ALAN WILSON
ATTORNEY GENERAL

May 6, 2020

The Honorable Deborah Culler
Clemson University Municipal Court Judge
Clemson University
G01-C Edgar Brown Union
Clemson, South Carolina 29634

Dear Judge Culler:

We received your letter addressed to Attorney General Alan Wilson requesting an opinion on issues involving conditional discharges for public disorderly conduct and simple possession of marijuana in summary court. First, you point out the statutes relating to both of these reference the judge placing the accused on probation. You note "summary courts do not have the authority to place defendants on true 'probation.'" You ask whether "the law should be amended to change the word 'probation' to some other word that more accurately reflects how these cases are handled?" Next, you question the summary court's role in the expungement process for these types of cases. Specifically, you ask for "clarification as to the responsibility for expungement of these cases because if it is expunged by the Solicitor's office the defendant is charged $285.00 but if it is done in summary court, there is currently no charge for doing an expungement. I would also like to know if we are expected to hold a specific hearing to release the defendant and dismiss the charge?"

Law/Analysis

I. Probation

Section 44-53-450 of the South Carolina Code (2018) pertains to conditional discharges for simple possession of marijuana and the eligibility for expungement of such charges. Section 44-53-450(A) provides:

> (A) Whenever any person who has not previously been convicted of any offense under this article or any offense under any state or federal statute relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under Section 44-53-370(c) and (d), or Section 44-53-375(A), the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions as it requires, including the requirement that such person cooperate in a treatment and rehabilitation program of a state-supported facility or a facility approved

> by the commission, if available. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions. However, a nonpublic record shall be forwarded to and retained by the Department of Narcotic and Dangerous Drugs under the South Carolina Law Enforcement Division solely for the purpose of use by the courts in determining whether or not a person has committed a subsequent offense under this article. Discharge and dismissal under this section may occur only once with respect to any person.

(emphasis added).

Similarly, section 16-17-530 of the South Carolina Code (Supp. 2019) pertains to conditional discharges for public disorderly conduct. This provisions states in pertinent part:

> (A) A person who is: (1) found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducts himself in a disorderly or boisterous manner; (2) uses obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church; or (3) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharges any gun, pistol, or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, is guilty of a misdemeanor and, upon conviction, must be fined not more than one hundred dollars or be imprisoned for not more than thirty days. However, conditional discharge may be granted by the court in accordance with the provisions of this section upon approval by the circuit solicitor.
>
> (A) When a person who has not previously been convicted of an offense pursuant to this section or any similar offense under any state or federal statute relating to drunk or disorderly conduct pleads guilty to or is found guilty of a violation of this section, the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions as it requires, including the requirement that the person cooperate in a treatment and rehabilitation program of a state-supported facility, if available. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court

> shall discharge the person and dismiss the proceedings against him. Discharge and dismissal pursuant to this section is without court adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. However, a nonpublic record must be forwarded to and retained by the South Carolina Law Enforcement Division solely for the purpose of use by the courts in determining whether or not a person has committed a subsequent offense pursuant to this section. Discharge and dismissal pursuant to this section may occur only once with respect to any person.

(emphasis added). As you point out, both of these statutes reference the accused being placed on probation while fulfilling the terms and conditions for their charges to be discharged and dismissed under these provisions.

First, we look to the role of summary court judges in these types of cases. Section 22-3-540 of the South Carolina Code (2007) gives magistrates exclusive jurisdiction in certain criminal cases.

> Magistrates shall have exclusive jurisdiction of all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days, except cases in which an offense within the jurisdiction of a magistrate is included in the charge of an offense beyond his jurisdiction or when it is permissible to join a charge of an offense within his jurisdiction with one or more of which the magistrate has no jurisdiction. Magistrates shall have concurrent but not exclusive jurisdiction in the excepted cases. The provisions of this section shall not be construed so as to limit the jurisdiction of any magistrate whose jurisdiction has been extended beyond that stated above.

S.C. Code Ann. § 22-3-540. Section 22-3-550(A) of the South Carolina Code (Supp. 2015) further provides: "Magistrates have jurisdiction of all offenses which may be subject to the penalties of a fine or forfeiture not exceeding five hundred dollars, or imprisonment not exceeding thirty days, or both."

The punishment for simple possession of marijuana is imprisonment of no more than thirty days or a fine of not less than one hundred dollar and no more than two hundred dollars. S.C. Code Ann. § 44-53-370(d)(4) (2018). In Bayly v. State, 397 S.C. 290, 300, 724 S.E.2d 182, 187 (2012), our Supreme Court acknowledged magistrates have jurisdiction over charges for simple possession of marijuana. See also, Op. Att'y Gen., 1981 WL 158235 (S.C.A.G. Apr. 16, 1981) (finding "all pending first offense simple possession of marijuana cases may be transferred to a magistrate's court inasmuch as the penalty which may be imposed on an individual found guilty of such offense is within the jurisdiction of a magistrate."). The Legislature further acknowledges a magistrate's jurisdiction over a conditional discharge of simple possession of marijuana in section 44-53-370 (Supp. 2019) prohibiting simple possession of marijuana, stating

"[c]onditional discharge may be granted in accordance with the provisions of Section 44-53-450 upon approval by the circuit solicitor to the magistrate or municipal judge." S.C. Code Ann. § 44-53-370(d)(4). Accordingly, summary courts can have exclusive or concurrent jurisdiction over these types of cases.

Similarly, the punishment for disorderly conduct, as provided above, is a fine of not more than one hundred dollars or imprisonment for not more than thirty days. As our Supreme Court recently stated in State v. Bellardino, No. 2018-001872, 2019 WL 7882503, at *1 (S.C. Oct. 23, 2019),

> [s]ummary courts "shall have exclusive jurisdiction of all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days." S.C. Code Ann. § 22-3-540 (2007). Therefore, a defendant charged with disorderly conduct may not be tried in circuit court, but must be tried in the exclusive jurisdiction of the summary court.

In addition to the specific authority given to judges in regard to conditional discharges under sections 44-53-450 and 16-17-530, section 22-3-800 of the South Carolina Code (2007) gives magistrates in particular the authority to suspend the imposition of a sentence in certain cases. "Notwithstanding the limitations of Sections 17-25-100 and 24-21-410, after a conviction or plea for an offense within a magistrate's jurisdiction the magistrate at the time of sentence may suspend the imposition or execution of a sentence upon terms and conditions the magistrate considers appropriate . . . ." S.C. Code Ann. § 22-3-800. However, this provision specifically provides: "Nothing in this section may be construed to give a magistrate the right to place a person on probation." Id. Moreover, our Supreme Court determined "[i]n South Carolina, a magistrate cannot lawfully place a person on probation." Talley v. State, 371 S.C. 535, 544, 640 S.E.2d 878, 882 (2007). Because both section 44-53-450 pertaining to a conditional discharge for simple possession of marijuana and section 16-17-530 pertaining to a conditional discharge for disorderly conduct reference the use of "probation" until the terms and conditions are met, you question whether the Legislature should revise the statute to remove the reference to probation.

Given that summary courts clearly have jurisdiction over these types of cases despite not having the authority to place people on probation, we look to the rules of statutory construction to determine what the Legislature meant by the use of the term "probation." To do this we must read these statutes in light of the general rules of statutory interpretation.

> The cardinal rule of statutory interpretation is to determine the intent of the legislature. All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. The legislature's intent should be ascertained primarily from the plain language of the statute. The language must also be

> read in a sense which harmonizes with its subject matter and accords with its general purpose.

Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005) (citations omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Id. at 231, 612 S.E.2d. at 724 (citations omitted). However, "[i]f the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law." Id. (citations omitted).

> Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law.

Id. at 234, 612 S.E.2d. at 724 (citations omitted).

We believe the reference to "the court" in both sections 44-53-450 and 16-17-530 refers to the court with jurisdiction over the case. While this could be a circuit court with the authority to place a person on probation, because summary courts can have jurisdiction over disorderly conduct and simple possession of marijuana cases we also believe these provisions apply to summary courts. Because summary courts do not have the authority to place people on probation, we do not believe sections 44-53-450 and 16-17-530 give summary courts such authority. However, we also do not believe by including the word "probation," the Legislature intended to take away a summary court's jurisdiction over a case. Such a reading would lead to an absurd result and would be contrary to sections 22-3-540 and 22-3-550 providing summary courts with jurisdiction. Moreover, section 22-3-800 specifically allows a summary court to suspend a sentence, as contemplated in sections 44-53-450 and 16-17-530, while the accused fulfills the terms and conditions imposed by the summary court.

This Office "cannot rewrite a statute or add or take away phrases from a statute. That may only be done by the General Assembly." Op. Att'y Gen., 1998 WL 746197 (S.C.A.G. Aug. 11, 1988) (citing Op. Att'y Gen., (S.C.A.G. Mar. 12, 1984)). However, we believe a court has the ability to read sections 44-53-460 and 16-17-530 in light of the jurisdictional authority specifically provided by the Legislature so as give effect to the intention of the Legislature and avoid an absurd result. Under sections 44-53-450 and 16-17-530, while a summary court cannot place a person on probation, we believe it has the authority to suspend the imposition of their sentence until the terms and conditions it sets forth are fulfilled.

II. Expungements

In 2009, the Legislature adopt the Uniform Expungement of Criminal Records Act in an effort to streamline expungements in the State. 2009 S.C. Acts 36. Under this Act, section 17-22-950 of the South Carolina Code (Supp. 2019) governs expungements in summary courts if the accused person is found not guilty or the charges are dismissed or nolle prossed. This statute provides two procedures based on whether the accused was fingerprinted for the charges. If the accused was fingerprinted, "the summary court, at no cost to the accused person, immediately shall issue an order to expunge the criminal records . . . ." S.C. Code Ann. § 17-22-950(A). If the accused was not fingerprinted "the accused person may apply to the summary court, at no cost to the accused person, for an order to expunge the criminal record . . . ." Id.
However, by way of section 17-22-910 of the South Carolina Code (Supp. 2019), the Legislature specifies the expungement of certain charges must be handled by solicitors' offices, including conditional discharges under section 44-53-450(b) for simple possession of marijuana.

> (A) Applications for expungement of all criminal records must be administered by the solicitor's office in each circuit in the State as authorized pursuant to:
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> . . .
>
> (2) Section 44-53-450(b), conditional discharge;
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> . . .

S.C. Code Ann. § 17-22-910 (emphasis added).

Section 44-53-450(B) provides:

> (B) Upon the dismissal of the person and discharge of the proceedings against him pursuant to subsection (A), the person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained as provided in subsection (A)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that the person was dismissed and the proceedings against him discharged, it shall enter the order. The effect of the order is to restore the person, in the contemplation of the law, to the status he occupied before the arrest or indictment or information. No person as to whom the order has been entered may be held pursuant to another provision of law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest, or indictment or information, or trial in response to an inquiry made of him for any purpose.

Section 17-22-940 of the South Carolina Code (Supp. 2019) explains the fees and process associated with the expungement process. Section 17-22-940(A) states "the applicant is responsible for payment to the solicitor's office of an administrative fee in the amount of two hundred and fifty dollars per individual order . . . ." In addition, with regard to expungements under section 44-53-450(b), the section 17-22-940(D) provides:

> (D) In cases when charges are sought to be expunged pursuant to Section 17-22-150(a), 17-22-530(A), 17-22-330(A), 22-5-910, or 44-53-450(b), or 17-22-1010, the circuit pretrial intervention director, alcohol education program director, traffic education program director, South Carolina Youth Challenge Academy director, or summary court judge shall attest by signature on the application to the eligibility of the charge for expungement before either the solicitor or his designee and then the circuit court judge, or the family court judge in the case of a juvenile, signs the application for expungement.

According to these provisions, a person receiving a conditional discharge for simple possession of marijuana must apply to the solicitor's office in the circuit where the charge occurred and pay a two hundred and fifty dollar fee to have the charge expunged regardless of whether the summary court handled the charge. The summary court's role consists of attesting to the eligibility of the charge for expungement by signing the application. The application must then be approved by the solicitor, or his designee, and a circuit court judge.

Section 44-53-450(B) states, in reference to expungements, "if the court determines, after a hearing, that the person was dismissed and the proceedings against him discharged, it shall enter the order." Although not entirely clear, based on the context of this sentence and the fact that under section 17-22-940(D) the circuit court approves expungements for conditional discharges for simple possession of marijuana, we believe this language requires the circuit court judge to hold a hearing prior to entering an order to expunge such charges.

The conditional discharge statute for disorderly conduct is not included in the list of charges in section 17-22-910. Section 17-22-910(A)(13) references "any other statutory authorization," but we have not found any other statute requiring applications for expungement for charges of disorderly conduct discharged under section 16-17-530 be made to the solicitor's office. Therefore, we believe when a summary court enters a conditional discharge for disorderly conduct pursuant to section 16-17-530, the provisions in section 17-22-950 apply and the summary court handles the expungement of the charges. In addition, we note section 16-17-530(C) provides:

> (C) Upon the dismissal of the person and discharge of the proceedings against him pursuant to subsection (B), the person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained as provided in subsection (B)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge

> pursuant to this section. If the court determines, after a hearing, that the person was dismissed and the proceedings against him discharged, it shall enter the order. The effect of the order is to restore the person, in the contemplation of the law, to the status he occupied before the arrest or indictment or information. No person as to whom the order has been entered may be held pursuant to another provision of law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest, or indictment or information, or trial in response to an inquiry made of him for any purpose.

S.C. Code Ann. § 16-17-530(C) (emphasis added). While not completely clear, we believe "the court" in this provisions refers to the court responsible for ordering the expungement. Thus, we read this language as requiring the court handling the expungement to hold a hearing to determine whether the person was dismissed and the proceedings against him were discharged prior to entering the expungement order. If that court is a summary court, we believe it would be required to hold such a hearing prior to entering an expungement order.

Conclusion

Both section 44-53-450, pertaining to conditional discharges for simple possession of marijuana, and section 16-17-530, pertaining to disorderly conduct, refer to a judge placing the accused on probation until the terms and conditions of the conditional discharge are met. However, we do not believe the Legislature meant to give summary courts the ability to place the accused on probation during the suspension of the sentence, nor do we believe the Legislature by its use of the term "probation" meant to modify the jurisdiction of the summary courts. Accordingly, we are of the opinion that a summary court has authority under these provisions, as well as its general authority under section 22-3-800, to suspend the imposition of a sentence until the terms and conditions set forth by the court are met for simple possession of marijuana and disorderly conduct charges.

While the conditional discharge statutes for simple possession of marijuana and disorderly conduct are very similar, the process for handling expungements after the cases are dismissed are different. Section 17-22-910 requires applications for expungement of conditional discharges for simple possession to be submitted to the solicitor's office along with a two hundred and fifty dollar fee. The summary court is responsible for attesting to the eligibility of the charge for expungement by signing the application. But, the application must be approved by the solicitor's office and the circuit court judge. Moreover, section 44-53-450(B) appears to indicate the circuit court must hold a hearing prior to entering an order for expungement of a simple possession of marijuana charge.

Because expungements of conditional discharges for disorderly conduct are not included in the list of charges under section 17-22-910(A), we believe they are handled by the court with jurisdiction over the conditional discharge, which may be a summary court. If a disorderly

conduct charge is conditionally discharged in summary court, we believe section 17-22-950 applies directing the charge to be dismissed by the summary court without a fee. Moreover, if the summary court is responsible for the expungement, section 16-17-530(C) indicates the summary court is required to hold a hearing prior to the entry of the expungement order.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General