

2003 WL 21998994 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 5, 2003

Re: Driving Under the Influence/Reckless Driving

*1 Captain John M. Hall
Travelers Rest Police Department
6711 State Park Road
Travelers Rest, South Carolina 29690

Dear Captain Hall:

You have requested an advisory opinion from this Office regarding the legality of the reduction of a driving under the influence charge to a reckless driving charge. You have also asked if the presiding judge is required to explain all of the relevant details on the back of the citation when a DUI charge is either dismissed or nol prossed.

This Office has opined on several occasions that a DUI charge cannot be reduced to reckless driving. Ops. S.C. Attn. Gen., dated January 12, 1982; March 10, 1972. The South Carolina Supreme Court has recognized that reckless driving is not a lesser included offense of driving under the influence, and that DUI and reckless driving are separate and distinct offenses. State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974). A magistrate or a municipal court would not therefore have jurisdiction to accept a guilty plea for reckless driving when the accused has been charged with driving under the influence unless a separate uniform traffic ticket or warrant charging reckless driving has been issued. State v. Fennell, supra. Moreover, a Judge does not have the authority to dismiss the driving under the influence charge on his own motion except at the instance of the prosecuting official. Id. Along those lines, this Office has previously opined that "... once a ticket for DUI is issued, the charge can only be changed by nol prossing the original ticket and issuing a new one on the alternative charge." See Op. S.C. Atty. Gen., dated November 7, 1996 (copy enclosed).

In the January 12, 1982 opinion, we opined as to the proper procedure for charging an individual with reckless driving who is currently being charged with driving under the influence:

A driving under the influence charge may be [nol] prossed or dismissed by the proper prosecuting officials, as any other criminal case, where the evidence does not justify the prosecution. The defendant may be charged with another offense on a separate warrant or traffic summons if evidence is available to support the charge.

Of course in order to issue a separate warrant or summons for reckless driving, the charge must be supported by probable cause.

It should also be noted that, as a matter of policy and based on the Attorney General's Constitutional authority as this State's chief prosecuting officer, this Office has issued directives regarding the prosecution of driving under the influence cases in magistrates' and municipal courts. The latest directive, issued in December of 1995 (copy attached) which reaffirms similar directives issued in 1977 and 1990, generally provides that "[i]f the evidence available to the prosecution is sufficient to justify the arrest of the defendant, subsequent prosecution shall be for the DUI charge made originally by the traffic officer. No such charge shall be changed to another offense for the purpose of obtaining a plea and avoiding trial." The 1990 directive also provides that "[n]o charge of DUI will be nol prossed by the person in charge

of the prosecution unless it shall appear that the evidence to support the charge is not available or is of such nature that there is not a reasonable chance of conviction.”

*2 Regarding your second question, this Office is aware of no statute that would require a presiding judge to give a detailed explanation of the facts surrounding the dismissal on the back of a traffic summons where a DUI charge is either dismissed or nolle prossed. Our 1990 directive referenced above, however, does state that if a prosecuting officer nol prosses a DUI charge, that officer shall announce the action in open court and “... shall set forth the reasons for the nol pros in writing on the arrest warrant or on the back of the ... uniform traffic ticket, and shall sign his name thereto.”

I trust that the above sufficiently addresses your questions.

Sincerely,

David K. Avant
Assistant Attorney General

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