

1978 WL 34909 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 15, 1978

***1 RE: DUI and the Implied Consent Law**

Chief John H. Cook
Department of Public Safety
Police Division
P. O. Box 1425
Orangeburg, S. C. 29115

Dear Chief Cook:

You have posed two questions regarding driving under the influence charges and the Implied Consent Law.

First, you ask whether a person must be placed under lawful arrest for driving under the influence prior to being administered a breathalyzer test pursuant to [Section 56-5-2950 of the 1976 Code of Laws of South Carolina](#). As you note, that statute appears to require an arrest prior to the administration of the breathalyzer test. The terms of that statute, of course, must be strictly complied with. Accordingly, it is manifestly certain from the language of [Section 56-5-2950](#) that a person must be under lawful arrest prior to the administration of the breathalyzer test.

You have also asked whether the arresting officer has the authority to change the charge of driving under the influence to another charge such as driving left of center following the administration of the breathalyzer test with a low reading. Assuming the existence of probable cause to support either charge in a given situation, the manner in which charges may be altered such as you describe is governed by the procedure contained in Directive No. 2 issued by the Attorney General and dated March 29, 1977. A copy of that Directive is enclosed for your convenience. Compliance with the procedure outlined therein should insure proper prosecution in accordance with accepted criminal justice procedures.

Additionally, it should be noted, however, that the practice outlined in Directive No. 2 concerns those instances in which a defendant has already been charged with driving under the influence and the initiating process (the Uniform Traffic Ticket or arrest warrant) has been issued prior to the desired change in charge. Presumably, such a procedure would not be necessary were the officer to refrain from serving the Uniform Traffic Ticket on a lawfully arrested defendant until after the administration of the breathalyzer test, thereby avoiding the problems inherent in subsequently nullifying judicial process. However, such a procedure is at all times subject to the individual department's procedures and the foregoing is merely a suggestion submitted for your consideration.

Also, as requested, I am enclosing a copy of the [Fennell](#) case. If you have any further questions or need further assistance, please feel free to contact me.

Very truly yours,

Richard P. Wilson
Assistant Attorney General

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