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OPINION NO. 2016-06

DISTRICT ATTORNEY; CITATIONS;
MISDEMEANORS; COURTS; NRS
171.1776 does not appear to have been
intended to abrogate prosecutorial
discretion, however, the statute does
require that citations be filed with the
court at the time they are issued.
Prosecutors are the proper authority to
negotiate the resolution of charges
brought by citation; however, due to the
requirements of NRS 171.1776, the final
disposition must involve judicial action
and, if a dismissal is contemplated,
leave of court is required.

Steven B. Wolfson
Clark County District Attorney
Attn: Christopher Lalli
Assistant District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Dear Mr. Wolfson and Mr. Lalli:

You have requested a formal opinion from the Office of the Attorney General pursuant to NRS 228.150 regarding the authority of prosecutors with respect to the disposition of non-traffic misdemeanor citations under NRS 171.1776.

QUESTION ONE

Do Nevada prosecutors have the discretion to determine which citations they will proceed upon in light of NRS 171.1776, which provides that such citations be filed with the court having jurisdiction over the matter and may be disposed of only by trial or other official action by a judge of such court?

SUMMARY CONCLUSION TO QUESTION ONE

NRS 171.1776 does not appear to have been intended to abrogate prosecutorial discretion; however, the language of the statute does require that all citations be filed with the court at the time they are issued and that the prosecutor obtain leave of court in order to dismiss.

ANALYSIS

Nevada first implemented citations for traffic violations in 1967. Codified as NRS 484.910 et seq. (now NRS 484A.600 et seq.), the procedural language was taken directly from the Uniform Vehicle Code, prepared by the National Committee on Uniform Traffic Laws and Ordinances. Hearing on S.B. 438 Before the Assembly Judiciary Committee, 1967 Leg., 54th Sess. 5 (April 3, 1967). In 1973, law enforcement sought to have the power to issue a citation in lieu of arrest extended to non-traffic related misdemeanors to increase efficiency and improve public relations. Hearing on A.B. 68 Before the Assembly Judiciary Committee, 1973 Leg., 57th Sess. 1 (February 5, 1973). The bill language mirrored that of the traffic citation statutes, including the “may be disposed of only by trial in such court or other official action by a judge” provision.

In reviewing A.B. 68, members of the Senate Judiciary Committee expressed concern that the citations were not reviewed by a district attorney or city attorney before becoming complaints. Hearing on A.B. 68 Before the Senate Judiciary Committee, 1973 Leg., 57th Sess. 1 (March 5, 1973). The bill’s sponsor, Assemblyman Torvinen, informed the Committee that at that time in some jurisdictions misdemeanor complaints were reviewed by prosecutors in advance of filing, but that in others they were reviewed only “when the case comes up.” *Id.* No further discussion was had on this issue. Senators also questioned whether a citation would appear on an individual’s criminal record “if the case were dropped.” *Id.* Assemblyman Torvinen indicated that the result would be essentially the same as with an arrest, except that the record would reflect a citation with no arrest. *Id.*

There is no support in the legislative history for a reading of NRS 171.1776 that removes prosecutors from the process until the time of trial. Rather, it appears that the Legislature intended for misdemeanor citations to be treated procedurally like misdemeanor arrests and be subject to the same prosecutorial scrutiny.

Statutorily, this procedure is as follows: “Upon issuing a misdemeanor citation,” the officer is to file the citation with the court having jurisdiction over the alleged offense. NRS 171.1776(1). Once filed with the proper court, the citation is “deemed to be a lawful complaint for purpose of prosecution.” NRS 171.1778. NRS 252.090(2) directs that, in justice court, the district attorney is to “conduct all prosecutions on behalf of the people for public offenses.” Thus, when a citation is filed and becomes a complaint, it falls to the district attorney to prosecute the complaint.

NRS 178.554 permits a prosecutor to file for dismissal of a misdemeanor complaint “by leave of court,” resulting in the termination of prosecution.¹ Provided the judge accepts and enters the dismissal, the requirement of NRS 171.1776(3) that the citation be disposed of by “official action by a judge” would then be satisfied.

While Nevada lacks case law with regard to the specific circumstances under which the court should grant leave to dismiss, NRS 178.554 is substantively identical to Federal Rule of Criminal Procedure 48(a). With respect to the federal rule, the United States Supreme Court has held that a court may withhold leave only where the prosecutor's decision to dismiss “clearly disserved the public interest.” *Rinaldi v. United States*, 434 U.S. 22, 29 (1977). “It is presumed that the prosecutor is the best judge of whether a prosecution should be terminated.” *United States v. Doe*, 61 F.3d 913 (9th Cir. 1995). Under this line of case law, the court does not substitute its judgment for that of the prosecutor with respect to the merits of the case, but rather acts as a balancing agent to ensure that the power to dismiss is not used for an improper purpose, such as prosecutorial harassment or personal gain.

The court does not have the power to *sua sponte* dismiss charges “in furtherance of justice”; rather, the legislature has provided that the prosecutor must initiate dismissal. *State v. Second Judicial Dist. Court*, 85 Nev. 381, 384, 455 P.2d 923, 925 (1969). Prosecutors are subject to an ethical duty not to proceed on charges not supported by probable cause, Nevada Rules of Professional Conduct 3.8(a), but are not required to prosecute even where there is sufficient evidence of guilt. *United States v. Lovasco*, 431 U.S. 783, 794 (1977). The prosecutor may also consider, for instance, the severity of the harm caused, the proportionality of the potential punishment to the offense, and the cooperation of the defendant in other prosecutions. *Id.* at n. 15. Prosecutorial discretion must therefore be exercised in order to avoid miscarriages of justice.

¹ NRS 174.085(5), which permits a prosecutor before trial to dismiss without prejudice a misdemeanor complaint “that the prosecuting attorney has initiated” and does not require judicial approval, would not be applicable in the context of misdemeanor citations.

QUESTION TWO

Are Nevada prosecutors vested with the authority to negotiate citations in light of NRS 171.1776, which provides that such citations be filed with the court having jurisdiction over the matter and may be disposed of only by trial or other official action by a judge of such court?

SUMMARY CONCLUSION TO QUESTION TWO

Prosecutors are the proper authority to negotiate resolution of charges brought by citation; however, due to the requirements of NRS 171.1776, the final disposition must involve judicial action and, if a dismissal is contemplated, leave of court is required.

ANALYSIS

Based on the legislative history, the language “may be disposed of only by trial in such court or other official action by a judge” comes originally from the Uniform Vehicle Code and thus was not intended to address a specific situation within the Nevada courts. It is therefore distinguishable from statutes such as NRS 200.485(8), which expressly limits prosecutorial authority to reduce or dismiss domestic battery charges, and NRS 484C.420, which expressly limits prosecutorial authority to reduce or dismiss driving under the influence charges, where a specific public interest is identified and served by the zealous prosecution of these offenses.

Prosecutors have broad discretion in the resolution of their cases, including the authority to permit an individual to complete a diversion program in lieu of prosecution. *Salaiscooper v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 117 Nev. 892, 902, 34 P.3d 509, 516 (2001). “[T]he decision to prosecute, including the offer of a plea bargain, is a complex decision involving multiple considerations, including prior criminal history, the gravity of the offense, the need to punish, the possibility of rehabilitation, and the goal to deter future crime.” *Id.* at 906, 34 P.3d at 518. The district attorney is in the best position to weigh these factors and reach a decision as to the most appropriate resolution of the case, up to and including dismissal of charges.

Moreover, because the statutes providing for traffic citations and non-traffic misdemeanor citations are identical, to the extent that it is inappropriate for a judge to engage in substantive negotiation of a traffic citation, the same would be equally true with respect to the negotiation of a non-traffic misdemeanor citation. See *Propriety of a Judge Participating in Ex Parte Resolution of Misdemeanor Traffic Citations*, Standing Comm. Judicial Ethics Op. JE15-003 (2015).

Steven B. Wolfson, District Attorney
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August 15, 2016
Page 5

As discussed in response to Question One, NRS 171.1776 requires, procedurally, that an officer file the citation with the court having jurisdiction when it is issued. Thereupon, it becomes a complaint and may only be disposed of through trial or other judicial action. Thus, while the prosecutor possesses authority to resolve a pending citation, if diversion is contemplated in the negotiations, it is incumbent upon the prosecutor to seek leave of the court and ensure that the dismissal is officially entered on the record.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
AMY K. STEELMAN
Deputy Attorney General

AKS/JCB