1973 S.C. Op. Atty. Gen. 148 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3526, 1973 WL 20986

Office of the Attorney General

State of South Carolina
Opinion No. 3526
May 17, 1973

***1 Re: If a criminal indictment is quashed the arrest warrant is still valid. The criminal defendant, represented by counsel must demand in writing a preliminary hearing ten days prior to the convening of the next Court of General Sessions in order to be entitled to the same.**

Norman Fogle
Solicitor
First Judicial Circuit
P. O. Box 212
Orangeburg, S. C. 29115

Dear Solicitor Fogle:
You requested that this Office advise you as to whether an arrest warrant is still valid if a criminal indictment is quashed.

In the absence of a statute specifying the grounds for a motion to quash, ordinarily it must be founded on defects which would render erroneous judgment against the accused on the indictment. 42 C.J.S. Indictments and Information, Section 201 (1944). A motion to quash presents a preliminary question of law, but rather than determining the actual guilt or innocense of the accused, it is directed to the sufficiency of the indictment to charge the offense. id. Section 195; as such it is a preliminary step authorized before trial on the merits id.

It has been held that a motion to quash cannot be heard after forfeiture of the accused bond, or in the absence of statute, when the accused is not in custody. 42 C.J.S. Indictments and Information, Section 197.

Section 17–409 of the Code of Laws of South Carolina 1962, provides that any motion to quash and indictment must be made before the jury is sworn. The apparent purpose of this is to prevent motions to arrest judgment on grounds based upon an indictment apparent on the face thereof, State v. Lark 64 S.C. 350, 42 S.E. 175. The effect of this is to prevent a dismissal of the accused case before an adjudication on the merits is involved. Because the quashing of an indictment is not an adjudication of the care, and it is generally required that the court have the defendant in custody, or on bail when it is heard, the quashing of an indictment in no way relieves the court of jurisdiction over the defendant which is obtained through the arrest warrant. 42 C.J.S. Indictments and Information, Section 215 states that on quashing or setting aside an indictment or information, it is apparent that an offense has been committed, the action of the court should be without prejudice for subsequent accusation and the prisoner may be remanded to custody, or held to bail, or to answer to a new indictment or information. In same jurisdictions it is discretionary with the court to discharge the accused or hold him in jail. This is apparently the rule of South Carolina although there is no expressed statutory authority, or care law directly in point.

The effect of an order quashing an indictment does not affect the question of guilt or innocence of the accused, or any defense which he may offer. The substance of a motion to quash an indictment goes to the information in the case stands as though no information had ever been filed. 42 C.J.S. Indictments and Information, Section 215. 22 C.J.S. Criminal law, section 252 states that except as otherwise provided by statute, quashing or dismissing an indictment or sustaining a demurrer does not amount to jeopardy such as will bar a prosecution on another indictment for the same offense.

***2** It thus appears that by sustaining a motion to quash, the court does not mandatorily divest itself with jurisdiction that it has already obtained through the arrest warrant. It thus appears that the quashing of an indictment has no effect on the validity or invalidity of the arrest warrant, and as such it is the opinion of this office that the quashing of the indictment does not render the arrest warrant invalid in the absence of circumstances.

You have further requested that this office advise you a to whether if a criminal defendant demands a preliminary hearing within ten days prior to the term of general sessions, is he entitled to have the same.

Code of laws of south Carolina 1962, Section 43–232 states that the defendant must demand a preliminary hearing in writing ten days prior to the convening of the next term of general sessions.

The case of McCall v. State, 257 S.C. 93 184 S.E. 2d 241, has held that where the procedure set out in this section is not followed at a time the defendant has counsel, the right to the preliminary hearing is waived. It thus appears that the criminal defendant, if represented by counsel, must demand in writing a preliminary hearing at least ten days prior to the convening of the Court of General Sessions in order to be entitled to the same. The Courts of this State have not spoken on the question of those situations in which the defendant is not represented by counsel, however the reasoning of McCall, (supra) appears to support the conclusion that there is no such waiver. This conclusion would be in accordance with the case of Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387.

I trust that this has been sufficient in answer to the questions which you posed.
Very truly yours,

Timothy G. Quinn
Senior Assistant Attorney General

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