



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

From: Robert "Sam" Phillips
To: Robert D. Cook
Date: June 11, 1997
Re: Legality of Aerial Traffic Enforcement in South Carolina

Ira A. Grossman, Assistant City Prosecutor, City of Charleston, has asked for an advisory opinion regarding Aerial Traffic Enforcement in order to "begin the process of integrating such a system into South Carolina Law Enforcement" because it is his understanding that "no current law exists in South Carolina on this subject". It is his understanding that the City of Charleston Police Department plans to develop an Aerial Traffic Enforcement capability within its aviation unit modeled upon the Aerial Traffic Enforcement Unit of the Florida Highway Patrol. Members of Charleston's aviation unit have already attended the Florida Highway Patrol's Aircraft Observer Training Course. Simply put, Charleston's aviation unit intends to utilize aerial observers to gauge the speed of motorists and report violators to ground unit who will detain the motorist and issue citations. The airborne unit will maintain visual contact with the offender until the ground unit detains the proper vehicle.

Conclusion

Aerial Traffic Enforcement (ATE) is a proven and effective law enforcement tool which offers obvious advantages over ground units in congested and high volume traffic areas. Additionally, the experience of the Florida Highway Patrol's ATE has demonstrated that aerial observation is a safer and more cost effective alternative to traditional traffic enforcement. Aerial observation is not only effective, it is also widely accepted by the courts. Few challenges to citations issued by ATE have been successful. The experience of other jurisdictions suggests that South Carolina could sanction the use of Aerial Traffic Enforcement with only minor statutory and regulatory modifications.

In order to comply with the Uniform Act Regulating Traffic on Highways, the General Assembly should adopt a statute sanctioning the use of aerial traffic observers by local law enforcement.

Memorandum to Robert D. Cook
Page 2
June 11, 1997

Such a statute would conform with S.C. Code Ann. §56-5-30 (1995) which in pertinent part requires that:

"[t]he provisions of this chapter shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance, rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein (emphasis added)."

While my reading of the code discloses no provision which would foreseeably conflict with the use of aerial observers by local law enforcement agencies, it would nevertheless be prudent to pass a statute authorizing aerial observation to forestall an unforeseen challenge as well as ensuring uniformity throughout the State.

In addition to the aforementioned statute, the Department of Public Safety (DPS) should promulgate regulations establishing standardized training and operational procedures for aerial observers as well as creating a procedure for certifying the accuracy of their timing devices. Such regulations would give the procedures and techniques used by aerial observers the full force of law pursuant to S.C. Code Ann. § 56-5-6180 (1995):

"[T]he Department may promulgate rules and regulations for the administration and enforcement of this article, and all such rules and regulations shall have the full force and effect of law."

DPS created a standardized training regulation for Traffic Radar Operators on April 27, 1990 in S.C. Code Regs. 38-170 (1996) which requires in pertinent part that:

"[T]o be accredited as a traffic radar operator, a law enforcement officer must complete a course of training taught by a certified law enforcement traffic radar instructor."

Given the similarity in function between radar operators and aerial observers, a strong argument can be made that aerial observers need a training regulation which mirrors that of the radar operators.

Although a statute sanctioning ATE would be desirable, it is certainly not essential nor does the absence of a statute mean the courts are likely to find fault with speeding citations issued by ATE. As noted earlier, other jurisdictions have used aerial

Memorandum to Robert D. Cook
Page 3
June 11, 1997

observers with little difficulty from the courts. Challenges to aerial observers usually fall into one of two categories. In the first category, challenges have taken the form of attacks upon either the competency of the observer or the accuracy of the timepiece used by the observer. Most courts have rejected these challenges upon a showing that law enforcement utilized uniform training procedures for officers and standardized techniques for verifying the accuracy of the timepieces. As mentioned earlier, the safest course would be for the South Carolina Department of Public Safety to develop appropriate training and operational regulations; however, in the absence of DPS action, a local law enforcement agency could develop their own policies and procedures with little fear of a successful court challenge to them.

The second category of challenges to ATE involve allegations that aerial observers violated local traffic enforcement statutes. I am unaware of any South Carolina Statute which would allow for such an attack upon ATE. In fact, S.C. Code Ann. § 56-5-30 (1991) allows "local authorities ... (to) adopt additional traffic regulations which are not in conflict with the provisions" of the Uniform Act Regulating Traffic.

Law/Analysis

Aerial Traffic Enforcement (ATE) has been successfully used in many jurisdictions since the late 1950s and is widely accepted by most courts. Annotation, Automobiles: Speeding Prosecution Based on Observation from Aircraft, 27 A.L.R.3d 1446, 1446-1447 (1970). Unlike radar, whose accuracy was often challenged in court during the early days of its use, Annotation, Proof, by Radar or Other Mechanical or Electronic Devices, of Violation of Speed Regulations, 47 A.L.R.3d 822 (1970), courts have rarely challenged the accuracy of determining a vehicle's speed from the air, 27 A.L.R.3d 1446. ATE's strength in court comes from the simplicity and accuracy of the methods used by the aerial observer. An observer computes the ground speed of a vehicle by using a certified stopwatch to measure the time it takes the vehicle to traverse a known distance. Id. A standardized formula converts the time into a ground speed. Id. Courts have recognized the accuracy of such a method for determining speed as early as 1906. See, Plancq v. Marks, 94 L.T.R. 577 (1906).

The most obvious challenge to ATE is an attack upon the accuracy of the stopwatch; however, such attacks have rarely succeeded. 27 A.L.R.3d 1446. Most jurisdictions which use stopwatches have a procedure for certifying their accuracy written into either a statute or an administrative rule. In People v. Wilson, 97 Ill. App. 505, 423 N.E.2d 272 (Ill. App. Ct. 1981), the court rejected a challenge to a stopwatch's accuracy which had been tested and found accurate two weeks after the arrest as well as

Memorandum to Robert D. Cook
Page 4
June 11, 1997

having been calibrated per normal procedure six weeks prior to the arrest. Often, a challenge to the accuracy of the stopwatch is accompanied by an attack upon the aerial observer's proficiency. Such challenges are best met with a standardized training program and watch certification procedure. In State v. Chambers, 207 Neb. 611, 299 N.W.2d 59 (1980), the court upheld a speeding conviction upon a showing that the aerial observer had been trained and certified for "clocking ground vehicles from aircraft" and that the stopwatch used was tested for accuracy according to an "accepted method for determining the accuracy of watches" one month prior to and one day after the speeding violation. Challenges to the accuracy of the stopwatch or the training of the aerial observer are the most common defenses raised by violators the easiest to overcome.

A handful of other challenges to aerial traffic observers have involved collateral attacks based upon local statutes which either prohibit "speed traps" or require the officer who issues the citation to have witnessed the infraction. 27 A.L.R.3d 1446. In People v. Darby, 95 Cal. App. 3d 707, 157 Cal. Rptr. 330 (Cal. Ct. App. 1979), the court refused to equate the use of measured distance markers along a highway by an aerial observer with a speed trap as recognized by California law. Cal. Vehicle Code § 40802 (West 1997) defines a "speed trap" as "a particular section of a highway measured as to distance and with boundaries marked ... in order that the speed of a vehicle may be calculated by securing the time it takes the vehicle to travel the known distance". The court reasoned that a section of highway used by an aerial observer does not meet the statutory definition of a speed trap because "no 'particular section' of the highway" is used, rather "any section could be used".

Ohio requires speed traps to be clearly identifiable to unwary motorists. A speed trap must be marked with a "[r]ectangular sign apprising drivers of motor vehicles of the presence of ... radar or mechanical or electrical timing device". Ohio Rev. Code § 4511.091. Also, police vehicles and officers who are primarily engaged in traffic control duties must be clearly identifiable to the motoring public. Officers are required to be in uniform while their vehicles must have an oscillating color light affixed to the roof. These rigorous standards were demonstrated in City of Dayton v. Adams, 9 Ohio St.2d 89, 223 N.E.2d 822 (1967), where the Ohio Supreme Court held that an officer was incompetent to testify who had operated a radar device in an unmarked car and radioed his observations to a marked car who then issued the speeding citation. The Court found such an arrangement to violate Ohio Rev. Code § 4549.13 (1967) which requires in pertinent part that:

"any motor vehicle used by a member of the
state highway patrol or by any other peace

Memorandum to Robert D. Cook
Page 5
June 11, 1997

officer, while said officer is on duty for the exclusive or main purpose of enforcing the motor vehicle or traffic laws of this state ... shall be equipped with ... at least on flashing, oscillating or rotating colored light mounted outside on top of the vehicle".

The Adams's decision suggests that Ohio's strict regulation of speed traps would prohibit the use of aerial observers; however, in a subsequent case, the Ohio Supreme Court refused to use the State's speed trap laws to invalidate the use of aerial observers. In State v. Heins, 72 Ohio St.3d. 504, 651 N.E.2d 933 (1995), a motorist convicted of speeding sought to overturn his conviction by using the Adams' decision to challenge the airborne observer's ability to testify pursuant to Ohio Rev. Code §§ 4549.13, 4549.14 and 4549.15 because the plane the officer rode in was not marked IAW those statutes nor was the officer in the plane in the required uniform. The court rejected his challenge observing the impracticability of having airborne officers conform to the vehicle and uniform requirements of the ground officer. Ohio also relaxed its strict identification requirements for speed traps in State v. Peters, 9 Ohio App. 2d 343, 224 N.E.2d 916 (Ohio Ct. App. 1965), where the court rejected an assertion that aerial observation violated requirement of Ohio Rev. Code § 4511.091 (1965) for a sign prior to a speed trap merely because a portion of the trap failed to meet the statute.

Occasionally, the competence of a ground officer who issues a citation based upon an aerial observer's determination of the suspect's speed, has been challenged in court. 27 A.L.R.3d 1446. In State v. Cook, 194 Kan. 495, 399 P.2d 835 (1965), the court rejected a challenge to the competence of the officer issuing a speeding citation because the officer had not observed the violation as required by Kansas law, but had relied instead upon a radio report from an aerial observer. Kan. Stat. Ann. § 8-5, 130 (1965) requires that a traffic offense must be committed in an officer's presence before the officer can issue a written notice for the violator to appear in court. The Cook court noted that "the law does not blindly close its eyes to reason. While holding fast to basic truths, it acknowledges the inevitability of change and seeks to adapt itself to new conditions", here "it would be unreasonable to say that the offense charged was not committed in" the ground officer's presence. Id. at 489-499.

A review of the various legal challenges to ATE in other jurisdictions fails to reveal a significant legal hurdle which might hinder the development of an ATE capability by a South Carolina law enforcement agency.