

1981 WL 157861 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 13, 1981

*1 Mr. Wallace Oswald
Chief
Batesburg Police Department
P. O. Box 429
Batesburg, SC 29006

Dear Mr. Oswald:

In your letter of July 2, 1981 you asked whether, when a person has committed an act which would support a charge of either driving left of center or of driving under the influence, an election must be made in magistrates' or municipal court between the two offenses.

[Section 22-3-740, South Carolina Code Ann. \(1976\)](#) is applicable. It provides that:

Whenever a person be accused of committing an act which is susceptible of being designated as several different offenses the magistrate upon the trial of the personal 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 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. Further, in [State v. Sheppard, 248 S.C. 464, 150 S.E.2d 916 \(1966\)](#), the court found that only one offense was created by § 56-5-2930 and that the 'act of operating a motor vehicle with impaired faculties is the gravamen of the offense' (of driving under the influence).

The term 'offense' is not synonymous with the act or transaction and the same act may constitute two offenses if it is a violation of two distinct statutory provisions. [State v. Turner, 168 A.2d 539 \(Del. 1961\)](#). [State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 \(1974\)](#) is distinguishable because it involved a question concerning offenses and not acts. The holding of that case was that reckless driving is not a lesser included offense of driving under the influence. This would not, however, preclude a situation where the same act could form the basis for the charge of either of several traffic offenses.

The legislative intent of [§ 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). This interpretation is in accord with that of the [South Carolina Bench Book for Magistrates, V 6 \(1979\)](#). 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.

While it was my pleasure to work on this material for you, I am not presently assigned to traffic law. Please address future inquiries to your city or county attorney first. If information is required from this Office, please address the request to the Attorney General, Mr. Daniel R. McLeod, for proper routing.

Sincerely,

*2 Harold M. Coombs, Jr.
State Attorney

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