

1978 S.C. Op. Atty. Gen. 239 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-206, 1978 WL 218428

Office of the Attorney General

State of South Carolina

Opinion No. 78-206

December 12, 1978

SUBJECT: Nolle Prosequi, Criminal Identification and Investigation, Law Enforcement, Identification.

SYLLABUS:

*1 (1) [S.C. Code, § 17-1-40 \(1976\)](#) requires that, when a charge has received an entry of nolle prosequi, all municipal, county and state law enforcement agencies must expunge the criminal record and cease the dissemination of information concerning such charge.

(2) Federal regulations concerning dissemination of non-conviction data allow municipal, county or state law enforcement agencies to cease dissemination of information concerning criminal records which have been expunged pursuant to [§ 17-1-40](#) as a result of an entry of nolle prosequi.

J. Preston Strom
Chief
South Carolina Law Enforcement Division

QUESTIONS:

1. Does [S.C. Code, § 17-1-40 \(1976\)](#) require municipal, county and state law enforcement agencies to expunge and cease dissemination of information concerning the arrest and booking record, files, mug shots, and fingerprints arising out of a charge which has received an entry of nolle prosequi?

2. What effect, if any, do federal regulations promulgated under [28 U.S.C.A. 534](#) have upon municipal, county or state law enforcement agencies which cease dissemination of information arising out of charges in which the criminal record has been expunged under [§ 17-1-40](#) as a result of an entry of nolle prosequi?

STATUTES AND CASES:

[S.C. Code, § 17-1-40 \(1976\)](#)

[State v. Gaskins](#), 263 S.C. 343, 210 S.E.2d 590 (1974)

[State v. Charles](#), 183 S.C. 183, 190 S.E. 466 (1936)

[State v. Messerby](#), 105 S.C. 254, 89 S.E. 662 (1915)

[28 U.S.C.A. 534](#)

DISCUSSION:

1. You have directed to this Office an inquiry as to whether the above-captioned expungement statute applies to cases which have received a final disposition of nolle prosequi. You also requested information as to the effect that the above-captioned statute would have upon a law enforcement agency subject to federal regulations on the dissemination of criminal history records pursuant to [28 U.S.C.A. Section 534](#).

[S.C. Code, Section 17-1-40 \(1976\)](#) provides as follows:

Any person who after being charged with a criminal offense and such charge is discharged or proceedings against such person dismissed or is found to be innocent of such charge the arrest and booking record, files, mug shots, and fingerprints of such persons shall be destroyed and no evidence of such record pertaining to such charge shall be retained by any municipal, county, or state law enforcement agency.

A nolle prosequi would be subject to the above statute if it constitutes a discharge, dismissal, or acquittal of the criminal charge against a defendant. “A nolle prosequi is a formal entry in the record by a prosecuting officer by which he declares he will not prosecute the case further.” [State v. Gaskins](#), 263 S.C. 343, 347, 210 S.E.2d 590 (1974), citing 22A C.J.S., [Criminal Law, Section 456](#), page 1. The only persons entitled to enter a nolle prosequi are the Attorney General and the Solicitors of the various judicial circuits in the State of South Carolina. [State v. Charles](#), 183 S.C. 188, 190 S.E. 466 (1936). The entry of a nolle prosequi will not bar a subsequent prosecution for the same offense unless it is entered after the jury is impaneled and sworn, at which time it is equivalent to an acquittal. [State v. Gaskins](#), *supra*. However, it has been held that the entry of the nolle prosequi after the Court has declared a mistrial will not prevent a subsequent prosecution for the same offense. [State v. Messerby](#), 105 S.C. 254, 89 S.E. 662 (1915); [State v. Charles](#), *supra*; [State v. Gaskins](#), *supra*. The entry of a nolle prosequi, thus, acts as a dismissal of the particular prosecution and nullifies the particular indictment in the case. 22A C.J.S., [Criminal Law, Section 456](#), page 2. As noted above, it may also act as an acquittal in certain limited situations. Therefore, upon entry of the nolle prosequi, the arrest, booking record, files, mug shots and fingerprints of the person charged with a criminal offense must be expunged from all municipal, county or state law enforcement agencies. I would call your attention to 1975-76 Op. Atty. Gen., No. 4504, page 361, as to what may constitute a “law enforcement agency” under [Section 17-1-40](#).

*2 2. The applicable federal regulations covering the dissemination of non-conviction data have been promulgated pursuant to [28 U.S.C.A. 534](#), which provides as follows:

(a) The Attorney General shall—

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and

(2) exchange these records with, and for the official use of, authorized officials of the federal government, the states, cities, and penal and other institutions.

(b) The exchange of records authorized by Subsection (a)(2) of the Section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions authorized by this Section.

The United States Attorney General has delegated the federal criminal record keeping tasks under [28 U.S.C.A. 534](#) to the director of the FBI. 28 C.F.R. Section 85. The federal regulations covering criminal justice information systems may be found in [28 C.F.R. Section 20.1](#) et seq. The regulations direct that any state and local agencies which have been funded in whole or in part with funds made available by the Law Enforcement Assistance Administration shall

establish a system for maintaining complete and accurate criminal history information subject to certain limitations on the dissemination of such information. The regulations apply to conviction and non-conviction data, suggesting that a central state repository for criminal information be established. 28 C.F.R. Section 20.21. The regulations also provide that any disposition of a case, such as a nolle prosequi, be entered in the state's criminal history records within ninety (90) days after the disposition has occurred. 28 C.F.R. Sections 20.3(e), 20.21(a)(1). These federal regulations are intended to assure that criminal record information is collected and stored within a centralized system designed so as to maintain accurate and current information. The regulations also limit the dissemination of criminal history record information so as to protect individual privacy. 28 C.F.R. Section 20.1.

The applicability of Section 17-1-40 to the above-cited federal regulations may be found in the provisions covering "non-conviction data." 28 C.F.R. Section 20.21(b). The sections covering non-conviction data specifically provide that they do not require dissemination of such criminal history record information to any agency or individual. As stated in 28 C.F.R. Section 20.21(c)(3), "States and local governments will determine the purposes for which dissemination of criminal history record information is authorized by State law, executive order, local ordinance, court rule, decision or order." The Appendix to 28 C.F.R. Section 20.21(c)(3) states as follows:

The language of this subsection leaves to the States the question of who among the agencies and individuals listed in Section 20.21(b) [limiting dissemination of non-conviction data] shall actually receive criminal records. Under these regulations the State could place a total ban on dissemination if it so wished. The State could, on the other hand, enact laws authorizing any member of the private sector to have access to non-conviction data.

*3 Therefore, the federal regulations give deference to the states as to the types of non-conviction data which will be disseminated, and Section 17-1-40 should be read as a policy of this State to cease dissemination of information dealing with a charge which has been discharged or dismissed, or which has been the subject of an acquittal.

It should also be noted that 28 C.F.R. Section 20.24, dealing with state laws on privacy and security, provides as follows: Where a state originating criminal history record information provides for sealing or purging thereof, nothing in these regulations shall be construed to prevent any other state receiving such information, upon notification, from complying with the originating state's sealing or purging requirements.

As you can see, the above federal regulations have been drawn so as not to conflict with any state's purging requirement in regards to non-conviction data.

CONCLUSION:

Therefore, Section 17-1-40 does apply to charges for which a nolle prosequi has been entered, and information dealing with such charges should not be disseminated after the dismissal has been entered. Federal regulations under 28 U.S.C.A. 534 do not prohibit the purging of such non-conviction data.

Lindy Pike Funkhouser
Staff Attorney

APPROVED BY:

Emmet Clair
Deputy Attorney General

1978 S.C. Op. Atty. Gen. 239 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-206, 1978 WL 218428

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.