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T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

September 29, 1988

Motte L. Talley, Esquire
Staff Attorney
South Carolina Court Administration
Post Office Box 50447
Columbia, South Carolina 29250

Dear Motte:

In a letter to this Office you referenced a program for fraudulent check offenders which is conducted by the American Community Corrections Institute, a nonprofit educational organization, and which is intended to reduce the recidivism rate of fraudulent check writers. You have questioned whether a magistrate is authorized to sentence offenders to attend such a program as a condition of a suspended sentence imposed on an individual convicted of issuing a fraudulent check.

Section 34-11-90(c) of the Code provides that

(a)fter a first offense conviction for drawing and uttering a fraudulent check ... within its jurisdiction, the court shall, at the time of sentence, suspend the imposition or execution of a sentence upon a showing of satisfactory proof of restitution and payment by the defendant of all reasonable court costs accruing not to exceed twenty dollars. For a second and subsequent conviction ... the suspension of the imposition or execution of the sentence shall be discretionary with the court.

Pursuant to Section 22-3-800 of the Code,

... (a)fter a conviction or plea for any offense within his jurisdiction any magistrate may at the time of sentence suspend the

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imposition or execution of a sentence upon such terms and conditions as he may deem appropriate; provided, however, that after a conviction or plea for drawing and uttering a fraudulent check ... he shall at the time of sentence suspend the imposition or execution of a sentence only upon a showing of satisfactory proof of restitution. Provided, further, when a minimum sentence is provided for by statute, except in 34-11-90, the magistrate shall not have authority to suspend such sentence below the minimum sentence so provided (emphasis added.)

A prior opinion of this Office dated July 21, 1986 responded to the question regarding the authority of circuit or municipal court judges to require a defendant sentenced to a term of probation to make, as a part of the sentence imposed by the court, a contribution to "Crime Stoppers" or to reimburse "Crime Stoppers" for funds expended by such organization in association with the defendant's case. The opinion noted that an earlier opinion of this Office dated October 4, 1984 dealt with the question of whether a circuit judge was authorized to impose monetary contributions to a public defender fund in lieu of a fine when sentencing defendants for certain violations. The particular sentencing practice involved the imposition of a sentence of a fine or term of imprisonment which was suspended upon payment of a designated amount to a public defender fund.

The opinion noted that pursuant to Section 24-23-110 of the Code "... judges of the court of general sessions may suspend the imposition or the execution of a sentence and may impose a fine and a restitution without requiring probation." The opinion also cited a previous opinion of this Office, 1978 Op. Atty. Gen. No. 78-110 p. 140 which concluded that a municipal court judge could authorize a convicted indigent defendant to reimburse costs of his representation by a public defender. The 1978 opinion referenced former Sections 14-25-810, 14-25-980 and 14-25-990 of the Code as authorizing municipal court judges to "... suspend sentences imposed by them in such cases as come within their jurisdiction upon such terms as in their discretion may seem fit and proper." The 1978 opinion particularly stated

(s)ince the Defense of Indigents Act .. does not prohibit the municipal court from ordering reimbursement as a condition of suspended sentences and since such orders are not generally unconstitutional or improper, it

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is the opinion of this Office that certain municipal courts may order as a condition of a suspended sentence, a convicted indigent defendant to reimburse the Judicial Department for the costs of his representation by a public defender

Referencing such prior opinion, it was concluded in the October 4, 1984 opinion that the same reasoning was applicable to sentencing by a general sessions court judge and, therefore, a judge of such court was authorized to suspend a sentence of a fine or term of imprisonment upon the payment of a designated amount to a public defender fund.

Additionally, this Office in an opinion dated May 18, 1984 dealt with the question of whether a circuit judge was authorized to impose public service as a condition of probation. The opinion referenced Section 24-21-430 of the Code which formerly authorized a circuit court judge to include as a part of a sentence of probation any of eight enumerated conditions "or any other." 1/ The opinion also noted the decision by the State Supreme Court in State v. Wilson, 274 S.C. 352, 264 S.E.2d 414 (1980), where the Court, while noting that payment of reparations was not included in a list of conditions of probation, construed the phrase "or any other" in Section 24-21-430 as authorizing a judge to impose reparations to a victim of crime as a condition of probation. The May, 1984 opinion concluded that since a condition of public service would serve the objective of probation, such a condition could properly be imposed.

Additionally, in State v. Brown, 284 S.C. 407, 326 S.E.2d 410 (1985) the State Supreme Court dealt with the question of the validity of a sentence which imposed castration as a condition to the suspension of a sentence and a term of probation. In its decision, the Court construed Section 24-21-410 of the Code which states:

(a)fter conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction at the

1/ Such provision was amended by Act No. 31 of 1987. While increasing the number of statutorily recognized conditions of probation, the statute still retains similar language that in sentencing to a term of probation a judge may include any of such specified conditions of probation "... or any other condition not herein prohibited."

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time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation.

The Court construed such provision as authorizing trial judges to suspend sentences upon the conditions they deem fit and proper. The Court noted that

... (t)hey are allowed a wide, but not unlimited, discretion in imposing conditions of suspension or probation and they cannot impose conditions which are illegal and void as against public policy. 326 S.E.2d at 411.

Noting that the public policy in this State is derived from the law of this State as provided by the Constitution, statutes, and judicial decisions, the Court particularly found the castration sentence before it to be violative of the constitutional provision prohibiting cruel and unusual punishment and, thus, void. See also: Henry v. State, 276 S.C. 515, 280 S.E.2d 536 (1981) (trial judge without authority to impose banishment from the State as a condition of probation inasmuch as such sentence violates public policy.)

The 1986 opinion of this Office cited above concluded that a circuit court judge could sentence a defendant to a term of probation and as a condition of such sentence, require the defendant to make a contribution to "Crime Stoppers" or to reimburse "Crime Stoppers" for funds expended by such organization in association with a defendant's case. As to the other question raised in that opinion concerning the authority of a municipal court judge to require a defendant sentenced to a term of probation to similarly make a contribution to or reimburse "Crime Stoppers", it was noted that the question was being interpreted as whether a municipal court judge could impose such a requirement as a term of a suspended sentence inasmuch as such a judge is generally not authorized to impose a sentence of a term of probation.

Pursuant to Section 14-25-45 of the Code, municipal court judges "... have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates." As referenced, pursuant to Section 22-3-800 of the Code, magistrates may "... suspend the imposition or execution of a sentence upon such terms and conditions as he may deem appropriate...." It was stated that such suspension authority of a magistrate is similar to that of a municipal court judge who pursuant to Section 14-25-75 "... may suspend sentences

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imposed by him upon such terms and conditions as he deems proper including, without limitation, restitution or public service employment." The opinion concluded that while a municipal court judge would not be authorized to require a contribution or reimbursement to "Crime Stoppers" as a condition of probation, a municipal court judge could suspend a sentence upon the payment of a contribution or reimbursement to "Crime Stoppers".

Consistent with the above, it appears that a magistrate would be authorized to sentence offenders to attend the referenced program for fraudulent check offenders conducted by a nonprofit organization as a condition of a suspended sentence imposed on an individual convicted of issuing a fraudulent check. Of course, any suspension would have to be consistent with the provisions of Section 34-11-90(c). Also, you indicated that the program would be paid for by fees charged the offender. If a defendant sentenced to attend such a program as a condition of a suspended sentence is an indigent, consideration must be given to such status in imposing a sentence where any payment is required. See: Section 17-25-350 of the Code; Bearden v. Georgia, 461 U.S. 660 (1983); Bartlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986).

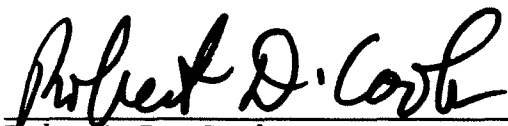
If there is anything further, please advise.

Sincerely,


Charles H. Richardson
Assistant Attorney General

CHR/an

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions