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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 13, 1995

Joe L. Rogers, Chief of Police
Dillon Police Department
401 West Main Street
Dillon, South Carolina 29536

Re: Informal Opinion

Dear Chief Rogers:

Attorney General Condon has referred your letter to me for reply. You have asked the following questions:

(1) Can an officer employ the use of a tape recorder during routine contact with citizens?

(2) If so, is the tape admissible in court?

(3) How many persons in a conversation need be aware of the fact that the conversation is being recorded to avoid the classification of eavesdropping?

(4) When, if at all, would Miranda warnings apply to electronic monitoring or tape recording?

(5) What is the admissibility of tape recorded evidence where the subject is under arrest, made aware of the fact that the conversation is being taped, but the subject continues to make statements?

(6) If an officer does not give Miranda warnings after arrest and does not question the subject, may tape recorded statements be used against the subject?

Your questions generally fall into three separate categories, and I will address them accordingly as follows: (1) the permissibility of an officer taping the conversation between himself and a subject he encounters either as part of a stop, investigation or arrest; (2) the admissibility of such tape-recorded statements in a subsequent prosecution of the subject: (3) the applicability of Miranda to this situation.

Permissibility of officer tape-recording the conversation between himself and a subject he encounters either as part of a stop, investigation or arrest.

Your first question requires reference to the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. This enactment prohibits the interception of any wire, oral or electronic communication. 18 U.S.C. § 2511 (1) (a). However, for two reasons, the federal enactment is inapplicable. First, § 2510 (2) defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include electronic communication." Certainly, a person possesses no expectation of privacy in a conversation he has with a law enforcement officer following his being stopped, where he is part of an investigation or subsequent to his arrest. It is well-known that officers often record, both by audio and video recording, events concerning their investigation or arrest for traffic offenses. See, e.g. State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990) [videotaping of performance of field sobriety test]. State v. Rainey, 233 Kan. 13, 660 P.2d 544 (1983) [all highway patrol transmissions are automatically recorded]; State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991) [trooper's transmissions recorded on tape]. Moreover, such traffic stop is almost always in a public area alongside the street or highway. See also, Wilks v. Commonwealth, 217 Va. 885, 234 S.E.2d 250 (1977) [defendant did not have justifiable expectation of privacy in conducting conversation easily overheard by police]; People v. Von Villas, 15 Cal. Reptr. 2d 112, 11 Cal. App. 4th 175 (1992) [defendant's conversation with his wife, taped by jail officials in jail visiting room, entitled to no expectation of privacy].

Secondly, Section 2511 (2) (c) specifically provides that "[i]t shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Obviously, where the officer is a party to the conversation, the federal law permits him to tape that

conversation. See Baumrind v. Ewing, 276 S.C. 350, 279 S.E.2d 359 (1981) ["Here there is no third party surveillance involved ..."]; Op. Atty. Gen., No. 3144 (June 28, 1971).

In Thompson v. State, 191 Ga. App. 906, 383 S.E.2d 339 (1989), the Georgia Court of Appeals held that, assuming a defendant had not consented to the taping of a statement he gave to police following his arrest, the taping did not violate the Georgia privacy statute, which is similar in purpose to the federal statute, because such statute "does not prohibit a party to a conversation from secretly recording or transmitting the conversation without the knowledge or consent of the other party." 383 S.E.2d at 341. Thus, concluded the Court:

> Since the interrogation was being conducted in a public place [police station] and recorded at the behest of one of the parties to the conversation, the interrogating detective, the trial court did not err in allowing the videotape to be admitted into evidence and viewed by the jury.

Supra. In addition, the Court held that the taping occurred at the police station, a more or less "public" place, and thus inferentially, the defendant possessed no expectation of privacy. Therefore, for these reasons, the police officer is not, as a general rule, prohibited from taping the conversation between he and the subject he stops for investigation or arrest.[1]

Admissibility of tape recordings.

Next, I will discuss the admissibility of tape recordings as evidence. In this segment, I will assume that a tape recording is not otherwise rendered inadmissible because of Miranda, which will be considered below.

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[1] The situation is different, however, if the person taping the conversation is an attorney. Our Court has consistently stated that an attorney may not utilize a recording device without prior knowledge and consent of all parties to the conversation, irrespective of the purposes for which recordings are made, the intent of the parties to the conversation, whether anything of a confidential nature is discussed or whether any party gains an unfair advantage from the recordings. Matter of Anonymous Member of SC Bar, 304 S.C. 342, 404 S.E.2d 513 (1991). Compare also, S.C. Code Ann. Section 17-29-10 et seq. [requiring court order in certain instances for installation of pen registers and trap and trace devices].

The admission of a tape recording, rests in the sound discretion of the trial court. The presiding judge possesses wide discretion in the admission of this evidence, as any other. State v. Tyner, 273 S.C. 646, 258 S.E.2d (1979). Likewise, the same rules of evidence, such as relevance and admissibility, govern the admission of a sound recording. In short, a sound recording is not rendered inadmissible simply because of its nature as such. State v. Tyner, supra.

Our Supreme Court has considered the admissibility of a tape recording made by police officers in several instances. For example, in State v. Tyner, supra, the Court emphasized the need to lay an adequate foundation for admitting the tape recording. If such is done, and the recording otherwise meets the test of relevancy and admissibility (such as exception to hearsay rule), the Court held that the sound recording will be admitted:

> Appellant asserts the trial court erred in admitting into evidence a tape recording of his confession, the transcription of the recording and the signed copy of the Miranda warnings.
>
> While appellant asserts the State failed to lay an adequate foundation for the admissibility of the tape, the record reveals a sufficient foundation was laid. Detective Causey testified that after appellant made an oral confession, he procured a dictaphone recorder and typed the statement. Causey identified the cassette and stated it had been in police custody since it was recorded. His secretary testified she went to the Department in the early morning hours of March 19th and typed a cassette handed to her by Causey.
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> As the admission of a tape recording of a confession was approved in State v. Valenti, 265 S.C. 380, 218 S.E.2d 726 (1975), and a proper foundation was laid, here the trial court acted within its discretion in admitting the recording.

273 S.C. at 655-656.

Sound recordings were also extensively discussed in State v Worthy, 239 S.C. 449, 123 S.E.2d 835 (1962), where the Court addressed the issue of "best evidence":

> It has almost uniformly been held that evidence offered in the form of a sound recording is not inadmissible because of that form if properly authenticated ... .
>
> The fact that a conversation or statement has been simultaneously overheard by witnesses and sound recorded has in some cases been used, unsuccessfully however, as an argument for the exclusion of testimony by the witnesses from memory as to what they heard, on the ground that the recording has preserved the best evidence .... [citations omitted]. Conversely, it has been held that recordings of conversations or statements will not be excluded on the ground that testimony of witnesses who simultaneously overheard them constitute the best evidence. Monroe v. United States, 98 U.S. App. D. C. 228, 234 F.2d 49 ... .
>
> Where proof of a conversation has been of two different kinds, namely, a recording thereof and testimony by witnesses who overheard it, it has been argued that both the recording and the testimony were the best evidence.
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> However, the courts have not relegated either to a secondary position but have held that both types of evidence are equally competent primary evidence. 58 A.L.R. (2d) 1044, 1045. [emphasis added]

239 S.C. at 460-461.

Finally, in Suiter v. State, 785 P.2d 28 (Alaska 1989), the admission of a tape made by troopers of statements provided by an individual arrested for driving while intoxicated, was addressed. Defendant Suiter had no awareness that the troopers were taping him. Nevertheless, the Court upheld the admission of the tape even though it was only partially audible.

> The court may admit into evidence partially audible tape recordings if the probative value of the evidence outweighs the potential for unfair prejudice and if the inaudible portions of the tape are not so substantial that the recording is unreliable. Gallagher v. State, 651 P.2d 1185, 1189-90 (Alaska App. 1982). We conclude that the trial court did not abuse its discretion in admitting the tape. From our review of the

> record, we conclude that the jury could tell when the voices on the tape were obscured by background noise and static and the jury would not conclude that the background noise and static were evidence that Suiter was intoxicated. The recording's shortcomings certainly reduced its probative value, but these shortcomings do not appear to increase its potential for unfair prejudice. We find no error.

See also, State v. Rainey, supra [automatic recording of highway patrol transmission admissible over murder defendant's objection where tape recording was carefully authenticated by the State and tape was admissible as an exception to hearsay rule pursuant to business records exception]. Therefore, so long as the tape recording is relevant, it either is not hearsay or there is an exception to the hearsay rule, and a proper foundation is laid for authentication, a sound recording made by an officer at the scene of a stop or subsequent to arrest would generally be admissible, subject to the Miranda requirements discussed below.

Miranda requirements.

Your question concerns when, and if, Miranda warnings relate to tape recordings made by police officers, and also whether, if no Miranda warnings are given, but the officers do not question the subject following arrest and custody, and the subject makes inculpatory statements which are tape-recorded, may such statements be admitted into evidence.

The seminal case in this area is Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). There, the Court elaborated upon the meaning of "custodial interrogation" for purposes of Miranda. In Innis, the defendant voluntarily made incriminating statements to police officers en route to the police station even though the officers did not attempt to question him. The United States Supreme Court held that the statements were thus admissible.

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit or incriminating response from the subject. The latter

> portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

446 U.S. at 1689-90. Further elucidating upon the issue of voluntary statements given by a defendant, the Court stated:

> [t]his is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in Miranda noted:
>
> > "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated .... Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today ..."

446 U.S. At 299-30, 100 S.Ct. at 1689, 64 L.Ed.2d at 307.

Our own Supreme Court has addressed the applicability of Miranda often. Only recently, in State v. Primus, 440 S.E.2d 128 (1994), the Court reiterated that

> [s]tatements, whether exculpatory or inculpatory, obtained as a result of custodial interrogation are inadmissible unless, the person was advised of and waived his rights. [emphasis added.]

Whether a defendant was "in custody" presents a factual issue which must be resolved in a Jackson v. Denno hearing. In State v. Primus, supra, the defendant was held not to have been subjected to interrogation, and thus Miranda was deemed inapplicable, when he "blurted" out a statement upon spotting a police officer.

Moreover, in State v. Franklin, 299 S.C. 911, 382 S.E.2d 911 (1989), defendant Willie Franklin made certain incriminating statements to police officers. A criminal investigator had tried to give Miranda warnings to Franklin, but before he could do so, Franklin made admissions to the investigator. The Supreme Court upheld the admission of these statements. Relying upon Innis, the Court analyzed the facts thusly:

> The State contends that the conversation that took place between Huff and Franklin did not constitute "interrogation" or its "functional equivalent." Reading or attempting to read the Miranda rights form would be communication normally incident to arrest. We conclude that the State met its burden by a preponderance of the evidence and that the trial court properly determined that the statements made by Franklin when he interrupted Huff were not of such nature that he should have known that they would elicit an incriminating response. Therefore, we hold that the July 15 statement was properly admitted.

299 S.C. at 136.

State v. Peele, 298 S.C. 63, 378 S.E.2d 254 (1989) offers another example of application of the "custodial interrogation" analysis as applied to the administration of a "field sobriety" test. Included in the sobriety test were recitation by the individual of the alphabet and counting from one to ten. Noting that "[w]e have previously held that Miranda warnings are not required for statements made at the scene of a traffic accident to be admissible ...", the Court held that the statements made during the field sobriety test could be admitted into evidence even though no Miranda warnings had been provided:

> [t]he question, then, is whether appellant was "in custody" at the time the sobriety tests were administered. This is the same question addressed by the United States Supreme Court in Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) and more recently in Pennsylvania v. Bruder, _____ U.S. _____, 109 S.Ct. 205, 102 L.Ed.2d 172 (1988). In Berkemer, the Supreme Court held that routine traffic stops do not constitute "custodial interrogation" for purposes of the Miranda rule. This holding was reiterated in the Bruder opinion ... .

> The facts in this case show that this traffic stop did not constitute detainment sufficient to give rise to the level of "custodial interrogation." The restrictions did not curtail appellant's freedom of action to a degree associated with formal arrest. The results of the field sobriety tests were properly admitted.

298 S.C. at 65-66. Accord, Op. Atty. Gen. No. 83-85 (March 15, 1985).

The rule of requiring "custodial interrogation" to trigger Miranda has been applied in other cases by our Court as well. State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987), noting that "[v]olunteered inculpatory statements that are not in response to custodial interrogation are admissible without Miranda warnings ...", found no evidence to support the fact that defendant had been subject to interrogation or its functional equivalent, and a spontaneous statement by defendant was thus properly admitted. Similarly, in State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984), the Court held that "[w]hen a defendant is not in custody or significantly deprived of his freedom, any inculpatory statements made at the time are not inadmissible because of the failure to give Miranda warnings." 282 S.C. at 411. Accordingly, statements made during the course of a routine traffic accident investigation did not require Miranda warnings.

Thus, so long as there is no "custodial interrogation", as defined and discussed above, Miranda warnings are not necessary.

This letter is an informal opinion only. It has been written by a designated Assistant 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 remain

Very truly yours,

Robert D. Cook
Assistant Attorney General

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