



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

October 2, 2015

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Larry W. Davis, Esquire
County Attorney for Albemarle County
401 McIntire Road, Suite 325
Charlottesville, Virginia 22902-4596

Dear Mr. Davis:

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

Issues Presented

Section 46.2-844 of the *Code of Virginia* imposes a civil penalty on a driver who illegally passes a stopped school bus, and it authorizes the use of video monitoring systems in such cases. You ask whether a locality may mail an alleged violator a notice of violation requesting payment of a civil penalty, where the evidence against him is video from a video monitoring system. You also ask whether a prosecution for violating this statute must be instituted by a law enforcement officer issuing a summons to the alleged violator.

Applicable Law and Discussion

With certain exceptions, and under certain conditions, passing a stopped school bus comprises the traffic offense of reckless driving.¹ As an alternative to a reckless driving charge, a civil penalty may be imposed on an alleged violator under § 46.2-844. In relevant part, the civil penalty statute allows the charge to be based on video monitoring, pursuant to a local ordinance:²

A. The driver of a motor vehicle approaching from any direction a clearly marked school bus which is stopped on any highway, private road or school driveway for the purpose of taking on or discharging children, the elderly, or mentally or physically handicapped persons, who, in violation of § 46.2-859, fails to stop and remain stopped until all such persons are clear of the highway, private road or school driveway, is subject to a civil penalty of \$250 and any prosecution shall be instituted and conducted in the same manner as prosecutions for traffic infractions. . . .

B. A locality may, by ordinance, authorize the school division of the locality to install and operate a video-monitoring system in or on the school buses operated by the division . . . for the purpose of recording violations of subsection A.

¹ VA. CODE ANN. § 46.2-859 (2014).

² This Opinion does not address the proof that may be necessary at a trial brought pursuant to § 46.2-844.

The video monitoring portion of this statute was enacted in 2011.³ Prior to enactment, the initial bill authorized the mailing of a summons to an alleged violator,⁴ but this language was not in the bill that was ultimately enacted into law. You relate that on July 2, 2014, Albemarle County enacted a video monitoring ordinance authorized by this statute.⁵

By a statute of general application, § 19.2-76, summonses executed by law enforcement officers must be executed in person.⁶

A related statute, § 15.2-968.1 of the *Code of Virginia*, addresses enforcing alleged traffic light violations, where the evidence is from video monitoring. These violations are commonly known as “photo red” violations. The statute provides an exception to the general rule requiring personal service of summonses by allowing this particular type of summons to be mailed:

A summons for a violation of this section may be executed pursuant to § 19.2-76.2 [authorizing mailing a summons for violation of a parking ordinance or a trash ordinance]. Notwithstanding the provisions of § 19.2-76, a summons for a violation of this section may be executed by mailing by first class mail a copy thereof to the owner, lessee, or renter of the vehicle.

It must be assumed that the General Assembly chose its words with care in enacting the two statutes.⁷ Because one statute authorizes mailing summonses while the other statute does not for a comparable offense, the General Assembly must have intended the absence of legal authority in the second statute to mean exactly that: § 46.2-844 does not authorize any official to mail a summons for passing a stopped school bus.

Various other statutes authorize localities to use summonses to give notice of various violations of law punishable by civil penalties: zoning administrators may issue notices of zoning code violations,⁸ and local health directors may issue notices of violations for onsite sewage violations.⁹ In addition, violations of a parking ordinance or a trash ordinance may be commenced by mailing a summons to the alleged violator.¹⁰ However, there is no statute specifically authorizing mailed service of a summons for passing a stopped school bus.

A prior Opinion of this Office concluded that the use of mailed warnings to notify alleged violators of possible violations was prohibited unless the General Assembly had granted express authority

³ 2011 Va. Acts chs. 787, 838.

⁴ H.B. 1911, 2011 Reg. Sess. (Va. 2011) (as prefiled by Miller, J., Patron).

⁵ That ordinance is now codified at §§ 9-800 to 9-802 of the *Code of the County of Albemarle*.

⁶ Section 19.2-76 states, in relevant part, “A law-enforcement officer may execute within his jurisdiction a . . . summons issued anywhere in the Commonwealth. A jail officer as defined in § 53.1-1 employed at a regional jail or jail farm may execute upon a person being held in his jail a . . . summons issued anywhere in the Commonwealth. . . . [A] summons shall be executed by delivering a copy to the accused personally.” (Emphasis added).

⁷ See *Williams v. Commonwealth*, 61 Va. App. 1, 7 (2012) (quoting *Coles v. Commonwealth*, 44 Va. App. 549, 557-58 (2004)).

⁸ VA. CODE ANN. § 15.2-2209 (Supp. 2012).

⁹ Section 15.2-2157 (2012).

¹⁰ Section 19.2-76.2 (2008).

to do so.¹¹ The Opinion discussed an earlier version of the “photo red” statute that did not contain the authorization for mailing summonses. In relevant part, it stated, “The General Assembly has not provided for the issuance of written warnings for violation[s] of this section. Therefore, I am of the opinion that any local ordinance enacted pursuant to [the section] may not provide that written warnings be mailed to violators . . . in lieu of issuing traffic summonses.”¹²

Virginia follows the Dillon Rule, which provides that “local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”¹³

Because of the absence of statutory authority in § 46.2-844 or any other statute to mail a summons for passing a stopped school bus, in contrast to the express statutory authority in § 15.2-968.1 for mailing summonses for “photo red” violations, and because of the Dillon Rule, it is my opinion that a prosecution for violating § 46.2-844 may not be commenced by mailing a summons to the alleged violator.

Section 46.2-844 provides that “any prosecution shall be instituted and conducted in the same manner as prosecutions for traffic infractions.” Law enforcement officers may enforce traffic infractions through the issuance and service of summonses.¹⁴ Issuance of a summons for a traffic offense is addressed by §§ 46.2-936 and 46.2-937.¹⁵

As previously noted, § 19.2-76 requires summonses to be personally served, unless there is statutory authority for a different form of service in particular circumstances. No such other form of service is authorized for a violation of § 46.2-844. Accordingly, it is my further opinion that the only present statutory authority for initiating a prosecution for violating § 46.2-844 is § 46.2-936,¹⁶ providing for personal service of a summons by a law enforcement officer.

Conclusion

For the reasons stated, it is my opinion that a proceeding for violating § 46.2-844 may not be initiated by mailing a summons to the alleged violator. It may be initiated by a summons issued in

¹¹ 1995 Op. Va. Att’y Gen. 205, 206.

¹² *Id.*

¹³ *See, e.g.,* *Tabler v. Bd. of Supvrs. of Fairfax Cnty.*, 221 Va. 200, 202 (1980).

¹⁴ Section 46.2-102 (2014).

¹⁵ Section 46.2-936 provides that an officer shall issue a summons for a traffic offense punishable as a misdemeanor. Section 46.2-937 provides that for purposes of arrest traffic infractions shall be treated as misdemeanors. Section 46.2-844 provides that prosecution shall be instituted in the same manner as prosecutions for traffic offenses. Therefore, § 46.2-936 governs instituting prosecution for a violation of § 46.2-844.

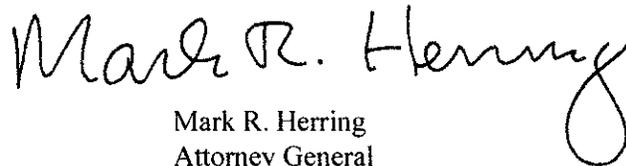
¹⁶ This statute provides that when a person is detained or in the custody of an officer, including for a traffic offense punishable as a misdemeanor, the officer shall, “issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice.” The context of the statute clearly contemplates the officer providing the notice while the person is detained or in his custody, not mailing it at a later time.

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compliance with all applicable legal requirements and then personally served on the alleged violator by a law enforcement officer.¹⁷

With kindest regards, I am

Sincerely yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping "y" at the end.

Mark R. Herring
Attorney General

¹⁷ If the driver meets certain standards of non-cooperation, the officer may take him or her before a magistrate, in lieu of issuing a summons at the site of the offense. VA. CODE ANN. § 46.2-936, 937, and 940 (2014).