The State of South Carolina

Office of the Attorney General

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Dear George:

In a letter to this Office you raised several questions regarding the construction of Act No. 84 of 1987 which relates to penalties for operating a motor vehicle while the operator's license to drive is cancelled, suspended, or revoked. I apologize for the delay in responding to your questions. However, Act No. 84, as you are aware, has a number of ambiguous provisions and there is no clear legislative history available to assist in construing the Act. The conclusions which will be set forth in this opinion are first impressions by this Office as to how such legislation should be construed. Because of the ambiguities in the legislation, the General Assembly may wish to consider clarifying some provisions. I would only further note that in preparing our responses we have been in communication with the Department of Highways and Public Transportation and have not been informed that such agency would interpret the legislation differently from what is set forth in this opinion.

You first asked whether magistrates and municipal judges have jurisdiction over the charge of first offense driving under suspension when the license was suspended pursuant to Section 56-5-2990 of the Code. Section 56-5-2990 provides for the suspension of a driver's license following a conviction for driving under the influence. Pursuant to Act No. 84, in such circumstances the offender must be punished for a first offense by a sentence of a term of imprisonment of not less than ten nor more than thirty days, no part of which may be suspended.

Section 22-3-550 of the Code provides that magistrates have jurisdiction of all offenses subject to the penalty of either a fine not exceeding two hundred dollars or imprisonment not exceeding thirty days "... and may impose any sentence within those limits, singly or in the alternative." (emphasis added.) Pursuant to Section 14-25-45 of the Code, municipal judges have the same subject matter jurisdiction. In prior opinions of this Office we have advised that pursuant to Section 22-3-550, a magistrate, and therefore a municipal judge, may impose a sentence of a term of imprisonment without offering the alternative of a fine to a defendant convicted of an offense in his court. See: Ops. Atty. Gen. dated May 11, 1983; February 2, 1981. Consistent with such, in the opinion of this Office, magistrates and municipal judges would have jurisdiction over the charge of first offense driving under suspension when the suspension of the driver's license was pursuant to the provisions of Section 56-5-2990 inasmuch as the sentence for such a charge is a term of imprisonment of not less than ten nor more than thirty days.

In your second question you questioned whether, assuming reasonableness of the bond, magistrates and municipal judges are limited to the amount of bond which may be set in a case where there is a charge of driving under suspension when the license was suspended pursuant to Section 56-5-2990 inasmuch as there is no monetary fine for such offense. As to cases within the jurisdiction of a magistrate, generally, pursuant to Section 22-5-530 of the Code, in lieu of entering into a recognizance, a defendant is authorized to deposit with a magistrate a sum of money which does not exceed the maximum fine for the offense with which the defendant is charged. However, obviously, such provision would be inapplicable to the offense referenced by you inasmuch as no fine is provided.

Generally, a magistrate or municipal judge is prohibited from setting bail at a level which is higher than what is necessary to assure the presence of an accused at trial. See: Stack v. Boyle, 342 U.S. 1 (1951); State v. Taylor, 255 S.C. 268, 178 S.E.2d 244 (1970). Therefore, while magistrates and municipal judges are not specifically limited to the amount of bond which may be set in the circumstances referenced by you, the amount must be reasonable. In determining an amount, reference may be made to the provisions of Section 17-15-30 of the Code which detail factors to be considered in determining the conditions of release on bond.

You next asked what estreatment procedures should be followed upon conviction after the trial in absence of a defendant charged with driving under suspension when the suspension followed a conviction for driving under the influence and a cash bond was set. In these circumstances, prior to being released, presumably the defendant would execute a bail bond form even though a cash bond, as opposed to a surety bond, was set.

Generally, the exclusive jurisdiction to estreat a bond conditioned on an appearance in court is in the court of general sessions. See: Section 17-15-170 of the Code; State v. Bailey, 248 S.C. 438, 151 S.E.2d 87 (1966). Therefore, in the situation referenced by you, inasmuch as there would be noncompliance with the terms of the bond where the defendant failed to appear and was tried in his absence, the bond would be estreated in the court of general sessions.

In your next question you asked whether any portion of a sentence may be suspended by a trial judge for first or second offense driving under suspension in circumstances where the suspension is not for a driving under the influence conviction. Pursuant to the provision of Act No. 84 to be codified as Section 56-1-460

> (a)ny person who drives a motor vehicle on any public highway of this State when his license to drive is canceled, suspended, or revoked must, upon conviction, be fined two hundred dollars or imprisoned for thirty days for the first violation, for the second violation fined five hundred dollars and imprisoned for sixty consecutive days, and for the third and subsequent violation imprisoned for not less than ninety days nor more than six months, no portion of which may be suspended by the trial judge.

You indicated that the proviso prohibiting suspension referenced above is unclear as to whether it is applicable to first, second, and third offenses or whether such suspension provision is solely applicable to third offenses.

Earlier drafts of the legislation indicate that previously consideration was given to a provision which would have prohibited the suspension of the sentence imposed on a defendant convicted of a second violation of Section 56-1-460. However, I was

informed by individuals familiar with the history of this legislation that a consensus was reached that the provision prohibiting the suspension of a sentence should be limited to third and subsequent offense violations. Moreover, support for such a conclusion may be found by reviewing the provision providing the sentences for first, second, and third and subsequent offenses of driving while under suspension pursuant to Section 56-5-2990. Prior to setting forth the penalties for the offense, the provision states that in such situations "... he must be punished as follows and no part of the minimum sentence may be suspended ...." (emphasis added.) Thus, the General Assembly made it quite clear that no part of the minimum sentences could be suspended for any offense of driving under suspension when the license was suspended pursuant to Section 56-5-2990.

Referencing such, it appears that the suspension provision of Section 56-1-460 noted above is solely applicable to third and subsequent offenses. Of course, legislative clarification should be sought so as to remove any ambiguity.

You additionally asked whether the punishment provisions for driving under suspension apply if the suspension was of an out-of-state license. Section 56-1-460 defines the offense as "(a)ny person who drives a motor vehicle on any public highway of this State when his license to drive is canceled, suspended or revoked ...."

Pursuant to Section 56-1-30 of the Code a nonresident who possesses a valid driver's license issued by his home state is exempt from obtaining a license in this State. Instead of issuing an additional license to nonresidents, such persons are afforded the "privilege" of operating a motor vehicle in this State. See: Section 56-1-10 (10) (defines "nonresident's operating privilege" as "... the privilege conferred upon a nonresident by the laws of this State pertaining to the operation by such person of a motor vehicle, or the use of a vehicle owned by such person, in this State") Such "privilege" however may be suspended by this State. See: Section 56-1-320 of the Code.

Section 56-1-340 provides that upon receipt by the Department of the record of the conviction in this State of a traffic offense by a nonresident, a copy of such record may be transferred to the motor vehicle administrator of the state where the person who was convicted is a resident. Such provision implies

that the conviction is being forwarded to the other state for its information and possible action, such as possible suspension of the driver's license issued by that state to the individual who was convicted in this State of a traffic offense. Moreover, pursuant to Section 56-1-320 of the Code, this State is authorized to suspend or revoke the license of a resident of this State upon receipt of notice of that person's conviction in another state of an offense which, if committed in South Carolina, would be grounds for suspension or revocation of a South Carolina driver's license. Therefore, such provisions indicate an intent to make it the responsibility of the state which issues a driver's license to take action to suspend or revoke any license that state issues. See: 7A Am.Jur.2d, Automobile and Highway Traffic, Section 107 (1980); Opinion of the Attorney General of Kansas dated January 18, 1985; Act No. 72 of 1987 (the Driver License Compact).

Referencing the above, in the opinion of this Office, if a resident of this State or of any other state has had his driver's license canceled, suspended, or revoked he would be in violation of Section 56-1-460 if that individual drives a motor vehicle in this State during the period his license is canceled, suspended or revoked. Therefore, in specific response to your question, the punishment provisions for driving under suspension do apply if the suspension was of an out-of-state license.

As to the question regarding whether the punishment provisions for driving under suspension, where a driver's license has been suspended following a conviction for driving under the influence, apply in circumstances where the suspension was for an out-of-state conviction for driving under the influence, it appears that as drafted, such provisions would be inapplicable to such out-of-state convictions. Such provision states in part "(i)f the license of the person convicted was suspended pursuant to the provisions of Section 56-5-2990, ..." (emphasis added) Section 56-5-2990 is this State's provision mandating the suspension of any individual convicted of Section 56-5-2930 of the Code, which prohibits driving under the influence in this State. Therefore, inasmuch as such provision makes specific reference to Section 56-5-2990, it appears that it would be solely applicable to suspensions in this State for driving under the influence in violation of Section 56-5-2930. This Office does not construe provisions in Act No. 72 of 1987, which authorizes the Department to enter into a Driver License Compact with other states, as changing our conclusion.

If there is anything further, please advise.

Sincerely,

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Assistant Attorney General

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REVIEWED AND APPROVED BY:

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