1983 S.C. Op. Atty. Gen. 140 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-86, 1983 WL 142755

Office of the Attorney General

State of South Carolina
Opinion No. 83-86
November 4, 1983

***1** The Honorable Julian L. Stoudemire
Judge
Municipal Court
Post Office Box 70
Walhalla, South Carolina 29691

Dear Judge Stoudemire:
You have requested an opinion as to whether a defendant acquitted of the offense of Failing to Obey a Traffic Control Signal may then be charged with the offense of Driving Too Fast for Conditions and convicted, without problems of double jeopardy arising. Based on the following, it is the opinion of the Attorney General that problems of double jeopardy would not arise if the defendant were so charged, but problems violative of Section 22–3–740, Code of Laws of South Carolina (1976), and established public policy might arise.

Both the Fifth Amendment to the United States Constitution and Article I, Section 12 of the South Carolina Constitution proscribe putting a person in jeopardy more than once for the same offense. The Double Jeopardy Clause protects against multiple punishments for the same offense and a second prosecution for the same offense after either acquittal or conviction. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

Generally, former jeopardy in a prosecution for a traffic offense depends upon the identity of the offenses charged and the facts necessary to establish those offenses. 7A Am.Jur.2d, Automobiles and Highway Traffic, § 388 (1980). Although interpretations of the law on this subject are by no means universal, in South Carolina the common law rule and the constitutional provisions against double jeopardy have been stated to 'apply only to a second prosecution for the same act and crime, both in law and fact for which the first prosecution was instituted.' State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950). Reaffirmed State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972). In cases where two or more violations, arise from the same incident, the test is whether different proof is required to support a conviction. Thus, two offenses may arise out of the same incident if one requires proof that the other does not. In such a case separate charges may be made as to each. State v. Grueling, 257 S.C. 515, 186 S.E.2d 706 (1972).

It is apparent that in the case you have presented a prosecution for Driving Too Fast for Conditions would revolve around the same overall set of facts as did the original prosecution. However, the key to whether or not this second prosecution could go forward would be whether the speed of the vehicle involved was an essential part of the prosecution's case in the first trial, and whether the defendant's allegedly disobeying a traffic control signal would be an essential part of the prosecution's case in the second. If not, then the two charges would not require the same evidence for conviction. It is certainly not a requirement to establish that a defendant was driving too fast in order to convict him of Failure to Obey a Traffic Control Signal, and vice versa, although it is possible such evidence may be necessary in a particular case. Herring v. Boyd, 245 S.C. 284, 140 S.E.2d 246 (1965). Therefore, unless these elements were or would be necessary facts in either case, a subsequent prosecution of the defendant on the charge of Driving Too Fast for Conditions could be maintained.

***2** There are other matters which should be considered before the defendant is charged with the second offense arising from the same incident. Section 22–3–740, Code of Laws of South Carolina (1976), applicable to both magistrates' courts and municipal courts, provides that:

Whenever a person being 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. [Emphasis added]

This statutory provision requires an election in a factual situation such as the one that you asked about where a person is 'accused of committing an act' (driving a vehicle in a certain manner) 'which is susceptible of being designated as several different offenses.' Numerous traffic regulation sections involve a person driving a vehicle, indicating that the driving of the vehicle is the act. The legislative intent of Section 22–3–740 is evident in the title of the original act (Act No. 707 of 1928), 'An Act to Prevent Double Jeopardy and to Prevent Multiplication of Charges in Inferior Courts . . ..' (Emphasis added). The purpose of similar statutes has been held to be the protection of citizens from repeated efforts to obtain a conviction and economy in judicial and professional resources. Commonwealth v. Thornton, 371 A.2d 1343 (Pa. Super. 1977). See Menthen v. State, 492 P.2d 351 (Okl. Cr. App. 1971). This interpretation of the election statute is also in accord with that of the South Carolina Bench Book for Magistrates, (1979). Examples given in the Bench Book where an election must be made between offenses include speeding, reckless driving, drunk driving, driving left of center, and passing a stopped school bus. On the other hand, an election need not be made between offenses such as driving without a license and drunk driving or between not having a vehicle registration and speeding. Clearly these different offenses, where there is not a requirement to elect, also involve different acts.

I hope that this reply will answer your question in a satisfactory manner.
Sincerely,

Patricia D. Petway
Staff Attorney

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