ALAN WILSON
ATTORNEY GENERAL

December 7, 2020

The Honorable Kenneth H. Dover
Inman Magistrate's Court
10471 Asheville Highway
Suite 12
Inman, South Carolina 29349

Dear Judge Dover:

We received your request for an opinion of this Office concerning several issues related to magistrate's court. Specifically, you ask the following three questions:

1. Should a bond revocation hearing in the general session's court be the remedy for the bond violation?

2. Should the warrant/charge be for the total amount of drugs that were in the defendant's possession rather than another charge under 24-7-155?

3. When a rare set of circumstances comes up requiring a quicker/immediate service and another regular deputy is available – Is there any issue with my authority to have him/her to serve the order/process?

We will address each question in detail below.

Law/Analysis

A. Bond Violations

First, you present a scenario in which a defendant is arrested for a general session's level charge and is released on bond "with the condition of having no contact with the victim and the conditions of the GPS monitor." In addition, you inform us that

> [t]he defendant violates his/her bond conditions before the court appearance by contacting the victim. Another frequent violation I see is when the defendant removes the GPS monitor. In the situation of the defendant removing his/her GPS monitor, the officers are requesting arrest warrants for escape – 24-13-410. This charge does not seem to fit because the defendant has been released on a surety bond signed by a professional bondsman and not incarcerated. Other

> defendants are being brought in under 'violation of home detention' (GPS monitor) and being held for long periods of time before being taken before the circuit court. (Bypassing bond court)

Thus, you ask "Should a bond revocation hearing in the general session's court be the remedy for the bond violation?"

Section 17-15-10 of the South Carolina Code (Supp. 2019), governing the release on bail or recognizance of persons charged with criminal offenses under State law, requires:

> A person charged with a noncapital offense triable in either the magistrates, county or circuit court, shall, at his appearance before any of such courts, be ordered released pending trial on his own recognizance without surety in an amount specified by the court, unless the court determines in its discretion that such a release will not reasonably assure the appearance of the person as required, or unreasonable danger to the community or an individual will result If such a determination is made by the court, it may impose any one or more of the following conditions of release:
>
> (1) require the execution of an appearance bond in a specified amount with good and sufficient surety or sureties approved by the court;
>
> (2) place the person in the custody of a designated person or organization agreeing to supervise him;
>
> (3) place restrictions on the travel, association, or place of abode of the person during the period of release;
>
> (4) impose any other conditions deemed reasonably necessary to assure appearance as required, including a condition that the person return to custody after specified hours.

This provision allows the imposition conditions for the defendant's release if deemed necessary by the judge. Section 17-15-170 of the South Carolina Code (2014) explains what happens if the defendant does not comply with the conditions of the bond.

> Whenever the recognizance is forfeited by noncompliance with its condition, the Attorney General, solicitor, magistrate, or other person acting for him immediately shall issue a notice to summon every party bound in the forfeited recognizance to appear at the next ensuing court to show cause, if he has any, why judgment should not be confirmed against him. If any person so bound fails to appear or, upon appearing, does not give a reason for not performing the condition of the recognizance as the court considers sufficient, then the

> judgment on the recognizance is confirmed. A magistrate may confirm judgments of not more than the maximum fine allowable under Section 22-3-550 in addition to assessments.

S.C. Code Ann. § 17-15-170. Accordingly, this statute provides the procedure by which a bond can be revoked or estreated. Moreover, as our Supreme Court explained in State v. Bailey, 248 S.C. 438, 443, 151 S.E.2d 87, 89 (1966), "It is well settled that the Court of General Sessions has exclusive jurisdiction of proceedings to forfeit a recognizance for appearance to answer a charge in that Court." Therefore, if a defendant was charged with a general session's level offense, general session's court is the appropriate court to hear the petition for revocation.

You mentioned some officers are requesting arrest warrants for escape pursuant to section 24-13-410 when a defendant removes his or her GPS monitor. Section 24-13-410 of the South Carolina Code (Supp. 2019) provides:

> (A) It is unlawful for a person, lawfully confined in a prison or local detention facility or while in the custody of an officer or another employee, to escape, to attempt to escape, or to have in his possession tools, weapons, or other items that may be used to facilitate an escape.
>
> (B) A person who violates this section is guilty of a felony and, upon conviction, must be imprisoned not less than one year nor more than fifteen years.
>
> (C) The term of imprisonment is consecutive to the original sentence and to other sentences previously imposed upon the escapee by a court of this State.

This statute applies when the defendant is in the physical custody of either a detention facility or an officer and does not address its application to electronic monitoring. Section 24-13-425 of the South Carolina Code (Supp. 2019), however, makes tampering with or removing an electronic monitoring device unlawful. This provision states in pertinent part:

> (B) It is unlawful for any person to knowingly and without authority remove, destroy, or circumvent the operation of an electronic monitoring device which is being used for the purpose of monitoring a person who is:
>
> (1) complying with the Home Detention Act as set forth in Article 15, Title 24;
>
> (2) wearing an electronic monitoring device as a condition of bond or pretrial release;
>
> (3) wearing an electronic monitoring device as a condition of probation, parole, or community supervision; or

> (4) wearing an electronic monitoring device as required by any other provision of law.

(emphasis added).

We believe section 24-13-410 is an appropriate charge for removing or tampering with an electronic monitoring device. Moreover, because wearing the electronic monitoring device is a condition of the defendant's release on bond, his or her bond may also be revoked pursuant to section 17-15-170.

In regard to a charge for escape under section 24-13-410, while we believe there are other more appropriate charges, we must acknowledge law enforcement has broad prosecutorial discretion in how it charges a defendant. See State v. Burdette, 335 S.C. 34, 40, 515 S.E.2d 525, 528–29 (1999) ("Choosing which crime to charge a defendant with is the essence of prosecutorial discretion . . . ."). Furthermore, in numerous opinions, this Office recognized the broad discretion held by prosecutors in determining if and what crime to charge a defendant with. See Ops. Att'y Gen., 2011 WL 6959373 (S.C.A.G. Dec. 9, 2011); 2006 WL 1207285 (S.C.A.G. Apr. 18, 2006); 2005 WL 2652375 (S.C.A.G. Sept. 12, 2005). A court would be prohibited from interfering with this discretion unless the actions on the part of the law enforcement officers are unconstitutional. See Ex parte Littlefield, 343 S.C. 212, 219, 540 S.E.2d 81, 84 (2000) ("The judiciary is empowered to infringe on the exercise of prosecutorial discretion when it is necessary to review and interpret the results of the prosecutor's actions when those actions violate certain constitutional mandates."). Therefore, while we believe a charge pursuant to section 24-13-425 is more appropriate, if and how a defendant is charged under these circumstances is up to the prosecutor barring an infringement on the defendant's constitutional rights.

B. Additional Drugs Found Upon Booking

Your next question asks how a defendant should be charged under the following circumstances:

> A defendant has been arrested for a general session's court level drug violation. The defendant has been brought into the detention facility for booking by the arresting officer. The booking officer, while assisting the arresting officer, finds more of the schedule I, II, III, IV drugs not found by the arresting officer (in underwear, socks, shoes, body cavity, etc.). Also, noting these charges enhance based upon numbers and/or weight of the drug. Officers are seeking warrants for the drugs they find upon the arrest and then seeking another warrant for 'contraband' – 24-7-155. The furnishing contraband charge does not seem to fit. It appears the proper charge would be for the total amount of the drugs that were in the defendant's possession. This discovery of the drugs in the booking area was in the presence of the arresting officer, before booking

> was completed, before warrants were obtained, and of course before being taking to bond court.

Accordingly, you ask: "Should the warrant/charge be for the total amount of drugs that were in the defendant's possession rather than another charge under 24-7-155?"

Section 24-7-155 of the South Carolina Code (Supp. 2019) provides:

> It is unlawful for a person to furnish or attempt to furnish a prisoner in any county, municipal, or multijurisdictional jail, prison camp, work camp, or overnight lockup facility with a matter declared to be contraband. It is unlawful for an inmate of a facility to possess a matter declared to be contraband. Matters considered contraband within the meaning of this section are those which are designated as contraband and published by the Department of Corrections as Regulation 33-1 of the Department of Corrections and this regulation must be displayed in a conspicuous place available and visible to visitors and inmates at the facility. The facility manager of a local detention facility, with the approval of the sheriff or chief administrative officer as appropriate, may designate additional items as contraband. Notice of the additional items must be displayed with Regulation 33-1.
>
> A person violating the provisions of this section is guilty of a felony and, upon conviction, must be punished by a fine of not less than one thousand dollars nor more than ten thousand dollars or imprisonment for not less than one year nor more than ten years, or both.

(emphasis added). Whether or not the defendant you describe can be charged under this provision hinges on whether he or she is an inmate at the time of booking.

Section 24-13-80(A)(2) of the South Carolina Code (Supp. 2019) defines "inmate" as "a person who is detained in a detention facility by reason of being charged with or convicted of a felony, a misdemeanor, a municipal offense, or violation of a court order." Whether or not a person is detained in a detention facility involves a determination of fact which is beyond the scope of an opinion of this Office. Op. Att'y Gen., 2010 WL 928444 (S.C.A.G. Feb. 24, 2010)(stating "this office has repeatedly stated that an opinion of this office cannot determine facts, noting that the determination of facts is beyond the scope of an opinion of this office."). Accordingly, we cannot make a determination as to whether the defendant you describe should be charged under the contraband statute. Moreover, as we discussed above, the determination of if and how a person is charged is left to the discretion of the prosecutor.

C. Service by Deputy

Lastly, you inquire as to whether you have the authority to reach out to a regular deputy to have him or her serve an order or process when the sheriff is unavailable. You explain as follows:

> The sheriff of our county took over process serving in January of this year. Our eight district offices no longer have a 'magistrate's constable.' The sheriff increased his staff of regular deputies by eight for the process serving of the district offices and the central/main magistrate court. I am assigned to the Inman district as I was appointed in 1992 located approximately twelve miles from the main courthouse. Due to the shortages of the regular deputies and the volume of court papers county wide these regular deputies that were assigned to multiple district offices are not always readily available for a court process requiring a quicker service than normal. There are times when service cannot wait a week or more. If I need to reach out to another regular deputy patrolling in my area, I would like to justify this with the supervisor if he or she is available to serve the paper.

Section 23-15-40 of the South Carolina Code (2007) requires as follows:

> The sheriff or his regular deputy, on the delivery thereof to him, shall serve, execute and return every process, rule, order or notice issued by any court of record in this State or by other competent authority. If the sheriff shall make default herein he shall be subject to rule and attachment as for a contempt and he shall also be liable to the party injured in a civil suit.

In a prior opinion, we determined the duties imposed on the sheriff by way of section 23-15-40 are ministerial in nature and therefore, the sheriff cannot refuse. See Op. Att'y Gen., 2001 WL 957761 (S.C.A.G. July 18, 2001)(finding pursuant to section 23-15-40, "it is not appropriate for a sheriff to refuse to serve an arrest warrant which is valid on its face.").

In a 1985 opinion addressing a situation in which there were no magistrate's constables, we discussed the roles of sheriffs in serving process for magistrate's court. Op. Att'y Gen., 1985 WL 166073 (S.C.A.G. Sept. 18, 1985).

> Of course, while a constable may have been the principal officer who executed process issued by magistrates, see e.g., Act No. 300 of 1870 (§ 74), such authority has not by any means been limited exclusively to constables. As the chief law enforcement officer of the county, the Sheriff has historically been mandated to serve process issued by all courts of record 'or by other competent authority.' See Act No. 2780 of 1839, now codified in § 23-15-40 of the 1976 Code; undoubtedly, the phrase 'other competent authority' includes as magistrate's court. The Sheriff has often been deemed as an officer supplementary to or even as a replacement for, the constable. See e.g. §§ 53-195 and 53-151 of the 1962 Code.

Id.

In other opinions, this Office expressed a similar view that sheriffs are ultimately responsible for service of process issued in magistrate's court. See e.g. Op. Att'y Gen., 1996 WL 82901 (S.C.A.G. Jan. 30, 1996)(opining "that the County Sheriff would be required to serve the restraining order against stalking or harassment where issued by the magistrate's court and placed in the Sheriff's hands for service."). Moreover, we have opined that "the general law with respect to sheriffs imposes on the sheriff the ultimate responsibility to serve, execute and return every process, rule, order or notice issued by any court of record in this State . . . ." Op. Att'y Gen., 1978 WL 35304 (S.C.A.G. Oct. 13, 1978)(quoting S.C. Code Ann. § 23-15-40).

In your letter, we understand the sheriff is not refusing to deliver service, but rather due to the logistics of serving all of the county's courts, you wish to ask a regular deputy patrolling in your area to execute service. Section 23-15-40 specifically allows for those duties to be performed by either the sheriff or "or his regular deputy." Moreover, in a 1980 opinion, this Office concluded "a deputy sheriff would be authorized and required to serve an arrest warrant issued by a municipal ministerial recorder of his county in the referenced circumstances." Op. Att'y Gen., 1980 WL 120673 (S.C.A.G. Feb. 13, 1980). But, we also must keep in mind that a deputy serves at the pleasure of the sheriff. See Rhodes v. Smith, 273 S.C. 13, 15, 254 S.E.2d 49, 50 (1979); S.C. Code Ann. § 23-13-10 (2007). Therefore, while a deputy may execute service, he or she serves at the pleasure of the sheriff and it is ultimately the sheriff's responsibility for such service. Accordingly, we believe it is best for you to coordinate with the sheriff for execution of service rather than contacting deputies directly unless instructed to do so by the sheriff.

Conclusion

Based on our analysis above, we believe a bond revocation hearing in general session's court is an appropriate procedure when a defendant charged with a general session's level offense violates the conditions of his or her bond. Moreover, if the condition violated involves the tampering or removing of an electronic monitoring device, we also believe such a defendant could be charged under section 24-13-425 of the South Carolina Code. Whether or not a defendant is charged for escape under section 24-13-410 of the South Carolina Code, involves a matter of prosecutorial discretion, which will not be infringed upon by a court unless it violates the defendant's constitutional rights.

Whether or not a defendant is charged under section 24-7-155, making it unlawful for an inmate to possess contraband, is also within a prosecutor's discretion. Furthermore, whether such charge is appropriate involves a factual determination of whether the defendant at the time of the charge is an inmate. Such a determination is beyond the scope of this opinion.

Lastly, section 23-15-40 requires sheriffs to serve, execute, and return process. In keeping with past opinions, we believe this statute not only places this mandate on sheriffs in regard to courts of record, but also applies to magistrate's courts. Section 23-15-40 itself contemplates the

performance of such service by deputies in addition to sheriffs. However, we must keep in mind that deputies serve at the pleasure of the sheriff. Therefore, while a deputy may satisfy the requirements under section 23-15-40, sheriffs are ultimate responsible for complying with this statute.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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