ALAN WILSON
ATTORNEY GENERAL

June 28, 2019

The Hon. B. Lee Miller
Municipal Judge, City of Greenwood
PO Box 40
Greenwood, SC 29648

Dear Judge Miller:

We received your request seeking an opinion on the appropriate charging statute for operating a moped without a license. This opinion sets out our Office's understanding of your question and our response.

Issue:

Your letter asks "[w]hat would be the appropriate statute in charging a person with No Valid Moped License." You direct us to S.C. Code Ann. § 56-1-1720 (Supp. 2019) and S.C. Code Ann. § 56-2-3000 (Supp. 2019) of the South Carolina Code, both of which address operating a moped without a license. However, each statute provides different penalties for a violation.

Law/Analysis:

It is the opinion of this Office that if a person operates a moped without a valid driver's license or valid moped operator's license, that person may be charged with a violation of either Section 56-1-1720 or Section 56-2-3000 in the prosecutor's discretion, provided that the facts of the particular case support the charge. *See Op. S.C. Att'y Gen.*, 2015 WL 3919079 (June 11, 2015).

Section 56-1-1720 reads in full:

> (A) To operate a moped on public highways, a person must possess a valid driver's license issued under Article 1 of this chapter or a valid moped operator's license issued under this article. The department may issue a moped operator's license to a person who is fifteen years of age or older.
>
> (B) A person younger than sixteen years of age with a moped operator's license may operate a moped:

> (1) alone during daylight hours only; and
>
> (2) during nighttime hours when accompanied by a licensed driver twenty-one years of age or older who has had at least one year of driving experience. The accompanying driver must be a passenger or within a safe viewing distance of the operator when the operator is operating a moped.
>
> (C) A person sixteen years of age or older with a moped license may drive a moped alone any time.
>
> (D) A person who operates a moped in violation of the provisions of this section is guilty of a misdemeanor and, upon conviction of a first offense, must be fined not more than one hundred dollars and, upon conviction of a second or subsequent offense, must be fined not more than two hundred dollars.

S.C. Code Ann. § 56-1-1720 (Supp. 2018) (emphasis added). We highlight that this statute establishes the payment of a fine, and not imprisonment, as the penalty for a violation. § 56-1-1720(D). This version of Section 56-1-1720 was last amended in 2017 by Act No. 89, 2017 S.C. Acts 482, 494-95.

The same Act 89 of 2017 also added for the first time Section 56-2-3000, which reads in full: "[a] person operating a moped on a public highway at all times must have in his possession a valid moped operator's license or valid driver's license and moped registration." S.C. Code Ann. § 56-2-3000 (Supp. 2018) (emphasis added). Violation of this provision is a misdemeanor punishable "by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days." S.C. Code Ann. § 56-2-4000 (Supp. 2018) (emphasis added).

While Section 56-1-1720 and Section 56-2-3000 regulate moped operation and licensing in different ways, they do overlap in that both sections require that a person operating a moped must possess either a valid driver's license or a valid moped operator's license. *Cf.* S.C. Code Ann. §§ 56-1-1720(A) (Supp. 2018) & 56-2-3000 (Supp. 2018). We understand your question to be which charged should be used if a person drives a moped without a valid license and the facts of a case could support either charge.

This author's research has not identified any reported South Carolina case or prior opinion of this Office which address your question directly. It appears that a court faced with this question would rely upon the rules of statutory construction to give effect to the intention of the Legislature in codifying the various statutes set out above. In the words of the South Carolina Supreme Court,

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hodges v. Rainey, 341 S.C.79, 85, 533 S.E.2d 578, 581 (2000) (internal citations and quotations omitted). Additionally, "[t]he rules of statutory construction developed by our Supreme Court establish that a criminal statute must be strictly construed against the state and any ambiguity or doubt or uncertainty must be resolved in favor of the defendant." *Op. S.C. Att'y Gen.*, 1983 WL 182044 (November 2, 1983) (citing *State v. Germany*, 216 S.C. 182, 57 S.E.2d 165 (1950); *State v. Lewis*, 141 S.C. 483, 86 S.E. 1057 (1927).). We also have observed, however, that

> [T]he rule of strict construction of criminal statutes cannot provide a substitute for common sense, precedent, and legislative history. The construction of a penal statute should not be unduly technical, arbitrary, severe, artificial or narrow. In this regard, while penal statutes are to be strictly construed, they need not be given unnecessarily narrow meaning in disregard of the obvious legislative purpose and intent . . . . In short, although criminal statutes are to be strictly construed in favor of the defendant, the courts are not authorized to interpret them so as to emasculate the statutes.

Op. S.C. Att'y Gen., 2006 WL 2382448 (July 14, 2006) (quoting 72 Am.Jur.2d, Statutes, § 196 (2001)).

Our Office also has previously opined regarding the broad discretion of prosecutors in pursuing criminal charges:

> Generally speaking, "[p]rosecutors are given great discretion in determining which cases will be prosecuted." *U.S. v. Allen*, 954 F.2d 1160, 1166 (6th Cir. 1992). Indeed, as the Supreme Court of the United States has explained, "[so] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision of whether or not to prosecute and what charge to file ... generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (footnote omitted).

> In South Carolina, Article V, Section 24 designates the Attorney General as "the chief prosecuting officer of the State" with the authority "to supervise the prosecution of all criminal cases in courts of record." *Id.* Further, the duties of the Attorney General are discharged not only by him and his staff, but through "the activities of the solicitors ... located in each judicial circuit of the State." *Ex parte McLeod*, 272 S.C. 373, 377, 252 S.E.2d 126, 127 (1979). Acknowledging this, our Supreme Court found in *State v. Addis*, 257 S.C. 482, 487, 186 S.E.2d 415, 417 (1972) that "[i]n every criminal prosecution the responsibility for the conduct of the trial is upon the solicitor and he must ... have full control of the State's case." This control extends to both charging decisions as well as "the decision ... to proceed with a given charge." *Op. S.C. Att'y Gen.*, 2004 WL 885184 (April 20, 2004).

Op. S.C. Att'y Gen., 2015 WL 3919079 (June 11, 2015). Our Office also has opined previously that where the facts of a case fit the elements of more than one criminal offense, a solicitor may exercise their discretion to charge either offense, including a lesser offense. *Op. S.C. Att'y Gen.*, 2006 WL 1207285 (April 18, 2006).

Turning to the question presented in your letter, it appears that the law provides a prosecutor with the option to charge a person operating a moped without a valid license under at least two separate statutes. *Cf.* S.C. Code Ann. §§ 56-1-1720(A) (Supp. 2018) & 56-2-3000 (Supp. 2018). The text of these statutes contains no indication that the Legislature intended that one be used instead of the other. *See id.* Instead, this appears to be a case where prosecutors are to use their discretion to decide which charge to pursue, provided that the facts of the case support the charge.

Conclusion:

Therefore, it is the opinion of this Office that if a person operates a moped without a valid driver's license or valid moped operator's license, that person may be charged with a violation of either Section 56-1-1720 or Section 56-2-3000 in the prosecutor's discretion, provided that the facts of the particular case support the charge. *See Op. S.C. Att'y Gen.*, 2015 WL 3919079 (June 11, 2015).

Our Office's longstanding policy is to defer to magistrates in their determinations of probable cause, and to local officers and solicitors in deciding what charges to bring and which cases to prosecute. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Our discussion of the law here is simply intended to aid you in your duties as a judge.

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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