1981 WL 157876 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 21, 1981

***1 Re: Your letter of July 15, 1981**

Terri L. Williams-Watts
Administrative Assistant to the Chief
Police Department
P. O. Box 1059
Columbia, S. C. 29202

Dear Ms. Williams-Watts:
Your letter to Mr. Bybee of July 15, 1981, has been referred to me for review and response. You have asked the following question:
What is the classification of a moped which exceeds twenty miles per hour and also lacks pedals?

I am enclosing for your benefit a copy of an Attorney General's opinion dated April 14, 1975, by Deputy Attorney General J. C. Coleman. This opinion should answer your question regarding mopeds. I am also enclosing for your benefit a copy of § 56-5-160 and § 56-5-3510 Code of Laws of South Carolina 1976.

You have also asked whether or not the fact of a breathalyzer refusal may be presented in a driving under the influence trial where the individual's driver's license was returned to him pursuant to an administrative hearing.

It is well settled in our law that the prosecution may present evidence of a breathalyzer refusal and may comment upon it in argument to the jury. State v. Miller, 185 S.E.2d 359 (1971). See also Attorney General's Opinion No. 3240 1971-72 page 21; Attorney General's Opinion No. 3017 1969-70 page 304; Attorney General's Opinion No. 3173 1970-71 page 142; Attorney General's Opinion No. 3502 1972-73 page 103. The following statement appears in the above cited Attorney General's Opinion No. 3502:
The ninety (90) day suspension provided for refusal of a chemical test to determine alcoholic content of blood provided in § 46-344 (now 56-5-2950) is a civil type action as opposed to a criminal action. cf. Parker v. State Highway Department, 224 S.C. 263, 78 S.E.2d 382 (1953). The suspension provided in 46-344 is entirely independent of the criminal violation created by § 46-343 (now § 56-5-2930) and the outcome of the criminal prosecution on the drunk driving charge has no bearing on such suspension.

The fact that an individual may have had his driver's license returned to him as the result of an administrative hearing is not dispositive of the factual issue of the refusal to take the breathalyzer test for the purposes of a criminal trial. The fact of the refusal is like any other fact in a trial, and it may be presented by the prosecution through testimony and evidence and likewise the defense may present evidence that the test was not in fact refused. The jury in a criminal trial must decide based upon the evidence placed before them whether or not the individual refused the test and what weight to give to that fact if any. The administrative hearing conducted pursuant to the alleged breathalyzer refusal is purely civil in nature and involves only the issue of the suspension of the driver's license, and not the guilt or innocence of the Defendant in the DUI charge.

I am enclosing copies of the cited Attorney General's opinions and the case of State v. Miller for your information.

Very sincerely yours,

***2** Patrick M. Teague
Assistant Attorney General

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