

1980 WL 120825 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 15, 1980

*1 Mr. John Patrick
Assistant Director
South Carolina Court Administration
P. O. Box 11788
Columbia, South Carolina 29211

Dear John:

In a letter to this office, you asked two questions concerning jury trials in magistrate's court. You specifically asked:

(1) May a magistrate on his own motion and without consent of either or both parties impanel a jury in both a civil and a criminal case?

(2) May the prosecution in a criminal case demand a jury trial without the consent of the defendant?

As to your first question concerning whether a magistrate may, on his own motion and without consent of either or both the defendant and the State, impanel a jury in a criminal case, [§ 22-2-150, Code of Laws of South Carolina, 1976](#), as amended, provides:

‘(e)very person arrested and brought before a magistrate charged with an offense within his jurisdiction shall be entitled on demand to trial by jury which shall be selected as provided in this chapter.’

While such statute provides that a defendant is entitled ‘on demand’ to a jury trial, as to your specific question, the South Carolina Supreme Court in [State v. Burgin, 255 S.C. 237, 178 S.E.2d 325 \(1970\)](#) held that as to a criminal case, a defendant has no right to waive a jury trial and demand that he be tried by a judge. (Based on the earlier case of [Redrup v. N. Y., 386 U.S. 767 \(1967\)](#), the U.S. Supreme Court reversed [Burgin](#), a case arising out of an obscenity prosecution. However, it appears that the principle in [Burgin](#) concerning the defendant's right to waive a jury trial was not affected by such reversal). Citing the U.S. Supreme Court's decision in [U. S. v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138 \(1968\)](#), and [Singer v. U. S., 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 \(1965\)](#), the South Carolina Supreme Court in [Burgin](#) determined that the defendant was not prejudiced by the trial court's denial of his motion for a trial by the judge alone. The Court further stated that:

‘(t)here is no right to waive trial by jury guaranteed by the United States Constitution.’ [257 S.C. 506 at 513](#).

In [Singer](#), the U. S. Supreme Court had stated:

‘(a) defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury the very thing that the Constitution guarantees him.’ [380 U.S. 24, 367; 85 S.Ct. 783, 790; 13 L.Ed.2d 630 \(1965\)](#).

Therefore, referencing the above, in the opinion of this office, a magistrate may on his own motion refuse to try a defendant without a jury even though the defendant has specifically waived a trial by jury and moved to be tried by the magistrate alone. It further appears that the consent of the prosecuting attorney or officer to such is unnecessary.

*2 As to your question concerning whether a magistrate may on his own motion and without the consent of either or both parties impanel a jury in a civil case, I am unaware of any authority in this State dispositive of the question. Pursuant to § 22-3-230, [Code of Laws of South Carolina, 1976](#):

‘(e)ither party to a suit before a magistrate shall be entitled to a trial by a jury.’

Furthermore, it is clear that civil litigants may waive a jury trial and submit the case to a judge alone. See, [Gilford v. South Carolina National Bank, 257 S.C. 374, 186 S.E.2d 258 \(1972\)](#), and [Southern Railway Company v. Surety Insurance Company of Greenville, 249 S.C. 407, 154 S.E.2d 561 \(1967\)](#).

Generally, there appears to be a split in authority as to whether or not a judge may disregard a waiver of a jury trial in a civil case. It has been stated that:

‘(t)he rule has been recognized that notwithstanding a waiver of a jury trial by the parties, the court may disregard it and require the issues to be submitted to a jury.¹ It has been held in other cases, however, that when the parties to an action which is triable of right by a jury, if a jury is properly demanded, have waived a trial by jury, the court may not thereafter impanel a jury on its own initiative, but must try the case without a jury.’ ‘Jury’, 47 [Am. Jur.2d](#) § 71, pp. 688.

However, again, as to your specific question, my research has not revealed an authority which specifically provides that a magistrate may require a jury trial where such has been waived by both sides. Therefore, it would appear that absent some statutory provision indicating otherwise, a magistrate in this State is without authority to require a jury trial in a civil case unless one of the parties makes demand.

In a separate question you asked whether the prosecution in a criminal case could demand a jury trial without the consent of the defendant. Enclosed please find a copy of a previous opinion of this office dated February 12, 1980, which held that the prosecution is a party within the language of § 22-2-230, [supra](#), which again provides that:

‘(e)ither party to a suit before a magistrate shall be entitled to a trial by jury.’

Therefore, the prosecution in a criminal case may demand a jury trial without the consent of the defendant.

If there is anything further, please do not hesitate to contact me.

Sincerely,

Charles H. Richardson
Assistant Attorney General

Footnotes

¹ In support of such statement, a reference was made to [64 ALR 2d 506, 584](#), § 24, which states in part: ‘(t)he rule generally recognized by the cases is that a trial court may on its own motion call a jury to try issues of fact in a civil case even though a jury has been waived by the parties.’

In association with such, reference was made to a South Carolina case, [Meier v. Kornahrens, 113 S.C. 270, 120 S.E. 285 \(1920\)](#). However, a review of such case does not appear to be sufficient authority to permit a conclusion that a magistrate may require a jury to be impanelled in a civil case unless demanded by one of the parties.

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