

1973 S.C. Op. Atty. Gen. 111 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3504, 1973 WL 20965

Office of the Attorney General

State of South Carolina

Opinion No. 3504

April 3, 1973

***1 In Re: Arrest, Legality Affecting Prosecution.**

Honorable Francis M. Prince
Magistrate
Box 4046—Station B
Anderson, South Carolina 29621

Dear Judge Prince:

You have inquired whether or not an illegal arrest requires that the criminal charge be dismissed.

In [State v. Swilling](#), 249 S.C. 541, 155 S.E.2d 607, one of the grounds of the appeal from conviction was that the arrest was allegedly illegal. The Supreme Court (hn. 9–10) held that this issue was immaterial so long as there was no evidence seized as a result of the illegal arrest and admitted at trial. In such an event the evidence seized would not be admissible, but the validity of the prosecution would not be affected.

[Town of Honea Path v. Wright](#), 194 S.C. 456, 9 S.C. 424, holds that issuance of an arrest warrant is essential to the validity of a trial in recorder's court (a rule now amended by statute when uniform traffic summons are issued), but does not relate this to the original arrest.

It is the opinion of this Office that an illegal arrest does not bar subsequent prosecution of the criminal charge and, therefore, does not justify dismissal of such charge.

Yours very truly,

Joseph C. Coleman
Deputy Attorney General

P. S. A defense attorney may preserve his client's rights on this question by moving to have the charge dismissed, and making refusal to dismiss one of his grounds of appeal. The question of the legality of the arrest is not one that may be argued to the jury. [State v. Swilling](#), *supra*.

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