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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

September 2, 1998

Sergeant Richard F. Moser
City of Charleston
Police Department
180 Lockwood Boulevard
Charleston, South Carolina 29403

Re: Informal Opinion

Dear Sergeant Moser:

You are seeking an Opinion "regarding the proper procedure on completing arrest warrants concerning 16-1-57." As you note, § 16-1-57 relates to the manner of sentencing an individual convicted for a third time for an offense "for which the term of imprisonment is contingent upon the value of the property involved." Such individual must be sentenced as a Class E felony offender. You further state that "[t]here is some confusion and debate among police officers and magistrates on the correct format." It is your opinion that the correct procedure is to charge the defendant with the underlying substantive offense committed. For example, it is your view that, with respect to Third Offense Shoplifting (§ 16-13-110), the individual is charged with that substantive offense and "then write in the affidavit pursuant to 16-1-57, the defendant is charged with a Class E felony." On the other hand, you indicate that "[t]hose that disagree with me state that you charge the defendant with 16-1-57."

Law / Analysis

I agree with your reasoning and conclusion. Section 16-1-57 does not appear to constitute a substantive offense, but instead is a sentencing statute. Such provision simply prescribes the punishment for those convicted of "a third or subsequent offense" where the offense is one "for which the term of imprisonment is contingent upon the value of the property involved ...."

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Request Letter

In State v. Lewis, 325 S.C. 324, 478 S.E.2d 696 (1996), the defendant appealed his sentence of three years imprisonment for shoplifting, contending his sentence was in excess of the statutory maximum penalty. Lewis had been convicted of shoplifting at least twice previously. He did not object to the three year sentence, but later argued on appeal that it exceeded the statutory maximum for shoplifting.

However, the State contended that Lewis was properly sentenced pursuant to § 16-1-57, as a Class E felony offender. A person convicted of a Class E felony could be sentenced to a term of imprisonment of up to 10 years. The Court concluded that the sentence was proper as prescribed by § 16-1-57. Advised the Court,

> [l]egislative intent must control in statutory interpretation if it reasonably can be discovered from the language of the statute. The statutory language must be construed in light of the intended purpose of the statute. See Dumas v. InfoSafe Corp., 320 S.C. 188, 463 S.E.2d 641 (Ct. App. 1995) (citing Focus on Beaufort County v. Beaufort County, 318 S.C. 227, 456 S.E.2d 910 (1995). Here, the "three strikes and you're out" statute is clear and unambiguous. Shoplifting falls within the class of property crimes in which "the term of imprisonment is contingent upon the value of the property involved." See S.C. Code Ann. § 16-1-57, 16-13-110(B) (Supp. 1995). Lewis' four prior shoplifting ocnvicitons place him within the rule in § 16-1-57. Pursuant to § 16-1-20(A)(5), Lewis could have been sentenced to a maximum of ten years as a Class E felon. Thus, Lewis's three year sentence does not exceed the statutory maximum penalty for his crime.

Id. at 327. Thus, the Court concluded in Lewis that the substantive crime involved was shoplifting, but that the appropriate sentencing statute was § 16-1-57.

Courts in other jurisdictions have consistently held that enhanced sentencing provisions -- where a defendant is charged and convicted under one substantive criminal law provision, but sentenced by virtue of a different enhanced sentencing provision -- are constitutional. See, U.S. v. Brewer, 853 F.2d 1319 (6th Cir. 1987); Vega v. State, 893 P.2d 107 (Colo. 1995); Nichols v. McCormick, 929 F.2d 507 (9th Cir. 1991); State v. Jones, 214 Kan. 568, 521 P.2d 278 (1974). Typically, these courts have viewed sentence enhancement provisions as not creating a separate offense and thus are used for sentencing purposes only. In U.S. v. Brewer, supra, for example, the Court found that language similar to that contained in § 16-1-57 "tracks the language of numerous other federal

criminal statutes which have been regarded as enhancers rather than separate offenses." Id. at 1323. And in Nichols, the Court upheld the Montana statute against a due process attack, noting that

> [o]ur decision in LaMere v. Risley, 827 F.2d 622 (9th Cir. 1987) controls this case ... . We upheld the constitutionality of the Montana statute against an identical due process attack. ... We said that the statute provides only for enhancement of a penalty once the defendant has been found guilty of an underlying offense. It does not create a separate substantive offense which must be changed in the indictment. ... Nichols' due process claim must fail because it is indistinguishable from the claim construed in LaMere.

Based upon the foregoing, therefore, it would appear that you are correct. I believe it would be appropriate to charge the individual with the **underlying offense** rather than the sentence enhancement provision. One principal purpose of the charging document is so that the accused will be fully informed of the nature and cause of the accusation. State v. Jeffcoat, 54 S.C. 196, 32 S.E. 298; State v. Green, 269 S.C. 657, 239 S.E.2d 485 (1977). Thus, I believe the procedure which you have outlined in your letter would be appropriate to follow as you have indicated.

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