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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 31, 2002

The Honorable Robert D. Coble
Mayor, City of Columbia
P. O. Box 147
Columbia, South Carolina 29217

Dear Mayor Coble:

You note that the City of Columbia as well as other large cities in South Carolina are "concerned about our ability to police traffic in our municipalities." As you are "pressed to do more with fewer resources," you are exploring the idea of "automated traffic enforcement." By way of background, you state the following:

> [t]his technology has been around for some time and to date, fourteen states and the District of Columbia use some type of automated traffic enforcement. Basically, the system combines a camera, computer and radar. If a speeding car is detected, or if a car intrudes on a red light, the camera takes a picture of the driver and the automobile's license plate. Most of the automated systems are placed in very busy interchanges, school zones, railroad crossings and neighborhoods. Many states access only a monetary fine with no point violation. All states give drivers the ability to review and contest the violation with the same rights as though getting a violation from a law enforcement officer.
>
> While we know that we face an uphill battle in the legislature, we feel we must attempt to move forward. Even before the bill is drafted, we have heard from opponents that this system of law enforcement has constitutional problems. That is why I am writing you today.
>
> I would like to ask for an informal advisory Attorney General opinion on whether we can precede statutorily or is this question a constitutional one? We hope that we can proceed with the S.C. General Assembly and want to ask for this opinion before we begin the process.
>
> Please note that we are in no way asking you to take a position on this issue but only review our ability to proceed statutorily. We have you will clear up the constitutional question of a camera being able to issue a citation. As we are faced

with budget cuts, we need to utilize the new technology available for traffic enforcement and we need to reserve our uniform officers for more serious crimes.

LAW / ANALYSIS

Photo-radar technology may be summarized as follows:

> [p]hoto radar incorporates low-level Doppler radar technology to determine the speed of a motor vehicle while simultaneously photographing the driver and the vehicle license plate. ... The device is most commonly mounted in the rear compartment of a police truck or van .... The police vehicle then parks alongside a road where speeding is common .... As oncoming traffic passes, the radar device calculates the speed of each vehicle and determines whether the vehicle is exceeding the posted speed limit .... If the vehicle is speeding, the photo radar device emits a visible flash as it photographs the vehicle's driver and then, as the vehicle passes, the device takes another photograph of the rear license plate. ... The device automatically imprints the photographs with the date, time and location of the violation, along with the speed at which the vehicle was traveling .... The traffic offense is then processed and a traffic ticket issued .... Within seven to ten working days, the registered owner of the vehicle receives the traffic ticket by first class mail ....

Stanck, "Photo Radar In Arizona: Is It Constitutional?" 30 Ariz. St. L. J. 1209, 1211 (Winter, 1998).

This Office addressed the legality of the photo-radar system in an Informal Opinion, dated March 19, 1996. In that opinion, we noted that no statute "absolutely prohibits a municipality's use of photo radar by virtue of an ordinance ...." After a detailed review of existing state law, we found that "... there is no statute which prohibits or attempts to regulate these devices as a tool available to law enforcement to detect speeding." Noting however, that "speeding and unlawful speeds on the highways are regulated by state law ...," we advised that the Legislature is "the appropriate authority to authorize" use of photo-radar devices. We cautioned therein that the use of any presumption or inference that the owner of the vehicle is the driver for purpose of the issuance of any speeding ticket though photo-radar should come through authorization by the General Assembly. In the view of this Office,

> ... Article V of the Constitution requires that all magistrate and municipal courts must be uniform throughout the State and cannot use procedures required by an ordinance on a piecemeal or localized basis. In light of these issues, as well as the constitutional requirements that the burden of proof cannot be shifted, I would advise that the General Assembly would be the more appropriate body to authorize the use of photo radar. While I have no doubt that this may be a valuable tool for law enforcement, it appears that in light of the many issues involved in its use, the

> General Assembly should clearly authorize its adoption on a unified basis rather than piecemeal.

Since the 1996 opinion regarding the use of photo radar was written, the law has further evolved in this area. I will now review the various cases, Attorneys General opinions and law reviews regarding the use of photo radar.

Photo radar cases have been challenged on a variety of constitutional grounds – usually unsuccessfully. In McNeill v. Town of Paradise Valley, 44 Fed. Appx. 871 (9th Cir. 2002), the District Court's judgment in favor of defendants in an action brought under RICO was appealed. Suit had been brought under 42 U.S.C. § 1983 and RICO for the use by Paradise Valley of photo radar. The ticket was challenged on the basis of 4th Amendment violations as well as a deprivation due process. The District Court granted judgment for the town officials and the Ninth Circuit affirmed. Concluded the Ninth Circuit Court of Appeals:

> [s]ummary judgment for Paradise Valley was proper because sending a traffic citation to the registered owner of a vehicle based on the photo radar system does not constitute a seizure under the Fourth Amendment. See Brower County of Inyo, 489 U.S. 593, 596, 109 S.Ct. 1378, 103 L.Ed.2d (1989) (A "seizure" under the Fourth Amendment "requires an intentional acquisition of physical control"). Additionally, because McNeill successfully challenged the citation in municipal court, he received all the process he was due. Cf. Brady v. Gabbic, 859 F.2d 1543, 1554 (9th Cir. 1988).

And, in State v. Weber, 172 Or.App. 704, 19 P.3d 378 (2001) a speeding citation issued pursuant to the photo radar statute was attacked on the basis of a due process violation. Defendant argued that "the delay of more than a week between the time of the offense and issuance of the citation violated her due process rights under the Fourteenth Amendment to the United States Constitution." She contended that "the delay impaired her ability to defend herself because she could no longer remember where she was going or why she was speeding." 19 P.3d at 384. Defendant took the position that under the photo radar system, an alleged offender is not stopped at the time of the offense, and thus has no occasion to fix the incident in his or her mind. Therefore, the offender was not given the opportunity to mount an adequate defense.

The Court rejected this due process argument. In the view of the Oregon Court of Appeals,

> [e]ven assuming that a defendant in traffic court can validly assert due process rights under the Fourteenth Amendment to the United States Constitution, ... defendant has failed to establish that any such violation occurred here. There is, on this record, no indication that the state intentionally delayed issuing the citation to gain a "tactical advantage"; rather, the record shows that Frolov issued the citation as soon as he received the developed photographs just seven days later. The trial court did not err in denying defendant's motion for judgment of acquittal based on precharge delay.

Id.

In another decision, the Supreme Court of Colorado upheld the validity of statutes authorizing photo-radar against conflicting provisions of home-rule cities' ordinances. See, City of Commerce City v. State, 40 P.3d 1273 (Supreme Court of Colorado, En Banc). Moreover, evidence was held to be insufficient to support a conviction for speeding in State v. Clay, 332 Or. 327, 29 P.3d 1101 (2001), another photo radar case. There, the Supreme Court of Oregon reviewed the rebuttable presumption, authorized by the photo radar statute, that the registered owner of the vehicle was driving at the time of the offense. In Clay, the state produced no direct evidence that defendant was the registered owner of the vehicle and thus tried to rely upon the presumption that public officers have regularly performed their duty. The argument was that in mailing the citation to the defendant, it could be presumed that defendant was the owner of the vehicle. However, the Supreme Court of Oregon rejected that argument, finding that the issuance of a citation for speeding was not a mandatory duty. The Court concluded that since no witness who could identify defendant as the driver of the speeding vehicle nor any evidence which would permit a trier of fact to conclude that defendant was the registered owner. Accordingly, "[g]iven the lack of evidence in this record," concluded the Court, "defendant's conviction cannot stand." 29 P.3d at 1104.

Opinions of Attorneys General from other jurisdictions are also instructive. In Fla. AGO 97-06 (1997 WL 43197, January 24, 1997), the Florida Attorney General concluded that "legislative authorization would be required for using photo-monitoring devices as a means to enforce traffic law violations." Moreover, in that same opinion, it was found that "service of traffic citations for violations of Chapter 316, Florida Statutes, may be made by mail only when authorized by statute."

A comprehensive opinion regarding the constitutionality of proposed legislation authorizing the prosecution of traffic light signal violations based on intersection cameras has been rendered by the Attorney General of Nebraska in Neb. Op. Atty. Gen. 0001 (2000 WL 46082, January 3, 2000). Therein, it was noted that several other states, including Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, New York and Virginia have enacted laws authorizing the use of photo-radar equipment. The legislation provided for the establishment of a new civil offense infraction – separate and apart from pre-existing Nebraska traffic laws.

The Nebraska Attorney General concluded that the proposed photo-radar legislation would pass constitutional muster. With respect to any contention that the legislation would constitute a deprivation of property or liberty without due process of law, the Nebraska Attorney General concluded it would not. The Attorney General concluded that "[t]he proposed legislation has a reasonable relationship to the legitimate state interest of addressing the hazards presented by individuals who disregarded red lights, thereby endangering the lives of the citizens of this state." In addition, noted the Attorney General, "authorizing prosecutors to establish a prima facie case for imposing liability for the red light violation against the 'owner or registered lessee' would appear to be a proper exercise of the state's police power."

In terms of any attack upon the legislation based upon Equal Protection, the Attorney General concluded that the classifications created by the legislation are legitimate and thus would be constitutional. The opinion stated:

> ... not only will the streets be safer after implementation of the red light camera system, but police officers are freed from time consuming traffic stops and have more time to attend to higher priority duties. In addition, under the proposed legislation, violations of red light traffic signals are enforced without discrimination, and safety and efficiency should be increased by reducing the number of high speed chases and the number of personnel required for traffic accident clean up, investigation and court testimony.

In the view of the Nebraska Attorney General, "the proposed legislation authorizing the use of intersection cameras to photograph violators and red light ordinances could successfully withstand constitutional challenges based on due process and equal protection."

In addition, a number of law reviews have analyzed the photo radar and other automated traffic enforcement systems in place around the country and generally concluded that these systems are constitutional. These scholarly articles focus in particular upon whether the mechanized systems infringe upon any federal or state constitutionally protected privacy interest. See, Naumchik, "Stop! Photograph Enforcement of Red Lights," 30 McGeorge L. Rev. 833 (1999); Tarr, "Picture It: Red Light Cameras Abide By the Law of the Land," 80 N.C.L.Rev. 1879 (2002); Milligan, "Facial Recognition Technology, Video Surveillance, and Privacy," 9 S. Cal. Interdisc. L. J. 295 (Winter, 1999); Stanck, supra; Morris, "Photo Radar: Friend or Foe?" 61 UMKC L. Rev. 805 (Summer, 1993); Burrows, "Scowl Because Your's on Candid Camera: Privacy and Video Surveillance," 31 Valparaiso L. Rev. 1079 (1997).

In Naumchik, supra, the author reviewed the constitutionality of California's 1995 Law allowing municipalities to set up demonstration programs to determine the efficacy of red light camera enforcement systems. That writer concluded that such a system would be upheld against a challenge based upon that State's constitutional provision protecting privacy. Naumchik found that

> [b]ecause Chapter 54 intrudes on a minimal expectation of privacy, and because the privacy interest is not as serious due to existing statutory safeguards, the court would balance the countervailing interest of the state [in traffic safety] against the privacy interest.

Thus, in the author's opinion, "constitutional challenges to Chap. 54 may fail." 30 McGeorge L. Rev. at 846, 833.

Tarr, supra, reviewed North Carolina's recently enacted "traffic-control photographic system." That author noted that the North Carolina General Assembly has "the power to enact the

red light camera statute because the statute's purpose is reasonably related to the means used to achieve that purpose." As to any argument regarding the creation of a rebuttable presumption offending the Due Process clause, Tarr noted that the North Carolina statute "does not actually shift the burden of persuasion; it merely shifts the burden of production." Id., at 1888. In sum, Tarr concluded that "red light cameras in North Carolina are consistent with due process." Id at 1894.

In Stanck, supra, the constitutional implications of Arizona's photo-radar statutes were considered. The Arizona statutory scheme violated neither procedural or substantive due process under the federal or Arizona Constitutions, concluded this author. Noting that "[r]ebuttable presumptions have been upheld as constitutional for parking ordinances, illegal dumping and drug-forfeiture laws," Stanck's view was that there exists a rational connection between the operator of the vehicle and its registered owner. Accordingly, such a statute would likely survive any due process challenge. Nor would the statute violate the Sixth Amendment right to present an adequate defense because the registered owner would not have the immediate opportunity to protest or explain the citation that author found. Any Equal Protection challenge would be rejected because the legislation directly promotes the legitimate state interests of traffic safety. With respect to the right of privacy, Stanck opined that "it is doubtful that photographing a vehicle and its driver with the photo radar technology used in Arizona today violates any legitimate right to privacy." Id., at 1239.

Burrows, supra argues for "an expanded right of privacy so that citizens will be protected from constant surreptitious video surveillance intrusions ... on public streets." However, he concedes that "the United States Supreme Court has, on numerous occasions, refused to extend the 'right of privacy' to public streets." Id., at 1082. He adds that "[t]he general conception of lower courts has been that no right of privacy exists in places accessible to the public or open to public view."

CONCLUSION

The general case law and other authority reviewed herein supports the conclusion that a properly drafted statute authorizing use of photo-radar or similar forms of automated traffic enforcement would pass constitutional muster. These authorities have reviewed automated traffic enforcement from a variety of constitutional perspectives including the Due Process and Equal Protection Clauses, the Fourth Amendment's protection against unreasonable searches and seizures, the Sixth Amendment's right to present an adequate defense as well as the federal and state constitution's right to privacy. The general consensus is that automated traffic enforcement is constitutional.

Of course, the constitutionality of any statute authorizing automated traffic enforcement would depend, in part, upon a well drafted statute. As you note, this form of traffic enforcement is already extant in a number of jurisdictions so that one or more of these statutes might be used as a guide or model. I would also caution that the South Carolina Constitution contains an express provision protecting privacy in Art. I, § 10, and any statute authorizing photo-radar or a similar form

of enforcement would have to be drafted with this provision in mind. That having been said, it is clear that some form of statutory enactment, as opposed to constitutional amendment, would suffice.

As you note, this opinion relates only to the legal issues posed by automated traffic enforcement and does not represent any position by this Office with respect to whether or not the General Assembly should enact such a statute.

I will be happy to continue to assist you in any way possible concerning this.

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an