

1983 S.C. Op. Atty. Gen. 151 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-91, 1983 WL 142760

Office of the Attorney General

State of South Carolina

Opinion No. 83-91

November 22, 1983

*1 The Honorable Larry A. Martin
Member
House of Representatives
Route 5, Box 545
Easley, South Carolina 29640

Dear Representative Martin:

By your letter of October 28, 1983, you have asked for the advice of this office as to (1) whether time served in jail subsequent to arrest and prior to release on bond must be credited in the sentences for Driving Under the Influence, first and second offenses, and (2) whether the minimum sentence of sixty (60) days for the third offense is mandatory. The responses are set forth separately, as follows.

1. Can the minimum sentence of forty-eight (48) hours prescribed in the first and second offenses be satisfied by the time served in jail after the arrest and prior to the time of making bail? Specifically, can any of the sentence be satisfied by the time served while awaiting bail after the arrest is made?

Act No. 114, 1983 Acts and Joint Resolutions, amended [Section 56-5-2940 of the Code of Laws of South Carolina](#) (1982 Cum.Supp.) to provide for sentencing upon conviction, entry of a plea of guilty or nolo contendere, or forfeiture of bail. Punishment for the first offense is specified in new [Section 56-5-2940\(1\)](#), as follows in pertinent part:

By a fine of two hundred dollars or imprisonment for not less than forty-eight hours nor more than thirty days, for the first offense; provided, that in lieu of the forty-eight hour minimum imprisonment the court may provide for forty-eight hours of public service employment[.] * * *

Punishment for the second offense is specified in new [Section 56-5-2940\(2\)](#):

By a fine of not less than one thousand dollars and imprisonment for not less than forty-eight hours nor more than one year for the second offense; provided, that in lieu of service of imprisonment the court may require that the individual complete an appropriate term of public service employment of not less than ten days upon such terms and conditions as the court deems proper[.]

For a number of reasons, one accused of Driving Under the Influence may remain in jail for several hours or days from the time of arrest to the time of making bail. [Section 24-13-40 of the Code](#) specifies in part, 'In every case in computing the time served by a prisoner, full credit against the sentence shall be given for time served prior to trial and sentencing.'¹ The use of the term 'shall' connotes mandatory compliance with the statute. 2A [Sutherland Statutory Construction](#) § 57.03. There is no indication, anywhere in Act No. 114, that the provisions of [Section 24-13-40](#) are not to be applied in sentencing offenders under this Act. Thus, credit against a forty-eight hour (or other sentence must be given for the hours one spent in jail subsequent to his arrest and prior to his release on bond. See, [State v. Dozier](#) 263 S.C. 267, 210 S.E.2d 225 (1974); [Oglesby v. Leeke](#), 263 S.C. 283, 210 S.E.2d 232 (1974); [Annot.](#), 77 A.L.R. 3d 182. The effect of crediting time served prior to sentencing would be to satisfy part or all of the sentence, depending upon the amount of time credited and the length of the sentence imposed by the court.

*2 2. On third offense sentences, can the sixty- (60) day minimum sentence be compromised in any way, by the Judge, so as to allow the defendant's time served to be less than sixty (60) days?

Section 56–5–2940(3), as amended by Act No. 114 of 1983, provides the sentence for third offense: ‘By a fine of not less than two thousand dollars and imprisonment for not less than sixty days nor more than three years, for the third offense[.]’ The Act further provides in part:

No part of the minimum sentences provided herein shall be suspended. The court may provide in lieu of service other sentences provided herein: For a third offense or any subsequent offense or for a violation of Section 56–5–2945 as it relates to great bodily injury the service of the minimum sentence is mandatory; provided, however, the judge may provide for the sentence to be served upon such terms and conditions as he deems proper including but not limited to weekend service or nighttime service in any fashion he deems necessary.

As noted above, the use of the term ‘shall’ connotes mandatory compliance. Thus, for third offense DUI, the court must impose a sentence of imprisonment for not less than sixty days without suspending a portion the sentence.²

This interpretation would comport with the apparent intention of the General Assembly to provide for mandatory imprisonment for third and subsequent offenses. While the title of an act is not a formal part of the act, the title is often referred to, to determine the intention of the legislature and to aid in interpreting the act. 2A Sutherland Statutory Construction § 47.03. The portion of the title of Act No. 114 relative to third offense reads:

AN ACT TO AMEND SECTION 56–5–2940, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO PENALTIES FOR VIOLATION OF LAWS PROHIBITING THE OPERATION OF MOTOR VEHICLES WHILE UNDER THE INFLUENCE OF INTOXICATING SUBSTANCES, SO AS TO PROVIDE FOR

A MANDATORY FINE AND IMPRISONMENT WITH NO OPTION TO PERFORM PUBLIC SERVICE EMPLOYMENT FOR A THIRD, FOURTH, OR FIFTH, AND SUBSEQUENT OFFENSE; NO PART OF A MINIMUM SENTENCE SHALL BE SUSPENDED; MINIMUM SENTENCE IS MANDATORY WHEN BODILY INJURY RESULTS FROM DRIVING UNDER INFLUENCE OF ALCOHOL OR DRUGS[.] . . .

The title would make clear the legislative intent that a mandatory minimum sentence be imposed without a portion thereof being suspended.

The conclusion that the provisions for imposing a minimum sentence are mandatory is bolstered when the particular areas in which the court is allowed discretion are examined. Section 56–5–2940, as amended by Section 1 of Act No. 114, does allow for some discretion by the court in the terms and conditions of the sentence to be imposed for third offense: ‘the judge may provide for the sentence to be served upon such terms and conditions as he deems proper . . .’ Use of the term ‘may’ connotes discretion in the judge’s sentencing, limited however to terms and conditions. 2A Sutherland Statutory Construction § 57.03. Because the act specifies discretion only as to terms and conditions, discretion as to other factors of sentencing, such as minimum time, would be excluded. 2A Sutherland Statutory Construction § 47.23. Thus, the judge may provide for service on weekends or at night, as long as the minimum sentence requirement is met. For example, a sixty-day sentence could be ordered to be served by incarceration for 120 twelve-hour nights or for thirty forty-eight-hour weekends. As discussed above for first and second offenses, credit must be given for time served subsequent to arrest and prior to release on bond, when computing time to be served after sentencing. It should also be noted that the act contains no provision for public service employment for third and subsequent offenses.

*3 Because Act No. 114 specifically mandates service of a minimum sentence and provides that no part of a minimum sentence shall be suspended, [Section 24–21–410 of the Code](#), authorizing the court to suspend imposition of a sentence for probation, would not apply to sentences for Driving Under the Influence under [Section 56–5–2940](#) as amended by Act No. 114. This interpretation of the apparent conflict between the statutes is also consistent with the rule that a later statute in a general law will be read as an exception to a former statute to harmonize the whole. Ex Parte Turner, 24 S.C. 211 (1886). Furthermore, where an apparent conflict exists between two statutes, the newer statute will control as it is the later expression of the legislature. 2A Sutherland Statutory Construction § 51.02. Thus, it must be concluded that the legislature, by the new act, intended that no part of the minimum sentence be suspended by the court.

Section 3 of Act No. 114 contains the following provision which must be considered by the court at the time of trial and sentencing:

Any person arrested, charged, or indicted under Section 56–5–2930 prior to the enactment of this act must be tried and sentenced and his driver's license suspended as provided by the law in force at the time of the commission of the crime.

Act No. 114 of 1983 became effective on June 14, 1983. Thus, any person arrested, charged, or indicted for Driving Under the Influence before June 14, 1983, would be tried and sentenced under the former Section 56–5–2940 which was repealed by Act No. 114.

In conclusion, for persons charged with the commission of a DUI offense that occurred on or after June 14, 1983, the sixty (60) day minimum sentence for third offense DUI may not be compromised or suspended; the total time served, in whatever fashion served, must total not less than sixty (60) days. The same principles would apply to the minimum sentences of ninety (90) days for the fourth offense and one (1) year for the fifth or subsequent offenses.

Act No. 114 also provides for fines as a part of sentencing for Driving Under the Influence under [Section 56–5–2940](#). Because no questions have been raised concerning fines, this opinion has addressed only those portions of the act concerning imprisonment. Sincerely,

T. Travis Medlock
Attorney General

Footnotes

- 1 [Section 24–13–40](#) also contains the following proviso which may affect credit for time served prior to trial and sentencing: Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.
- 2 The provisions of this act apply to offenses for which an individual was arrested, charged, or indicted after the effective date of the act. See Section 3 of Act No. 114 and discussion, infra.

1983 S.C. Op. Atty. Gen. 151 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-91, 1983 WL 142760