment), the setting aside of a conviction "is a privilege and conditional and is not a right." ... Furthermore, this Court has construed similar statutes ... which operate to close criminal records under certain circumstances to be remedial ... .
>
> We are also instructed by State v. Heaton, 108 App.3d 38, 669 N.E.2d 885 (1995), where the defendant was convicted of "gross sexual imposition on a three-year-old" in 1988 and moved for expungement of his conviction in November 1994. On December 9, 1994, the Ohio expungement statute was amended (similar to our Michigan

statute), in such a manner that the defendant's sexual crime could no longer be expunged. The defendant there argued that the trial court erred in denying his application for expungement. In affirming the decision of the trial court, the appellate court said:

> Appellant contends that the right of expungement provided to him in 1988 and at the time of his conviction, and which was still available to him at the time he filed his application for expungement in November 1994, was a substantive right which vested before the enactment of amended R.C. 2953.36. We disagree. ... [W]e find that appellant never had a substantive vested right ... .
>
> The expungement statute is a post-conviction relief proceeding which grants a limited number of convicted persons the privilege of having the record of their conviction sealed, should the court in its discretion so decide. Expungement is a matter of privilege, never of right.

570 N.W.2d at 299. The Link Court went on to find that "the amendment of the expungement statute is remedial" and therefore should apply retroactively. Id. at 300.

And in the Hartup, case, the Ohio appellate court vacated the lower court's conclusion that application of the amended expungement statute [three year waiting period] to a defendant who had pled guilty at the time the old expungement law [one year waiting period] had been in place would jeopardize the knowingness and voluntariness of such plea. In reversing the lower court, the Court of Appeals declared:

> [t]he problem with the court's conclusion is that the right to apply for the privilege of having the record of conviction expunged did not exist at the time the defendant filed his motion to seal the record of his conviction. R.C. 2953.32 requires an offender to wait three years from the date the court terminates probation before filing a motion to seal the record of conviction. Until that date three years hence arrives,

> an offender had no "right," indeed no basis, for filing a petition to seal the record of conviction. In the simplest terms, no right to apply for expungement exists until all preconditions of R.C. 2953.32 are met. Hence, the effective date of R.C. 2953.36 predated the expiration of defendant's probation, so no possible right to petition for expungement existed on that date.

Finally, in Comeau and Burr, similar conclusions were reached. The Court rejected arguments that retroactive application to a person who filed for expungement after the effective date of the amended statute (but who was convicted before then) did not violate the Ex Post Facto Clause nor unconstitutionally infringe upon his guilty plea. The amended statute applicable in these cases actually specified that a person convicted under the earlier law had the option of applying for expungement under the old law, but if an application was filed after the effective date of the new law, such law must be the only applicable one. The Court, in both those cases, concluded that no constitutional rights were infringed in applying the amended statute to those convicted before its enactment but who did not seek relief through expungement until after the amendment went into effect.

Accordingly, based upon the foregoing authorities, it is my opinion that the three-year period set forth in § 22-5-910 is applicable to those convicted prior to the statute's effective date. The statute, as amended, expressly specified that the law is applicable to those convicted prior to June 1, 1992. It would make little or no sense to differentiate between the statute's applicability for purposes of the right to expungement, but not in respect to the waiting period to qualify for such expungement. Moreover, such a reading would treat persons differently, depending upon when convicted. Such a distinction could create potential constitutional problems of unequal treatment.[1]

I must advise, however, that **ultimately** this question is one for the circuit courts of this State to decide. As mentioned above, the circuit court is given exclusive jurisdiction to order expungement. Thus, while my opinion is that the three year waiting period applies uniformly, only the circuit court can resolve such issues definitively.

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[1] Unless the statute is interpreted uniformly, there could be at least three possible categories created: persons convicted prior to June 1, 1992, persons convicted prior to May 21, 1997 and those convicted after May 21, 1997. Surely, the General Assembly did not intend this.

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