

OPINION NO. 88-031**Syllabus:**

A foreign corporation that is required to be licensed under R. C. Chapter 1703, but that has not obtained a license to transact business in Ohio, may, pursuant to R.C. 1703.191 and Crim. R. 4, be served with criminal summons by delivery of the summons to the Secretary of State.

To: Wilfrid G. Dues, Preble County Prosecuting Attorney, Eaton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 21, 1988

I have before me your request for my opinion regarding how service of a criminal summons may be made upon a foreign corporation. You indicate that the corporation in question is an Indiana corporation that has engaged in business in Ohio as a dealer of motor vehicle fuel without a license to do so, in violation of R.C. 5735.20.¹ It is alleged that the corporation sold and delivered untaxed diesel fuel to an Ohio truck stop. You wish to file a criminal complaint against the Indiana corporation. Your question about how to effect valid service arises because the corporation is neither licensed to do business in Ohio nor has it designated a local agent to receive process. Based upon information provided by a member of your staff, I have rephrased your question as follows: may criminal service be made upon an unlicensed foreign corporation by service of summons upon the Secretary of State?

The issuance and service of criminal process upon complaint is controlled by Crim. R. 4.² Crim. R. 4 provides, in pertinent part, as follows:

(A) Issuance.

(1) Upon complaint. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant, or a summons in lieu of a warrant, shall be issued by a judge, clerk of court, or officer of the court designated by the judge, to any law enforcement officer authorized by law to execute or serve it.

....

(C) Warrant and summons: form.

(1) Warrant. The warrant shall contain the name of the defendant or, if that is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint, and shall state the numerical designation of the applicable statute or ordinance. A copy of the complaint shall be attached to the warrant....The warrant shall command that the defendant be arrested and brought before the court issuing it without unnecessary delay.

(2) Summons. The summons shall be in the same form as the warrant, except that it shall not command that the defendant be arrested, but shall order the defendant to appear at a stated time and place and inform him that he may be arrested if he fails to appear at

¹ Violation of R.C. 5735.20 is a third degree misdemeanor. R.C. 5735.99(B).

² Warrants and summons issued upon indictment or information are governed by Crim. R. 9. Crim. R. 9(D) incorporates the provisions of Crim. R. 4(D) regarding execution and service. As Crim. R. 4(D) governs service of summons issued under both Crim. R. 4 and Crim. R. 9, my answer to your question is not affected by the manner in which you initiate the criminal action.

the time and place stated in the summons. A copy of the complaint shall be attached to the summons....

(D) Warrant or summons: execution or service; return.

(1) By whom. Warrants shall be executed and summons served by any officer authorized by law.

(2) Territorial limits. Warrants may be executed or summons may be served at any place within this state.

(3) Manner. Warrants, except as provided in subsection (A)(2), shall be executed by the arrest of the defendant.

Summons may be served upon a defendant by delivering a copy to him personally, or by leaving it at his usual place of residence with some person of suitable age and discretion then residing therein, or, except when the summons is issued in lieu of executing a warrant by arrest, by mailing it to the defendant's last known address by certified mail with a return receipt requested. When service of summons is made by certified mail it shall be served by the clerk in the manner prescribed by Civil Rule 4.1(1). *A summons to a corporation shall be served in the manner provided for service upon corporations in Civil Rules 4 through 4.2 and 4.6(A) and (B), except that the waiver provisions of Civil Rule 4(D) shall not apply.* (Emphasis added.)

Issuance of a warrant is not appropriate in the situation you describe, as it is clearly not possible to arrest a corporation.³ Thus, it is necessary to review the provisions of Civ. R. 4, 4.1, 4.2, 4.6(A) and 4.6(B) with regard to the service of a summons upon a corporation.

Civ. R. 4 describes the issuance and form of summons. Civ. R. 4.1 states that "[a]ll methods of service within this state, except service by publication as provided in Rule 4.4(A) are described herein." The methods, described in Civ. R. 4.1(1), (2) and (3), are service by certified mail, personal service, and residence service. Civ. R. 4.2 describes who may be served with a summons. Civ. R. 4.2(6) states that service shall be made "[u]pon a corporation either domestic or foreign: by serving the agent authorized by appointment or by law to receive service of process; or by serving the corporation by certified mail at any of its usual places of business; or by serving an officer or a managing or general agent of the corporation...." Civ. R. 4.6(A) states that "[a]ll process may be served anywhere in this state and, when authorized by law or these rules, may be served outside this state." Civ. R. 4.6(B) gives the court discretionary authority to allow amendment of process and proof of service.

In applying these provisions to your question, I note that most of the potential recipients of service listed in Civ. R. 4.2(6) are unavailable. Because the corporation is not licensed to do business in Ohio, it has not appointed a statutory agent for the purpose of receiving service of process within the state pursuant to R.C. 1703.041(A), and it has not expressly consented to alternative service on the Secretary of State as provided in R.C. 1703.27(G) and R.C. 1703.04(B)(6). Thus there is no "agent authorized by appointment...to receive service" pursuant to Civ. R. 4.2(6). Nor, given the facts you have presented, is it possible to serve the corporation at its "usual places of business" or through "an officer or a managing or general agent" within the state. However, Civil Rule 4.2(6) also provides that effective service may be made upon "the agent authorized...by law." (Emphasis added.) I must therefore determine whether, under Ohio law, there is an agent authorized to receive service on behalf of the unlicensed Indiana corporation.

R.C. 1703.191 states, in part:

Any foreign corporation required to be licensed under sections 1703.01 to 1703.31 of the Revised Code, which transacts business in

³ I note that where criminal action against the officers of the corporation is contemplated, *see, e.g.*, R.C. 1703.30 (officer shall not transact business in Ohio on behalf of an unlicensed foreign corporation); R.C. 2901.24 (criminal culpability of officers, agents or employees of an organization for offenses committed by that organization), the individuals in question would be subject to arrest or to extradition under R.C. 2963.20--29.

this state without being so licensed shall be conclusively presumed to have designated the secretary of state as its agent for the service of process in any action against such corporation arising out of acts or omissions of such corporation within this state,⁴ including, without limitation, any action to recover the statutory forfeiture for failure to be so licensed.⁵ Pursuant to such service, suit may be brought in Franklin county, or in any county in which such corporation did any act or transacted any business. Such service shall be made upon the secretary of state by leaving with him, or with an assistant secretary of state, duplicate copies of such process, together with an affidavit of the plaintiff or one of the plaintiff's attorneys, showing the last known address of such corporation, and a fee of five dollars which shall be included as taxable costs in case of judicial proceedings. Upon receipt of such process, affidavit, and fee the secretary of state shall forthwith give notice to the corporation at the address specified in the affidavit and forward to such address by certified mail, with a request for return receipt, a copy of such process.

The secretary of state shall retain a copy of such process in his files, keep a record of any such process served upon him, and record therein the time of such service and his action thereafter with respect thereto. (Emphasis and footnotes added.)

Under the express terms of R.C. 1703.191, the Secretary of State is designated as an agent to accept service on behalf of an unlicensed foreign corporation.⁶

In order to determine if R.C. 1703.191 can be applied in your situation, however, I must examine whether or not it is in conflict with Crim. R. 4 and the civil rules incorporated therein.⁷ Both the Ohio Rules of Criminal Procedure and the Ohio Rules of Civil Procedure were adopted pursuant to Ohio Const. art IV, §5(B), which states, in part: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right....All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." The Ohio Supreme Court has held that if a statute and a rule conflict, the rule will control the statute on matters of procedure, and the statute will control the rule on matters of substantive law. See *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972) (civil rules); *State v. Slatter*, 66 Ohio St. 2d 452, 454, 423 N.E.2d 100, 102 (1981) (criminal rules).

The portion of R.C. 1703.191 that designates the Secretary of State as agent for service of process does not conflict with Civ. R. 4.2(6). The rule itself, by the

⁴ The term "action" has been defined as "a suit brought in a court; a formal complaint within the jurisdiction of a court of law. (Citation omitted.)...An ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Emphasis added.) *Black's Law Dictionary* 26 (5th ed. 1979). I conclude that the term "any action," as used in R.C. 1703.191, includes a criminal action.

⁵ See R.C. 1703.28 (forfeiture for transacting business without a license).

⁶ I note that under R.C. 5703.371, there is also a conclusive presumption that the Secretary of State is the designated agent for service of process in any action to recover unpaid taxes owed by an unlicensed foreign corporation. See, e.g. R.C. 5735.12 (providing for assessment, judgment, and execution). As your question refers only to a criminal action brought under R.C. 5735.20, an analysis of R.C. 5703.371 is not within the scope of this opinion.

⁷ I need not decide whether R.C. 1703.191 is in conflict with Civ. R. 4.3-4.5, as these rules are not incorporated into the Rules of Criminal Procedure. See Crim. R. 4(D)(3).

words "agent...authorized by law," contemplates that agency status will be defined outside the rule. See generally *Anson v. Tyree*, 22 Ohio St. 3d 223, 225, 490 N.E.2d 593, 595 (1986) (in construing a similar statute allowing service on the Secretary of State, the court noted that "it is important to distinguish between procedural methods for service which specify how a party may be served...and procedures which may stipulate *who* may be served. See, e.g., Civ. R. 4.2. The Civil Rules do not deny the possibility of the appointment of a statutory agent").⁸

I now turn to the question of whether the form of summons or manner of service required by R.C. 1703.191 is in conflict with that required by the rules. R.C. 1703.191 requires that the Secretary of State be served with "duplicate copies of such process, together with an affidavit...showing the last known address of such corporation, and a fee of five dollars...." Crim. R. 4(C)(2) and Civ. R. 4 do not include these requirements in their description of the form of summons. However, the procedural requirements of R.C. 1703.191 do not negate any requirements of these rules. Rather, R.C. 1703.191 simply provides additional steps. In considering the analogous relationship between local court rules and the Ohio Rules of Appellate Procedure,⁹ the Ohio Supreme Court found no conflict where the local rule was merely supplementary. See *Vorisek v. Village of North Randall*, 64 Ohio St. 2d 62, 64, 413 N.E.2d 793, 794 (1980) (a local rule which imposes "additional, not contradictory" requirement for filing an appellate statement is not in conflict with the Ohio Rules of Appellate Procedure). R.C. 1703.191 also sets forth a procedure under which a summons, once served upon the Secretary of State in accordance with Civ. R. 4.2(6), is to be delivered to the foreign corporation. The language of R.C. 1703.191 is clear in this regard. It provides that "service shall be made upon the secretary of state by leaving with him...copies of such process....Upon receipt of such process...the secretary of state shall forthwith give notice to the corporation...." (Emphasis added.) Since Civ. R. 4.2(6) does not prescribe the manner or method by which the agent, once having been served with summons, is to give notice of service to the corporation, there is no ground for conflict between the statute and the rule on this point. See generally *Vorisek v. Village of North Randall*, 64 Ohio St. 2d 62, 413 N.E.2d 793 (1980). Service is completed in accordance with Crim. R. 4 and the incorporated civil rules upon delivery to the Secretary of State as the agent "authorized...by law." Civ. R. 4.2(6). The notification procedure provided in R.C. 1703.191 is merely supplementary to the procedure established under the applicable rules. I conclude, therefore, that R.C. 1703.191 is not in conflict with Crim. R. 4 or any of the civil rules incorporated therein by reference.

Finally, I note that in order for the presumption to arise that the Secretary of State has been designated as agent, R.C. 1703.191 requires that the foreign corporation transact business in Ohio without being licensed as required under R.C. 1703.01 to R.C. 1703.31.¹⁰ It is implicit in R.C. Chapter 5735 that engaging in the business of a motor vehicle fuel dealer also constitutes transacting business for

⁸ The court in *Anson* considered whether R.C. 2703.20, allowing service on the Secretary of State as statutory agent in certain civil cases, was in conflict with Civ. R. 4.4(A). Although noting that the civil rules in general and Civ. R. 4.2 in particular do not preclude such service, the court based its holding on the more narrow ground that Civ. R. 1(C)(7) excepts R.C. 2703.20 from the civil rules, regardless of any conflict. *Anson v. Tyree*, 22 Ohio St. 3d at 225, 490 N.E.2d at 595. Civ. R. 1(C) is not incorporated into the criminal rules and is therefore not applicable to the situation you describe.

⁹ "Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court." Ohio Const. art. IV, §5(B).

¹⁰ A foreign corporation must be licensed to "transact business in this state," R.C. 1703.03, unless the corporation is "engaged in this state solely in interstate commerce." R.C. 1703.02.

purposes of R.C. Chapter 1703 licensure.¹¹ Whether the specific actions of the Indiana corporation you describe constitute transacting business in Ohio requiring licensure under R.C. Chapters 1703 and 5735, is, of course, a question of fact to be determined by the court. *See* 1949 Op. Att'y Gen. No. 578, vol. I, p. 282 (syllabus, paragraph one).

Therefore, it is my opinion, and you are hereby advised that a foreign corporation that is required to be licensed under R.C. Chapter 1703, but that has not obtained a license to transact business in Ohio, may, pursuant to R.C. 1703.191 and Crim. R. 4, be served with criminal summons by delivery of the summons to the Secretary of State.

¹¹ R.C. 5735.01(F) defines a "dealer" as "any person...who...[i]mports into the state or causes to be imported any motor vehicle fuel for use, distribution, or sale and delivery in the state, from a refiner or other supplier who at the time of importation is not a duly licensed dealer under section 5735.02 of the Revised Code." R.C. 5735.02 states that "[a] dealer shall not receive, use, sell, or distribute any motor vehicle fuel or engage in business within this state unless he holds an unrevoked license issued by the tax commissioner to engage in such business." R.C. 5735.02(D) further requires that "[i]f such dealer is a corporation organized under the laws of another state, territory, or country, [the dealer shall file with the tax commissioner] *a certified copy of the certificate or license issued by the secretary of state showing that such corporation is authorized to transact business in this state.*" (Emphasis added.) Thus, in order to obtain a license to be a dealer of motor vehicle fuel, a foreign corporation must first be licensed under R.C. Chapter 1703.