1974 WL 28042 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 15, 1974

***1 In Re: H-3404 [1974]; Act to Require Law Enforcement Agencies in Chesterfield and Marlboro Counties to Cooperate With ASAP**

Colonel P. F. Thompson
Director of Law Enforcement
State Highway Patrol
Post Office Box 191
Columbia, South Carolina 29202

Dear Colonel Thompson:
You have inquired as to the validity of H-3404, effective September 4, 1974:
'All law enforcement agencies operating in Chesterfield and Marlboro Counties shall cooperate in every respect with the Alcohol Safety Action Projects conducted in these counties.'

Assuming, without deciding, that 'cooperate in every respect' is definite enough to escape the condemnation of being unconstitutionally value, and that such language was intended to mean that law enforcement officers in the two Counties named are required by such language to nol pros DUI cases and substitute other, lesser traffic charges in lieu thereof when directed to do so by ASAP, this opinion will be directed at the question of the validity of the Act in light of State constitutional provisions relating to delegation of legislative authority and the enactment of special laws where general laws can be made applicable.

It is my understanding that the ASAP program as now carried out in Richland County permits the trial judge [magistrate or municipal judge] in a first offense DUI case to designate the defendant as an enrollee in a series of instructional courses conducted by ASAP. When a defendant is so designated, the DUI charge is held in abeyance pending the defendant's completion of the ASAP instructional course. Upon completion of such course, ASAP makes a written report and recommendation to the trial judge. If the report is favorable to the defendant, the charge of DUI is nol prossed, and the defendant is permitted to enter a plea of guilty to a lesser traffic charge.

No attempt will be made here to determine the question of whether or not the unrestricted discretion of the trial judge to determine who shall be permitted to participate in the ASAP program affords the even-handed application of the criminal laws required by both Federal and State Constitution under the 'equal protection of the laws' provisions of those governing instruments.

Circuit Judge Craven of the Fourth Circuit Court of Appeals said in United Citizen's Party v. South Carolina State Plection Commission, 319 F. Supp. 734:
'It is a block letter rule now so firmly fixed that it is found in legal encyclopedias that a legislature may not delegate legislative functions to private persons or associations. 16 Am. Jur. 2d 249.'

It is equally well founded in our law that the legislature may not delegate to a governmental administrative body or commission any purely legislative authority, such as providing for definition of crimes and providing penalties therefor.

16 CJC, Constitutional Law, S. 133. Also, the legislature may not give to anyone, including an administrative agency or commission, the right to ignore or nullify a law which it has enacted. U.S. Sugar Equalization Board v. DeRonde, 70 L. ed. 406.

***2** Under provisions of Section 46-345, 1962 Code of Laws of South Carolina, as amended, the General Assembly has set forth the penalty for DUI, viz., $50-$100 fine or 10-30 days imprisonment. An act delegating to an administrative agency or commission the legislative authority to change or ignore such penalty by the simple procedure of requiring police officers to change the DUI charge preferred in certain circumstances to a lesser offense is patently an unlawful delegation of legislative authority. Under the language of H-3404 [1974], law enforcement officers are required to 'cooperate in every respect with ASAP. Without doubt, under such authority, ASAP is empowered to change its procedures at will - - - even to the extent of eliminating all penalties for first offense DUI, under any conditions it wishes to set forth. Such provisions of H-3404 constitute a delegation to ASAP of the legislative authority to enact criminal penalties - - - something that is forbidden under our doctrine and system of separation of powers of the three branches of our government.

Act H-3404 [1974] runs afoul of another, equally important State constitutional provision, viz.; that the General Assembly may not enact, except in enumerated areas of the law, any special or local law where a general law can be made applicable. Ref.: Article 3, Section 34(IX), Constitution of South Carolina.

It cannot be argued seriously that if the General Assembly wishes for first offense DUI defendants to be given the opportunity of having the DUI charge removed upon condition of successful completion of an ASAP course of instruction, it can make a general law applicable. Such opportunity would then be available to all persons in the State - - - not only to those prosecuted in certain counties.

For the foregoing reasons, it is the opinion of this Office that H-3404 [1974] is invalid.

This opinion is not intended, and it should not be construed, to indicate any feeling on the part of this Office that the ASAP programs are not beneficial to individuals involved and to society in general, or that they are not motivated by the desire to alleviate a situation that has become a great problem affecting everyone. It is intended to say, however, that where crimes and criminal penalties are involved, the legislature itself must set forth with specificity the conditions under which charges and penalties may be modified - - - not leaving such matters to the discretion of an administrative board or commission - - - and any such provisions must be made available to all persons in such manner as to result in an even-handed application of the criminal laws.
Yours very truly,

Joseph C. Coleran
Deputy Attorney General

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