

1979 WL 43203 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

December 12, 1979

**\*1 SUBJECT: Sentencing Discretion of Circuit Court**

(1) A judge may suspend a portion of the sentence given an individual under [Section 56-1-1100, Code of Laws of South Carolina \(1976\)](#); however, he cannot give a sentence less than the statutory minimum of one year.

(2) A judge may suspend a portion of the sentence given an individual who has violated [Section 56-1-460, Code of Laws of South Carolina \(1976\)](#), however, he cannot give a sentence less than the statutory minimum of forty-five days.

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QUESTIONS:

1. May a judge suspend a portion of the sentence given an individual under [Section 56-1-1100, Code of Laws of South Carolina \(1976\)](#) or give a period of incarceration less than one year?
2. May a Judge suspend a portion of the sentence given an individual who has violated [Section 56-1-460, Code of Laws of South Carolina \(1976\)](#), or give a period of incarceration less than forty-five days?

STATUTES AND CASES:

South Carolina Code of Laws (1976), [§ 56-1-1100](#), [17-25-100](#), [24-21-410](#), [16-11-330](#), [56-1-460](#).

DISCUSSION:

1. An examination of the first issue is in order. [Section 56-1-1100, Code of Laws of South Carolina \(1976\)](#) provides, in pertinent part that:

‘It shall be unlawful for any person to operate any motor vehicle in this State while the judgment of the court prohibiting the operation remains in effect. Any person found to be an habitual offender under the provisions of this article, who is thereafter convicted of operating a motor vehicle in this State while the judgment of the court prohibiting such operation is in effect, shall be guilty of a misdemeanor and shall be imprisoned for not less than one year nor more than five years.’

Under this statutory provision, it is clear that any person declared to be an habitual offender who operates a motor vehicle in violation of a court order prohibiting such use, is guilty of a misdemeanor, punishable as provided by the statute. The language of the statute is clear and unambiguous. An individual violating the statute ‘shall be imprisoned for not less than one year nor more than five years.’ The term ‘shall’ denotes mandatory minimum and maximum periods of imprisonment.

As applied to the facts of the case, the defendant was declared to be an habitual offender on April 28, 1979 by the Honorable C. Victor Pyle, Jr. In the order, His Honor directed that defendant ‘shall not operate any motor vehicle on a highway of this State for a period of five years from the date of this order or until such respondent has been properly licensed by the State Highway Department pursuant to the statute whichever comes last, or until further order of the Court modifying this order.’ There is no record that His Honor modified the order, nor is there any record that defendant has been properly licensed by the Highway Department. Consequently, the order of the Court was still in effect when defendant was indicted on October 4, 1979 for driving after having been declared an habitual offender, in violation of [Section 56-1-1100, Code of Laws](#).

\*2 With respect to the sentencing discretion of the Court under [Section 56-1-1100](#), a number of statutory provisions are applicable. Under [Section 17-25-100, Code of Laws of South Carolina \(1976\)](#) the language reads: ‘The circuit judges of this State, may, in their discretion, suspend sentences imposed by them except in cases of felony upon such terms and upon such conditions as in their judgment may be fit and proper.’

[Section 24-21-410, Code of Laws of South Carolina \(1976\)](#) provides that:

‘After 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 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.’

From a reading of the two aforementioned statutory provisions, it is evident that the Court may, in its discretion, suspend the sentence of an individual. [Section 17-25-100](#) allows such discretion in cases of misdemeanors; [Section 24-21-410](#) broadens the discretionary power of the Court to include all misdemeanors and felonies, with the exception of those cases punishable by death or life imprisonment.

Applying [Sections 17-25-100](#) and [24-21-410, Code of Laws of South Carolina \(1976\)](#) to [Section 56-1-1100](#) of the [Code of Laws](#), it is the opinion of this Office that the Court has the authority to suspend a portion of the sentence given an individual under the statute. However, the Court does not have unlimited sentencing discretion. The statutory language of [Section 56-1-1100](#), which is clear in its meaning provides that the Court must impose a sentence of imprisonment not less than one year. Consequently, the Court does not have the authority to impose a sentence of incarceration less than the one year period. The Court must impose a sentence equal to or greater than one year, but not more than five years. He then has the discretion under [Sections 17-25-100](#) and [24-21-410](#) to suspend the sentence imposed. This construction and interpretation of the statute is buttressed by the fact that had the General Assembly intended to preclude the judiciary from suspending sentences for violations of [Section 56-1-1100 of the Code](#) it would have done so expressly, as it did in [Section 16-11-330](#):

‘1. Any person convicted for the crime of robbery while armed . . . shall suffer punishment by imprisonment of hard labor for a term of not less than ten years nor more than twenty-five years, in the discretion of the judge, no part of which may be suspended.’

2. The analysis of the second issue follows a similar pattern. [Section 56-1-460, Code of Laws of South Carolina \(1976\)](#), provides, in pertinent part, that:

‘Any person who drives a motor vehicle on any public highway of this State at a time when his license to drive or privilege to do so is cancelled, suspended or revoked shall, upon conviction, be punished by a fine of one hundred dollars or imprisonment for thirty days for the first violation; for the second violation a fine of five hundred dollars or not more than sixty days or both and for the third and subsequent violation imprisonment for not less than forty-five days nor more than six months.’

\*3 A Court under [Sections 17-25-100](#) and [24-21-410](#) has the authority to suspend the sentence of an individual who pleads or is convicted under this statute, particularly since the offense is a misdemeanor. However, the Court does not have the authority to issue to a third time or more offender a sentence less than forty-five days imprisonment. The provisions of the statutes are to be strictly complied with.

CONCLUSION:

1. It is therefore the opinion of this Office that the Court does have the authority to suspend sentence under both [Sections 56-1-1100](#) and [56-1-460 Code of Laws of South Carolina \(1976\)](#) by virtue of the authority granted them under [Sections 17-25-100](#) and [24-21-410 Code of Laws](#), particularly since violations under the former statutes are misdemeanors. The General Assembly did not choose to expressly limit the authority of the Court to suspend sentences, as it clearly could have done, and did in the language of [Section 16-11-330, Code of Laws of South Carolina](#). Therefore, the clear meaning of the language of the statutes in question reveal the intent that the Court have the authority to suspend sentences given under [Sections 56-1-1100](#) and [56-1-460](#).

2. However, it is also the opinion of this Office that the Court does not have the authority to issue sentences below the minimum prescribed by the respective statutory provisions. [Section 56-1-1100](#) provides for a sentence or not less than one year nor more than five. The Court is so bound. [Section 56-1-460](#) provides for a sentence of not less than forty-five days nor more than six months for a third time or more offender. The Court is so bound. After such sentencing, the Court may, in his discretion suspend a portion of such sentence.

Sincerely,

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