

1979 S.C. Op. Atty. Gen. 49 (S.C.A.G.), 1979 S.C. Op. Atty. Gen. No. 79-33, 1979 WL 29039

Office of the Attorney General

State of South Carolina

Opinion No. 79-33

February 26, 1979

***1 SUBJECT: Criminal Identification and Investigation, Law Enforcement, Identification, Magistrates, Municipal Courts, and Courts**

(1) The bookkeeping entries for recording an arrest and ensuing charge, as described in [S.C. Code, §§ 17-1-40 and 44-53-450 \(1976\)](#), may be expunged once the conditions of the said statutes have been fulfilled. The work product of law enforcement agencies pertaining to investigation of criminal activity, and the evidence of criminal activity, do not constitute bookkeeping entries for recording of an arrest and the ensuing charge under the above-mentioned statutes.

(2) A person seeking expungement of applicable records of the South Carolina Law Enforcement Division must apply to the Circuit Court of jurisdiction, with proper notice to the Circuit Solicitor, for an Order of Expungement, which must then be served upon SLED.

(3) A copy of the Order, under the Circuit Judge's original signature or certified by the Clerk of Court, may serve as a non-public record under [§ 44-53-450\(a\) \(1976\)](#)

(4) A Magistrate's Court or Municipal Court may not order the South Carolina Law Enforcement Division to expunge criminal record information.

TO: James K. Wilson, Director
Narcotics and Controlled Substances
South Carolina Law Enforcement Division

QUESTIONS:

1. What criminal record information maintained by the South Carolina Law Enforcement Division may be expunged pursuant to [S.C. Code, §§ 17-1-40 and 44-53-450 \(1976\)](#)?
2. What is the proper procedure for expunging such criminal record information?
3. Which Courts have authority to direct that such criminal record information be expunged?

STATUTES AND CASES:

[S.C. Code, §§ 17-1-40, 44-53-110 and 44-53-580.](#)

[Martin v. Ellisor, 264 S.C. 202, 213 S.E.2d 732 \(1975\).](#)

[State v. Scott, S.C., 237 S.E.2d 886 \(1977\).](#)

[Williams v. S.C., 239 F.Supp. 360 \(D.S.C. 1965\), rev'd. on other grounds, Morris v. S.C., 356 F.2d 432 \(4th Cir. 1966\).](#)

DISCUSSION:

You have directed to this Office an inquiry concerning the above-captioned matter regarding expungement of criminal records in South Carolina. You desire an opinion as to which judicial authorities may properly order records to be expunged by the South Carolina Law Enforcement Division under applicable statutes. Also, you desire an opinion as to how and under what circumstances may these criminal records be validly expunged.

Expungement of criminal records is a statutory matter in South Carolina. S.C. Code, § 17–1–40 (1976) provides:

Any person who after being charged with a criminal offense and such charge is discharged or proceedings against such person dismissed or is found to be innocent of such charge the arrest and booking record, files, mug shots, and fingerprints of such persons shall be destroyed and no evidence of such record pertaining to such charge shall be retained by any municipal, county, or state law enforcement agency.

*2 It is the opinion of this Office that the above-mentioned statute applies to cases which have received an entry of nolle prosequi. See Op. Atty. Gen., dated December 13, 1978, a copy of which is enclosed herewith. records is S.C. Code, § 44–53–450 (1976) which provides, in pertinent part:

(b) Upon the dismissal of such person [certain persons pleading or found guilty of a first offense possession of certain controlled substances and who have successfully completed a term of probation to include cooperation with a qualified drug rehabilitation program] and such discharge of the proceedings against him . . . such person . . . may apply to the Court for an Order to Expunge from all official records (other than the nonpublic records to be retained as provided in subsection (a) of this section) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the Court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over twenty-five years of age at the time of the offense, it shall enter such Order . . .

Subsection 44–53–450(a), as it pertains to the nonpublic records to be retained, provides:

. . . However, a nonpublic record shall be forwarded to and retained by the Department of Narcotic and Dangerous Drugs under the South Carolina Law Enforcement Division solely for the purpose of use by the Courts in determining whether or not a person has committed a subsequent offense under this Article . . .

The procedure for maintaining a nonpublic record, although not specified by statute, is set forth by a Memorandum to County Clerks of Court in South Carolina from the South Carolina Court Administration, dated September 25, 1974, a copy of which is enclosed herewith for your perusal. It is the opinion of this office that a copy of the Expungement Order, either signed in original form by the Circuit Judge or certified by the Clerk of Court of jurisdiction, may serve as the nonpublic record, and it should suffice to say that such record may be used for no other purpose than for determining whether a person has committed a subsequent offense under S.C. Code, §§ 44–53–110 through 44–53–580 (1976).

It should be noted at the outset that the above expungement statutes are intended to obliterate any record of a persons arrest and the ensuing charge once the criminal proceedings pursuant to such arrest have been dismissed prior to judgment or have resulted in acquittal. It is the opinion of this office that the aforesaid statutes apply only to the bookkeeping entries which serve as the recording of the arrest and ensuing charge in question. Thus, the arrest and booking record, files, mug shots and fingerprints pertaining to the charge in question may be obliterated or purged under § 17–1–40. In a case involving § 44–53–450 all entries made pertaining to the arrest and the ensuing indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to such section may be obliterated or purged with the exception being the nonpublic record retained to show the first offense. Any other material or evidence not serving as an entry made in the usual course of business for recording the arrest and ensuing charge will not be subject to the expungement statutes quoted above. Furthermore, it is the opinion of this Office that the work product of law enforcement agencies pertaining to investigation of criminal activity, and the evidence of criminal

activity, do not constitute bookkeeping entries for recording of an arrest and the ensuing charge, and are not covered by the aforesaid statutes.

*3 It is also the opinion of this Office that a person seeking expungement of criminal record information must apply to the Circuit Court with jurisdiction over the charge in question to obtain the Order of Expungement. The application should be served upon the Circuit Solicitor and the Solicitor may consent to the Order, if appropriate, or the Order may be rendered without such consent if the Solicitor has been served and given an opportunity to appear on behalf of the State. The Order must then be served upon SLED.

A magistrate Court or Municipal Court does not have authority to take action for expungement against the South Carolina Law Enforcement Division, an agency of the State government performing a state-wide function inasmuch as such action would amount to an unlawful extension of those Courts beyond their territory limits. See, [Martin v. Ellisor](#), 264 S.C. 202, 213 S.E. 2d 732 (1975). The aforesaid rule would apply to a finding of insufficient probable cause at a preliminary hearing, inasmuch as a magisterial official may not acquit or accept a plea from a defendant, but, rather, may only release a defendant from custody at such hearing until he is indicted. [State v. Scott](#), S.C., 237 S.E. 2d 886 (1977). [Williams v. South Carolina](#), 237 F. Supp. 360 (D.S.C. 1965), rev'd on other grounds, [Morris v. South Carolina](#), 356 F. 2d 432 (4th Cir. 1966). Therefore, the ruling of the Magistrate will not serve as a dismissal or discharge of the formal proceedings against a defendant, and will not apply to the aforesaid statutes.

CONCLUSION:

Only the bookkeeping entries for recording an arrest and the ensuing charge, as described in S.C. Code, §§ 17-1-40 and 44-53-450 (1976), may be expunged once the conditions of the said statutes have been fulfilled. The work product of law enforcement agencies pertaining to investigation of criminal activity, and the evidence of criminal activity, do not constitute bookkeeping entries for recording of an arrest and the ensuing charge under the above-mentioned statutes. A person seeking expungement of applicable records of the South Carolina Law Enforcement Division must apply to the Circuit Court of jurisdiction, with proper notice to the Circuit Solicitor, for an Order of Expungement, which must then be served upon SLED. A copy of the Order, under the Circuit Judge's original signature or the certification of the Clerk of Court, may serve as a non-public record under § 44-53-450(a) (1976). A Magistrate's Court or Municipal Court may not issue the Order of Expungement pursuant to the above listed statutes.

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