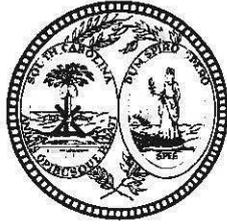


05-5939.
February



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 4, 1996

Investigator Melvin H. Brock
New Ellenton Police Department
P. O. Drawer 479
New Ellenton, South Carolina 29809

Dear Investigator Brock:

You reference the following factual situation and request advice thereupon:

[a]n officer stops a vehicle on a minor traffic violation and during this time, the officer obtains a consent to search the vehicle from the driver. With the consent given, the officer asked the driver if he had any weapons in the vehicle, to which the driver replied "yes, in the center console." The officer finds the weapon in a center console located below the radio. The officer observes that this console is next to the glove compartment, but the gun was located in the console, not in the glove compartment. The officer issued the driver a ticket for the gun and seized it for evidence.

Question: With the vehicle having a glove compartment, was the officer in the right to take the gun?

LAW / ANALYSIS

S.C. Code Ann. Sec. 16-23-20 defines the act of unlawfully carrying a pistol and provides in pertinent part:

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[i]t shall be unlawful for anyone to carry about the person, whether concealed or not any pistol, except as follows:

- (a) any person in any vehicle where the pistol is secured in a closed glove compartment or closed trunk. (emphasis added).

Thus, the issue raised by your question is whether the "center console located below the radio" violates Section 16-23-20. Yours is a question now made more difficult simply because of the nature of new vehicles on the road today. Many of the newer model vans, as I understand it, no longer have a traditional "glove compartment", but instead have a console between the two front seats, or a storage compartment on the passenger side near where the old "glove compartment" had been located. Others have a storage compartment elsewhere in the vehicle. Still others have both the traditional "glove compartment", as well as other storage areas nearby, either between the seats or under, above or near the standard glove compartment. Apparently, the vehicle you reference falls in the latter category.

As a general matter, courts have divided over the years as to whether, absent a specific statutory exemption, the carrying of a pistol in various parts of an automobile is the carrying of a weapon "on" or "about" the person. Numerous cases have been decided, with wildly conflicting results. As is stated generally, "ready availability of the weapon to its owner is essential for concealment in a vehicle to be deemed concealment on or about his person." 79 Am.Jur.2d, Weapons and Firearms, § 12. See also, 1964 Op. Atty. Gen. 164. [the weapon must not be "available for immediate use".] Applying this standard, it is stated by general authorities that

[i]n a number of cases convictions have been sustained where the weapon was located beneath the seat of an automobile, in the glove compartment, in a closed bag on the front seat beside the defendant, or concealed by clothing, or the like, within the automobile. On the other hand, under varying circumstances, it has been held that the weapons statute was not violated where the weapon was in the glove compartment of an automobile, wrapped in a towel and placed under the driver's seat, or in the pocket of an automobile beside the driver.

Another general treatise states that, while there is authority to the contrary, it is generally held "that a weapon is carried on or about the person when it is in a motor vehicle in

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which the accused is riding, provided that the weapon is ... to some extent within his possession or control." 94 C.J.S., Weapons, § 8.

An old South Carolina Supreme Court case, State v. Weston, 108 S.C. 383, 94 S.E. 871 (1918), which addressed the issue of whether a pistol was being carried in violation of a statutory prohibition against carrying unlawful weapons on or about the person when transported in a latched satchel or suitcase, sheds little additional light. The Court, without analysis, simply concluded that "there is an entire failure on the part of the evidence adduced to convict the defendant of the charge made against him" It would appear that the Court determined that the weapon's presence in a latched satchel or suitcase rendered it not immediately available to the defendant and thus it was not "on or about" his person. The case was not an automobile case, however, and because there was no real examination of what was meant by the term "on or about the person" in that context, I am not sure how much weight to give this case.

This background aside, with respect to a violation for the carrying of a pistol in an automobile, the General Assembly has resolved this conflict by recognizing only two express exceptions: the carrying of the weapon either in a closed "glove compartment" or a closed "trunk". In the past, this Office has read the "glove compartment" exception very narrowly and literally in view of the fact that the carrying of a pistol in an automobile is most often deemed by the courts to be the carrying of a weapon "on" or "about" the person, as well as the fact that the term "glove compartment" has come to have a well-understood meaning.

For example, in an Opinion, dated November 28, 1979, we addressed the question of whether this statutory exemption was applicable to a pistol kept in a closed console of a vehicle, and concluded that it was not. We stated as follows:

[a]s you can see, an automobile console is not specifically referenced as a part of an automobile where a pistol may lawfully be transported.

Inasmuch as Section 16-23-20, supra., is a criminal statute it must be construed in a light most favorable to a defendant and least favorable to the State. Obviously an argument may be made that the phraseology 'glove compartment' should be read broadly to include an automobile console. However, it may be argued that inasmuch as a glove compartment and a console are readily distinguishable and the Legislature did not specifically include an automobile console

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as a place where a gun may legally be carried, an individual in an automobile with a pistol in a console may be charged with violating Section 16-23-20, supra. Of course, this presumes that the individual does not come within one of the other exceptions provided by such section. Also, admittedly a pistol in an automobile console, which you indicated in the situation prompting your request was between the two front seats of the car, is much more accessible to a driver than is a pistol in a closed glove compartment. Inasmuch as a closed glove compartment and a closed trunk are provided as places where a pistol may legally be carried, arguably trying to guard against immediate accessibility was a factor in making such a provision.

Therefore, with reference to the above, in the opinion of this Office an individual carrying a pistol in a closed console of an automobile would, presuming he is not within one of the other exceptions provided by Section 16-23-20, supra., be in violation of such criminal section. (emphasis added).

Moreover, in an Opinion dated May 4, 1989, we stressed that "[t]o come within the exception provided by Sec. 16-23-20 (a), the vehicle must have either a glove compartment or a trunk that can be closed inside of which the pistol would be secured." In that Opinion, we also reaffirmed the November 28, 1979 Opinion, referenced above. Thus, in construing the exceptions to Section 16-23-20 it is fair to say that this Office has concluded that a glove compartment and other storage areas within the vehicle are "readily distinguishable" and that if an area of an automobile is not "specifically referenced as a part of an automobile where a pistol may lawfully be transported", such transportation in that area violates Section 16-23-20.

Likewise, the Court of Appeals of Virginia recently concluded that a pistol contained in a locked console between the passenger and driver's seats was a weapon being carried on or about the person. In Leith v. Commonwealth, 17 Va.App. 620, 440 S.E.2d 152 (1994) the Court held that the concealed weapons statute was violated inasmuch as the weapon was "readily accessible to the defendant" even though the console was locked. Further, the Court noted that the console was even closer to the defendant in proximity and accessibility than was the glove compartment.

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Your situation, probably involves a closer case than those referenced above. Certainly, an argument could be made that the compartment under the radio of the vehicle is the same as a "glove compartment." However, only the General Assembly, not an Opinion of this Office, can further expand the two specific exceptions referenced in the statute. Moreover, as indicated, the term "glove compartment" has come to have a well-defined meaning and specific location in a vehicle. Thus, in view of the fact that the vehicle which you reference had a traditional "glove compartment" in addition to the other compartment under the radio, I do not think it at all unreasonable that your officer made the charge of a violation of Section 16-23-20. If the General Assembly had meant to include storage areas other than the "glove compartment" or "trunk", it easily could have done so and could do so today.¹

Moreover, it would appear that if the weapon is not located in the "glove compartment" as that term is traditionally defined (or in more recent vehicles a substitute for the glove compartment) then the better-reasoned cases conclude, consistent with our 1979 Opinion, that the weapon is being carried "about" the person. That is certainly the approach the Virginia case, referenced above, took -- that the weapon was readily accessible to the defendant. The two places in the automobile where the General Assembly has concluded are not immediately accessible are the closed trunk and the closed glove compartment as that area has been traditionally known. In my judgment, other locations in the vehicle (under seat, in consoles, etc.) are thus deemed by the Legislature to be "about" the individual's "person". Op. Atty. Gen., Nov. 18, 1979., supra.

Finally, from the information you have provided, it would appear that the compartment where the weapon was found was located closer in proximity to the driver than the "glove compartment". If this compartment is not as a matter of law a "glove compartment" (and I do not believe it is), it would, to my mind, at least be a jury issue as to whether the weapon is located on or about the individual's person. The jury could determine the proximity to the driver, its immediate accessibility (locked or unlocked) etc.

Thus, based upon the facts as you have provided, I do not believe that your officer acted unreasonably in this situation. Because the vehicle in question had a glove compartment and the gun was locked in a place other than there, I am of the view that the

¹Of course, the whole issue of the concealed weapons statute is being debated and the General Assembly is considering a statute which would put the authorization to carry a concealed weapon on one's person to a public vote. This Bill would not take effect until the people vote "yes", however, even if it is enacted.

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"glove compartment" exception would not apply. That being the case, it should be at least a jury issue whether the gun was being carried on or about the defendant's person.

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/ph