

The State of South Carolina



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May 3, 1988

The Honorable Landon M. Louthian, Jr.  
Chief Judge, Municipal Court of Hanahan  
1255 Yeamans Hall Road  
P. O. Box 9278  
Hanahan, South Carolina 29410

Dear Judge Louthian:

In a letter to this Office you referenced that based upon rulings of the South Carolina Supreme Court in State v. Carter, 291 S.C. 385, 353 S.E.2d 875 (1987) and State v. Grampus, 288 S.C. 395, 343 S.E.2d 26 (1986) some individuals are of the opinion that any traffic-related offense related to an additional charge of driving under the influence must be nolle prossed in order not to invoke a double jeopardy defense in the driving under the influence case. In Grampus, the Court adopted the double jeopardy rationale set forth by the United States Supreme Court in Illinois v. Vitale, 447 U.S. 410 (1980), a case which dealt with the question of whether the double jeopardy clause of the Fifth Amendment would prohibit the prosecution of a defendant for involuntary manslaughter where there had been a previous conviction for failing to reduce speed. Both offenses arose out of the same incident. The Court, while not absolutely determining whether the referenced offenses were the same for double jeopardy purposes, stated

(i)f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.

447 U.S. at 421.

In Grampus, the State Supreme court determined that a felony driving under the influence prosecution violated a defendant's right to be free from double jeopardy in circumstances

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where the prosecution was based on the same act, i.e. improper crossing of the center line, which served as the basis for a defendant's prior conviction in a magistrate's court for the offense of improper use of lanes (crossing of the center line). <sup>1/</sup> Subsequently in Carter, the State Supreme Court held that a defendant's double jeopardy claim prohibited his being prosecuted for reckless homicide following a conviction for driving under the influence in municipal court where the State established the reckless act necessary to prove reckless homicide on the same facts adjudicated in the prior driving under the influence conviction. The Court noted that in the reckless homicide prosecution the State introduced evidence that the defendant was arrested for driving under the influence and presented the results of the defendant's breathalyzer test. The jury was charged with the law regarding driving under the influence and the presumptions under the implied consent law. As stated by the Court, "(i)n our view the trial on the reckless homicide was, in effect, a retrial of the DUI offense." 291 S.C. at 388.

The decision by the United States Supreme Court in Vitale offered further clarification of the Court's double jeopardy ruling in Blockburger v. United States, 284 U.S. 299 (1932) which was restated by the Court in Brown v. Ohio, 432 U.S. 161 (1977). In Blockburger and Brown the Court determined the test for determining whether offenses are the same for purposes of prohibiting successive prosecutions. As stated by the Court

(t)he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304. Consistent with such, if separate statutory violations require proof of a fact that the other does not, the

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<sup>1/</sup> As noted by the Court in Grampus, the offense of felony DUI requires the proof of three separate elements: (1) an individual drives a vehicle while under the influence of alcohol and/or drugs; (2) the individual does an act which is forbidden by law or neglects some duty imposed by law; (3) such act or neglect is the proximate cause of great bodily injury or death to another person. The Court determined that the improper lane change violation "... was critical to establish an 'act forbidden by law.'" 288 S.C. at 397.

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referenced test is satisfied. However, as stated, in Vitale the Court went beyond the Blockburger test and concluded that in considering a double jeopardy issue, a determination should be made of the evidence the State would rely upon in its prosecution of the second offense. If the evidence is the same, a defendant would have a substantial claim of double jeopardy even if the two offenses are not the same under the Blockburger test.

You specifically questioned whether Grampus and Carter require that a charge of driving with defective tail lights (Section 56-5-4510) or an expired inspection sticker (Section 56-5-5350) be nolle prossed in order not to invoke a double jeopardy defense in a driving under the influence case. Also, pursuant to Section 22-3-740 of the Code

(w)henever a person be accused of committing an act which is susceptible of being designated as several different offenses the magistrate upon the trial of the person shall be required to elect which charge to prefer and a conviction or an acquittal upon such elected charge shall be a complete bar to further prosecution for such alleged act.

As to the examples cited by you, it does not appear that Section 22-7-340 or potential double jeopardy claims would prohibit prosecutions for driving with defective tail lights or an expired inspection sticker and driving under the influence arising out of the same incident. As stated by the South Carolina Supreme Court in State v. Sheppard, 248 S.C. 464, 150 S.E.2d 916 (1966) "the act of operating a motor vehicle with impaired faculties is the gravamen of the offense ... (of driving under the influence) ...." The acts of driving with a defective tail light or an expired inspection sticker are not essential elements to an offense of driving under the influence. Therefore, Grampus and Carter would not prohibit the prosecution of cases for driving with a defective tail light or an expired inspection sticker in order to prosecute a driving under the influence case arising out of the same incident. Moreover, if the act of driving with a defective tail light or expired inspection sticker was the basis for the initial traffic stop, such could be introduced at a subsequent driving under the influence trial. However, I have been advised that the State Highway Patrol has a policy against citing for such separate offenses arising out of the same incident. Therefore in the situations addressed by you, typically, a state trooper would only make an arrest for the driving under the influence offense.

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You also asked whether the act of driving with a defective tail light or inspection sticker is evidence of "impaired driving." As stated above, the offense of driving under the influence has been defined as the act of operating a motor vehicle with "impaired faculties" as a result of being under the influence of intoxicating liquors or drugs. "Impaired driving" is not crucial to the offense of driving under the influence.


If there is anything further, please advise.

Sincerely,

  
Charles H. Richardson  
Assistant Attorney General

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REVIEWED AND APPROVED BY:

  
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