

1983 S.C. Op. Atty. Gen. 77 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-53, 1983 WL 142724

Office of the Attorney General

State of South Carolina

Opinion No. 83-53

August 3, 1983

**\*1 RE: Sections 44-53-40, 44-53-390(a)(3), and 44-53-420, Code of Laws of South Carolina (1976), as amended.**

The Honorable Donald V. Myers

Solicitor

Eleventh Judicial Circuit

Lexington County Courthouse

Lexington, S.C. 29072

Dear Solicitor Myers:

You have asked which of the above sections would apply to a defendant arrested for attempting to obtain a controlled substance through deceit, or other false and fraudulent means.

The legislature has set forth different penalties for attempting to obtain controlled substances by fraudulent means, as opposed to attempting to obtain other drugs by such methods.

Section 39-23-20(b)(1) defines 'drug' as follows:

The term 'drug' means (A) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (b) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (c) articles (Other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any articles specified in clause (A), (B), or (C); but does not include devices or their components, parts or accessories.

The above definition is substantially identical to a definition for 'drug' contained in Title 44, Chapter 53, Article 3, 'Poisons and Controlled Substances', at § 44-53-110.

[Section 44-53-40 of the Code](#) of Laws is a general statute, found in chapter 53, Article 1, 'General Provisions', of Title 44. It prohibits obtaining or attempting to obtain a drug by fraud, deceit, misrepresentation, subterfuge, or several other means, including forgery of a prescription, and use of a false name. It is a misdemeanor, and the penalty for the first offense is a fine of a \$500.00, eighteen (18) months in jail, or both. A second offense is also a misdemeanor, and carries a fine of \$2,000.00, or five years, or both. The above section is the general provisions and applies to any drugs, as defined in § 39-23-20(b)(1).

Title 44, Chapter 53, Article 3 of the Code deals with 'Narcotics and Controlled Substances'. Various substances are grouped in five (5) Schedules. Section 44-53-110, in addition to defining 'drug' as noted above, also defines 'controlled substance' separately:

'Controlled Substances' means a drug, substance or immediate precursor in Schedules I through V in §§ 44-53-230, 44-53-250 and 53-270.

Thereafter in the Code, § 44-53-390 sets forth certain prohibited acts relating to controlled substances. More specifically, contained within that provision is a subsection that prohibits an individual from knowingly and intentionally acquiring or obtaining possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. See, § 44-53-390(a)(3). Violation is a misdemeanor, and carries to five (5) years in jail, or a fine of \$10,000.00 or both. In addition, § 44-53-420 makes it a misdemeanor to attempt or conspire to violate the provisions of §44-53-390. A lesser punishment is provided therein.

\*2 Accordingly, it would appear that the provisions of the Code listed above, found in Chapter 53, Article 3 of Title 44 dealing with 'Narcotics and Controlled Substances' create an exception to the penalties set forth in the general provisions of Title 44, as listed as § 44-53-40. The exception is for controlled substances, as listed in Schedules I through V. Harsher penalties are provided for the obtaining of a controlled substance through fraud, misrepresentation, forgery or deceit. A person obtaining any other drug, as defined in § 39-23-20(b)(1) (an identical definition to that found in § 44-53-110), by fraud or subterfuge would fall under the prohibitions contained in § 44-53-40. The legislature has therefore created a harsher penalty for the fraudulent obtaining or attempted obtaining of controlled substances, as opposed to other substances which are classified as drugs.

Generally, penal statutes must be strictly construed against the State, when determining how to charge a defendant. However, general principles of interpretation of a penal statute do not differ from those relating to other statutes. The standard is the intent of the legislature. See, 3 Sutherland Statutory Construction § 59.08.

The provisions from Article 3 cited above have been amended more recently than the general provisions cited from Article 1, Chapter 53, Title 44 of the Code. The presumption is against repeal by implication of the Article 1 provisions, in absence of specific language indicating the intent to effect such repeal. 73 Am.Jur.2d 'Statutes' § 257, pp. 392-399. It is reasonable, therefore, to conclude that the provisions found in Article 3 are a more recent expression of the intent of the legislature, to create harsher penalties for the obtaining or attempted obtaining of controlled substances by fraud or deceit as opposed to the obtaining of other drugs by such methods as prohibited in Article 1.

In conclusion then, it appears that a defendant who attempted or conspired to obtain a controlled substance by fraudulent means should be charged under § 44-53-420 in conjunction with § 44-53-390(a)(3).

I trust the above information satisfies your questions. If any further information is needed, please do not hesitate to contact this office.

Sincerely yours,

James G. Bogle  
Assistant Attorney General

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