

1977 WL 37159 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 3, 1977

***1 RE: Dismissal of DUI's Due to Unavailability of Arresting Officer**

Herbert F. Payton
Chief of Police
Newberry County Police Department
Prosperity, South Carolina 29127

Dear Chief Payton:

Thank you for your letter of October 31, 1977, to the Attorney General regarding the possible prosecution of DUI cases in situations in which the arresting officer has left the department and is otherwise unavailable.

You have asked what courses of action are open to the prosecution in situations in which the arresting officer has left the police department and is no longer available to testify at the trial of a DUI defendant. It would first be advisable to obtain some assurance that the departing officer will appear at the subsequent trial either by having the trial judge impose an appearance bond on him as a material witness (See Section 17-15-70 of the 1976 Code) or by other agreement satisfactory to the department. If he is still in the State, such a bond may be secured through the local magistrate. However, if that officer is outside the State, he commonly in these situations may not be brought back by the use of legal process for proceedings in courts which are not of record. (See generally Section 19-9-10, et seq. of the 1976 Code.)

Moreover, the breathalyzer operator ordinarily has no knowledge and therefore no ability to testify as to the defendant's driving though he may know of facts supporting the arresting officer's conclusion of probable cause to believe that the defendant was driving under the influence. His testimony alone, of course, could not be sufficient to support the arresting officer's charge since he did not observe the defendant at the time of the alleged violation and hearsay evidence would be inadmissible.

Where the arresting officer has become completely unavailable, the particular facts should be clearly stated on the back of the uniform traffic ticket or arrest warrant and not proessed by the person in charge of prosecution, preferably the respective law enforcement chief. See Directive 2 which is attached for your convenience.

If you have any further questions or if we can be of any assistance, please do not hesitate to contact us.

Very truly yours,

Richard P. Wilson
Assistant Attorney General

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