

March 24, 2008

Marvin Brown, Commander  
York County Multijurisdictional Task Force  
Sixteenth Circuit Solicitor's Office  
Moss Justice Center  
1675-1A York Highway  
York, South Carolina 29745-7422

Dear Commander Brown:

In a letter to this office you requested an opinion regarding the propriety of the use by law enforcement officers of a seventeen year old informant to arrange and make a purchase of a controlled substance. You stated that the concern among law enforcement is that the use of an individual under the age of eighteen could be construed as violating S.C. Code Ann. § 16-17-490 which prohibits contributing to the delinquency of minors. You particularly questioned the applicability of the provision against causing a person under the age of eighteen to associate with immoral or vicious persons. You stated that in the circumstances you are referencing, the purchase of the controlled substance would be arranged and supervised by law enforcement by the use of a body wire. However, the informant would not necessarily be accompanied by a law enforcement officer at all times during the operation.

S.C. Code Ann. § 16-17-490 states that

[i]t shall be unlawful for any person over eighteen years of age to knowingly and wilfully encourage, aid or cause or to do any act which shall cause or influence a minor:

- (1) To violate any law or any municipal ordinance;
- (2) To become and be incorrigible or ungovernable or habitually disobedient and beyond the control of his or her parent, guardian, custodian or other lawful authority;
- (3) To become and be habitually truant;
- (4) To without just cause and without the consent of his or her parent, guardian or other custodian, repeatedly desert his or her home or place of abode;
- (5) To engage in any occupation which is in violation of law;
- (6) To associate with immoral or vicious persons;
- (7) To frequent any place the existence of which is in violation of law;

- (8) To habitually use obscene or profane language;
- (9) To beg or solicit alms in any public places under any pretense;
- (10) To so deport himself or herself as to wilfully injure or endanger his or her morals or health or the morals or health of others...

This section is intended to be cumulative and shall not be construed so as to defeat prosecutions under any other law which is applicable to unlawful acts embraced herein.

Pursuant to S.C. Code Ann. § 15-1-320, “[a]ll references to minors in the law of this State after February 6, 1975...(shall)...be deemed to mean persons under the age of eighteen years, except in laws relating to the sale of alcoholic beverages....”

With regard to the offense of contributing to the delinquency of a minor by actions of law enforcement, this office has issued opinions dealing with the question of whether a law enforcement agency can use an underage undercover agent to purchase alcoholic beverages for the purpose of obtaining convictions for the sale of alcoholic beverages to underage individuals. This office in an opinion dated September 27, 1978 stated that

[t]he fact that the seller may allege that the officers were contributing to the delinquency of the minor would not affect the legality of the arrest of the seller. The question presents a collateral issue which...appears to have no prohibition in the law.

Since that opinion was written, the General Assembly has enacted S.C. Code Ann. § 61-4-100 which provides:

(A) If a person is charged with a violation of the unlawful sale of beer or wine to minors pursuant to Section 61-4-50, the minor also must be charged with a violation of the unlawful purchase or possession of beer or wine pursuant to Section 20-7-8920. In addition, if the minor violated false information as to age pursuant to Section 61-4-60 or if an adult violated the unlawful purchase of beer or wine for a person who cannot lawfully buy pursuant to Section 61-4-80, these persons also must be charged with their violations.

(B) A person may not be charged with a violation of Section 61-4-50 if the provisions of subsection (A) are not met.

(C) Nothing in this section requires that charges made pursuant to this section be prosecuted to conclusion; but rather this determination must be made in the manner provided by law.

(D) Notwithstanding the provisions of subsections (A) and (B), a person under the age of twenty-one may be recruited and authorized by a law enforcement agency to

test an establishment's compliance with laws relating to the unlawful transfer or sale of beer or wine to a minor. The testing must be under the direct supervision of a law enforcement agency, and the agency must have the person's parental consent. If the requirements of this subsection are met, a person may be charged with a violation of Section 61-4-50 without the requirement that the minor also be charged.

Therefore, under subsection (D), a minor can be recruited to test compliance with laws prohibiting the illegal sale of beer or wine to a minor. Prior to that statute being enacted, this office in an opinion dated May 25, 1993 citing an 1975 opinion concluded that "...it does not constitute entrapment for a law enforcement officer to instruct a minor to request the sale of beer and then to arrest the seller following the illegal sale. Therefore, it appears that the law enforcement officers could utilize underage individuals to cause "transfers" prohibited...(by law)."

The Connecticut Attorney General in an opinion dated July 31, 1998 dealt with the question of whether a state agency could use minors in unannounced tobacco age law enforcement. In concluding in the affirmative that the agency could use minors in unannounced tobacco law enforcement checks, the opinion stated

The use of decoys, informers and under cover operators in the detection and apprehension of criminals has long been recognized and approved as a law enforcement tool. Thus, it is universally recognized that law enforcement officials and those who help them may present an opportunity for the commission of crime by feigning complicity in the act or assistance in its commission...Specifically, in the context of liquor control laws prohibiting certain conduct by minors, it has been held that such provisions are inapplicable to minors in decoy programs supervised by law enforcement agencies. Provigo v. Alcoholic Bev. Control App. Bd., 869 P.2d 1163, 1166 (Cal. 1994). Analogous cases make it clear that law enforcement involvement in criminal activity for the purpose of investigating violators is permissible even if technical violations of law occur. See, e.g., United States v. Russell, 411 U.S. 423 (1973) (drug law violations); United States v. Bowling, 666 F.2d 1052, 1054 (6<sup>th</sup> Cir. 1981), cert. denied, 455 U.S. 960 (1982) (informant participating in illegal activity); People v. Superior Court (Orecchia), 65 Cal. App.3d 842, 846, 134 Cal. Rptr. 361 (1976) (decoy drug purchase).

In the People v. Superior Court (Orecchia) decision, the California Court of Appeal stated that

...we do not perceive any "evil" policy in the utilization by the police of minors as decoys in the legitimate pursuit of drug pushers whose prime markets are also minors attending high school. It is patently obvious that infiltration into drug trafficking among high school students can only be realistically achieved by decoys who belong to the same peer group.

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65 Cal.App.3d at 846.

Similarly, in State v. Suchy, 277 N.E.2d 459, 463-464 (Ohio, 1971), the Ohio court determined that

[t]he Court's holding today applies to the use of juveniles as well as adults. As discussed above, a person (juvenile or adult) who purchases or possesses a hallucinogen under the direction of the law enforcement officer, as an aid in the apprehension and prosecution of a dealer or seller, violates no narcotics law, since the requisite criminal intent is lacking. The Court can conceive of no reason, statutory, moral or otherwise, why a juvenile should not be used in a manner such as the juvenile-agent was used in the case at Bar. In the Court's opinion, the only restrictions on such use would be that the law enforcement agency owes a duty to the juvenile to take all reasonable precautions for his safety. This was done in the instant case. In today's society when the evil spectre of the drug traffic has spread across all class, social, racial and economic lines, when even our youngest school-age children are subjected to the temptations and dangers of drugs of all types, it is inconceivable that our law enforcement agencies should be deprived, by legislation or Court decision, of the invaluable assistance of the juvenile-agent. It is essential, if the drug traffic among our younger, school-age population is ever to be controlled and stopped, that our law enforcement agencies be able to use young people, such as might be expected to participate in the drug traffic, as either sellers or buyer-users, to infiltrate the ranks of the drug sellers and to serve as informers or even as police agents to make pre-arranged purchases of the drug itself. There is no law, statutory or Court made, preventing this use.

The Court further stated that

[h]owever, in line with our reasoning above, the Court holds that the juvenile's possession, use or control, such as to subject him to being declared a delinquent, must be done with the requisite criminal intent. A juvenile who aids the police in the manner of the instant case commits no crime and cannot be adjudged a delinquent. By the same reasoning, the police officer who works in concert with the minor under such facts cannot be guilty of the offense of contributing to the delinquency of said minor. (emphasis added).

277 N.E.2d at 464.

Also as to your particular question regarding the concern of law enforcement that utilizing minors could be construed as contributing to the delinquency of a minor, in McAninch and Fairey, THE CRIMINAL LAW OF SOUTH CAROLINA (3rd ed. 1996) at page 9 it references the contributing to the delinquency statute which, again, states that “[i]t shall be unlawful for any person

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over eighteen years of age to knowingly and wilfully encourage, aid, or cause to do any act which shall cause or influence a minor....” (emphasis added). It further states that the term “wilfully” as used in such provision “...would seem to contain a concept of *mens rea* or evil intent in influencing the minor...” See also: 31 ALR3d, *Mens Rea or Guilty Intent As Necessary Element of Offense of Contributing to Delinquency or Dependency of Minor*, Section 2, p. 852 (“...courts...(being)...unwilling to punish without some awareness of wrongdoing on the part of the defendant, and recognizing the limitation on the power of a legislature to criminalize the acts of innocent or well-meaning people, have decided that the word “wilful” as used in a statute defining the crime of contributing to the delinquency of a minor, implies an evil mind or intent or that the words “knowingly” and “wilfully” mean just that, in the ordinary sense of the words; and that a knowledge of facts which would cause an actual belief that the act is wrongful is required.”

It does not appear that law enforcement in using minors to make undercover drug buys would be acting with an evil mind or intent so as to violate the contributing to the delinquency of a minor statute. Therefore, in the opinion of this office, the actions of law enforcement using an individual under the age of eighteen in association with an undercover drug buy would not be construed as violating S.C. Code Ann. § 16-17-490 by contributing to the delinquency of minors and, in particular, that provision against causing a person under the age of eighteen to associate with immoral or vicious persons.

If there are any questions, please advise. With kind regards, I am,

Sincerely,

Henry McMaster  
Attorney General

By: Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook  
Deputy Attorney General