The State of South Carolina

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Dear Mr. Talley:

In a letter to this Office, you referenced § 44-29-60 of the 1976 Code which declares venereal disease to be dangerous to the public health. You further referenced § 44-29-100 which provides that "[a]ll persons who shall be confined or imprisoned in any State, county or city prison of this State may be examined and treated for venereal disease by the health authorities or their deputies...." You state that "[r]ecently, health officials requested the magistrates' assistance in implementing procedures for examining individuals charged with prostitution or solicitation of prostitution and the magistrates question their authority in this area." The following questions are raised by your letter:

> "(1) Can health authorities require an individual to submit to an examination over his objection?
>
> (2) Can health authorities examine an individual held in a county jail or detention center awaiting a bond hearing?
>
> (3) Can a magistrate delay a bond hearing for a period of twenty-four hours to allow the health authorities time to examine an individual?"

We would advise that each of your questions is most probably answered in the affirmative and that the policy which you have referenced would most probably be held to be constitutional by a court. We will first address the governing statutory provisions

and then discuss the constitutionality of their application to the situation which you have referenced.

As you have pointed out, the General Assembly has, by enactment of § 44-29-60, declared that venereal disease is "contagious, infectious, communicable and dangerous to the public health." Accordingly, Section 44-29-70 requires any physician or other person who makes a diagnosis of or treats a case of venereal disease to "make a report of such case to the health authorities...." Moreover, § 44-29-90 authorizes state, county and municipal health officers, when it is necessary in their judgment to protect the public health, to "make examination of persons infected or suspected of being infected with venereal disease, require persons infected with venereal disease to report for treatment until cured or to submit to treatment provided at public expense and isolate persons infected or reasonably suspected of being infected with venereal diseases." In addition, as you have also noted, § 44-29-100 provides as follows:

> All persons who shall be confined or imprisoned in any State, county or city prison of this State may be examined and treated for venereal disease by the health authorities or their deputies. The State, county and municipal boards of health may take over such portion of any State, county or city prison as may be necessary for a board of health hospital wherein all persons who shall have been confined or imprisoned and who are suffering with venereal disease at the time of the expiration of their terms of imprisonment shall be isolated and treated at public expense until cured, or in lieu of such isolation, such person may, in the discretion of the board of health, be required to report for treatment to a licensed physician or submit to treatment provided at public expense as provided in § 44-29-90.

Based upon the foregoing statutory provisions, it is clear, that the answer to your first question must be in the affirmative. Section 44-29-90 mandates that public health officers make examination of persons infected or suspected of being infected with venereal disease where necessary to protect the public health. The section further "requires" persons infected to report for treatment. Moreover, Section 44-29-100 states that

"all persons" who are confined or imprisoned may be examined and treated for venereal disease; no exceptions are made for those who do not consent to examination. Reading both sections 44-29-90 and 100 in pari materia, it is apparent that the statutes provide authority to compel examination. See also, 72 C.J.S., Prisons, § 11; 60 Am.Jur.2d, Penal and Correctional Institutions, § 28.

Moreover, it is well recognized that statutes enacted to preserve the public health should be construed in a manner to carry out their purpose, 39A C.J.S., Health and Environment, § 5, and so as not to restrict their scope. See, Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782 (1939). Clearly, the purpose of the foregoing statutory provisions is to control venereal disease and the potential sources of its origin. See, Reynolds v. McNichols, 488 F.2d 1379, 1382 (10th Cir. 1973). If these statutes were thus construed as not authorizing health officials to compel examination for venereal disease, the legislature's purpose would be clearly defeated. See, Ex Parte Fowler, 184 P.2d 815, 818 (1947). Equally defeating would be a construction that did not authorize compulsory examination of those confined or imprisoned in State or local jails or detention centers. Both the language and intent of the statutes do not warrant such a reading.

As to your second question, whether health authorities can examine an individual held in a county jail or detention center awaiting a bond hearing, again, the answer is in the affirmative. Section 44-29-100 specifically provides that "[a]ll persons who shall be confined or imprisoned in any State, county or city prison of this State may be examined and treated for venereal disease by the health authorities or their deputies." (emphasis added). The statute makes no distinction on the basis of the pendency of a bail hearing. The use of words "confined or imprisoned" clearly indicates that the statutes were intended to be applicable to pretrial detainees later released on bail, as well as all other prisoners. Thus, whether or not an individual is awaiting a bond hearing is not a relevant consideration under the statute.

As to your third question, whether a magistrate can delay a bond hearing for a period of twenty-four hours to allow the health authorities time to examine an individual, we are aware of no statute which would prohibit such a short-term delay. To our knowledge, no statute explicitly requires a magistrate to hold a bond hearing within twenty-four hours. See, § 17-15-10 et seq. This Office has heretofore concluded that bond must

be set within a reasonable period of time, but that there exists no "right to immediate release except upon proper court order." (emphasis added). Op. Atty. Gen., June 19, 1974. As noted above, § 44-29-100 obviously contemplates the examination of pretrial detainees who may ultimately be released on bond, as well as other prisoners. Here, the Chief Magistrate of Richland County, after consultation with DHEC, has determined that such examination cannot, as a practical matter, be accomplished unless the bail hearing is delayed twenty-four hours. Pursuant to a similar statute, it has been determined that a court, as well as health officials, may insure that the examination for venereal disease is carried out. Ex Parte Fowler, 184 P.2d 814, 818 (Okl. 1947). In our judgment, the governing statutes would permit such a short-term delay.

CONSTITUTIONALITY OF PROCEDURE

Implicit in your question also is the issue of whether the referenced procedure would be constitutional. Based upon the decisions which we have located, we believe a court would probably conclude that the procedure is constitutional. We emphasize, of course, that our comments herein are directed only to the policy which you have described and that only a court could make a final determination of constitutionality. For that reason, a declaratory judgment may still be deemed advisable by the interested parties for the sake of certainty. With these caveats in mind, we will review the applicable authorities.

It is generally recognized that

> ... the preservation of the public health is one of the prime duties resting upon the sovereign power of the State. The health of the people has long been recognized as one of the greatest social and economic blessings. The enactment and enforcement of necessary and appropriate health laws and regulations is a legitimate exercise of the police power which is inherent in the State and which it cannot surrender.

Varholy v. Sweat, 15 So.2d 267, 269 (Fla. 1943). Moreover, our own Supreme Court has previously stated that "[s]tatutes and ordinances requiring the removal or destruction of property or the isolation of infected persons, when necessary for the protection of public health, do not violate the constitutional

guaranty of the enjoyment of liberty and property...." Kirk v. Wyman, 83 S.C. 372, 65 S.E. 387, 389 (1909). The Court added that the

> ... individual has no more right to the freedom of spreading disease by carrying contagion on his person than he has to produce disease by maintaining his property in a noisome condition.

Id.

Probably the most recent and perhaps the leading case upholding a procedure similar to that referenced in your question is Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973). There plaintiff was arrested and charged with solicitation and prostitution. Thereafter, pursuant to local ordinance, she was given the choice of being detained in jail for forty-eight hours during which time she would be examined for venereal disease and treated, if necessary, or simply taking penicillin without examination. If she chose the latter alternative, she would be eligible for immediate release. Based upon this procedure, plaintiff brought an action pursuant to 42 U.S.C. §§ 1983 and 1985, alleging that the procedure violated her rights under the Fourth and Fourteenth Amendments to the United States Constitution.

The Court rejected the variety of constitutional attacks which the plaintiff mounted against the procedures. 1/ Construing the ordinance, the Court discerned that its "principal thrust"

1/ Among the constitutional arguments advanced by the plaintiff were the following:

> "... (1) The ordinance authorizes involuntary detention, without bond, involuntary examination and involuntary treatment, all in violation of her Fourth Amendment right to be secure in her person; (2) The ordinance does not spell out adequate guidelines as to the class of persons who can be compelled to submit to examination and treatment; (3) The current practice whereby a person, though initially detained in jail, is nonetheless eligible

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was "aimed at bringing under control the source of communicable venereal disease." Continuing, the Court stated:

> To that end, the city authorities are empowered to examine and treat those reasonably suspected of having an infectious venereal disease. It is not illogical or unreasonable, and on the contrary it is reasonable, to suspect that known prostitutes are a prime source of infectious venereal disease. Prostitution and venereal disease are no strangers.

488 F.2d at 1382. The Court further observed that

> [i]nvoluntary detention, for a limited period of time, of a person reasonably suspected of having a venereal disease for the purpose of permitting an examination of the person thus detained to determine the presence of a venereal disease and providing further for the treatment of such disease, if present, has been upheld by numerous state courts when challenged on a wide variety of constitutional grounds as a valid exercise of the police power designed to protect the public health. Cases involving state statutes or municipal ordinances similar to, though not necessarily the same

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1/ Continued from Page 5

> for immediate release if he or she submits to the injection of penicillin, even though there be no examination to indicate the presence of gonorrhea, results in an unconstitutional coercion of the person thus detained whereby one submits to an invasion of her right to be secure in her person in exchange for immediate release ... and (5) The ordinance is applied only to females and not to males."

> as, the ordinance here in question, are: Welch v. Shepherd, 165 Kan. 394, 196 P.2d 235 (1948); Ex Parte Fowler, 85 Okl. Cr. 64, 184 P.2d 814 (1947); People v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1944); Varholy v. Sweat, 153 Fla. 571, 15 So.2d 267 (1943); City of Little Rock v. Smith, 204 Ark. 692, 163 S.W.2d 705 (1942); and Ex Parte Arata, 52 Cal. App. 380, 198 P. 814 (1921).

Id. Moreover, concluded the Court, the procedure was also in accord with those cases upholding compulsory smallpox vaccinations and the quarantining of persons having infectious diseases. See, Jacobson v. Massachusetts, 197 U.S. 11, 49 L.Ed. 643 (1905) and Compagnie Francaise v. St. Bd. of Health. 186 U.S. 380, 46 L.Ed. 1209 (1902). Thus, the Court held, the ordinance "authorizing limited detention in jail without bond for the purpose of examination and treatment for a venereal disease by virtue of the fact that she has been arrested and charged with solicitation and prostitution is a valid exercise of the police power." 488 F.2d at 1383.

> It would seem to follow that the milder provisions of the ordinance providing for a walk-in order of one reasonably suspected of having a venereal disease for the purpose of involuntary examination and treatment are also valid under the police power, and we so hold.

Id.

As stated in Reynolds, numerous other decisions have reached similar conclusions with regard to statutes or ordinances like the referenced policy. In Ex Parte Fowler, supra, the Court upheld a similar statute, concluding that it was reasonable to conclude that one charged with prostitution might fall within the category of those infected with venereal disease. The Court further cautioned, however against undue delay in administering the examination, by stating:

> If a person is lawfully arrested for one of the crimes mentioned in the statute and the officers mentioned are of the opinion that an examination be given ... the suspected person is entitled as a matter of right to

> have the test given as speedily as is possible so that her quarantine will not be longer than is absolutely necessary to determine whether there is an infectious disease.

184 P.2d at 820. Varholy v. Sweat, supra addressed in detail the question of the unconstitutional denial of bail; construing a bail provision similar to our own Article I, § 15, 2/ the Court held such provision did not preclude the examination and restraint of one suspected of having venereal disease. Such, concluded the Court "would render quarantine laws and regulations nugatory and of no avail." 15 So.2d at 270. See also, 8 Am.Jur.2d, Bail and Recognizance, § 26; 127 A.L.R. 421; Op. Atty. Gen., April 2, 1985.

And in People v. Strautz, supra, it was stated that "[c]ertainly one who is charged with soliciting to prostitution ... is one who may first be suspected of carrying such dreadful affliction." 54 N.E.2d at 444. The same conclusion was reached in Ex Parte Arata, supra. In Ex Parte Lewis, 42 S.W.2d 21 (Mo. 1931), the Court in upholding an ordinance similar to the referenced procedure stated that such ordinance was "enacted to protect and promote the health of the people, and is therefore fairly referable to the police power of the city, and for that reason is not violative of the constitutional provisions invoked." 42 S.W.2d at 22. See also, Ex Parte Caselli, 62 Mont. 201, 204 P. 364 (1922); State ex rel. McBride v. Sup. Court. 174 P. 973 (Wash. 1918).

Also analogous are the cases upholding the delay of a bond hearing for one charged with driving under the influence. In McClanahan v. State, 112 N.E.2d 575, 577 (Ind. 1953), the Court stated that to release on bond one who is still intoxicated "would permit him to commit another misdemeanor by being found in a public place unlawfully in a state of intoxication." And

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2/ Article I, § 15 provides in pertinent part that "[a]ll persons shall, before conviction be bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, giving due weight to the evidence and to the nature and circumstances of the event."

in Evans v. Mun. Ct., 207 Cal. App.2d 633, 24 Cal. Reptr. 633 (1962), the Court stated:

> the appellant's condition of inebriation allowed the officer discretion in refusing to release appellant immediately on bail if, in his official capacity, to do so would endanger the appellant or society.... An intoxicated person need not be released on bail eo instante.... He has no basis for justifiable complaint that his rights have been transgressed if he is released as soon as it reasonably appears that he is no longer under the influence of intoxicating liquor.

See also, Vacendak v. State, 302 N.E.2d 779, 781 (Ind. 1973) ["Due process has been served" if bond hearing occurs within a reasonable time after arrest.]; State v. Pillow, 234 N.C. 146, 66 S.E.2d 657 (1951) [temporary delay in admitting to bail for one charged with DUI not unconstitutional]; Op. Atty. Gen., June 19, 1974.

Finally, the Attorney General of Michigan has determined that a statutory provision authorizing the detention and physical examination of a person arrested and charged with prostitution for a maximum of five days to determine the presence of venereal disease is not unconstitutional. The Attorney General cited many of the decisions referenced herein, relying greatly upon Reynolds v. McNichols, supra. Noting also that the Fourth Amendment requires that there be probable cause for the issuance of an arrest warrant, or for a warrantless arrest on a charge of prostitution, the Attorney General concluded that

> ... the existence of probable cause to believe an individual has engaged in acts of prostitution, combined with the need to protect the public health from a disease reasonably associated with such alleged criminal activity, furnish[es] the basis for upholding the constitutionality of the statute.

Mich. Op. Atty. Gen., December 13, 1978.

In summary, based upon the foregoing authorities, we believe that a court would uphold the referenced procedure as

constitutional. The policy and procedures as described in your letter would probably be sustained as a reasonable exercise of the State's police power, designed to protect the public health and safety. This conclusion of validity would appear to be particularly warranted in view of the fact that you state that the present policy treats equally all charged with prostitution, both male and female, and also that the period of anticipated delay, 24 hours, is so brief.

Of course, it should be noted that the delay or detention for examination should not be employed as punishment or harassment, see, Bell v. Wolfish, 441 U.S. 520 (1979), nor should the period of delay be more than is reasonably necessary. See, Ex Parte Fowler, supra. We note also that herein no comment is made or conclusion reached regarding the procedures required by due process for the civil commitment or quarantine of one afflicted with venereal disease and in need of treatment. See, O'Connor v. Donaldson, 422 U.S. 563 (1975); Compagnie Francaise v. State Bd. of Health, supra. We simply conclude here that the referenced policy of a 24 hour delay in release for examination and treatment of those in custody on charges of prostitution would probably be held to be constitutional by a court, pursuant to the referenced authorities.

If I can be of further assistance, please let me know. With kindest regards, I remain

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

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