ALAN WILSON
ATTORNEY GENERAL

July 14, 2014

The Honorable Steve Loftis
Greenville County Sheriff's Office
4 McGee Street
Greenville, South Carolina 29601

Dear Sheriff Loftis:

Thank you for your letter dated March 26, 2014, requesting an opinion of this Office concerning the following questions:

> [a]bsent articulable reasonable suspicion to order the urine screen when the Datamaster results are .05% or less, is it lawfully within the discretion to release the suspect from custody and not prosecute the DUI on the designated ticket without involvement of a magistrate?
>
> Can the arresting officer defer the DUI charge on the designated ticket and proceed to amend it and charge another primary traffic violation which in part when observed by the arresting officer, supported the probable cause to originally arrest the subject for DUI?

Your questions stem from what you seem to consider as somewhat of a "catch-22" where a motorist is placed under arrest for driving under the influence prior to administering a breath test based upon probable cause but is conclusively presumed not to be under the influence of alcohol after testing reveals the arrestee's alcohol concentration is .05% or lower. When an officer has no reasonable suspicion that the motorist is under the influence of drugs other than alcohol or a combination of both drugs and alcohol, we interpret your questions to be whether the officer can nolle pros the charge for driving under the influence, issue another traffic violation that supported the traffic stop, and release, or "unarrest," the subject from custody without a magistrate's involvement.

While we believe the answers to your questions should, in part, be answered affirmatively, it is our opinion that an officer should use caution when exercising these authorities. We provide this warning because it seems the factual scenario presented in your letter, where a person is lawfully arrested, pursuant to probable cause, for driving under the influence, and despite a breathalyzer reading of .05% or lower, the officer lacks reasonable suspicion to believe the arrestee is under the influence of drugs or a combination of alcohol and drugs, is likely rare. While an officer *must* be able to articulate the factors leading him to believe that the arrestee was under the influence of drugs to meet the reasonable suspicion standard, if probable cause existed to legally arrest the motorist for driving under the influence and a breathalyzer reading of .05% or lower contradicts this finding, it is presumable that reasonable suspicion, a lower standard than probable cause, would exist to believe that the motorist was under the influence of drugs or a combination of drugs and alcohol. Of course, we reiterate that whether or not reasonable suspicion that the arrestee is under the influence of drugs exists depends entirely on the specific facts of

the case at hand, and in no way are we suggesting that a lawful arrest for driving under the influence automatically warrants reasonable suspicion that the arrestee is under the influence of drugs. We merely use logic in deducting that if not alcohol, some other intoxicant or drug may be the cause for the factors supporting the probable cause that justified the lawful arrest for driving under the influence.

Law / Analysis

As you note in your correspondence, S.C. Code Ann. § 56-5-2950 (Supp. 2013), the "implied-consent" statute, governs the procedure law enforcement officers must follow when a person is arrested for driving under the influence.[1] In relevant part, this section states:

> [a] breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. . . .
>
> If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing. . . .
>
> [I]f the alcohol concentration was at [the time of the test] five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol.

S.C. Code Ann. § 56-5-2950(A), (G)(1) (Supp. 2013).

For purposes of this opinion, we assume that your questions arise in the context of a law enforcement officer who makes a lawful warrantless arrest of a motorist for driving under the influence. To answer your questions, we will discuss what constitutes a lawful warrantless arrest for driving under the influence; the statutory requirements for administering a breath test and drug screen and the implications of those results; when the offense of driving under the influence is officially charged on the arrestee; who has authority to nolle pros and issue an alternative charge for the underlying traffic violation subsequent to the driving under the influence offense being formally charged; and when it is necessary to "unarrest" or release an arrestee from custody after a lawful warrantless arrest has been effectuated.

1. Lawful Warrantless Arrest

a. Probable Cause Standard

Our courts have addressed what constitutes a lawful warrantless arrest in the context of driving under the influence on numerous occasions. See, e.g., S.C. Dep't of Motor Vehicles v. McCarson, 391 S.C. 136, 705 S.E.2d 425 (2011); Lapp v. S.C. Dep't of Motor Vehicles, 387 S.C. 500, 692 S.E.2d 565 (Ct. App. 2010); State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005). In McCarson the supreme court stated that the dispositive question in determining the lawfulness of an arrest is whether there was probable cause to make the arrest. McCarson, 391 S.C. at 145, 705 S.E.2d at 430 (citing Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992)). Such a determination "depends upon the totality of the circumstances surrounding the information at the officer's disposal." Id. at 146, 705 S.E.2d at 430 (citing State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006)). Furthermore, "probable cause does not import absolute certainty;" rather, it exists "when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." State v. Arnold, 319 S.C. 256,

[1] S.C. Code Ann. § 56-5-2950 has been amended by Act No. 158, 2014 S.C. Acts ___, effective Oct. 1, 2014 (to be codified at S.C. Code Ann. § 56-5-2950). The portions of the statute cited above, that are currently in effect, will not be changed by the amendment.

260, 460 S.E.2d 403, 405 (Ct. App. 1995) (citations omitted); State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006) (citations omitted); see also Jackson v. City of Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005) (holding that "probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime" (citing State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996)).

In determining whether probable cause exists, "all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received." Lapp v. S.C. Dep't of Motor Vehicles, 387 S.C. 500, 505, 692 S.E.2d 565, 568 (Ct. App. 2010) (citing State v. Roper, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979)). It has been determined that an officer may lawfully arrest for a misdemeanor not committed within his presence where the facts and circumstances observed by the officer give him probable cause to believe that a crime has been freshly committed. State v. Clark, 277 S.C. 333, 334, 287 S.E.2d 143, 144 (1982); State v. Martin, 275 S.C. 141, 145-46, 268 S.E.2d 105, 107 (1980); Summersell v. S.C. Dep't of Pub. Safety, 334 S.C. 357, 367, 513 S.E.2d 619, 625 (Ct. App. 1999), vacated in part on other grounds, 337 S.C. 19, 522 S.E.2d 144 (1999); Fradella v. Town of Mount Pleasant, 325 S.C. 469, 475, 482 S.E.2d 53, 56 (Ct. App. 1997)). In sum, whether a lawful warrantless arrest is made turns on the facts within the officer's knowledge that would lead a reasonable person to believe a person is guilty of a crime.

b. Conclusive Presumption

After a determination is made that probable cause exists to make an arrest, driving under the influence is unique in that it is an "implied-consent offense." See 60 C.J.S. Motor Vehicles § 395 (2014). In other words, pursuant to statute, a motorist arrested for driving under the influence implicitly consents to a chemical test of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs. See S.C. Code Ann. § 56-5-2950(A) (Supp. 2013). The Legislature has provided that: "[a] breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs." Id. In addition, the Legislature has set guidelines as to the presumptions and statutory inferences of impairment from alcohol based upon the results of the breath test. See S.C. Code Ann. § 56-5-2950(G).

While a person has the right to refuse testing pursuant to S.C. Code Ann. § 56-5-2950(B)(1) (Supp. 2013), if a breath or other chemical test is administered, the person under arrest may be "conclusively presumed" not to be under the influence of *alcohol* based upon a reading of .05% or lower of the breath test administered pursuant to the arrest. See S.C. Code Ann. § 56-5-2950(G)(1) (Supp. 2013). However, the results of the breath test in no way relate to possible intoxication by drugs other than alcohol. In addition, despite enactment of these presumptions, the Legislature provides a caveat at the end of the S.C. Code Ann. § 56-5-2950(G) stating that: "[t]he provisions of this section [referencing § 56-5-2950(G)(1)-(3)] must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of them." S.C. Code Ann. § 56-5-2950(G) (Supp. 2013).

It has been said that "[a] conclusive presumption requires that, once a basic fact is established, the presumed fact is conclusively and unconditionally assumed." Alex Sanders & John S. Nichols, Trial Handbook for South Carolina Lawyers § 12:3 (2013). The following Georgetown Law Review excerpt helps to distinguish between conclusive presumptions and rebuttable presumptions:

> [a] conclusive presumption requires the jury to infer the elemental fact upon proof of the predicate facts and thereafter removes the presumed fact from the case. Technically, a

> conclusive presumption is not a presumption, but rather an irrebuttable direction by the court to find an element. The jury may not reject the presumption, and the defendant cannot dissuade the jury from drawing the conclusion. . . . A rebuttable presumption requires the jury to find the presumed element unless the defendant introduces enough evidence to persuade the jury that the inference is unwarranted. Therefore, while a conclusive presumption is irrebuttable, a rebuttable presumption can be defeated by presenting sufficient evidence to persuade the jury to reject the presumption.

Madeleine C. Timin, Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1989-90, 79 Geo. L.J. 1076, 1085, n.2137 (1991). In the case of State v. Weaver, 265 S.C. 130, 139, 217 S.E.2d 31, 35-36 (1975), our supreme court upheld a charge read to the jury which made reference to the difference between a conclusive and rebuttable presumption. The trial judge charged the jury as follows:

> [i]f the reading is .10 or more, the law says that it is presumed that the Defendant is under the influence of intoxicating liquors. That presumption is not a conclusive presumption, but is a rebuttable presumption. You, the Jury, are entitled to take into consideration any other facts in the case in addition to this reading on the breathalyzer machine and the presumption raised by that breathalyzer machine in deciding ultimately as to whether or not the Defendant is innocent or guilty of the charge, leaving the burden of proof upon the State as I have previously explained to you.[2]

Id. While the distinction between conclusive and rebuttable presumptions has been recognized, the South Carolina Bench Book for Summary Court Judges clarifies that breathalyzer results are to be treated as evidentiary facts when prosecuting a charge of driving under the influence in the suggested jury charge pertaining to the "statutory inferences" set forth in S.C. Code Ann. § 56-5-2950(G)(1)-(3). The suggested jury charge reads as follows:

> [t]he results of any breath analysis test were submitted to you for your consideration. You are not required to accept or believe the results of the test. Any inference created by law which I have just read to you is an inference only. This inference is simply an *evidentiary fact* to be taken into consideration by you, the jury, along with other evidence in the case, and to be given such weight as the jury determines it should receive when considered with all of the evidence in the case.

South Carolina Bench Book for Summary Court Judges, § (G)(3), available at http://www.judicial.state.sc.us/summaryCourtBenchBook/HTML/TrafficG.htm (emphasis added). This suggested charge is consistent with the precautionary language included in S.C. Code Ann. § 56-5-2950(G), quoted above, stating that the provisions listed in Subsections (G)(1)-(G)(3) are not to be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of them. While the results of a breath test appear to be evidentiary, regardless, a prosecutor should consider the conclusive presumption that one is not presumed to be under the influence of alcohol upon a breath test reading of .05% or below in determining whether or not to go forward with prosecution. However, of particular importance, the conclusive presumption that one is not under the influence of alcohol as set forth in S.C. Code Ann. § 56-5-2950(G)(1) pertains only to alcohol and not to other drugs. In a former opinion of this Office we stated that:

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[2] The court applied former statutes pertaining to driving under the influence, S.C. Code §§ 46-343 and 46-344, that have since been amended.

> [i]f [the] defendant has five one hundredths (.05 percent) of one percent or less [of alcohol in his or her blood], it shall be conclusively presumed that he was not under the influence of intoxicating liquor. This means that a defendant in this category was not under the influence of intoxicating liquor as a matter of law and therefore should not be charged as such. Remember the breathalyzer not only shows when a defendant is guilty but also shows when he is innocent. The test does not indicate the presence o[r] lack of presence of drugs, etc. and therefore the presumptions are limited only to alcohol.

Op. S.C. Att'y Gen., 1970 WL 12908 (Feb. 10, 1970). Thus, despite a conclusive presumption that a motorist is not under the influence of alcohol based on breath test results, if, as discussed below, the officer has a reasonable suspicion that the arrestee is under the influence of drugs other than alcohol he may order a urine screen to test for the presence of drugs.

c. Reasonable Suspicion

The "reasonable suspicion" standard, as applied in Terry v. Ohio, 392 U.S. 1, 30-31, 88 S.Ct. 1868, 1884-85 (1968), is used to determine whether an officer can lengthen detention beyond that related to an initial stop when it is suspected that illegal activity is afoot and conduct a limited search for weapons if he reasonably concludes the person he is dealing with is armed and presently dangerous. However, by using the term "reasonable suspicion" in S.C. Code Ann. § 56-5-2950(A) (Supp. 2013) we must assume the Legislature intended for the usual meaning of the term to apply. See Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994) (holding that "[w]here the legislature elects not to define a term in a statute, the courts will interpret the term in accord with its usual and customary meaning" (citations omitted)). We will therefore apply the customary reasonable suspicion analysis in determining whether a law enforcement officer can order a urine sample to test for drugs.

When determining whether reasonable suspicion exists, the trial court must consider the totality of the circumstances. State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007) (citing State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006)). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause. Id. (citing State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000)). "Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations or everyday life on which reasonable prudent persons, not legal technicians, act.'" State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). "Reasonableness is measured in objective terms by examining the totality of the circumstances. As a result, the nature of the reasonableness inquiry is highly fact-specific." Id. at 501, 706 S.E.2d at 516 (quoting State v. Tindall, 388 S.C. 518, 527, 698 S.E.2d 203, 208 (2010)).

By providing that "[i]f the officer has *reasonable suspicion* that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order than a urine sample be taken for testing" in S.C. Code Ann. § 56-5-2950(A) (Supp. 2013) (emphasis added), it follows that the officer must have more than a general hunch of drug usage but less than is required for probable cause. While each inquiry is entirely dependent upon the facts at hand, and the officer must be able to articulate the factors linking the arrestee's impairment to drugs, we caution officers that the discrepancy in the probable cause initiating the arrest for driving under the influence and the low alcohol content reading of a breath test could be the result of impairment from drug usage. As was stated in Sponar v. S.C. Dep't of Pub. Safety, 361 S.C. 35, 41, 603 S.E.2d 412, 416 (Ct. App. 2004), cert. granted (Nov.17, 2005):

> even if one is conclusively presumed to not be under the influence of *alcohol* if his or her breath test registers .05% or lower, "[s]uch a result does not rule out the possibility that the individual is under the influence of some other intoxicant. Indeed, an individual may fail field sobriety tests and/or exhibit signs of being under the influence of an intoxicant regardless of whether the individual does not have enough alcohol in his or her system to register as being under the influence of alcohol.

Thus, if the arresting officer has more than a general "hunch" that the motorist is under the influence of drugs, ordering a urine test for screening will provide a concrete determination of whether or not it is appropriate for the officer to nolle pros the charge for driving under the influence and release the arrestee from custody.

2. Service of a Uniform Traffic Ticket

Prior to discussing an arresting officer's authority to nolle pros a charge for driving under the influence and to issue a separate charge for the underlying traffic violation, we pause to suggest cancellation of judicial process can be avoided if the arresting officer postpones service of the uniform traffic ticket until after completion of the breath test, and in some cases, the drug screen. In City of Goose Creek v. Brady, 288 S.C. 20, 21, 339 S.E.2d 509, 510 (1986), it was held that since an "action" for driving under the influence was "commenced by the issuance of a UTT [uniform traffic ticket], an arrest warrant was not required under S.C. Code § 22-3-710 (1976)" (citing State v. Biehl, 271 S.C. 201, 246 S.E.2d 859 (1978)). The court further concluded that the issuance of the uniform traffic ticket can act as the formal charging document against the subject:

> [t]he UTT issued to appellant informed him that he was charged with driving under the influence in violation of S.C. Code § 56-5-2930 (1976). It further informed him of the time, date and place the offense allegedly occurred. In our opinion, this was more than sufficient to adequately inform appellant of the charge against him.

Id. at 21, 339 S.E.2d at 510 (citing U.S. Constitution, Amendments V, XIV; S.C. Constitution, Article I, § 14). S.C. Code Ann. § 56-7-10(C) (Supp. 2013) also states that, "*[t]he service* of the uniform traffic ticket shall vest all traffic, recorders', and magistrates' courts with jurisdiction to hear and to dispose of the charge for which the ticket was issued and served" (emphasis added). Thus, as we have stated in former opinions of this Office, we believe that if a law enforcement officer refrains from serving the uniform traffic ticket on the lawfully arrested motorist until after the breath test is administered, the problems inherent in subsequently nullifying judicial process could be avoided. See Ops. S.C. Att'y Gen., 1996 WL 755775 (Nov. 7, 1996); 1978 WL 34909 (May 15, 1978).

We have also opined that it is not necessary that a uniform traffic ticket for driving under the influence be served on an arrestee prior to administration of a breath test. We clarified that the choice of the word "charged" when used in a previous opinion to indicate that a defendant must be *charged* with driving under the influence prior to administration of the breath test was merely used in a generic sense. Op. S.C. Att'y Gen., 1974 WL 27487 (Oct. 15, 1974). Specifically, we noted that "[t]he word 'charged' in such previous opinion was used in the broad, generic sense, rather than in the technical sense that there must be a formal written charge of DUI [uniform traffic ticket or arrest warrant] before such test could lawfully be required" (second alteration in original). Id. at *1. We therefore concluded that "a defendant who has been arrested for DUI may be required by the arresting officer to submit to a breathalyzer test . . . even through no uniform traffic ticket or arrest warrant has yet been issued." Id. If the arresting officer has reasonable suspicion that the motorist is under the influence of drugs, we also believe it would be appropriate to delay service of the uniform traffic ticket until completion of the drug screen. This practice would prevent the need to nolle pros the driving under the influence charge and issue a separate charge

for the underlying traffic violation.

As we previously cautioned, such a practice is at all times subject to the individual department's procedures and is merely a suggestion submitted for your consideration. Ops. S.C. Att'y Gen., 1996 WL 755775 (Nov. 7, 1996); 1978 WL 34909 (May 15, 1978). Furthermore, as you noted in your correspondence, the arresting officer is required to enter "arrest information" into the Datamaster at the time of the arrest. Specifically, among other information, the uniform traffic ticket number must be entered into the machine before the breath test can be conducted. South Carolina Law Enforcement Division Forensic Services Laboratory, Implied Consent Operations Manual, Version 1.120113 § 8.12.5(K)(6)(m), available at http://www.sled.sc.gov/ImpliedConsent.aspx?MenuID=ImpliedConsent. For this reason, we also caution that administrative procedures would presumably need to be implemented to ensure that any records of the uniform traffic ticket that was not served on the subject be appropriately disposed of to avoid confusion and inadvertent prosecution for driving under the influence.

3. Authority of Prosecutor to Nolle Pros

If, based upon department procedures or otherwise, an arrestee is formally charged with the offense of driving under the influence and his or her innocence is thereafter conclusively shown, it is our opinion that the arresting officer can nolle pros the charge without the involvement of a magistrate. We reach the conclusion based on the long-standing rule of law that the decision of whether or not to bring a criminal case to trial in this State rests almost exclusively with the prosecutor. Article V, section 24 of the South Carolina Constitution provides that the Attorney General is "the chief prosecuting officer of the State with the authority to supervise the prosecution of all criminal cases in courts of record." However, to carry out these prosecutorial duties, the Attorney General acts not only through himself and his immediate staff, but also through "his constitutional authority to supervise and direct the activities of solicitors or prosecuting attorneys located in each judicial circuit of the State." Ex Parte McLeod, 272 S.C. 373, 377, 252 S.E.2d 126, 127-28 (1979). Moreover, the South Carolina Supreme Court has confirmed that arresting law enforcement officers may serve as prosecutors in magistrate's and municipal court for misdemeanor traffic offenses. See In re Unauthorized Practice of Law Rules Proposed by the S.C. Bar, 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992); State ex rel. McLeod v. Seaborn, 270 S.C. 696, 698, 244 S.E.2d 317, 319 (1978); see also Op. S.C. Att'y Gen., 1999 WL 1390355 (Nov. 29, 1999).

The authority of a prosecutor to decide whether or not to prosecute a given case has been established by our courts and reiterated in opinions of this Office on numerous occasions. In State v. Ridge, 269 S.C. 61, 64, 236 S.E.2d 401, 402 (1977) it was held that with the exception of a judge finding that the solicitor acted corruptly, "the entering of a nolle prosequi at any time before the jury is impaneled and sworn is within the discretion of the solicitor; the trial judge may not direct or prevent a nol pros at that time" (citing State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937)). In State v. Brittian, 263 S.C. 363, 366, 210 S.E.2d 600, 601 (1974) the court expanded on the subject, stating that:

> [a] statute may authorize the court, either of its own motion or on the application of the prosecuting officer, to order an indictment or prosecution dismissed. But in the absence of such a statute, a court has no power . . . to dismiss a criminal prosecution except at the instance of the prosecutor . . . .

(quoting 21 Am.Jur.2d Criminal Law § 517 (1965)). We also point out State v. Thrift, where the court again noted that the "unfettered discretion" of whether or not to prosecute lies with the prosecutor rather than the judiciary:

> [b]oth the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands. . . . Prosecutors may pursue a

> case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety. The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion . . . .

State v. Thrift, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346-47 (1994) (footnotes omitted); see also State v. Tyndall, 336 S.C. 8, 18, 518 S.E.2d 278, 283 (1999).

While the aforementioned rulings are silent as to whether an arresting officer is cloaked with all of the discretionary authority of the prosecutor, South Carolina's consistent deference to prosecuting officers in determining when to bring and dismiss charges have formerly led us to the conclusion that a municipal judge must defer to the arresting officer's discretion in dismissing a charge. See Op. S.C. Att'y Gen., 1999 WL 1390355 (Nov. 29, 1999). Strengthening this conclusion, we have also opined that we are "unaware of any statutory authority which permits a municipal recorder [or judge] to *nol pros* or dismiss a particular case on his own motion. Therefore . . . a case triable in the municipal court may only be *nol prossed* in the discretion of the individual acting as the prosecutor." Op. S.C. Att'y Gen., 2012 WL 1561867 (April 19, 2012) (citing Op. S.C. Att'y Gen., 1998 WL 746176 (Aug. 19, 1998); Op. S.C. Att'y Gen., 1979 WL 42923 (April 12, 1979)). We are unaware of any changes in this area of the law subsequent to our last opinion reaching this conclusion.

Again we note that while it is our opinion a prosecuting officer has the authority to nolle pros a charge for driving under the influence, we believe this authority should be exercised with caution and only when the arrestee's innocence is conclusively shown through the facts surrounding the case. The facts present in Mathis v. Coats, 24 So.3d 1284, 35 Fla. L. Weekly D142 (Fla. Dist. Ct. App. 2010), while outside of our jurisdiction, provides an ideal example of when, in our opinion, it would be appropriate for an arresting officer to nolle pros a charge of driving under the influence. Mathis involved a motorist arrested at the scene of a traffic stop for driving under the influence. Id. at 1286-87. The motorist was initially stopped after striking the center median, nearly sideswiping another vehicle, and then hitting the center median again. Id. at 1286. The officer initiated the traffic stop, and based upon the motorist's agitation, movement in a jerky fashion, slow coordination, difficulty following conversation, and flushed face, he administered a series of field sobriety tests which the motorist could not successfully complete. Id. From these observations, the officer determined probable cause existed to believe the motorist was driving under the influence. Id.

At "Central Breath Testing" the motorist agreed to take a breath test that revealed no indication of alcohol in her system. Id. at 1287. "Due to the inconsistency between the breath tests and the field sobriety test results, [the Officer] requested a urine sample from [the motorist], and another deputy conducted a drug recognition evaluation." Id. Despite the motorist's breath test reading .000 and a urinalysis revealing no level of drug or other intoxicants, the motorist remained under arrest from the afternoon the arrest took place until she was released from jail at approximately noon the next day. Id. While the issue in Mathis was, in part, based on the legality of the motorist's continued detainment, we believe the facts provide a textbook example of a situation where the arresting officer would be correct in exercising his or her authority to nolle pros a charge for driving under the influence. After a determination that the motorist was not intoxicated from either alcohol or drugs, her innocence was at that time, in our opinion, conclusively shown. Accordingly, if the officer had formally charged the motorist with driving under the influence, prosecution would be futile and nolle prossing the charge would be appropriate.

In addition to our opinion that a prosecuting officer should nolle pros a charge for driving under the influence when the arrestee's innocence is conclusively shown, we also caution that all prosecutors are subject to any directives of the Attorney General, as the chief prosecutor, regarding the prosecution of

particular cases. In addition, we provide a reminder that a case cannot be dismissed through the corrupt or capricious actions of the prosecutor. See State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937).

4. Procedure for Issuing an Alternative Charge Subsequent to Nolle Pros of DUI Charge

If an arresting officer does conclude it appropriate to nolle pros a charge for driving under the influence in light of the analysis above, we will now discuss the proper procedure for issuing a separate charge for the traffic violation initiating the traffic stop. In State v. Fennell, 263 S.C. 216, 218, 209 S.E.2d 433, 433 (1974) the supreme court addressed the procedure for issuing a charge of reckless driving in the context of a magistrate judge who permitted a defendant charged with driving under the influence of intoxicants to plead guilty to reckless driving. Because reckless driving is not a lesser included offense of driving under the influence, the supreme court held the magistrate was in error for permitting the defendant to plead guilty to that charge:

> [t]he issuance of either a uniform traffic ticket or a warrant charging the respondent with the offense of reckless driving was necessary to give the magistrate jurisdiction to dispose of that particular offense. . . . Since reckless driving is not a lesser offense included within the offense of driving under the influence of intoxicants and respondent was not properly charged with the offense of reckless driving, it follows that the magistrate was without jurisdiction to accept a plea of guilty to the offense of reckless driving and thereby dispose of the case.

Id. at 220-21, 209 S.E.2d at 434-35 (citations omitted). In accordance with Fennell, this Office has, on many occasions, opined that to prosecute someone for a different offense than that which the subject was originally charged, the original offense must either be nolle prossed or dismissed, and the defendant charged anew with a different offense either on a uniform traffic ticket or warrant. See, e.g., Op. S.C. Att'y Gen., 1996 WL 755775 (Nov. 7, 1996) (stating that "it is my opinion that once a ticket for DUI is issued, the charge can only be changed by nol prossing the original ticket and issuing a new one on the alternative charge. "); Op. S.C. Att'y Gen., 1982 WL 154971 (Jan. 12, 1982) (concluding that "[i]t is the opinion of this office that a driving under the influence charge may be nolle prossed or dismissed by the prosecuting officials, as any other criminal case, where the evidence does not justify the prosecution. The defendant may be charged with a separate and distinct offense in a separate and distinct warrant or uniform traffic summons if the evidence exists to go forward with a separate charge"); Op. S.C. Att'y Gen., 1974 WL 27996 (Nov. 1, 1974) (stating that "[F]ennell does not affect the authority of an arresting officer, if the policy of his Department permits such action, to [n]ol pros the original charge and issue another uniform traffic ticket or obtain another arrest warrant preferring another charge. Such action has always been the prerogative of the State, represented in General Sessions Court and County Courts by the Solicitor, and, in magistrate's and municipal courts by the arresting officer, or a city or county attorney").

Based on the foregoing authority, it is our opinion that after appropriately nolle prossing the initial charge for driving under the influence, the officer can issue an alternative charge, if probable cause exists to do so. Rather than "amend" the ticket for driving under the influence as you state in your letter, we believe the arresting officer must nolle pros the initial ticket and subsequently issue another uniform traffic ticket or obtain another arrest warrant preferring the alternate charge.

5. Authority to Release Arrestee from Custody

Last, we will address your question of whether an arresting officer has authority to release or "unarrest" a motorist from custody after he or she has been arrested for driving under the influence. If the officer determines the innocence of the arrestee has been conclusively shown, it is our opinion that a court would find the probable cause which formed the basis for the arrest has become unfounded, and the

arrestee should be released from custody. While our courts have not directly spoken to the issue, we make this prediction from analysis of the court of appeal's decision in Sponar v. S.C. Dep't of Public Safety, 361 S.C. 35, 603 S.E.2d 412 (Ct. App. 2004), cert. granted (Nov.17, 2005) and from rulings among other jurisdictions. In Sponar, a motorist who was transported to the police station after being arrested for driving under the influence engaged in conversation with the officer who was to administer his Datamaster breath test. Id. at 37, 603 S.E.2d at 413-14. During the conversation, the motorist inquired if he would "still go to jail if he took the test." Id. at 37, 603 S.E.2d at 413. In reply, the officer said regardless of if he took the test or not, he would go to jail either way "as part of their procedure." Id. at 37, 603 S.E.2d at 414. In its decision, the court of appeals reversed the circuit court and upheld the DPS (Department of Public Safety) administrative hearing officer's suspension of the motorist's driver's license due to his refusal to submit to a breath test. Id. at 42, 603 S.E.2d at 416. The court of appeals found that the circuit court erroneously ruled that the officer failed to adequately advise the arrestee pursuant to the implied consent statute when he indicated the arrestee would go to jail if he submitted to the breath test or not reasoning that such would not be the case if the arrestee's breath test resulted in a reading of .05% or below. Id. at 41, 603 S.E.2d at 416.

The court of appeals' reversal was made on the grounds that what is currently S.C. Code Ann. § 56-5-2950(G)(1), stating that one is conclusively presumed not to be under the influence of alcohol if his or her breath test is .05% or lower, does not rule out the possibility of being under the influence of other intoxicants.[3] Id. The court also stated that:

> [ ] [T]he attorney for DPS represented to the court that different officers and law enforcement agencies take different approaches, but that once an individual is arrested for DUI, some officers and agencies continue to detain the person, regardless of whether they blow below a .05 on a breath test. Further, the record shows that at the administrative hearing, [the Officer] testified, 'Even if [the arrestee] blew below a zero point five, he was still under arrest and would be taken [to] the county jail.' Thus, it appears that as a matter of policy, officers often do not release an individual, regardless of whether the breath test results show an individual is conclusively presumed to not be under the influence of alcohol.

Id. at 41-42, 603 S.E.2d at 416. The court went on to note that "[e]ven if we assumed for the sake of argument that it is improper for authorities to continue to detain an individual after they have registered below a .05% on a breath test, this is irrelevant to an individual's decision on whether to submit to a breath test." Id. A footnote followed this statement, which read "[a]s noted by [the arrestee's] attorney in argument before the circuit court, if the authorities continued to incarcerate an individual for DUI under such circumstances, that individual's recourse may be civil action for false imprisonment or false arrest." Id. at 42, 603 S.E.2d at 416, n.3. Sponar suggests that an individual who authorities continue to detain for DUI after their innocence has been shown may have recourse in a civil action for false imprisonment. However, as shown by court's analysis, the appropriateness of the detention revolves in large part on the possibility that the individual may be under the influence of some other intoxicant. As the court stated:

> [w]e find the officer's statement to [the arrestee] that he would be going to jail regardless of his decision on whether to submit to the breath test did not inadequately advise [the arrestee] pursuant to the implied consent statute. . . . [O]ne is conclusively presumed to not be under the influence of *alcohol* if his or her breath test registers .05% or lower.

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[3] In 2004, the language that if the alcohol level at the time of testing is "five-one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol" was codified at S.C. Code Ann. § 56-5-2950(b)(1)(Supp. 2003).

> Such a result does not rule out the possibility that the individual is under the influence of some other intoxicant, or a combination of alcohol and another intoxicant. Indeed, an individual may fail field sobriety tests and/or exhibit other signs of being under the influence of an intoxicant regardless of whether the individual does not have enough alcohol in his or her system to register as being under the influence of alcohol.

Id. at 41, 603 S.E.2d at 416 (emphasis in original).

In Mathis v. Coats, 24 So.3d 1284, 35 Fla. L. Weekly D142 (Fla. Dist. Ct. App. 2010), the Florida District Court of Appeals also spoke to the issue of continued detainment subsequent to a breath test conclusively presuming the arrestee was not under the influence of alcohol and a urinalysis showing a negative result for drugs. Based upon the facts surrounding the case, as presented in detail above, the court held that the arrestee should have been given leave to amend her complaint to add a cause of action for false imprisonment, noting that while probable cause existed at the time of her arrest at the scene, "she may be able to demonstrate that probable cause evaporated at some point after she was transported to CBT and jailed." Id. at 1290. We again point out that the motorist's breath test and urinalysis showed that no alcohol or drugs were in the her system; it is in a scenario such as this that we believe the motorist's innocence has been conclusively shown, and it would therefore be appropriate for an arresting officer to release the arrestee from custody.

The First Circuit, in the case of Thompson v. Olson, 798 F.2d 552 (1st Cir. 1986), has also addressed false imprisonment implications due to the continued detention of a person lawfully arrested without a warrant. Although Thompson involved an arrest for the mistaken belief that a diabetic undergoing an insulin shock was under the influence of alcohol or drugs after refusing to exit a bus, we believe the standard of when an officer should release an arrestee from custody applied by the court is relevant to all warrantless arrests based on probable cause. This standard, derived from the Restatement of Torts, is as follows: [f]ollowing a legal warrantless arrest based on probable case, an affirmative duty to release arises only if the arresting officer ascertains beyond a reasonable doubt that the suspicion (probable cause) which forms the basis for the privilege to arrest is unfounded." Id. at 556 (citing Restatement, Torts, 2d, § 134, comment f). The court concluded the officers were not liable for false imprisonment on the basis that the magistrate, not the policeman, should decide whether probable cause had dissipated to such an extent following the arrest that the suspect should be released. Id. However, the court distinguished that it did not "intimate that a police officer, upon an initial finding of probable cause, may close his eyes to all subsequent developments." Id.

From the aforementioned case law, we believe that an arresting officer has an affirmative duty to release a person from custody only if he determines beyond a reasonable doubt that the probable cause which formed the basis for the arrest becomes unfounded. Put differently, if based upon all of the facts and circumstances surrounding the case, one's innocence can be conclusively shown, it is our opinion that an officer should release a person arrested for driving under the influence. We also make mention that an officer's release of an arrestee from custody does not in and of itself render the arrest unlawful. As stated by the U.S. District Court for the District of Illinois:

> [i]t is not unlawful for a person to be released, after an arrest without a warrant, without his having been taken before a committing magistrate for arraignment, nor does that fact standing along render his arrest unlawful. The fact, however, is a circumstance to be considered with all other evidence in a determination of whether in the first instance there was probable cause for his arrest.

Monroe v. Pape, 221 F.Supp. 635, 646, 7 Fed.R.Serv.2d 462 (N.D. Ill. 1963).

Conclusion

Based on the analysis above, if the facts surrounding a case conclusively show an arrestee's innocence, we believe it is appropriate for the arresting officer to exercise his authority to nolle pros the charge for driving under the influence and issue a separate charge for an alternative offense that is supported by probable cause. However, as discussed, this process can be avoided by delaying service of the uniform traffic ticket until after the results from a breath test and, in some instances, a urine screen, are obtained. It is also our opinion that an arresting officer should release an arrestee from custody for driving under the influence only if the facts supporting probable case for the arrest become unfounded, or, stated differently, if the arrestee's innocence is conclusively shown.

We caution again that while you ask your questions based upon a scenario where the officer has no reasonable suspicion to order a urine screen on the arrestee for drugs, it is our opinion that such an occurrence is likely rare. While we stress that an officer must in all instances be able to articulate the factors linking the arrestee's impairment to drugs to meet the reasonable suspicion standard, if an officer lawfully arrests a motorist based upon probable cause for driving under the influence and the motorist's breath test shows an alcohol concentration of .05% or below, such a result does not rule out the possibility that the individual is under the influence of some other drug. For this reason, it is our recommendation that law enforcement use their authority to nolle pros a charge for driving under the influence, issue an alternative traffic charge, and release the arrestee from custody with caution and only when the evidence conclusively shows the arrestee's innocence.

We also warn that due to the absence of express direction from the legislature on your questions, clarification is strongly recommended. Please note all opinions expressed herein are informative only and should not be construed as official. If we can answer any questions pertaining to this opinion, please do not hesitate to contact our Office.

Sincerely yours,

Anne Marie Crosswell

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REVIEWED AND APPROVED BY:

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