



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

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The Honorable Richard K. Newman
Commonwealth Attorney for the City of Hopewell
100 E. Broadway Room #252
Hopewell, Virginia 23860

Dear Mr. Newman:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether a prosecutor may amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent misdemeanor charge alleging a violation of state law when such an arrest or summons was made by an officer of a local police department or a deputy for a local sheriff's department. You also inquire, if a prosecutor is permitted to make such an amendment, whether the amendment is subject to judicial review.

Response

It is my opinion that, while a prosecutor is permitted to move to amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent misdemeanor charge alleging a violation of state law when such an arrest or summons was made by an officer of a local police department or a deputy for a local sheriff's department, any such an amendment is subject to judicial review and may be made only by an appropriate judicial officer.

Applicable Law and Discussion

You note your questions arise from a previous Opinion of this Office.¹ That opinion addressed whether § 46.2-1308 prohibits a prosecutor from amending a misdemeanor charge alleging a violation of state law to the equivalent municipal ordinance in the situation where the arrest or summons was issued by an officer of the Department of State Police for offenses found in titles other than Title 46.2. The opinion concluded that the restriction on prosecutorial discretion contained in § 46.2-1308 is expressly limited to violations under Title 46.2, so that a prosecutor remains otherwise free to exercise his discretion in bringing and amending charges for violations of other provisions outside Title 46.2.²

¹ 2011 Op. Va. Att'y Gen. No. 11-036, available at <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2011opns/11-036-vener.pdf>.

² *Id.* at 2. Section 46.2-1308 provides:

With respect to your inquiry, § 46.2-1308 is silent regarding a prosecutor's discretion to amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent state charge alleging a violation of state law when such an arrest or summons is issued by a local police department or deputy for a local sheriff's department. Thus, as explained in the earlier opinion,³ because § 46.2-1308 does not refer to arrests or summons issued other than those brought under Title 46.2 and issued by an officer of the Department of State Police or any other division of state government, the exclusion of all other arrests or summons outside of Title 46.2 and issued by the Department of State Police is presumed to be intentional.⁴ Additionally, § 46.2-1308 does not place any limitation on arrest warrants or summonses if issued by a local police department or local sheriff's department. Accordingly, I find no limitation on a prosecutor's discretion that prohibits him from amending a misdemeanor charge alleging a violation of a municipal ordinance being amended to the equivalent misdemeanor charge alleging a violation of state law when such an arrest or summons was made by an officer of a local police department or a deputy for a local sheriff's department.

Turning to your second question, § 19.2-71 provides that process for the arrest of a person charged with a criminal offense may be issued by a judge, clerk of court, or any magistrate. Section 16.1-129.2 provides that, upon the trial of a warrant, the general district court may, on its own motion or at the request of counsel for either side, "amend the form of the warrant in any respect in which it appears to be defective." Also, a prior Opinion of this Office concluded that neither a chief of police nor a Commonwealth's attorney has the authority to unilaterally withdraw or dismiss a lawfully issued arrest warrant or summons.⁵

It is an accepted principle of statutory construction that a statute stating the manner in which something may be done, or the entity that may do it, also evinces the legislative intent that it not be done

In counties, cities, and towns whose governing bodies adopt the ordinances authorized by §§ 46.2-1300 and 46.2-1304, all fines imposed for violations of such ordinances shall be paid into the county, city, or town treasury. Fees shall be disposed of according to law.

In all cases, however, in which an arrest is made or the summons is issued by an officer of the Department of State Police or of any other division of the state government, for violation of the motor vehicle laws of the Commonwealth, the person arrested or summoned shall be charged with and tried for a violation of some provision of this title and all fines and forfeitures collected upon convictions or upon forfeitures of bail of any person so arrested or summoned shall be credited to the Literary Fund.

Willful failure, refusal or neglect to comply with this provision shall constitute a Class 4 misdemeanor and may be grounds for removal of the guilty person from office. Charges for dereliction of the duties here imposed shall be tried by the circuit court of the jurisdiction served by the officer charged with the violation.

³*Id.*

⁴ The maxim of statutory construction *expressio unius exclusio alterius* is applicable here. Where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute. *See, e.g.,* Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992). *See* Smith Mountain Lake Yacht Club, Inc. v. Ramaker, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001). *See also* NORMAN J. SINGER & J.D. SHAMBLE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (7th ed. 2007); MITCHIE'S JURISPRUDENCE, Statutes § 45 (2006).

⁵ 2003 Op. Va. Att'y Gen. 73 (noting that a former Commonwealth's attorney who amended an arrest warrant without the knowledge or consent of the court by reducing the felony charge to a misdemeanor, in contravention of the Rules of the Supreme Court, was directed to write a letter of apology to the court in *Morrissey v. Va. State Bar*, 260 Va. 472, 479, 538 S.E. 677, 680-81 (2000)).

otherwise.⁶ The Code clearly establishes that it is the court, rather than the prosecutor, who ultimately has authority to amend a warrant. Because the relevant statutes indicate, and prior Opinions of this Office conclude, that changes or corrections to warrants should be regarded as amendments,⁷ logic dictates that those same procedures govern making amendments to a lawfully issued arrest warrant or summonses.

I therefore conclude that amending an arrest warrant or summons is subject to judicial review, and may only be made by an appropriate judicial officer. Nonetheless, this conclusion does not limit the long-standing and well-recognized doctrine of prosecutorial discretion, an inherently executive function.⁸ The institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion.⁹ Once an arrest warrant or summons is issued, however, the charges become the province of the judicial branch, and are no longer within the unfettered purview of the Commonwealth's Attorney.

Conclusion

Accordingly, it is my opinion that, while a prosecutor is permitted to move to amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent misdemeanor charge alleging a violation of state law when such an arrest or summons was made by an officer of a local police department or a deputy for a local sheriff's department, any such an amendment is subject to judicial review and may be made only by an appropriate judicial officer.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General of Virginia

⁶ *Id.*; see also *Grigg v. Commonwealth*, 224 Va. 356, 297 S.E.2d 799 (1982); *Town of Christiansburg v. Montgomery Cnty.*, 216 Va. 654, 222 S.E.2d 513 (1976); 1986-87 Op. Va. Att'y Gen. 130, 131.

⁷ 1990 Op. Va. Att'y Gen. 132, 133; see also 1975-76 Op. Va. Att'y Gen. 87A; 1954-55 Op. Va. Att'y Gen. 220.

⁸ See *Barrett v. Commonwealth*, 268 Va. 170, 178, 597 S.E.2d 104, 107-08 (2004) ("It is well established that the choice of offenses for which a criminal defendant will be charged is within the discretion of the Commonwealth's Attorney.").

⁹ *Bradshaw v. Commonwealth*, 228 Va. 484, 492, 323 S.E.2d 567, 572 (1984).