

6811 Library



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

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

August 5, 1997

The Honorable Thomas E. Pope  
Solicitor, Sixteenth Judicial Circuit  
Moss Justice Center  
1675-1A York Highway  
York, South Carolina 29745-7422

Re: Informal Opinion

Dear Solicitor Pope:

You have enclosed a series of correspondence concerning the potential prosecution of a magistrate court case by a private attorney. Your letter indicates that you have discussed this matter "with Judge Lynn Benfield, the Magistrate involved with the case, and we jointly request that your Office render an opinion as to the propriety of private prosecution of magistrate and city level cases." You wrote that the Solicitor's Office

is not typically involved in the prosecution [of] magistrate or city court cases in the Sixteenth Circuit. Based on our current resources prosecution of these cases by the Solicitor's Office is not feasible. However, to deny the private attorney the opportunity to prosecute the case would effectively leave the victim unrepresented in the case.

Law/Analysis

In an Opinion of this Office, dated November 7, 1990, we discussed the question you have raised at considerable length. There too, the issue presented was the authority of a private citizen to prosecute cases in magistrate's court. Quoting from this Opinion in detail, it was stated that

Solicitor Pope  
Page 2  
August 5, 1997

[p]ursuant to Section 17-1-10 of the Code, "(a) criminal action is prosecuted by the State, as a party, against a person charged with a public offense, for the punishment thereof." In State v. Addis, 257 S.C. 482 at 487, 186 S.E.2d 415 (1972) the State Supreme Court indicated

(i)n every criminal prosecution the responsibility for the conduct of the trial is upon the solicitor and he must and does have full control of the State's case. ...

In State v. Addison, 2 S.C. 356 at 363-364 (1870) the State Supreme Court noted

The State is the party to the record charging an offence committed against "its peace and dignity." As it represents the whole people within its territorial limits, in point of fact, each one of them is more or less, as citizens, interested in the issue. ... Suppose that even the prosecutor by whom the charge is made should apply for the removal of the trial against the opinion and judgment of the Solicitor, is he to be heard, and thereby, in effect, substituted as the Solicitor? or, is it likely that the interest of the State would be promoted by a conflict of opinion between them, in which the Solicitor is to be made to yield to the prosecutor? But, how is any one citizen, in a legal point of view, to be considered more interested for the State in a prosecution for murder than another? Save for the just and proper vindication of the law, no one has an interest in the conviction of the prisoner. The prosecuting officer speaks for the State, and, if the motion is to be made for the removal of the trial on behalf of the State, it should be by him, and induced by his judgment. He is responsible for all errors in the official discharge of his duty, and he must be uncontrolled in the exercise of it.

In State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986) the Supreme Court dealt with the prosecution of cases by a private attorney who had entered into an agreement with the solicitor to handle such prosecutions. The Court had earlier indicated that private counsel may participate in a trial to assist a

Solicitor Pope  
Page 3  
August 5, 1997

solicitor. See: State v. Addis, supra. In its decision the Court cited Section 1-7-405 of the Code which authorizes solicitors to appoint assistant solicitors and vest them with "such responsibility as he directs." The Court stated however

The statute does not permit a solicitor to relinquish prosecutorial control to a private attorney, but it removes any limitations upon his actual trial participation arguably imposed by our prior decisions. It was not error ... (for the private attorney appointed as special assistant solicitor) ... to try the case without the solicitor being present.

339 S.E.2d at 868. Therefore, while a solicitor may not relinquish control of a case, he is not required to be in attendance when the case is being tried. The Court in Mattoon however added further

... we express our disapproval of the practice of appointing private counsel to prosecute criminal cases ... (W)e believe the practice should be discouraged.

339 S.E.2d at 869.

A prior opinion of this Office dated February 8, 1989 referenced the situation where the solicitor had appointed a special assistant solicitor for a particular county. The opinion, citing Mattoon, stated that the Supreme Court "... has recognized the authority of the solicitor to designate assistants and special assistants to carry out his responsibilities."

An opinion of this Office dated April 22, 1974 dealt with the question of whether an assistant solicitor would be entitled to charge the State for services in trials in a magistrate's court. The opinion commented that the assistant solicitor's statement that his position did not entail the trial of cases at the

magistrate's level was "erroneous". The opinion concluded that compensation additional to that received as assistant solicitor for services in the magistrate's court was impermissible.

In another opinion of this Office dated July 5, 1990 it was stated that it is our understanding that where a solicitor has indicated that he or his staff could not personally prosecute cases in a magistrate's court, a private attorney would be authorized to prosecute such cases if specifically appointed or authorized to handle such prosecutions by the solicitor. In such circumstances, the solicitor would maintain prosecutorial control but would not be obligated to be in attendance during a trial. However, the opinion noted, as referenced above, that the Supreme Court disapproves generally of such practice and discourages appointments of private attorneys.

Referencing the above, it appears that a solicitor should be considered as having control of any criminal case brought in magistrate's court. Therefore, requests may be made for the solicitor to prosecute any such cases. Of course the degree of the solicitor's involvement in particular magistrate's court cases is a matter within his discretion. As to your question regarding the authority of an affiant on a warrant to nol pros a case and a solicitor's authority to assume control of a case after initially refusing to prosecute the matter, as referenced above, the State Supreme Court in Addis affirmed a solicitor's control of every criminal prosecution. This would include situations such as that where the solicitor initially refuses to prosecute the matter. I am unaware of any authority for an affiant to nol pros a case. Moreover, nothing should be construed to indicate that the Attorney General or any of his representatives has affirmatively delegated the prosecutorial function to an affiant on a warrant. (emphasis added).

Since the 1990 Opinion was issued, our Supreme Court has decided the case of State v. Nichols, \_\_\_ S.C. \_\_\_, 481 S.E.2d 118 (1997). In Nichols, the defendant was convicted of manslaughter and criminal conspiracy. On appeal, he asserted that "it was

Solicitor Pope  
Page 5  
August 5, 1997

unconstitutional to allow the solicitor to use three private attorneys hired by the victim's family to prosecute this case." The Supreme Court rejected this argument, with the following analysis:

Private counsel's participation in a trial to assist the solicitor has been sanctioned in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986); State v. Addis, 257 S.C. 482, 186 S.E.2d 415 (1972); State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971); and State v. Gregory, 172 S.C. 329, 174 S.E. 10 (1924).

In State v. Addis, 257 S.C. at 487-88, 186 S.E.2d at 417, we declined to find error in the allowance of a private attorney's participation in a criminal trial. The trial court has discretion to allow the solicitor to have the assistance of counsel employed by the prosecuting witness or other person interested in securing a conviction with the consent of the solicitor. *Id.* A special assistant solicitor is not automatically disqualified because of his simultaneous representation of an interested party. Disqualification occurs when a special assistant solicitor attempts to use his authority in the criminal action to the advantage of his civil client or otherwise compromises his neutrality in the criminal proceeding. State v. Mattoon, 287 S.C. at 494-95, 339 S.E.2d at 869. There is no evidence the private attorneys who acted as special assistant solicitors here stood to gain an unfair advantage in the civil matter as frowned upon in In re Jolly, 269 S.C. 668, 239 S.E.2d 490 (1977). Further, the solicitor maintained control of the case. We do not find error in the use of private attorneys here.

Id. at 122.

The 1990 Opinion and the Nichols case appear to be consistent with each other. While the Court in Mattoon discouraged the use of private prosecutors, the decisions of the Court have consistently upheld their use when attacked by the defendant. The Nichols case reiterates this view. Accordingly, based upon the Court's recent decision in Nichols (citing Addis, Mattoon, etc.), it would appear that the 1990 Opinion of this Office

is still valid. In summary, the following basic principles are established in the 1990 Opinion and the cases rendered by our Supreme Court:

1. The Solicitor must be deemed to maintain control of criminal cases brought in magistrate's court.
2. However, in the discretion of the solicitor, the solicitor may grant requests by individuals to prosecute cases in magistrate's or municipal court. The trial judge should approve the private attorney who will prosecute the case as well.
3. The degree of the Solicitor's involvement in particular magistrate's court cases is a matter within the Solicitor's discretion.
4. There must be a certainty that the private attorneys who prosecute such cases do not stand to gain in any related civil action.

Of course, it should also be remembered that the Court has expressly authorized "that police officers may prosecute traffic offenses in magistrate's court and in municipal court." In Re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 422 S.E.2d 123 (1992), the Court further stated that

[o]nly the arresting officer may prosecute the case, although if the officer is new or inexperienced, he may be assisted at trial by one of his supervisors. State v. Sossamon, 298 S.C. 72, 378 S.E.2d 259 (1989); see also State ex rel. McLeod v. Seaborn, 270 S.C. 696, 244 S.E.2d 317 (1978).

See also, State v. Messervy, 258 S.C. 110, 187 S.E.2d 524 (1972). In Messervy, the Court approved the procedure whereby the arresting patrolman presents the State's case, testifies as prosecuting witness, cross examines defense witnesses and argues to the jury in magistrate's court. Seaborn declared valid the policy of the Highway Patrol assigning supervisory officers to assist arresting officers in the prosecution of misdemeanor traffic violations in magistrate's court. In Sossamon, the Court refused to extend beyond the holding of Seaborn and Messervy where the prosecutor was neither the arresting officer or the officer's supervisor. These authorities provide further guidance with respect to the

Solicitor Pope  
Page 7  
August 5, 1997

prosecution of cases in magistrate's and municipal court by a person other than an attorney.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General

RDC/ph