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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 9, 1996

William M. Roth, Chief of Police
Lexington Police Department
P. O. Box 397
Lexington, South Carolina 29071

Re: Informal Opinion

Dear Chief Roth:

You seek an opinion as to whether it would be legal to use confiscated drug money to purchase a traffic radar unit. You have provided statistical information documenting the fact that forty-seven percent of your department's "drug cases are generated from traffic enforcement."

LAW / ANALYSIS

S. C. Code Ann. Sec. 44-53-530 (g) provides as follows:

> (g) [a]ll forfeited monies and proceeds from the sale of forfeited property as defined in Section 44-53-520 must be retained by the governing body of the local law enforcement agency or prosecution agency and deposited in a separate, special account in the name of each appropriate agency. These accounts may be drawn on and used only by the law enforcement agency or prosecution agency for which the account was established. For law enforcement agencies, the accounts must be used for drug enforcement activities and for prosecution agencies, the accounts must be used in matters relating to the

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> prosecution of drug offenses and litigation of drug-related matters.

(emphasis added).

In Op.Atty.Gen., No. 92-74 (December 3, 1992), we commented with respect to a similar provision that

> [a]ny examination of the use of drug forfeiture funds obviously involves a case by case analysis. For instance, an opinion of this Office dated August 1, 1991 determined that to the extent a law enforcement training center is not used directly or indirectly for drug enforcement activities, drug forfeiture funds could not be used for the center. Another opinion of this Office dated August 19, 1991 dealt with the question of whether handguns for deputies could be purchased from funds derived from drug forfeitures and seizures. The inquiry stated that as to the small law enforcement agency involved, each and every law enforcement officer was involved in drug arrests, eradication and/or deterrent activities. The opinion, referencing the involvement in drug arrests and enforcement, determined that drug forfeiture funds could be used to purchase handguns for the deputies.

That same opinion concluded that the purchase of automobiles for a traffic safety program to be funded by a federal grant, was not a use for drug enforcement activities. While one of the purposes of the program was to "decrease the use of rural roads for drug trafficking activities" there was no doubt that the principal and overriding objective of such program was traffic safety. We thus stated:

> [a]s referenced above, it appears that while a purpose of the program at issue does include decreasing drug trafficking on rural roads, the primary intent of the program is traffic safety. As a result, it does not appear that funds which "may be drawn on and used only ... for drug enforcement activities" could be utilized to purchase vehicles which would be used in the program.

Thus, the issue in your situation is whether the purchase of a radar unit constitutes "drug enforcement activities" within the meaning of Section 44-53-530 (g).

While the principal use of a radar unit is for traffic enforcement, there is little question that a radar unit is also a major tool in drug detection activity. The recent United States Supreme Court decision of Ohio v. Robinette, 1996 WL 662461 (Nov. 18. 1996) clearly illustrates such use. In Robinette, a deputy "was on drug interdiction patrol". The deputy stopped a motorist for speeding, clocking him at 24 mph. over the speed limit. The driver was asked to see his license and a computer check was run at the request of the deputy. Then asking the driver to step out of the car, the deputy turned on his mounted video camera, issued a verbal warning to the motorist and returned his license.

Subsequently, the driver was asked if he was carrying any illegal contraband in the car such as weapons or drugs. When told no, the deputy asked the driver if he could search the car. His request to search was granted and narcotics were found in the vehicle.

The Ohio Supreme Court ruled that the search of the vehicle resulted from an unlawful detention and thus suppressed the narcotics. That Court held that the state and federal Constitution required "that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation."

The United States Supreme Court reversed, holding that a per se rule was inappropriate as a constitutional standard. Summarizing, the Court concluded:

> [w]e have previously rejected a per se rule very similar to that adopted by the Supreme Court of Ohio in determining the validity of a consent to search. In Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), it was argued that such a consent could not be valid unless the defendant knew that he had a right to refuse the request. We rejected this argument: "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." Id., at 227, 93 S.Ct., at 2048. And just as it "would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning," id., at 231, 93 S.Ct., at 2050, so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.

> [t]he Fourth Amendment test for a valid consent to search is that the consent be voluntary, and "[v]oluntariness is a question of fact to be determined from all the circumstances," id., at 248-249.
>
> The Supreme Court of Ohio having held otherwise, its judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It was noted in the lower court's opinion that "Newsome testified that as part of the drug interdiction project he routinely asked permission to search the cars he stopped for speeding violations." Moreover, the Court noted that "Newsome testified that from the outset he never intended to ticket Robinette for speeding." Nevertheless, the Court concluded that the consensual search was not invalid simply because the officer had not informed the motorist that he was free to go before requesting consent to search his vehicle.

That the use of the traffic stop, particularly for speeding, has now become an important tool in the war against drugs, is thus evident. As the dissenting judge in the lower court opinion concluded,

> [t]his technique of requesting consent following an initial valid detention is employed on a daily basis throughout this nation to interdict the flow of drugs. While I certainly do not advocate giving police officers carte blanche in their treatment of traffic violators, when the original stop is permissible, the police should be permitted to make inquiries that are not coercive. The majority's bright-line test undercuts police authority and severely curtails an important law enforcement tool that is sanctioned by state and federal constitutional law.

653 N.E.2d at 700.

Numerous other authorities recognize that a traffic stop which is itself valid presents a legitimate opportunity for the officer who made the stop to pursue information concerning other crimes about which he has a suspicion. This technique is often used by law enforcement agencies to deter drug trafficking activities on the highways. One treatise writer has stated that it is well recognized that

> [p]olice use traffic violation stops as a way to gain consent, plain view or other justification for a search or seizure. Highway officers are encouraged to stop cars on alleged traffic or motor vehicle offenses to establish the requisite cause to search for drugs. In many instances, the stop is ... done with the expectation that in a certain number of cases the stop will enable the officer to obtain consent, observe contraband in plain view, or develop other cause for search.

Rudovsky, "Toward A Rational Drug Policy", 1994 U. Chi. Legal Forum, 237, 247. Such stops "have been validated by most federal courts ... ." So long as "there was cause for the police action [in making the traffic stop]," it does not matter that there was no cause or suspicion at the time of the stop that the vehicle was transporting drugs.

Our Fourth Circuit Court of Appeals has recognized this police technique and held it to be valid. In U..S. v. Hassan El, 5 F.3d 726, 730 (4th Cir. 1996), the Fourth Circuit recently quoted with approval U.S. v. Cummins, 920 F.2d 498, 500-501 (8th Cir. 1990) as follows:

> When an officer observes as traffic offense - however minor he has probable cause to stop the driver of the vehicle ... . [T]his otherwise valid stop does not become unreasonable merely because the officer has intuitive suspicions that the occupants of the car are engaged in some sort of criminal activity ... . [T]hat stop remains valid even if the officer would have ignored the traffic violation but for his other suspicions.

In other words, it is now fully recognized that a traffic control device such as radar also serves an important purpose in narcotics interdiction. Another case where this is illustrated is United States v. Willis, 61 F.3d 526 (7th Cir.1995). There, an officer stopped a vehicle going 62 miles an hour in a 55 mile-per-hour zone. The officer gave the driver a warning ticket and placed a consent to search form underneath the ticket. The driver signed the consent to search form and the trooper then told him he had signed the wrong spot and asked him to sign the warning ticket at the correct location. He then told the driver he was free to go.

However, the trooper then asked the driver if he could ask him a few questions, to which he consented. The driver denied he was carrying drugs, and then the driver voluntarily consented to the search of the vehicle.

Subsequently, 146 kilograms of marijuana were found. However, the driver attacked the validity of the search on the basis that the stop for speeding was pretextual. He contended the trooper did not "radar" the vehicle until it had passed the officer. In addition, he argued that the consent to search form had already been filled out by the officer when he was presented with the warning ticket. Importantly, he urged the Court to find the traffic stop a mere pretext because the officer using the radar was "a member of a drug interdiction team, not a traffic officer" who "selectively operated his radar on out-of-state vehicles, looking for drugs, and that his stop of Mr. Willis' vehicle was merely a pretext to facilitate a drug search."

The Court, however, disagreed. Recognizing the validity of the use of a valid traffic stop for the opportunity to search for drugs, the Court stated:

> [o]nce we determine that the stop was based on a reasonable suspicion or probable cause, and that the officer was authorized by law to make the stop, the stop is constitutionally valid ... . In this case there is no challenge to the fact that Mr. Willis' vehicle was speeding and that Trooper Hartman was authorized to stop his vehicle for a violation of Illinois law. Speeding is certainly a legitimate reason for stopping the vehicle.

In view of the close correlation, recognized in the authorities above, between the use of radar in traffic stops for speeding and drug enforcement and interdiction, I am of the opinion that a court could construe the purchase of a radar unit as falling within the requirements of § 44-53-530 (g) as an expenditure for "drug enforcement activities". Admittedly, this is a close question and it could be said that he principal use of a radar unit is traffic control. However, while radar's use remains the detection of speeding, it is now generally recognized by the courts that the detection of speeding also serves the legitimate purpose of ferreting other crimes such as drug trafficking. In view of the close relationship between the detection of speeding and drug interdiction (47% of your drug cases are through traffic stops) and in light of the importance of the traffic stop in drug enforcement, I am of the view that the proposed expenditure is authorized.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph