



ALAN WILSON
ATTORNEY GENERAL

June 2, 2014

The Honorable Karl B. Allen
Senator, District No. 7
PO Box 142
Columbia, SC 29202

Dear Senator Allen:

This Office received your request for an opinion regarding the definition of “first offense” in section 22-5-910 of the South Carolina Code, *i.e.* the adult expungement statute. Specifically, you are asking whether “first offense” means “first in time” or whether it means a type of crime. The example you provided during our telephone conversation was that a person was convicted of first offense fraudulent check¹ in 2003 and of first offense criminal domestic violence in 2006. If both of these convictions are first offenses of the type of crime and if neither of the convictions have been expunged, can the criminal domestic violence conviction be expunged instead of the fraudulent check conviction (provided the person had not had another conviction in the five year period following the criminal domestic violence conviction)?

LAW/ANALYSIS:

Section 22-5-910 provides as follows:

(A) Following a first offense conviction for a crime carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars, or both, the defendant after three years from the date of the conviction, including a conviction in magistrates or general sessions court, 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:

- (1) an offense involving the operation of a motor vehicle;
- (2) a violation of Title 50 or the regulations promulgated pursuant to Title 50 for which points are assessed, suspension provided for, or enhanced penalties for subsequent offenses are authorized; or

¹ The person is not asking for an expungement under section 34-11-90, *i.e.* the fraudulent check expungement statute.

(3) an offense contained in Chapter 25, Title 16, except first offense criminal domestic violence as contained in Section 16-25-20, which may be expunged five years from the date of the conviction.

(B) If the defendant has had no other conviction during the three-year period, or during the five-year period as provided in subsection (A)(3), following the first offense conviction for a crime carrying a penalty of not more than thirty days imprisonment or a fine of not more than one thousand dollars, or both, including a conviction in magistrates or general sessions 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.

(C) After the expungement, the South Carolina Law Enforcement Division is required to keep a nonpublic record of the offense and the date of the expungement to ensure that no person takes advantage of the rights of this section more than once. This nonpublic record is not subject to release pursuant to Section 34-11-95, the Freedom of Information Act, or any other provision of law except to those authorized law or court officials who need to know this information in order to prevent the rights afforded by this section from being taken advantage of more than once.

(D) As used in this section, 'conviction' includes a guilty plea, a plea of nolo contendere, or the forfeiting of bail.

S.C. Code Ann. § 22-5-910 (1976 Code, as amended) (emphasis added).

In a past opinion, we indicated that "first offense" meant "first in time." In Op. S.C. Atty. Gen., January 21, 2004, (2004 WL 235412), we opined:

You next asked whether Title 56 offenses such as driving under the influence or driving under suspension are to be included as first offense convictions, since such are excluded from expungement pursuant to Section 22-5-910, so as to preclude expungements for subsequent magistrate court convictions. You indicated in our telephone conversation that you were asking whether if there was a Title 56 motor vehicle offense first, followed by another offense not within that category, such as simple assault, would the Title 56 offense count as a first offense magistrate's court conviction.

Section 22-5-910 is arguably ambiguous as to the situation addressed by you. As specified by Section 22-5-910, a "conviction" encompasses all convictions, including guilty pleas, pleas of nolo contendere or the forfeiture of bail. In my opinion, a Title 56 conviction, if it preceded

another conviction, such as for simple assault, could be considered a first offense conviction so as to preclude the expungement of the simple assault conviction since the simple assault conviction would no longer be a first offense conviction. There is no intent expressed in the legislation that the General Assembly did not intend for all convictions to be considered for purposes of whether an offense is a first offense conviction. In my opinion, the language “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 subsequent offenses authorized, or to an offense contained in Chapter 25 of Title 16, except first offense criminal domestic violence as contained in Section 16-25-20. ...” is to be construed solely to prohibit those convictions from ever being expunged. The language does not prohibit those convictions from otherwise being considered, such as in the situation addressed by you. To exempt a motor vehicle conviction from being considered as a first offense so as to allow expungement of a subsequent offense would also lead to a criminal domestic violence conviction, except first offense criminal domestic violence, from being considered as a first offense.

Pursuant to our prior opinion, it appears that “first offense” relates to “first in time” and not to type of crime. Considering your example, we believe a court would find that the criminal domestic violence conviction could not be expunged because it was a second offense in time.

This appears to be supported by the law and persuasive authority in other jurisdictions. For purposes of expungement of criminal records, the Rhode Island Legislature defines “first offender” as “a person who has been convicted of a felony offense or a misdemeanor offense, and who has not been previously convicted of or placed on probation for a felony or a misdemeanor and against whom there is no criminal proceeding pending in any court.” R.I. Gen. Laws. 1956, § 12-1.3-1.

In an opinion, the Mississippi Attorney General analyzed section 99-19-71² of the Mississippi code of laws and determined that the term “first offender” “means an individual who has no prior non-traffic convictions of any offense.” Op. Miss. Atty. Gen., Op. No. 2003-0566, October 24, 2003, (2003 WL 22536091).

² Section 99-19-71(A) of the Mississippi Code provides:

Any person who has been convicted of a misdemeanor, excluding a conviction for a traffic violation, and who is a first offender, may petition the justice, county, circuit or municipal court in which the conviction was had for an order to expunge any such conviction from all public records.

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CONCLUSION:

In conclusion, we believe that a court would find that "first offense" in section 22-5-910 means "first in time" rather than a type of crime.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General