

1977 S.C. Op. Atty. Gen. 212 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-276, 1977 WL 24616

Office of the Attorney General

State of South Carolina

Opinion No. 77-276

September 7, 1977

*1 TO: Neal Forney
Assistant Director
South Carolina Court Administration

QUESTION:

Is the ruling of the South Carolina Supreme Court in the case of [In Re Brittian](#), 263 S.C. 363, applicable in magistrate courts as it relates to dismissing criminal cases for lack of prosecutions?

AUTHORITIES:

[In Re Brittian](#), 263 S.C. 363, 210 S.E.2d 600 (1974);

[State v. Lewis](#), 266 S.C. 45, 221 S.E.2d 524 (1976);

[State v. Sweat](#), 221 S.C. 270, 70 S.E.2d 234 (1952).

DISCUSSION:

You have asked whether the South Carolina Supreme Court's holding in [In Re Brittian](#), applies in magistrates' courts as well as the family courts. It is our opinion that it does.

Upon examination of the case text, it is clear that the holding in [In Re Brittian](#), 263 S.C. 363, 210 S.E.2d 600 (1974), is applicable to magistrates' courts as it relates to dismissing cases for lack of prosecution. An analysis of the Court's holding is supportive.

There the Court based its holding upon the following principle:

‘A statute may authorize the court, either of its own motion or on the application of the prosecuting officer; to order an indictment or prosecution dismissed. But in the absence of such statute, a court has no power . . . to dismiss a criminal prosecution except at the instance of the prosecutor . . .’ 210 S.E.2d 601 (1974)

The Court then proceeded to search the Code for such a statute. Since the case arose in family court, the Supreme Court first examined the all-inclusive Family Court Act and found no statute authorizing the family court to dismiss a case at its own instance for failure of prosecution. A further examination of the entire Code revealed no such statute. The Court concluded that a dismissal for failure of prosecution was improper.

In [Brittian](#), the Court recognized important policy considerations underlying the principles quoted above. Inherent in the criminal prosecution are public safety and welfare considerations. The State, as the party representing the people, is vested with the discretion to dismiss. The public welfare cannot be prejudiced by a dismissal without the consent of its representative. 210 S.E.2d 601. Further, and by analogy, the Court recognized that the lower courts, absent appropriate statutory provisions, have no power

to enter a nolle prosequi at this stage of the proceedings. Since a nolle prosequi is similar to a dismissal, the same underlying principles of its enforcement apply to a dismissal for failure to prosecute. Since no such statute specifically empowered the family court judge to dismiss the case for failure to prosecute, his actions were reversed.

The principles espoused in In Re Brittian are of general application. The Supreme Court made no attempt to narrow the effect of its holding to the family court. The principles espoused in In Re Brittian dictate that absent a statute no court may dismiss a case without the consent of the prosecutor. The Supreme Court has implicitly so held. [State v. Lewis](#), 266 S.C. 45, 221 S.E.2d 524 (1976). Our research reveals no such statute. It is our opinion that absent an appropriate statute, the failure of the prosecuting officer to appear at the scheduled time does not warrant a magistrate's dismissal of the case for lack of prosecution. Further, a directed verdict for the defendant before the State has offered any testimony would likewise be inappropriate. [State v. Sweat](#), 221 S.C. 270, 70 S.E.2d 234 (1952); see cases collected at 7A South Carolina Digest, Criminal Law, Key Number 753(2).

CONCLUSION:

*2 Therefore, it is our opinion that the principles stated in In Re Brittian regarding dismissal for lack of prosecution, are applicable to the magistrates' courts and generally prohibit such a dismissal without the consent of the prosecutor.

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