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ATTORNEY GENERAL

November 13, 2015

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Dear Ms. Kohn:

We are in receipt of your opinion request concerning criminal conspiracy. Specifically you ask, "whether a defendant is guilty of a felony when he is convicted of conspiracy to commit a crime classified as a misdemeanor?" Our response follows.

I. Law/Analysis

As noted in your letter, Section 16-17-410 of the Code explains, "[t]he common law crime known as 'conspiracy' is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003). Continuing, Section 16-17-410 provides that an individual convicted of conspiracy "*is guilty of a felony* and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years." Id. (emphasis added). However, Section 16-17-410 adds that an individual "convicted of the crime of conspiracy *must not be given a greater fine or sentence* than he would receive if he carried out the unlawful act contemplated by the conspiracy and had been convicted of the unlawful act contemplated by the conspiracy or had he been convicted of the unlawful acts by which the conspiracy was to be carried out or effected." Id. (emphasis added).

Understanding the terms of Section 16-17-410, we now return to your question—whether a defendant found guilty of conspiracy to commit a crime classified as a misdemeanor is guilty of a felony. Because Section 16-17-410, as well as South Carolina law, explain that conspiracy is its own offense, we believe, consistent with the terms of Section 16-17-410, that one convicted of conspiracy is necessarily guilty of a felony regardless of whether the crime tied to the conspiracy is a misdemeanor.

South Carolina's courts have explained Section 16-17-410's definition of conspiracy "is declaratory of the common law definition of conspiracy." State v. Crawford, 362 S.C. 627, 636, 608 S.E.2d 886, 891 (Ct. App. 2005). However, Section 16-17-410's current classification of the crime as a felony parts ways with the common law. See Crawford, 362 S.C. at 637, 608 S.E.2d

at 891 (explaining that while conspiracy was a misdemeanor at common-law, Section 16-17-410 has now classified conspiracy as a felony). Therefore, while Section 16-17-410 and the law of conspiracy are in accord, the classification of conspiracy as a felony punishable by up to five years imprisonment, or up to five-thousand dollars in fines, is exclusively governed by the terms of Section 16-17-410.

A. The Crime of Conspiracy

The reasoning behind the prohibition of conspiracy "serves two distinct purposes: the punishment of group behavior and the control of inchoate activities." Crawford, 362 S.C. at 639, 608 S.E.2d at 893 (quoting 15A C.J.S. Conspiracy § 98). As explained by one treatise, "[t]he basic rationale of conspiracy seems to be that the combination of two or more persons make it more likely that the criminal objective will be achieved, because the co-conspirators may offer each other encouragement and support, thereby rendering it less likely that the project will be abandoned." William Shepard McAninich & W. Gaston Fairey, The Criminal Law of South Carolina, 474 (4th ed. 2002).

It is well-settled that the "gravamen of the offense of conspiracy is the agreement or combination." State v. Larmand, --- S.C. ---, --- n.4, ---, S.E.2d ---, ---n.4 (2015) (quoting State v. Gunn, 313 S.C. 124, 134, 437 S.E.2d 75, 80 (1993)); State v. Cope, 405 S.C. 317, 348, 748 S.E.2d 194, 210 (2013); State v. Sanders, 388 S.C. 292, 300, 696 S.E.2d 592, 596 (Ct. App. 2009); State v. Stuckey, 347 S.C. 484, 502, 556 S.E.2d 403, 412 (Ct. App. 2001). Indeed, "[o]nce an agreement has been reached, the crime of conspiracy has been committed[.]" Crawford, 362 S.C. at 639, 608 S.E.2d at 892. In fact, "[t]o establish a criminal conspiracy it is unnecessary to prove an overt act." 7 S.C. Jur. Civil Conspiracy § 3 "Criminal conspiracy distinguished" (2015); see also, State v. Gosnell, 341 S.C. 627, 636, 553 S.E.2d 453, 458 (Ct. App. 2000) (quoting State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 867-68 (1993) ("Under South Carolina law, a conspiracy does not require overt acts."). This is because "overt acts committed in furtherance of the conspiracy are not elements of the crime." Wilson, 315 S.C. at 294, 433 S.E.2d at 867-68.

Moreover, the law is clear that "[a] conspiracy to commit a crime does not merge with the completed offense." Crawford, 362 S.C. at 636, 608 S.E.2d at 891 (citing State v. Rutledge, 232 S.C. 223, 101 S.E.2d 289 (1957)). In other words, conspiracy "is a distinct offense in itself and punishable as such, notwithstanding that the object of the conspiracy has been accomplished." State v. Ferguson, 221 S.C. 300, 303-04, 70 S.E.2d 355, 356 (1952). Thus, unless Section 16-17-410 can be construed in a manner that would tie the classification of the offense of conspiracy to the classification of the unlawful object of the conspiracy, it would appear that an individual convicted of conspiracy would necessarily be convicted of a felony in light of its status as a separate offense.

B. Interpretation of Section 16-17-410

As mentioned above, the question of whether Section 16-17-410 can be construed in a manner that ties classification of the crime to the unlawful object of the conspiracy requires us to interpret the statute. We therefore look to the canons of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will" and "courts are bound to give effect to the expressed intent of the legislature." Media General Communications, Inc. v. South Carolina Dept. of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). When determining the effect of words utilized in a statute, a court typically looks to the "plain meaning" of the words. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). Nevertheless, courts do not focus on isolated portions of the language contained within a statute, but instead consider the statute's language as a whole. See Mid-State Auto Action of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) ("In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole."). This is because "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent." 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction, § 46.5 (7th ed. 2007). However, courts will reject the plain and ordinary meaning of the words used in a statute when doing so would defeat the intent of the legislature. Greenville Baseball v. Bearden, 200 S.C. 363, 368, 20 S.E.2d 813, 815 (1942).

Applying these principles of statutory construction to Section 16-17-410, we believe the crime of conspiracy is a felony. As stated previously, Section 16-17-410 clearly and unambiguously states "*[a] person who commits the crime of conspiracy is guilty of a felony. . . .*" Id. As a result, South Carolina law mandates that we must apply these terms "according to their literal meaning." See S.C. Dep't of Highways & Pub. Transp. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1986) ("Where the terms of a statute are clear and unambiguous, there is no room for interpretation and we must apply them according to their literal meaning.").

Furthermore, while it is true Section 16-17-410's third sentence reflects an individual convicted of conspiracy may not "be given a greater fine or sentence" than if he were convicted of the unlawful object of the conspiracy, there is nothing within the sentence to suggest the classification of conspiracy is changed by the fine or sentence tied to the conspiracy's unlawful object. Instead, Section 16-17-410's third sentence suggests the Legislature was aware of a way to link the classification of conspiracy to its object, but simply declined to do so. See Rainey, 341 S.C. at 86-87, 533 S.E.2d at 582 (explaining with respect to statutory construction that, "to express or include one thing implies the exclusion of another or the alternative.").

This conclusion is further supported by the legislative history of Section 16-17-410. In particular, the 1993 amendment to Section 16-17-410 changed the classification of conspiracy from a misdemeanor to a felony. See 1993 S.C. Acts No. 184, § 35 (striking "misdemeanor" and inserting "felony"). The Act explained the purpose behind this change, along with the amendment to approximately 70 other statutes, was "to change portions [of the statutes] from misdemeanors to felonies and the maximum term of imprisonment to conform to the classification system established in § 16-1-10 and § 16-1-20." 1993 S.C. Acts No. 184, § 35; see also, 17 S.C. Jur. False Pretenses § 11 (Cum. Supp.) (explaining the effect of the 1993 amendment to the conspiracy statute). Notably, Section 16-1-90(F) confirms this understanding explaining that a violation of the conspiracy statute is a Class F felony. S.C. Code Ann. § 16-1-90(F) (2003). Again, had the Legislature intended for the offense of conspiracy to be classified based upon the classification of the conspiracy's unlawful object, one would expect the classification statutes to reflect this understanding—however, they do not. See Rainey, 341 S.C. at 86-87, 533 S.E.2d at 582 (explaining with respect to statutory construction that, "to express or include one thing implies the exclusion of another or the alternative."). Accordingly, we believe that regardless of the classification of the conspiracy's unlawful object, the Legislature clearly intended the offense of conspiracy to be classified as a felony.

II. Conclusion

In conclusion, it is the opinion of this Office that because an individual violating the conspiracy statute is guilty of a crime that is separate and apart from the unlawful object of the conspiracy, the terms of the statute related to the classification of the offense necessarily control. As a result, and based upon the clear and unambiguous language of Section 16-17-410, which explains that "[a] person who is convicted of . . . conspiracy is guilty of a felony" we believe a defendant convicted of a conspiracy to commit a crime classified as a misdemeanor is guilty of a felony so long as the individual is charged with violating the conspiracy statute—Section 16-17-410.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

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