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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

June 12, 1998

Greg Holland, Chief of Police
Jonesville Police Department
P. O. Box 785
Jonesville, South Carolina 29353

Re: Informal Opinion

Dear Chief Holland:

You have sought an opinion concerning a question involving Reserve Police Officers. You present the following facts by way of background:

> The question came about recently when one of our Reserve Officers, off-duty and in street clothing, but inside the Municipal Limits of the Town of Jonesville, observed an apparent violation of the Municipal Code.
>
> This Reserve did **NOT** approach the vehicle in question at its location at Jonesville High School. He rather went and got a uniformed, regular, paid Jonesville Police Officer, who was in uniform and on-duty at the time.
>
> Both officers then approached the vehicle together, with the uniformed officer making initial contact with the vehicle, and the off-duty reserve there as backup. He did have his badge displayed and was armed, and was identified to the people in the vehicle as a police officer.
>
> Almost immediately after the initial contact, a moderate quantity of marijuana, weapons, and open alcohol were found, both in plain view, and on a search incident to arrest.

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Request Letter.

> Several arrests were made, with charges including distribution of marijuana, distribution of same near a school, etc., as well as minor violations that will be resolved in Municipal Court.
>
> During the preliminary hearing, an argument was made by one of the defense attorneys that since the initial violation was observed by the reserve officer as detailed above, the case and all evidence was invalid. As a result, some of the cases were dismissed, and some of them were sent to the Grand Jury. The outcome of the cases to be decided in Municipal Court is still in doubt.

You state that you have contacted the Legal Staff at the South Carolina Criminal Justice Academy concerning this question. In addition, it is your understanding that this Office issued an opinion in 1984 to the staff at the Academy which concluded that reserve officers must be in uniform. Notwithstanding that Opinion, you ask the following:

> ... since many of the requirements for reserve officers have been changed and even relaxed in the years since then, has such a requirement been changed? If the Chief approves a reserve officer to work in street clothes, is such approval legal? If an off-duty reserve officer, in street clothes is given evidence of a crime, or sees a crime take place, and then calls a paid officer in, can he not then back up said paid officer? Finally, if a reserve officer, off-duty, receives informant's tips or information from concerned citizens, can such be used later in search warrants or arrest warrants?

S.C. Code Ann. Sec. 23-28-10 et seq. provides the authority for reserve police officers in South Carolina. Section 23-28-20 sets forth the manner of appointment of such officers and the compensation therefor. Subsection (B) of § 23-28-20 states that "[w]ork performed for compensation must be in excess of the minimum logged service time required by Section 23-28-70." Requirements of training are provided in § 23-28-30 and -40. Section 23-28-70 establishes the duties of reserve officers as follows:

> (A) Reserves shall serve and function as law enforcement officers only on specific orders and directions of the chief or sheriff. To maintain status, reserves shall maintain a minimum logged service time of twenty hours each month or sixty hours each quarter.

> (B) Each reserve must be in proximate contact, by radio or another device, with the full-time officer to whom he is assigned.
>
> (C) A person appointed as an auxiliary or reserve police officer after January 1, 1996, shall perform his duties while accompanied by a full-time, certified South Carolina police officer or deputy sheriff for a minimum of two hundred forty hours and receive the approval of the chief or sheriff before he may work as provided in subsection (B). Reserve or auxiliary officers serving before January 1, 1996, and who have at least two hundred forty hours of logged service time are exempt from this provision.
>
> (D) Reserves shall not assume full-time duties of law enforcement officers without complying with all requirements for full-time officers.
>
> (E) Each department utilizing reserves shall have one full-time officer as coordinator-supervisor who must be responsible directly to the chief or sheriff.

Pursuant to § 23-28-100, "[r]eserves shall wear uniforms which will identify them as law enforcement officers." As you indicate, in an Opinion dated January 25, 1984, we read § 23-28-100 as requiring that "reserve police officers may not wear civilian clothes while performing their duties as reserve police officers." This Opinion was reiterated in another Opinion dated April 26, 1991. In the latter opinion, we noted that § 23-28-100 would preclude a reserve officer from being utilized as an undercover officer in a drug investigation. This statute and these opinions remain in effect even though other provisions of the Reserve Police Officer statute have been revised.

In addition, § 23-28-100 also provides that "[t]he uniforms and equipment issued by the political entity shall remain the property of the entity but may, in the discretion of the chief, be entrusted to the care and control of the reserves." Such Section further states that "[h]andguns, if issued, shall be of a caliber approved by the chief." In addition, § 16-23-20 (1) has now been amended to permit "reserve police officers of a municipality or county of the State" to carry a pistol.

Thus, the issue is whether § 23-28-100 would prohibit the reserve officer from assisting the regular police officer in the situation which you have outlined. While at first

blush, it would appear that the factual scenario which you have presented would be prohibited by § 23-28-100, I would advise that such is not necessarily the case. Several other statutes and legal principles must also be considered in this particular context.

Of course, it is black letter law in South Carolina that in order to arrest for a misdemeanor not committed in the police officer's presence, either a warrant must be obtained or there must be probable cause that the offense has been freshly committed. State v. Clark, 277 S.C. 333, 287 S.E.2d 143. Recently, in Fradella v. Town of Mt. Pleasant, 325 S.C. 469, 482 S.E.2d 53 (Ct. App. 1997), the South Carolina Court of Appeals reiterated the rule that so long as the officer had probable cause to believe the misdemeanor offense was freshly committed, an arrest made upon such information was legally valid. In Fradella, Mt. Pleasant police officers arrived at the scene of an accident. During the course of the investigation, an individual, Copeland, told the officers that they had given the driver of one of the vehicles a ride home. The driver, Fradella, smelled of alcohol at the time. Copeland agreed to lead the officers to the address where he had left Fradella. In the meantime, the officers had received a dispatch that Fradella had called 911 and informed police he had been in an accident at the same location. Arriving at Fradella's residence, the officer's called him outside and he admitted he was the driver of the wrecked vehicle. Copeland also identified Fradella as the driver. After observing Fradella's bloodshot eyes and the smell of alcohol on his breath, the officers told Fradella he was under investigation for possible DUI. Subsequently, he admitted he had had three beers and was deemed to be "definitely impaired" following the administration of field sobriety tests. Fradella was then arrested for DUI. He was later convicted.

The circuit court reversed Fradella's conviction holding that his warrantless arrest was for a misdemeanor which had not been committed in the officer's "presence" as required by § 17-13-30. The Court of Appeals disagreed, concluding that "the facts and circumstances surrounding the incident satisfy the requirement that a misdemeanor be committed in an officer's presence in order to justify a warrantless arrest." 482 S.E.2d at 55.

The Court thoroughly reviewed the South Carolina Supreme Court decisions interpreting the state's "misdemeanor in the presence" requirement, noting the following:

> South Carolina Code Ann. § 17-13-30 (1985), states that sheriffs and deputy sheriffs "may arrest without warrant any and all persons who, within [the officer's] view, violate any of the criminal laws ... if such arrest be made at the time of such violation of law or immediately thereafter." However, in State v. Martin, 275 S.C. 141, 268 S.E.2d 105 (1980), the

court noted that the rule in § 17-13-30 must be interpreted in light of S.C. Code Ann. § 23-13-60 (1989), which provides that such officers "may for any suspected freshly committed crime, whether upon view or upon prompt information or complaint, arrest without warrant ... ." Thus, Martin holds "an officer can arrest for a misdemeanor [not committed within his presence] when the facts and circumstances observed by the officer give him probable cause to believe that a crime has been freshly committed." 275 S.C. at 146, 268 S.E.2d at 107 (emphasis in original). Our Supreme Court has extended the operation of these statutory rules to town policemen. State v. Clark, 277 S.C. 333 287 S.E.2d 143 (1983) (citing State v. Retford, 276 S.C. 657, 281 S.E.2d 471 (1981)).

In Martin, the officer discovered (1) two cars which obviously appeared to have recently collided, (2) a highly intoxicated man who admitted to being one of the drivers, and (3) a group of people gathered at the scene. 275 S.C. 141, 268 S.E.2d 105. The court held these circumstances sufficient to justify the warrantless arrest. Id. A number of subsequent opinions have construed Martin. See Retford, 276 S.C. 657, 281 S.E.2d 471 (1981) (holding a warrantless arrest justified when (1) the subject fit the description of the perpetrator of a recent auto theft, (2) a witness identified the subject as one who was entering automobiles, and (3) the subject was behaving in a disorderly manner); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (holding that an undercover agent serving as a lookout could arrest subjects without a warrant when he arrived at the drug-laden plane's landing site); Clark, 277 S.C. 333, 287 S.E.2d 143 (holding that a warrantless arrest for discharge of a firearm was permissible when (1) officers arrived at the scene shortly after being summoned, (2) officers found the subject armed and an expended shell nearby, and (3) the subject's mother told the officers that the subject had fired the gun). Notably, State v. Sawyer, 283 S.C. 127, 322 S.E.2d 449 (1984), held that the defendant's admission that he was the driver satisfied the presence requirement in the breathalyzer statute, because the admission "should be treated as part of the officer's sensory awareness of the commission of the offense."

Thus, in the Court's mind, the facts present warranted application of the Martin exception. Concluded the Court:

> ... Here, the officers arrived shortly after being summoned to the scene, and found Fradella's car involved in a single car accident. The officers received information from Copeland who claimed he drove the driver home and reported the driver smelled of alcohol. Copeland identified Fradella as the driver. The officers arrived at Fradella's residence about twenty minutes after they arrived at the scene of the wreck. Importantly, Fradella reported to the dispatcher that he was involved in the accident, and he admitted to the officers and Copeland that he was the driver of the wrecked car. Both officers testified that it was obvious Fradella was impaired after administration of field sobriety tests and their conversation with him. Based on the facts and circumstances observed by these officers within their sensory awareness, we hold that they had probable cause to believe Fradella had "freshly committed" the crime of DUI.

482 S.E.2d at 56. The Court also rejected Fradella's argument that the Martin line of cases was confined to what the officer may have observed or learned at the crime scene. The Court conceded that its ruling was "an extension of Martin," but that

> ... neither Martin nor subsequent cases interpreting Martin expressly mandated that the officer observe all of the facts and circumstances at the scene. We believe such a holding would construe Martin too narrowly. **Therefore, we hold that as long as the facts and circumstances observed or perceived by an officer justify the conclusion that a crime has been freshly committed, then the Martin rule is satisfied.** (emphasis added).

Id.

In addition, it is well recognized that "a peace officer may summon bystanders to assist him in making an arrest, and such summons invests the bystanders with full authority to render all needed assistance." 1 Wharton's Criminal Procedure, § 50 (13th ed.), p. 271. Our Supreme Court stated in Messervy v. Messervy, 80 S.C. 285, 61 S.E.

445 (1908) that where a police officer requires assistance in making an arrest, "the officer can summon bystanders to his assistance ... ."

Thus based upon the facts as you have presented them, it would certainly be arguable that the arrest by the regular police officer could be upheld notwithstanding the fact that he acted upon information received from an off-duty reserve police officer who was not wearing his uniform. Here, the reserve officer could be deemed to be acting in the capacity of a private citizen rather than as a reserve officer. Viewed in this light, certainly it could be argued that the regular police officer was acting upon information which gave him probable cause to believe that the offense had been "freshly committed" in much the same way as the Court in Fradella had done. Of course, each situation would depend upon all its own facts; however, when an off-duty reserve officer is out of uniform and observes a misdemeanor being committed and reports that immediately to a regular police officer who conducts his own investigation and ends up subsequently arresting the individual, I believe it can clearly be argued that the officer had probable cause to believe the offense had been "freshly committed" under the Martin analysis. Moreover, Fradella makes it clear that all the information does not have to have been obtained by the officer at the scene. The regular police officer could use the reserve officer's observation of the offense (acting as any other citizen would) together with any other evidence gathered in the course of his investigation. So long as the Martin test is met by the arresting officer (here, the regular police officer), the arrest is valid.

With respect to using the reserve officer as "backup" for the arrest, again, since the reserve officer is not in uniform, he could not act in the capacity of **a reserve police officer**, including the display of badge. However, if the police officer chooses to use him as a "bystander," he possesses full authority to assist the officer in the capacity of a private citizen. However, I would caution that such "bystander" status cannot be used to circumvent or avoid the requirements of § 23-28-100, mandating that a reserve officer be in uniform in order to exercise law enforcement functions. Any use of the reserve officer as a "bystander" must be legitimate and in that capacity only rather than that of a reserve officer.

With this caveat and caution in mind, where the regular officer makes the arrest based upon probable cause that the offense had been "freshly committed," (including information provided by the reserve officer of what he had witnessed) Martin and Fradella mandate that the arrest is valid. Moreover, nothing precludes the regular police officer from selecting the off-duty reserve officer to assist him as a "bystander" where necessary. It is cautioned that such role for the reserve must remain purely that of a "bystander" where the reserve officer is out of uniform. In such situations, the reserve officer must act only as a private citizen, not as a police officer. Any use of the reserve

officer out of uniform as a police officer rather than a private citizen is inconsistent with the Reserve Law.

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