

7028 Liberty



The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**

CHARLIE CONDON  
ATTORNEY GENERAL

January 11, 2001

Christopher E.A. Barton, Senior City Solicitor  
City Of Rock Hill Solicitor's Office  
120 East Black Street  
Rock Hill, South Carolina 29730

**Re: Your letter of October 27, 2000**

Dear Mr. Barton:

In your above-referenced letter, you pose several questions related to the conduct of municipal courts. Specifically, you ask the following:

1. Can a Municipal Court Judge Nolle Prosequi (Nol Pros) a Case?
2. Does a Municipal Court Judge Have Authority to Re-Open and Amend, Alter or Suspend the Sentence Without Notice to the City Solicitor, Arresting Officer or Victim?
3. Who has the Authority to Control the Docket in Municipal Court, the Resident (full-time) Judge, the Clerk of Court or the City Solicitor?

By follow-up telephone conversation and letter, you also ask about the propriety of a Solicitor issuing a uniform traffic ticket when reducing a charge to one which is not a lesser-included offense. Each question will be addressed in turn.

**Nolle Prosequi of Cases**

It is a general principle that a prosecuting officer has virtually unlimited authority to decide whether and how to prosecute a given case. This tenet has been reiterated by our courts as well as opinions of this Office numerous times in a variety of contexts. With reference to the dismissing or nol prosequi of cases, we have opined that this "broad prosecutorial discretion gives the prosecutor alone the authority to nol pros a case at any time prior to the impaneling of the jury." See Atty. Gen. Op. (June 3, 1996). In State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977), our Supreme Court stated that, except in cases where the prosecutor acts corruptly or capriciously, the rule in this State is:

Request Letter

Mr. Barton  
Page 2  
January 11, 2001

... the entering of a nolle prosequi at any time before the jury is impaneled and sworn is within the discretion of the solicitor; the trial judge may not direct or prevent a nol pros at that time. Citing State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937).

Citing State v. Brittan, 263 S.C. 363, 210 S.E.2d 600 (1974), the Ridge Court also noted that absent a statute to the effect, "a court has no power ... to dismiss a criminal prosecution except at the instance of the prosecutor." Further, concerning municipal court prosecutions this Office has previously opined that we are "... unaware of any statutory authority which permits a municipal [judge] to nol pros or dismiss a particular case on his own motion. Therefore ... a case triable in the municipal court may only be nol prossed in the discretion of the individual acting as the prosecutor." See Atty. Gen. Op. (April 12, 1979). With the recognition of certain caveats, this opinion was reaffirmed in the June 3, 1996 opinion referenced above.<sup>1</sup> I am aware of no recent changes in the law which would alter this opinion.

You also ask at what "point in time can a nolle prosequi be entered in a case (do you have to wait until the arrest warrant has been served)? I am aware of no requirement that a prosecuting officer wait until after service of an arrest warrant before nol prossing the charge. In fact, if as you describe, your office and police department officials have determined a particular case lacks merit, allowing someone to be arrested based on such a charge is probably not advisable. In fact, this Office has stated on more than one occasion that "...if it appears that upon the face of the warrant that service is no longer justified or if any additional facts are brought to your attention which would indicate that service is no longer proper, service should not be made. This is a determination that would have to be made as to each individual arrest warrant." Atty. Gen. Ops. (April 25, 1995, October 1, 1979 & October 26, 1978).

#### **Re-Opening of Cases to Alter/Amend Sentence**

In your second question you ask "does a presiding or resident (full-time) municipal court judge have the authority to reopen a case after a sentence has been rendered on a prior court date and alter, amend or suspend the prior sentence of the court, in a case where the sentencing was by the same or different judge without notifying either the city solicitor, arresting officer, or victim?"

---

<sup>1</sup> In addition to the general limitation that a case cannot be dismissed through the corrupt or capricious action of a prosecutor, there are a number of limitations upon the inherent authority of a prosecutor, such as any directives from the Attorney General as Chief Prosecutor regarding the prosecution of particular cases (i.e. Atty. General's Directive In Re: Prosecution of DUI Cases in Magistrates' and Municipal Courts - issued 3/29/77; re-issued 12/1/95). Also, the "Victim's Bill of Rights" would have to be complied with prior to the prosecutor disposing of a case through dismissal or Nolle Prosequi. See, S.C. CONST Art. I, § 24 and SC Code Ann. §16-3-1545.

South Carolina Code Ann. §16-3-1535(D) requires that “[t]he summary court judge reasonably must attempt to notify each victim related to the case of each hearing, trial, or other proceeding.” Obviously, a victim would be entitled to have a summary court, such as a municipal court, make reasonable attempts to notify him or her of an action or proceeding to amend a sentence. Moreover, our Supreme Court has held that orders which modify sentences previously imposed without notice to the State are “subject to being set aside on such ground alone.” State v. Best, 257 S.C. 361, 186 S.E.2d 272 (1972). Accordingly, it is apparent that a court, including a municipal court, should not act to alter or amend a sentence previously imposed without ensuring that reasonable steps have been taken to provide notice of the proceeding to the State and the victim.

### Control of the Municipal Court Docket

Your third question is “which party (solicitor, clerk of court or judge) controls the docket (the call of the case) at the municipal court level and where does the authority for control of the docket come from, state statute, case law, or court administrative rule?”

In circuit court, the solicitor is vested with the power and authority to control the docket. This is based on long-standing case and statutory law. See for example, State v. Mikell, 257 S.C. 315, 185 S.E.2d 814 (1971) (solicitor has authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties); See also SC Code Ann. § 1-7-330 (Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial). I can find no such specific authority related to prosecuting officers in magistrates’ and municipal courts. In fact, such a delegation is most likely impracticable as most summary courts lack a “city solicitor’s office” (as exists in Rock Hill) and prosecution is left to various arresting officers.

Furthermore, administrative orders issued by South Carolina’s Supreme Court would appear to rest the responsibility for setting the municipal court docket in the hands of the judge. On April 17, 1985, the following was issued:

#### ADMINISTRATIVE ORDER FOR THE MAGISTRATE AND MUNICIPAL COURTS

The judges of the Magistrate and Municipal Courts of South Carolina being a part of the uniform statewide judicial system, and pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution: and,

IT APPEARING that there is a lack of uniformity in the manner in which defendants may exercise their rights to trial by jury for criminal or traffic charges triable in magistrate or municipal courts; NOW, THEREFORE,

Mr. Barton  
Page 4  
January 11, 2001

IT IS ORDERED, that a person charged with a criminal or traffic offense triable in a magistrate or municipal court may make written demand for jury trial prior to the time and date set for bench trial, and the case shall forthwith be continued until the next available time reserved for jury trials, thereby relieving defendant of the responsibility for appearance at the originally scheduled bench trial. Such demand may be made by the defendant or his attorney and must be received by the trial court prior to the time and date set for bench trial. Further notice of jury selection and trial date may be served upon the defendant or his attorney by regular mail. The provisions of this Administrative Order shall not relieve the defendant of any obligations imposed as conditions of bond, nor shall it prohibit the Court from trying a defendant in his absence pursuant to the Rules of Practice for the Circuit Courts of South Carolina.

Further, by administrative order dated June 26, 1980 the Supreme Court set forth the following:

IT IS ORDERED that each magistrate and municipal judge of this State shall try to otherwise dispose of all criminal cases, including traffic cases, within sixty (60) days of the return of the charging paper to the court, in the absence of good cause shown to the court.

-Orders published in the *South Carolina Bench Book for Magistrates and Municipal Court Judges, Second Edition*

Magistrates and Municipal judges have been ordered to set jury trials for "the next available time reserved for jury trials" and, have further been ordered to ensure the disposal of criminal cases within sixty days. It is my opinion that these provisions give the judge the authority to set the docket in the municipal court. To find otherwise would place the magistrate and municipal judge in the untenable position of having to answer for the timely disposition of cases with no ability to control when such cases may be tried.

#### City Solicitor Issuing Uniform Traffic Tickets

Finally, you inquire as to the propriety of a solicitor issuing a uniform traffic ticket when, in his discretion, he determines an offense, other than a lesser included offense, is appropriate. You indicate that such would allow the solicitor to correct the charge in court without having to inconvenience the arresting officer.

While we have not specifically addressed this issue, our Office has previously opined that "law enforcement officers" with the authority to arrest are the appropriate persons to issue uniform traffic tickets Atty. Gen. Op. (October 10, 2000). Obviously, a "city solicitor" would not be such an officer. Further, S.C. Code Ann § 56-7-15 provides that "the uniform traffic ticket, established under the provisions of Section 56-7-10, may be used by law enforcement officers to arrest a person

Mr. Barton  
Page 5  
January 11, 2001

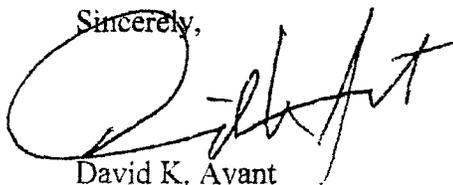
for an offense committed in the presence of a law enforcement officer..." While there are exceptions to this "in the presence of" requirement, I am not sure the situation you describe would fall under any such exception. Therefore, it is my opinion that a "city solicitor" should not issue uniform traffic tickets.

There may, however, be an alternative which would address the problem you describe. As you know, the jurisdiction of the municipal court can also be triggered by the issuance of an arrest warrant. An arrest warrant can be based on probable cause established by any citizen. In this regard, this Office has opined that "any citizen who has reasonable grounds to believe that the law has been violated has the right to cause the arrest of a person who he honestly and in good faith believes to be the offender ... [f]urthermore, the probable cause expressed in the affidavit may be based on personal knowledge or hearsay ... The affiant to an arrest warrant must be able to satisfy an inquiring magistrate that sufficient facts and information exist to support the warrant which determination is entirely within the magistrate's judgment.... [t]herefore, a court employee would be authorized to act as the affiant on a warrant, just as any other citizen would be authorized to act ..." Atty. Gen. Op. (September 29, 1999) (emphasis added).

It seems that a person, other than the arresting officer, could provide sufficient information to establish probable cause for the issuance of an arrest warrant, thereby vesting jurisdiction in the municipal court. Perhaps, your office could develop appropriate guidelines to utilize this process in response to your concerns.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,



David K. Avant  
Assistant Attorney General

DKA/an