

The State of South Carolina



Office of the Attorney General

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7274

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September 4, 1985

S. Jeff Boyd, Jr., Staff Attorney
South Carolina Court Administration
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Dear Jeff:

In a letter to this Office you indicated that magistrates and municipal court judges are required to collect certain assessments under certain specified statutory conditions. The assessments referenced by you are the \$7.75 assessment for local correctional facilities as provided by Section 52 (A) (1) of the 1985 General Appropriations Act, the \$6.00 assessment for the Law Enforcement Training Council as provided by Section 23-23-70 of the Code, the \$.25 assessment for the Law Enforcement Hall of Fame also provided by Section 23-23-70, and the \$2.00 assessment for the Community Corrections Program as provided by Section 24-23-210 of the Code. The assessment provided by Section 52 (A) (1) applies to all convictions in magistrates' or municipal courts. Such provision also expressly states that such court fee may not be suspended except for expired tag and expired inspection sticker traffic offenses. Section 23-23-70's assessments are to be collected only when a fine is imposed or bond forfeited but apply to all criminal or traffic violations. The assessments provided by Section 24-23-210 apply to any offense, other than a nonmoving traffic offense, when a fine is imposed or bond forfeited. None of the assessments provided by Sections 23-23-70 or 24-23-210 are applicable when a defendant's sentence is imprisonment. Referencing such assessments, you have raised the following questions:

1. Which assessments should be collected when a person is convicted of a violation of §56-5-6450 of the 1976 Code, as amended, in the event the defendant, on

Continuation Sheet Number 2
To: S. Jeff Boyd, Jr., Staff Attorney
September 4, 1985

or before the trial date, demonstrates to the court the acquisition of a child restraint system?

2. Which assessments should be collected when a person is convicted of issuing a fraudulent check but, pursuant to § 34-11-90(c) of the 1976 Code, as amended, the defendant makes satisfactory proof of restitution to the court?
3. If a defendant is convicted and sentenced to a jail term without the opportunity to pay a fine, and regardless of whether the jail term is suspended, will the defendant be responsible for the payment of any of the above mentioned assessments?
4. May any of the assessments be waived by the court if a convicted defendant is indigent and unable to pay?
5. If the court may not waive any of the referenced assessments upon a showing of indigency, and the defendant cannot pay the assessments, or the defendant refuses to pay the assessments, what remedies are available to the magistrate or municipal judge?

As to your first question concerning Section 56-5-6450, such provision states that any person convicted of violating such statute shall be fined not more than twenty-five dollars. Such fine may, however, be waived as to any individual who on or before his appearance date provides evidence of the acquisition of an appropriate child restraint system. Referencing such, it appears that upon conviction of violating Section 56-5-6450, and regardless of whether a fine is imposed, the \$7.75 assessment provided by Section 52 (A) (1) should be assessed. As to the assessment provided by Section 24-23-210, such would not be assessed inasmuch as Section 56-5-6450 should be classified as a nonmoving traffic offense to which the assessment provided by such provision is inapplicable.

As to the assessments established by Section 23-23-70, upon a conviction, the assessments should be collected regardless of whether a fine is imposed or is imposed and,

Continuation Sheet Number 3
To: S. Jeff Boyd, Jr., Staff Attorney
September 4, 1985

thereafter, suspended. While pursuant to Section 56-5-6450 any fine imposed shall be waived as authorized, Section 23-23-70 makes no provisions for the suspension of the assessments established by such statute. Generally, at common law trial judges lacked authority to suspend sentences. However, it has been recognized that such suspension authority can be expressly conferred. Ex parte: Moore v. Patterson, 203 S.C. 90, 26 S.E.2d 319 (1943). See also: 24 C.J.S., Criminal Law, Section 1618(1), p. 868. Therefore, while a fine may be waived for a conviction under Section 56-5-6450, such statute does not authorize the waiver or suspension of any assessments, such as those authorized by Section 23-23-70. Absent express authorization for such suspension, the assessments provided by Section 23-23-70 should be collected. 1/

In your second question you asked what assessments are applicable as to a defendant convicted of issuing a fraudulent check who makes restitution and as a result has his sentence suspended. As noted, the assessments provided by Sections 23-23-70 and 24-23-210 are inapplicable when a defendant's sentence is imprisonment. Although a fine imposed following such a conviction may be suspended, the assessments provided by Sections 23-23-70 and 24-23-210 would be applicable. Furthermore, even though any sentence is suspended, a conviction remains and as a result, the \$7.75 assessment provided by Section 52 (A) (1) would be applicable.

As to the assessment provided by Section 24-23-210, such would be imposed upon a conviction regardless of whether a fine is imposed or is imposed and thereafter suspended. Such provision states:

"(w)hen any person is convicted, pleads guilty or nolo contendere, and is sentenced to payment of a fine, or when any person forfeits bond, including the assessment hereinafter provided, to any offense within the jurisdiction of a municipal, recorder's, or magistrate's court other than a nonmoving traffic violation, there is imposed an assessment, in addition to any other costs or fines imposed by law, in the sum of two dollars."

1/ We would note that the magistrates' Bench Book expressly states that the fees authorized by Section 23-23-70 are to be collected "even if the fine is suspended." South Carolina Bench Book for Magistrates and Municipal Judges, p. III - 104.

Continuation Sheet Number 4
To: S. Jeff Boyd, Jr., Staff Attorney
September 4, 1985

No provision for suspension is provided. However, for any convictions in the general sessions court, pursuant to subsection B of such provision, a circuit judge is authorized to waive or suspend the imposition of an assessment pursuant to Section 24-23-210 upon a finding of financial hardship. The omission of a similar provision authorizing suspensions for convictions in the magistrate's court makes out a persuasive argument that suspensions are not authorized in such circumstances. "It is a well-settled principle of statutory construction that the expression of one thing excludes others not expressed." Jones v. H. D. and J. K. Crosswell, 60 F.2d 827, 828 (E.D.S.C. 1932). See also: 2A Sutherland Statutory Construction, Section 47.23. For the reasons set forth above, the assessments established by Sections 23-23-70 would also be applicable.

In your third question you asked whether a defendant sentenced to a jail term, regardless of whether such term is suspended, is responsible for the payment of any of the referenced assessments. Inasmuch as a jail term is involved, none of the assessments provided by Sections 23-23-70 or 24-23-210 are applicable. However, in such a situation, the \$7.75 assessment provided by Section 52 (A) (1) would remain applicable except where an individual is convicted of an expired tag or expired inspection sticker offense.

As to your question concerning whether any of the referenced assessments may be waived where a defendant is indigent and unable to pay, there are no provisions in Section 52 (A) (1), Section 24-23-210, or Section 23-23-70 for such a waiver in magistrates' or municipal court cases where the assessments are properly imposed. The waiver in situations of indigency provided by Section 24-23-210 is limited to offenses within the jurisdiction of the Court of General Sessions.

In your last question you asked what remedies are available to a magistrate or municipal judge where an individual because of indigency cannot pay an assessment or where an individual refuses to pay any assessment. In a previous opinion of this Office dated September 30, 1981 reference was made to an opinion dated September 17, 1981 which stated that as to assessments imposed on General Sessions court cases "failure to pay any assessment properly imposed could, upon proper showing, constitute contempt of court." This office stated in the September 30, 1981 opinion that such a determination would similarly be applicable to municipal court cases. Referencing such, it

Continuation Sheet Number 5
To: S. Jeff Boyd, Jr., Staff Attorney
September 4, 1985

appears that where a defendant refuses to pay an assessment properly imposed by a magistrate or municipal court judge, such could constitute contempt. 2/

2/ Section 22-3-950 of the Code provides:

"(e)very magistrate shall have power to enforce the observance of decorum in his court while holding the same and for that purpose he may punish any person who shall, in the presence of the court, offer an insult to the magistrate or a juror or who shall be willfully guilty of an undue disturbance of the proceedings before the magistrate while sitting officially, as for a contempt, by fine and imprisonment, either or both, not exceeding twenty dollars fine and twelve hours imprisonment." See: Dean v. Shirer, 547 F.2d 227 (4th Cir. 1976).

As to any assertions that the refusal to pay an assessment would not constitute contempt as provided by Section 22-3-950, it has been stated that:

"(t)he power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." Curlee v. Howle, 277 S.C. 377 at 382, 287 S.E.2d 115 (1982); See also: City of Klamath Falls v. Bailey, 602 P.2d 1107 (1979).

Such recognition of contempt powers by the Court was not limited to any particular jurisdictional level and, therefore, should apply equally to all courts of this State's unified judicial system, including the magistrates' and municipal courts. State ex rel. McLeod v. Crowe, 272 S.C. 41, 249 S.E.2d 772 (1978); Section 14-25-5 of the 1976 Code. Therefore, refusal to pay any assessment imposed in a magistrate's court or municipal court could constitute contempt.

Continuation Sheet Number 6
To: S. Jeff Boyd, Jr., Staff Attorney
September 4, 1985

In circumstances where a defendant because of indigency is unable to pay an assessment imposed by a magistrate or municipal court judge, consistent with an opinion of this Office dated July 30, 1981, a schedule in which payments on such an assessment could be made should be established. The referenced opinion indicated that such a schedule would be similar to the schedule for the payment of a fine for an indigent as provided by Section 17-25-350 of the Code.

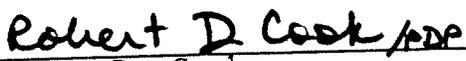
If there are any questions concerning the above, please contact me.

Sincerely,


Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:


Robert D. Cook
Executive Assistant for Opinions