1979 WL 42825 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 26, 1979

***1** F. Hampton Alvey, Esquire
Office of the Solicitor, Fifth Judicial Circuit
1131 Marion Street
Columbia, South Carolina 29201

Dear Mr. Alvey:
You requested an opinion as to what to charge an individual with when he has been arrested for his second and third offense DUI or DUS, each within a short period of time. The problem arises because § 56-5-2940, S. C. Code (1976), requires a conviction, guilty plea or forfeiture of bail in connection with prior DUI offenses before a person can be prosecuted for subsequent offenses. The DUS provisions of § 56-1-460 similarly require prior 'convictions' before subsequent offenses may be prosecuted as subsequent offenses. When a person is charged with two DUI or DUS offenses within a short period of time, no 'conviction' will have yet resulted from the second violation—thereby allowing a prosecution for DUI or DUS, third offense. The question is whether a person should be charged with DUI or DUS, second offense, for both the second and third violations, or whether it is permissible to charge the individual with both a second and third offense. It is our opinion both charges should be listed as DUI or DUS, second offense, but that once a conviction on the second offense occurs, the third charge should be amended pursuant to § 17-19-100, S.C. Code (1976), to charge the defendant with DUI or DUS, third offense.

The general rule is that an indictment must allege convictions of prior offenses where the prior offenses enhance the punishment or effect the grade or degree of the offense. State v. Mitchell, 220 S.C. 433, 68 S.E.2d 250 (1952); 42 C.J.S., 'Indictments And Informations,' § 145(a), p. 1067. Thus, the defendant you describe could not be charged with DUI, third offense, until after conviction for DUI, second offense. Yet, you may wish to go ahead and have him indicted for both offenses.

§ 17-19-100, supra, allows such a practice, since an indictment may be amended where there is a variance between it and the proof adduced at trial. The qualification to that rule is that the amendment not change 'the nature of the charge.' The underlying idea of this qualification is to prevent surprise to the defendant. The indictment is designed to give a defendant notice of the charge against him, thereby allowing him to prepare his defense. This purpose is not defeated, and amendment therefore does not change the nature of the offense, where an indictment for DUI or DUS, second offense, is amended to charge a third offense. This result follows from the fact that no undue hardship is imposed on the defendant in preparing his defense. The conduct he is being tried for is the same in either case—i.e., he was driving under the influence of alcohol or drugs. His theory of defense to this charge thus will not change whether the charge is second or third offense DUI. This conclusion is fortified by State v. Quarles, 261 S.C. 413, 200 S.E.2d 384 (1973), which interpreted § 17-19-100, supra, as calling for a liberal construction in order to simplify procedure and further the ends of justice by eliminating technicalities. This type amendment is consistent with that interpretation.

***2** Therefore, it is our opinion that where two DUI or DUS violations occur within a short period of time and there is one previous conviction, the defendant should be charged with DUI or DUS, second offense, for each violation, but that after conviction for the second violation, the indictment for the third violation should be amended pursuant to statutory procedures to charge DUI or DUS, third offense.
Sincerely,

Joseph R. Barker

Assistant Attorney General

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