

OP. NO. 03-025

CRIMINAL PROCEDURE: ARREST — BAIL AND RECOGNIZANCES — TRIAL AND ITS INCIDENTS.

No authority for chief of police or Commonwealth's attorney to withdraw or dismiss lawfully issued arrest warrant or summons, to 'unarrest' person lawfully arrested on warrant or summons, or for Commonwealth's attorney to dismiss misdemeanor or felony charge leading to lawful arrest of accused, without showing good cause to court.

The Honorable Ralph B. Robertson
Judge, Richmond General District Court, Criminal Division
May 30, 2003

Issue Presented

You ask whether the chief of police or the Commonwealth's attorney may withdraw or dismiss a lawfully issued arrest warrant or summons, without judicial approval. You also ask whether a police officer or a Commonwealth's attorney may "unarrest" a person who is lawfully arrested. Finally, you ask whether a Commonwealth's attorney has the discretionary authority to dismiss any misdemeanor or felony charge that led to the arrest, without showing good cause to the court.

Response

It is my opinion 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. It is also my opinion that there is no authority or process by which a police officer or a Commonwealth's attorney may "unarrest" a person who is lawfully arrested on a warrant or summons. It is further my opinion that a Commonwealth's attorney has no authority to dismiss any misdemeanor or felony charge that led to the lawful arrest of an accused, without a showing of good cause to the court.

Background

You relate a hypothetical situation where a police officer executes a lawful arrest warrant or summons for an alleged misdemeanor or felony and the following separate scenarios occur: (1) the chief of police dismisses the warrant or summons and releases the individual prior to a court appearance; (2) a Commonwealth's attorney dismisses or withdraws the warrant or summons without judicial authority; or (3) the Commonwealth's attorney dismisses the misdemeanor or felony charge without giving the court a reason for such dismissal.

Applicable Law and Discussion

You first ask whether the chief of police or the Commonwealth's attorney may withdraw or dismiss a lawfully issued warrant or summons, without judicial

approval. "A primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning."¹ Section 19.2-72 provides that an arrest warrant shall "command that the accused be arrested and *brought before a court of appropriate jurisdiction* in the county, city or town in which the offense was allegedly committed." (Emphasis added.) Section 19.2-73 applies to misdemeanors and provides that "[a]ny person on whom [a misdemeanor] summons is served *shall appear* on the date set forth in same, and if such person *fails to appear in such court* at such time and on such date then he shall be treated in accordance with the provisions of § 19.2-128."² (Emphasis added.)

Section 19.2-72 plainly requires that an accused for whom an arrest warrant is issued shall be brought before the appropriate court. Similarly, § 19.2-73 requires the person served with a misdemeanor summons to "appear" in court. Thus, there is no authority for disposing of an arrest warrant or summons without judicial action.³

Section 19.2-76.1 further illustrates that judicial action is necessary to dismiss a warrant or summons in the context you describe. Section 19.2-76.1 directs the chief law-enforcement officer of each jurisdiction to prepare quarterly reports listing "unexecuted felony and misdemeanor arrest warrants, summonses, capiases or other unexecuted criminal processes." "Upon receipt of the report and the warrants listed therein," the Commonwealth's attorney must petition the circuit court to destroy the unexecuted documents.⁴ Since judicial authority is needed to destroy *unexecuted* warrants and summonses, logic dictates that *executed* warrants and summonses may not be withdrawn or dismissed without judicial authority.⁵

A 1975 opinion of the Attorney General determined that a magistrate may not withdraw a warrant after it has been issued.⁶ Additionally, the 1975 opinion relied on a 1938 opinion of this Office concluding that a justice of the peace may not withdraw a warrant after its issuance.⁷ Both opinions relied on the language in the applicable statutes requiring warrants to be returned to the appropriate court for action thereon.⁸ Likewise, a warrant or summons issued pursuant to § 19.2-72 or § 19.2-73 requires judicial action for disposition. Therefore, neither the chief of police nor the Commonwealth's attorney has the authority to unilaterally withdraw or dismiss a warrant or summons.

You next ask whether a Commonwealth's attorney, or a police officer, may "unarrest" a person who is lawfully arrested on a warrant or issuance of a summons. I find no authority or process in the Code for such an action. Once arrested on an arrest warrant or summons, the person must appear in court before the warrant or summons may be dismissed. If the court, however, subsequently dismisses the charge, the person may seek to have the records expunged.⁹

Finally, you ask whether a Commonwealth's attorney has the discretion to dismiss misdemeanor or felony charges without a showing of cause to the court. Section 19.2-265.3 provides that "[n]olle prosequi¹⁰ *shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown.*"¹¹ (Emphasis added.) A *nolle prosequi* discontinues the case and operates as a dismissal without prejudice when entered before jeopardy has attached.¹² A dismissal based on the merits of the case, however, bars further prosecution.¹³ The plain language of § 19.2-265.3 requires a Commonwealth's attorney to show good cause to *nolle prosequi* a pending charge. Whether a

Commonwealth's attorney has demonstrated to the court "good cause" for the *nolle prosequi* is a determination that is within the discretion of the court.

Conclusion

Accordingly, it is my opinion 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. It is also my opinion that there is no authority or process by which a police officer or a Commonwealth's attorney may "unarrest" a person who is lawfully arrested on a warrant or summons. It is further my opinion that a Commonwealth's attorney has no authority to dismiss any misdemeanor or felony charge that led to the lawful arrest of an accused, without a showing of good cause to the court.

¹Loudoun County Dep't of Soc. Servs. v. Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993).

²Section 19.2-128 prescribes penalties for persons released pursuant to Chapter 9 of Title 19.2 or § 19.2-319 or on a summons pursuant to § 19.2-73 or § 19.2-74, and for alleged or convicted felons or misdemeanants whose execution of sentence is suspended pursuant to § 19.2-319, who willfully fail to appear before any court or judicial officer as required.

³Please note that such action by a Commonwealth's attorney may create an ethical violation. A former Commonwealth's attorney 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, and was directed to write a letter of apology to the court. See *Morrissey v. Va. State Bar*, 260 Va. 472, 479, 538 S.E.2d 677, 680-81 (2000).

⁴Va. Code Ann. § 19.2-76.1 (Michie Repl. Vol. 2000).

⁵I note also that, in instances where service is not executed, judicial action is necessary to recall process. The Office of the Executive Secretary of the Supreme Court of Virginia has prepared an official form, which requires a judge's signature, to use in such situations. See Va. Sup. Ct. Recall of Process Form DC-323 (rev. July 1, 1993), available at <http://www.courts.state.va.us/forms/district/dc323.pdf>.

⁶See 1974-1975 Op. Va. Att'y Gen. 257 (interpreting § 19.1-91, predecessor to § 19.2-72).

⁷See *id.* (citing 1937-1938 Op. Va. Att'y Gen. 90 (interpreting former § 4987-f)).

⁸Compare Op. Va. Att'y Gen.: 1974-1975, *supra* note 6, at 257 (interpreting former § 19.1-91), and 1937-1938, *supra* note 7, at 90 (interpreting former § 4987f).

⁹See § 19.2-392.2 (LexisNexis Supp. 2002) (providing for expungement of police and court records when person charged with commission of crime is acquitted, *nolle prosequi* is taken, or charge is otherwise dismissed).

¹⁰"*Nolle prosequi*," a Latin term used as a verb, means "[t]o abandon (a suit or prosecution); to have (a case) dismissed." Black's Law Dictionary 1070 (7th ed. 1999). Used as a noun, *nolle prosequi* means "[a] docket entry showing that ... the prosecutor has abandoned the action." *Id.*

¹¹ See *Battle v. Commonwealth*, 12 Va. App. 624, 631 n.2, 406 S.E.2d 195, 198 n.2 (1991) (discussing what constitutes "good cause"); see also *Goolsby v. Hutto*, 691 F.2d 199, 202 n.3 (4th Cir. 1982) (noting that two separate judges denied prosecuting attorney's motion for *nolle prosequi* on basis of request that prosecutor intended to seek felony indictment instead of misdemeanor charge).

¹² See *Cantrell v. Commonwealth*, 7 Va. App. 269, 281, 373 S.E.2d 328, 333 (1988) (noting general rule that *nolle prosequi*, entered before jeopardy attaches, does not act as acquittal and does not bar further prosecution of offense); see also *Neff v. Commonwealth*, 39 Va. App. 13, 569 S.E.2d 72 (2002) (holding that doctrines of double jeopardy and *res judicata* did not bar Neff's indictment in circuit court on same charge previously dismissed by that court, and that district court dismissal of charge was equivalent of *nolle prosequi*, in that it did not address Neff's guilt or innocence and did not constitute decision on merits).

¹³ See, e.g., *Greenwalt v. Commonwealth*, 224 Va. 498, 500, 297 S.E.2d 709, 710 (1982) (noting that dismissal qualifies as acquittal for double jeopardy purposes when granted pursuant to facts presented by defense).

[Back to May 2003 Index](#)