

1973 WL 26652 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 9, 1973

***1 Re: South Carolina Sunday Closing Laws**

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1. What activities constitute a violation of that portion of § 64-2, South Carolina Code of Laws (1962), as amended, which prohibits the 'offering to sell' of certain items on Sunday?

§ 64-2 provides that:

On the first day of the week, commonly called Sunday, it shall be unlawful for any person to engage in worldly work, labor, business of his ordinary calling or the selling or offering to sell, publicly or privately or by telephone, at retail or at wholesale to the consumer any goods, wares or merchandise or to employ others to engage in work, labor, business or selling or offering to sell any goods, wares or merchandise, excepting work of necessity or charity. (Emphasis added.)

The Supreme Court of the State of South Carolina has ruled that the purpose and effect of this legislation is:

[T]o set aside a uniform day of rest in furtherance of the State's legitimate concern for the improvement of the health and general well being of its citizens. [State v. Solomon](#), 245 S.C. 550, 567, 141 S.E.2d 818, 827 (1965); appeal dismissed, 382 U.S. 204 (1965).

Therefore, one seeking to apply the provisions of § 64-2 to certain activities being conducted on Sunday must first determine the extent to which the activity engaged in necessitates the efforts and labor of individual citizens.

To this date, there has been no judicial determination in South Carolina as to what constitutes 'offering to sell.' The Office of the Attorney General has received inquiries in the past posing the question with regard to specific businesses. As some of the opinions may apply to businesses operating in your jurisdiction, I am enclosing copies for your consideration. (See Exhibits 1, 2 and 3).

Generally speaking, 'offering or exposing for sale' within a statutory prohibition:

[C]onsists of keeping and showing for the purpose of selling, or placing in view with the purpose and intention of selling. 83 C.J.S. Sunday, § 15 (1953), citing [State v. Hogan](#), 212 Mo. App. 473, 252 S.W. 90 (1923).

If this definition is to be applied rationally, we must distinguish those business practices embraced by the statutory scheme from those exempt. In all cases, however, the crucial inquiry is whether or not the conduct involved conflicts with the legislative intent: to set aside a uniform day of rest for the benefit of all citizens.

Obviously, not all cases in which goods and merchandise are displayed with the intention that they be ultimately sold are within the purview of the statute. This would yield absurd results: storefront windows would have to be shielded, automobile dealerships would have to conceal their stock from public view on Sunday, etc. Mere display does not constitute a violation

because it does not require any citizen to sacrifice his day of rest in order to accomplish the objective. No sale is consummated and no one is required to engage in 'worldly work or labor' because the establishment is not open for business.

***2** In marked contrast to the passive display practices described above are those business-oriented activities which necessitate the labor of individuals on the Sabbath. Most frequently involved in this type of conduct are the business establishments that deal in goods which are prohibited by statute from being sold on Sunday. Merchants in this category, seeking a competitive advantage, often open for 'display and inspection only.' 'Browsing' is easily distinguishable from 'window shopping' in that it requires (1) that the business premises be open and (2) the presence of staff personnel. There are a number of reasons why it runs afoul of the statutory proscription:

(1) Any person or persons available on the premises to open and close the business or to display and demonstrate the merchandise would be engaged in the 'worldly work, labor, business of [his] ordinary calling' since such duties are obviously part of the usual operation of the enterprise.

(2) In direct contravention of the declared purpose of the statute, those persons so engaged are being deprived of their day of rest.

(3) The fact that the goods on display are otherwise prohibited from sale on Sunday supports the conclusion that the practice is intended to circumvent the law. Courts are loathe to countenance such subterfuge.

(4) In view of the reasons stated above, opening 'for display and inspection only' constitutes 'offering to sell' under § 64-2. Displaying the merchandise achieves an integral part of the sales process and the fact that the transaction may actually be consummated on a week day does not alter this conclusion.

The South Carolina General Assembly has seen fit to exempt the sale of specified commodities and the conduct of certain business operations from the proscriptions of § 64-2. For example, § 64-2.1 provides that § 64.2 does not apply to: [T]he sale of emergency food needs at open air markets and grocery stores which do not employ more than three persons including the owners or proprietors at any one time . . .

The problem thus becomes one of applying the 'offering to sell' standard to those retailers dealing in merchandise (or engaging in activities) excepted from § 64-2 prohibitions who also display goods open to public view which are not permitted to be sold on Sunday. Your inquiry was with regard to self-service mercantile establishments which are most exemplary of the type of operation affected. In order to understand the rationale behind the statutory exceptions, consider the court's discussion in *State v. Soloman*, supra:

The legislative problem was one of limiting business activity to that necessary to provide for the reasonable needs of the public and at the same time provide a day of rest and relaxation for the most people. Because of the variety of factors which enter into any such determination, a wide range of legislative discretion must be allowed. We think that the legislature could reasonably conclude that the statutory exceptions were necessary in order to supply the reasonable needs of the public and provide at the same time the atmosphere of a day of rest and relaxation. 245 S.C. at 572, 141 S.E.2d at 830. (Emphasis added.)

***3** Therefore, while some individuals will have to engage in worldly work, labor or business on Sunday, they do so as a result of the legislature's balancing of interests. Their efforts have been deemed necessary to the public welfare of their fellow citizens. As a result, any conduct they may engage in within the exceptions of § 64-2.1 is protected. The mere fact that the premises upon which they operate on Sunday also contain prohibited items would not be sufficient to constitute a violation.

Are these businesses required to cover prohibited wares and/or post signs indicating what can and cannot be sold? There is no statutory requirement to this effect and, in the absence of such, it would be unjust to impose criminal sanctions for a failure

to take affirmative action not mandated by the controlling legislation. Especially in view of the rule of construction that penal statutes are to be strictly construed, it cannot be said that an 'offer to sell' is constituted solely by the absence of visual warnings.

Recalling that 'offering to sell' is defined as 'placing in view with the purpose and intention of selling,' law enforcement personnel must look beyond the passive display to those additional factors which could indicate such an intent or purpose. According to the factual situation, this could include, but not be limited to the following:

- (1) Actual demonstration of the item in operation.
- (2) Presence of sales personnel in excess of the number needed to sell permitted merchandise.
- (3) Sales personnel handing out brochures or making a sales pitch.
- (4) Opening for public inspection portions of the establishment not containing permitted items.
- (5) Opening for sale of a limited number of items by a business dealing primarily and substantially in prohibited merchandise. (China shop selling tobacco.)

(The examples cited are intended for use merely as guidelines.)

2. Does the donation to charitable purposes of profits derived from the transaction of business on Sunday bring that endeavor within the 'works of charity' exception of § 64-2?

§ 64-2, South Carolina Code of Laws (1962), as amended, excepts 'work of necessity or charity' from the general prohibition against working, selling, or offering to sell on Sunday. Those who seek to claim the benefit of this statutory exception are, by definition, not otherwise engaged in the sale of commodities (or conduct of operations) already excluded by the provisions of § 64-2.1. Nevertheless, can they operate on Sunday in harmony with the law if they donate their profits to charity? It is the opinion of this office that such a result is precluded for the following reasons:

(A) The general rule as it applies to Sunday closing laws is that:

The word 'charity' in this connection means or connotes giving, and not receiving. The dedication to charity of funds or proceeds raised by the transaction of prohibited acts or matters on Sunday is not of itself sufficient to bring such transaction within the exception of works of charity. 83 C.J.S. Sunday § 11, citing [Forehand v. Moody](#), 200 Ga. 166, 36 S.E.2d 321 (1945).

*4 (B) South Carolina's judicial precedents are in accord with the general rule. In [Olweros v. Henderson](#), 116 S.C. 77, 106 S.E. 855 (1920), the Supreme Court was confronted with an appeal from an order sustaining a demurrer to a complaint for slander and libel. The plaintiffs had been previously tried and acquitted of criminal charges filed by the defendant in this civil action. In the previous case, plaintiffs were charged with violation of §§ 698 and 699, South Carolina Criminal Code of 1912, which similar to § 64.2 provided that:

No tradesman, artificer, workman, laborer or other person whatsoever shall do or exercise any worldly labor business or work of their ordinary calling upon the Lord's Day (commonly called the Sabbath) or any part thereof (work of necessity or charity only excepted) . . .

Although the plaintiffs claimed that they donated the proceeds of their Sunday sales to charity, the Court held:

It is clear that, no matter what may have been done with the profits, such sales on Sunday were plain violations of Sections 698 and 699 of the Criminal Code of this State. 116 S.C. at 94, 106 S.E. at 801. (Emphasis added.)

The business enterprise (a combination ice cream parlor and cigar store) was not of itself a work of charity.

(c) Lending support to the reasoning of the South Carolina Court is the decision of [Rogers v. State of Georgia](#), 60 Ga. App. 722, 4 S.E.2d 918 (1939) which interpreted § 26-6905, Georgia Code of 1933 providing that:

Any person who shall pursue his business or ordinary calling on the Lord's Day, works of necessity or charity only excepted, shall be guilty of a misdemeanor.

The defendants, theater operators and employees, maintained that their work was charitable since the proceeds (minus expenses) from Sunday operations went to a hospital. The Court held to the contrary:

Within the meaning of this section the person himself must be engaged in an act which is itself charitable or at least the enterprise for which he works must itself be engaged in acts which are themselves charitable and a detached business from which the support is to be derived is not exempted as a charitable enterprise, nor are the operators or employees of the detached business exempt. 60 Ga. App. at 772, 4 S.E.2d at 921.

The defendants were doing the same kind of work as they did the rest of the week and receiving the same pay. Hence, this was work of their ordinary calling. The same would hold true for owners and employees in South Carolina who operated non-exempt businesses on the Sabbath.

[The statutory provisions of Georgia and South Carolina are not to be compared with those of states which have legislation specifically recognizing the exhibition of motion pictures (or conduct of other enterprises) for purely charitable purposes. See [Williams v. Commonwealth](#), 179 Va. 471, 20 S.E.2d 493 (1942).]

Perhaps this is a harsh result, but as the Court noted in [Rogers, supra](#),

*5 If the existing law is in any way unsatisfactory or unjust, the remedy is by way of application to the legislature to modify or annul it not by application to the court whose sole duty is to construe it. . . . 60 Ga. App. at 726, 4 S.E.2d at 921.

3. A. If an establishment opens on Sunday in violation of § 64-2 for the sale or offering to sell of prohibited items what persons are properly charged with the offense.

§ 64-2.3, South Carolina Code of Laws (1962), as amended, provides that:

Each separate sale, offer or attempt to sell on Sunday, and each Sunday a person is engaged in other work, labor or business in violation of § 64-2, or employs others to be so engaged, shall constitute a separate offense.

The facts in existence at the time of the violation will determine what persons are chargeable. If the manager or owner is participating on Sunday in the business of his ordinary calling he has committed an offense. The same is true if he employs others to engage in prohibited activities (which includes offering to sell). Employees acting in contravention of the proscriptions of § 64-2 would also be in violation.

B. Who can be charged if a prohibited item is sold?

The person who sells the merchandise has committed a violation of the statute. Anyone who employed him for that purpose can also be charged.

C. How many violations may be charged on the same day?

In [State v. James](#), 81 S.C. 97, 62 S.E. 214 (1908), the Supreme Court decided that the provisions of § 500, South Carolina Criminal Code of 1902 which made it an offense for a person to do work or business of his ordinary calling on Sunday could only support one offense on the same day and, as a result, the number of separate acts done did not increase the number of offenses. The present law adheres to that decision insofar as it provides that:

[E]ach Sunday a person is engaged in other work, labor or business in violation of § 64-2, or employs others to be so engaged shall constitute a separate offense. § 64-2.3.

It is important to note that this limitation to one violation per Sunday applies only to work, labor or business. In 1962 the South Carolina Sunday closing laws were substantially revised. One significant change was the addition in § 64-2 of language prohibiting sales and offers to sell. Recognizing that any number of sales or attempts to sell could be made in any single day, the legislature further provided:

Each separate sale, offer or attempt to sell on Sunday . . . shall constitute a separate offense. § 64-2.

In summary, if a business establishment continues to make sales following an initial violation, each separate sale or attempt to sell constitutes a separate violation.

Both Questions 4 and 5 involve interpretation of this portion of § 64-2.1 which specifies that the prohibitions of § 64-2 shall not apply to:

[T]he sale of emergency food needs at open air markets and grocery stores which do not employ more than three persons including the owners or proprietors at any one time. . . .

***6** 4. How does this section apply to chain stores who have a number of locations and numerous employees?

In an opinion issued by this office on April 23, 1962, shortly after the Sunday closing law was amended, the position was taken that the only construction of this section consistent with the State Constitution was that it was limited to the employment of no more than three persons on Sunday, regardless of whether or not more than three persons were employed at that market or store on other days of the week. Thus, with regard to chain stores, each separate location gets the benefit of the three employee exemption.

5. Does the limitation to the employment of no more than three persons refer only to employment on Sunday or does it refer to the number of employees used during the weekdays?

As stated in No. 4 above the limitation to three persons applies only to those involved in the operation of the business on Sunday. This interpretation of the section is in harmony with the purpose of the legislation which is to provide a uniform day of rest for the greatest number of persons. Although certain persons may be required to labor on the Sabbath in order to promote the public welfare, every effort is made to restrict the number so involved. Thus, it is only Sunday labor that this section regulates.

6. Is § 5-103 violated if a religious organization rents a movie theater in Cherokee County and conducts services and a gospel sing therein on Sunday between the hours of 7:00 P. M., and 9:00 P. M., to which a charge in the nature of a donation is made for admission?

§ 5-103(1) South Carolina Code of Laws, 1962, as amended, makes it lawful to show movies, engage in sports, and hold musical concerts in certain counties in South Carolina. (Cherokee County does not meet the population requirements needed to qualify.) § 5-103(2) then prescribes that elsewhere in the State:

No moving picture, athletic sport or musical concert shall be publicly exhibited or engaged in between the hours of seven o'clock P.M., and nine o'clock P.M., on Sundays.

The question becomes one of whether or not a gospel sing can (or should be) classified as a 'musical concern' within the language of that statute. The term 'musical concert' is one which defies precise definition. As of yet, the courts of South Carolina have not had occasion to consider its usage. Therefore, it is essentially a factual determination to be made in the light of all the attendant circumstances.

If the performance is secular in nature, widely promoted, and devoted to profits first and foremost, it may well be a 'musical concert.' If the sponsoring organization is a church or congregation, the music consists of making a joyful noise unto the Lord, only a small donation is charged for admission, the hymns are interspersed with prayer, and the meeting is held during the regular hours of worship, it would be judicious to consider such a gathering a 'gospel sing.' (In this vein, it is wise to remember that one result of the restrictions on entertainment from 7:00 P. M., to 9:00 P. M., on Sunday, is to limit the number of distractions which might otherwise divert worshipers from the religious services and gospel sings normally held during those hours.)

*7 Article I, Section 2 of the Constitution of the State of South Carolina provides in part:
The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .

In view of this constitutional safeguard, it would be futile to attempt to apply the penal provisions of § 5-103 to Sunday gospel sings regardless of whether or not donations are charged for admission.

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