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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 28, 1998

William M. Roth, Chief of Police
Lexington Police Department
111 Maiden Lane
Lexington, South Carolina 29072

Re: Informal Opinion

Dear Chief Roth:

You have asked for an opinion regarding the legality of a proposed Ordinance being considered by the Town of Lexington. Such Ordinance provides as follows:

> [i]t shall be unlawful for any person in the Town to wilfully and knowingly fail or refuse to stop when signaled, hailed or commended to stop by a police officer of the Town or to wilfully disobey any other lawful order of a police officer of the Town when such order is issued in conjunction with the officer's official duties.

Law / Analysis

We start with the proposition that an Ordinance of a municipality will be presumed valid in the same way that a statute of the General Assembly is entitled to a presumption of correctness. As this Office stated in an opinion, dated May 23, 1995,

> [a]ny municipal ordinance adopted pursuant to Section 5-7-30 [of the Code] is presumed to be valid. Town of Scranton v. Willoughby, ___ S.C. ___, 412 S.E.2d 424 (1991). Within the limits of a municipality, an ordinance has the same local force as does a statute. McCormick v. Cola. Elec. St. Ry. Light and Power Co., 85 S.C. 455, 67 S.E. 562

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Request Letter

(1910). Any ordinance must be demonstrated to be unconstitutional beyond all reasonable doubt. Southern Bell Tel. and Tel. Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985). The presumption of validity applies to legislation relating to a city or a town's police powers. Town of Hilton Head v. Fine Liquors, Ltd., 302 S.E. 550, 397 S.E. 662 (1990).

Only recently, our Supreme Court, in Williams v. Town of Hilton Head Island, ___ S.C. ___, 429 S.E.2d 802 (1993), reaffirmed the considerable degree of autonomy that municipalities now enjoy. The Court held in Williams that the so-called "Dillon's Rule", long-recognized by our Court in previous cases to limit substantially the power of municipalities to specific statutory authorization or fair implications therefrom was, in keeping with the Home Rule amendments and their implementing statutory authority, no longer valid. Recognizing that Home Rule meant just that, the Court left no doubt as to the intent of the General Assembly:

> This Court concludes that by enacting the Home Rule Act, S.C. Code Ann. Sec. 5-7-10 et seq. (1976), the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government. We are persuaded that, taken together, Article VIII and Section 5-7-30, bestow upon municipalities the authority to enact regulations for government services, deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization **so long [as] ... such regulations are not inconsistent with the Constitution and general law of the state**. (emphasis added).

This same standard was enunciated by the Court recently in Hospitality Assoc. v. Town of Hilton Head, ___ S.C. ___, 464 S.E.2d 113 (1995). There, the Court said the following:

> [d]etermining if a local ordinance is valid is essentially a two-step process. The first step is ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State. For the reasons discussed below, we hold that (1) the local governments had the power to enact the ordinances, and (2) the ordinances are not inconsistent with either the Constitution or general law of this state.

Moreover, "[w]hile this Office advises whenever it may identify a constitutional infirmity, it is solely within the province of the courts of this state to actually declare an enactment or ordinance unconstitutional or unenforceable for other reasons."

Applying the foregoing authority, it is clear that the Town would possess the power to adopt the Ordinance which you have enclosed. S.C. Code Ann. Sec. 5-7-110 provides as follows:

> [a]ny municipality may appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipality and fix their salaries and prescribe their duties.
>
> Police officers shall be vested with all the powers and duties conferred by law upon constables, in addition to the special duties imposed upon them by the municipality. (emphasis added).

With respect to this statute, we have previously noted that Section 5-7-110 gives municipalities "broad authority" with respect to a municipal police department. Op. Atty. Gen., April 2, 1996 (Informal Opinion). Moreover, as the Court stated in the Williams case, "... Article VIII and Section 5-7-30 [taken together] ... bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long [as] ... such regulations are not inconsistent with the Constitution and general law of the state."

Thus, readily acknowledging that the proposed ordinance is within the Town's authority to adopt, the real issue is whether it conflicts with the general law of the State or is not constitutionally valid. Again, we must emphasize the presumption of validity, referenced above. Such Ordinance would thus be binding and enforceable, if adopted, unless and until set aside by a Court.

The question of constitutionality must be divided into two parts of analysis -- first, that portion of the ordinance making it unlawful to stop when signalled, hailed or commanded to do so by a police officer; and secondly, the provision making it illegal to willfully disobey "any other lawful order of a police officer ... when such order is issued in conjunction with the officer's official duties." With respect to the first part of the proposed Ordinance, it is my opinion that such provision is constitutional. I have located several decisions which convince me of the provision's validity.

It is clear that many jurisdictions throughout South Carolina and the nation have adopted statutes and ordinances making it unlawful for failure to stop upon command of a police officer or a police vehicle. It is, for example, recognized that "... in most states it is a crime for a motorist to ignore a police officer's command to stop; the failure to stop constitutes the offense." Humm, "Criminalizing Poor Parenting Skills as a Means To Contain Violence By and Against Children," 139 U. Pa. Law Rev. 1123, 1145 (April, 1991). Indeed, § 56-5-750 makes it unlawful in South Carolina to "fail to stop when signalled by a law enforcement vehicle by means of a siren or flashing light." As I read the proposed Ordinance, the gist of the offense is fail to stop upon command of the officer. I would read such Ordinance as complimentary to § 56-5-750 rather than inconsistent therewith. In other words, the Ordinance can be read as primarily applicable to those situations not covered by § 56-5-750.

Only recently, the Court of Appeals dealt with a similar ordinance of the City of Columbia in the context of double jeopardy. In State v.Lewis, 321 S.C. 146, 467 S.E.2d 265 (Ct. App. 1996), the Court recognized that "[t]he municipal offense requires evidence that a person failed or refused to stop when signaled, hailed or commanded to stop by a police officer." 467 S.E.2d at 267. Although the case was confined to an analysis of whether an unconstitutional double jeopardy had been created, there is no suggestion therein that a municipal ordinance in any way conflicted with state law.

There is also the issue of whether this portion of the proposed Ordinance would be consistent with the requirements of the Fourth Amendment of the United States Constitution. In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court recognized that a police officer may, consistent with the Fourth Amendment, "stop" and briefly detain a person where no probable cause is present

where the officer has articulable and reasonable suspicion of the person's involvement in criminal activity. See, Op. Atty. Gen., March 29, 1995 (Informal Opinion). With respect to automobile stops, our own Supreme court has stated that

> ... a police officer may stop an automobile and briefly detain its occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity.

Knight v. State of South Carolina, 284 S.C. 135, 325 S.E.2d 535, 537 (1985), And in Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), the United States Supreme Court concluded that

> ... except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unrestrained exercise of discretion. ... Questioning of all incoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

99 S.Ct. at 1401.

Case law has applied the Terry v. Ohio and Delaware v. Prouse analysis in the context of ordinances requiring a person to stop upon command of a police officer to reach a variety of results. In Commonwealth v. Scattone, 448 Pa. Super. 533, 672 A.2d 345 (1996), the Court addressed the validity of a statute which mandated that a driver bring his vehicle to a stop when given a visual or audible signal to stop by a police vehicle. The appellant argued that the officer stopping the vehicle must have possessed probable cause or articulable suspicion in order to be convicted pursuant to the foregoing statute. The Court rejected this argument, concluding as follows:

> [g]enerally, it is not a crime (malum in se) to operate a vehicle and refuse to stop when directed to do so. However, the act of avoiding police direction to stop has been criminalized (malum in prohibition] by the Legislature without the additional condition that the police have probable cause to act prior to directing a stop or initiating a chase. ...
>
> [W]e find that the General Assembly did not make "probable cause" or "articulable suspicion" a condition precedent to sustaining a conviction of Section 3733(a). In fact, nowhere in the statute is there any mention that the absence of "probable cause" or "articulable suspicion" to stop a motorist is a defense. ...
>
> Further, we hold that, just as a citizen is not permitted a defense to a resisting arrest charge to assert the unlawfulness of the arrest ..., a citizen is not permitted to avoid a violation of Section 3733(a) under the cloak of no probable cause or articulable suspicion to believe criminal activity afoot by police. The statute is clear and unambiguous on its face as to the elements necessary to trigger its violation: an operator's "willful" failure to bring his/her vehicle to a stop in the face of an audibly or visually identifiable police officer's signal to do so.

672 A.2d at 346-347. Thus, the Pennsylvania Court refused to read the requirements of Terry into the statute.

In Vansant v. State, 264 Ga. 319, 443 S.E.2d 474 (1994), the Supreme Court of Georgia considered this issue. There, a police officer stopped a van by activating his blue light and siren. The defendant was charged with DUI and he sought to suppress certain evidence obtained on the basis that the stop was invalid. The Georgia Supreme Court agreed, reasoning as follows:

> [a]lthough an officer may conduct a brief investigative stop of a vehicle (see Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), such a stop must be justified by "specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868,

1880, 20 L.Ed.2d 889 (1968). See also United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). The U.S. Supreme Court recognized the difficulty in defining "the elusive concept of what cause is sufficient to authorize police to stop a person," and concluded that the essence of the elusive concept was to take the totality of the circumstances into account and determine whether a detaining officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). "This demand for specificity in the information upon which police action is predicated is the central teaching of [the Supreme Court's] Fourth Amendment jurisprudence." Terry v. Ohio, supra, 392 U.S. at 22, n. 18, 88 S.Ct. at 1880, n. 18.

With these legal precepts in mind, we turn to the facts of the case before us. At the hearing on the motion to suppress, the officer who stopped petitioner Vansant testified that he had acted on information that a white van purportedly had been involved in a hit-and-run accident in a restaurant parking lot approximately a mile away. In response to his request for more detailed information, the officer was told the name of the hit-and-run suspect. ... As he did not know the named suspect, that information played no part in the officer's decision to stop the white van driven by Vansant. The officer followed the white van for approximately 1/2 mile, observing no traffic violations by the driver of the white van, other than the van's failure to stop in response to the police vehicle's flashing blue lights. The officer testified he stopped the white van solely because it was a white van, and admitted that he would have stopped any white van. ...

It is clear from the evidence adduced at the suppression hearing that the detaining officer did not have the requisite particularized basis for suspecting the driver of this particular white van of criminal activity. He did not have a particularized description of the vehicle; he did not know the direction in which the vehicle had left the scene of the purported hit-and-run; he had not observed criminal activity

> on the part of the person stopped; he had no knowledge or suspicion that the vehicle had been involved in other similar criminal behavior. See 3 LaFave,Search and Seizure, A Treatise on the Fourth Amendment, (2d ed.), § 9.3(d), p. 461. The officer's lack of specific information resulted in an unreasonable governmental intrusion.

In People v. Bora, 83 N.Y.2d 531, 611 N.Y.S.2d 796, 634 N.E.2d 168 (1994), the Court of Appeals of New York held that the order to stop by uniformed police officer where the subject continued walking was not a "seizure" under the Fourth Amendment. Relying upon California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690, the Court held that "... in the case before us, there was neither physical force nor a submission to authority and thus no seizure of defendant under Federal law because of the officer's direction to stop." 634 N.E.2d at 169.

And in Jones v. Commonwealth, 230 Va. 14, 334 S.E.2d 536 (1985), the Supreme Court of Virginia scrutinized the validity of a provision of the Arlington County Code which made it unlawful for any person in a public place to refuse to identify himself to a police officer. The Supreme Court of Virginia upheld the validity of the stop based upon the circumstances of the particular case, concluding that the police officer's right to stop an individual must be based upon the parameters of Terry v. Ohio, supra.

The Court saw the ordinance as simply the County's means to enforce Terry, analyzing the law as follows:

> ... as the Attorney General indicates further, criminal liability for failure to furnish identification under § 17-13(c) arises only when some independent basis justifies the detention and questioning of an individual in the first place, for example, "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968).
>
> The Commonwealth has relied upon Terry, rather than § 17-13 (c), both in the trial court and here, to justify Officer Hanrahan's detention and questioning of Jones. We believe this reliance is fully warranted.

> Terry permits a police officer, even without probable cause, to stop and question an individual on the street, provided the officer has a reasonable suspicion, based upon objective facts that the individual is involved in criminal activity. ...
>
> Because Terry provides a complete, independent basis for the detention and questioning of Jones, ... § 17-13(c) of the Arlington County Code does not "violate or even implicate the Fourth Amendment." ...

334 S.E.2d 539, 540.

Thus, based upon the foregoing authorities, the proposed ordinance which makes it unlawful to willfully refuse to heed a police officer's command to stop is valid on its face. At the very least, it may be interpreted as a mechanism to enforce Terry v. Ohio, supra as was done by the Virginia Supreme Court in the Jones case. The proposed ordinance simply attempts to make it unlawful to fail to stop when ordered to do so by a police officer. Even if the command to stop is viewed as a "seizure" under the Fourth Amendment (arguably it is not), a court would ultimately view a "stop" by an officer in light of the parameters of Terry. Thus, this aspect of the Ordinance, which must be presumed valid, if enacted would be enforceable until a court concludes otherwise.

The other aspect of the proposed Ordinance making unlawful the failure to obey an order of a police officer could be subject to an attack based upon grounds of vagueness or overbreadth. However, there is a case authority which has upheld similar statutes or ordinances. In Farmer v. State of Mississippi, 253 Miss. 289, 161 So.2d 159 (1964), the Mississippi Supreme Court upheld a similar ordinance against a vagueness contention. And in Smith v. Picayune, 701 So.2d 1101 (Miss. 1997), the Mississippi Supreme Court, in a recent case, upheld an ordinance, deeming it unlawful to comply with the requests or commands of a law enforcement officer, against charges of both vagueness and overbreadth. There, the Court reaffirmed its earlier Farmer decision, reasoning as follows:

> [a]s generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens or arbitrary enforcement, we have recognized recently that the more

> important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement.' Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections,' [citing Nichols v. City of Gulfport, 589 So.2d 1280, 1282 (Miss. 1991). ...
>
> Smith also argues that the statute should be subject to the highest level of scrutiny, as it is capable of reaching various forms of speech. "Where the activity to be regulated is capable of reaching First Amendment rights, the statute or ordinance should be subjected to heightened scrutiny." Nichols v. City of Gulfport at 1283, citing Keyishian v. Board of Regents, 385 U.S. 589, 604, 87 S.Ct. 675, 684, 17 L.Ed.2d 629 (1967). Where a constitutional right is so affected, the statute must be drawn with precision and narrowly tailored to serve a legitimate objective or it fails the overbreadth inquiry. Mississippi High School Activities Assn. Inc. v. Coleman, 631 So.2d 768, 778 (Miss. 1994).
>
> We point out that in this case the statute was applied to conduct, not speech. The presence of the baseball bat, regardless of whether Smith was cursing or threatening the officer, greatly enhanced the possibility of grievous injury to the police officers or others if the disturbance escalated. In light of the facts, it seems imminently reasonable for the officer to have attempted to distance a potentially lethal weapon from a crowd of people. Therefore, we hold that the statute is constitutional as applied to the facts of the case.

701 So.2d at 1102. The Court also noted that Farmer had upheld the facial validity of a similar statute. Referencing Nichols and noting that certain ordinances pose "'special problems of draftmanship and enforcement,'" the Court stated that "[t]he drafting of a disorderly conduct statute falls into just such a category, as the statute must empower officers to deal with a myriad of potential disasters on a moment's notice."

Likewise, in State v. Rodinsky, 60 Or. App. 193, 653 P.2d 551 (Ct. App. Oregon) the Oregon Court of Appeals upheld a statute making it an offense for failure to obey a police officer against an attack based upon vagueness and overbreadth. The Court noted that "[b]y its term the 'lawful order' must be given by a police officer displaying his star or badge and having lawful authority to direct, control or regulate traffic." Thus, in the Court's view, the statute did not subject citizens to unbridled power and discretion of a police officer. Moreover, the Court deemed the statute to have a "clear, uncomplicated meaning." The term "disobey" in the context of a person "disobeying" a "lawful order" required that a person "be aware of the order given by a police officer and refuse to follow it." 653 So.2d at 552, 553. Thus, no vagueness problem was created by the statute.

Other cases have also upheld similar ordinances. See, Washington Mobilization Comm. v. Cullinane, 566 F.2d 107 (D.C. Cir. 1976). Contra, Hill v. City of Houston, 789 F.2d 1103 (5th Cir. 1986) [city ordinance making it illegal to in any manner oppose, molest, abuse or interrupt a police officer in execution of his duty was unconstitutionally overbroad].

It is my understanding that United States Supreme Court has just accepted a case, City of Chicago v. Morales, 687 N.E.2d 53 (Ill. 1997), cert. granted, ___ U.S. ___ (1998), to determine the validity of an ordinance adopted by the City of Chicago. Such Ordinance was adopted in response to criminal street gang activity. The Ordinance provided that if a police observed a person whom he reasonably believed to be a street gang member, he shall order such persons to disperse and promptly remove themselves from the area. An affirmative defense to the Ordinance was allowed where no person observed "loitering" was in fact a street gang member. The Ordinance was attacked and held to be unconstitutional on the grounds of vagueness and Due Process. The Court held that the police order to disperse provision was "insufficient to cure the vagueness of the ordinance." Shuttlesworth v. City of Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965) was cited by the Illinois Supreme Court as persuasive authority. The Court stated as follows:

> [i]n Shuttlesworth, the Supreme Court reviewed a conviction pursuant to an ordinance which made it "'unlawful for any person to stand or loiter upon any street or sidewalk ... after having been requested by any police officer to move on.'" Shuttlesworth, 382 U.S. at 90-92, 86 S.Ct. at 213-14, 15 L.Ed.2d at 179-80. The Court determined that, as written, the ordinance was unconstitutionally vague because it allowed a person to "stand on a public sidewalk ... only at the whim of

> any police officer." Shuttlesworth, 382 U.S. at 90-92, 86 S.Ct. at 213-14, 15 L.Ed.2d at 179-80.
>
> The proscriptions of the gang loitering ordinance are essentially the same as the Shuttlesworth ordinance. Merely adding the element of refusing to obey an order by police to disperse does not elevate the gang loitering ordinance to such a level that it provides adequate notice of proscribed conduct. See State v. Hudson, 111 N.H. at 26, 274 A.2d at 879 (merely loitering cannot be made criminal, even if statute requires refusal of police's order to disperse); Kirkwood, 323 F.Supp. at 616 (violation of loitering ordinance conditioned upon failure to move when directed to do so by police officer includes unconstitutionally vague standards). Moreover, this determination is consistent with our prior holdings. See e.g. City of Chicago v. Meyer, 44 Ill.2d 1, 5, 253 N.E.2d 400 (1969) (police may arrest persons for failing to obey an order to cease otherwise lawful conduct, but only after the police have made all reasonable efforts to maintain order and the conduct produces an imminent threat of uncontrollable violence or riot).
>
> Furthermore, if the underlying statute is itself impermissibly vague, as the gang loitering ordinance here, then a conviction based upon failure to obey the order of a police officer cannot stand. See Shuttlesworth, 382 U.S. at 90-92, 86 S.Ct. at 213-14, 15 L.Ed. 2d at 179-80. The city correctly observes that it is free to prevent people from obstructing traffic and blocking the public way. However, it must do so "through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." Coates, 402 U.S. at 614, 91 S.Ct. at 1688, 29 L.Ed.2d at 217, citing Gregory v. City of Chicago, 394 U.S. 111, 118, 124-25, 89 S.Ct. 946, 950, 953-54, 22 L.Ed.2d 134-40, 139, 143 (1969) (Black, J., concurring, joined by Douglas, J.).

It is important to note that the Court in Morales implied that not all ordinances making it unlawful to fail to obey the order of a police officer were invalid -- only that such a provision did not validate an otherwise unconstitutional ordinance. It is also important

to consider that the United States Supreme Court did not view the ordinance in Shuttlesworth as construed by the Alabama Court of Appeals to be limited to interference or obstruction of free passage of traffic as necessarily unconstitutional.

In conclusion, there is case authority upholding both aspects of the proposed Ordinance. While constitutional attacks can be made on Fourth Amendment grounds with respect to the "failure to stop" portion, a court would likely deem that segment to be merely a means to enforce a "stop" under Terry v. Ohio. So construed, such provision would be deemed valid.

As to the portion of the Ordinance making it unlawful to fail to obey an order of a police officer, again, such ordinance would be subject to challenge based upon vagueness and overbreadth grounds. Cases have upheld such an ordinance, although other cases find the ordinance subject to overbreadth challenges unless limited by construction of a court to situations where a person is interfering with traffic or free access. It will undoubtedly be helpful to see how the United States Supreme Court rules in the Morales case, referenced above.

While it is a close question, I would deem the Ordinance constitutionally valid. It would be entitled to a presumption of validity and would be enforceable unless and until a court rules otherwise.

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/an