1981 WL 157951 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
September 2, 1981

***1** The Honorable Carroll M. Gray
Chief Magistrate of Marlboro County
Post Office Box 418
Bennettsville, South Carolina 29512

Dear Judge Gray:
In a letter to this office you questioned whether in a situation where an individual is charged with both driving under the influence and failing to stop when signaled by a law enforcement vehicle, must an election be made pursuant to §§ 22-3-740, Code of Laws of South Carolina, 1976, as to which of the two offenses to prefer. Such section states:
'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 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.'

The referenced section relates to the commission of a criminal act which is capable of being construed as more than one magisterial court offense. However, if acts which may be construed as unrelated offenses are committed, an election does not have to be made.

Please by advised that as a practical matter, the question of whether there is a requirement to make an election does not arise in your referenced factual situation. While first offense driving under the influence is a magistrate's court offense, the offense of failing to stop when signaled by a law enforcement vehicle is, according to § 56-5-750, Code of Laws of South Carolina, 1976, punishable by a fine of not less than Five Hundred Dollars ($500.00) or imprisonment for not less than ninety (90) days. Therefore, such offense is triable in the Court of General Sessions.

Furthermore, it would appear that pursuant to the ruling of the South Carolina Supreme Court in State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972), there would be no double jeopardy problem in prosecuting both offenses, such appearing to be readily distinguishable. In considering whether there are any double jeopardy problems in prosecuting offenses arising from the same transaction or related acts, the Court stated in Hoffman,
'[t]he test generally applied is whether the evidence necessary to support a second . . . (charge) . . . would have been sufficient to produce a legal conviction upon the first . . . (charge) . . ..' 257 S.C. 461 at 467.

Evidence that a driver was driving under the influence would not be sufficient to convict a driver for failing to stop when signaled by a law enforcement vehicle. Likewise, evidence that a driver did not stop when signaled by a law enforcement vehicle would not be sufficient to convict a driver for driving under the influence.

With best wishes,
Sincerely,

Charles H. Richardson
Assistant Attorney General

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