The State of South Carolina

Office of the Attorney General

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The Honorable Ryan C. Shealy
Member, South Carolina Senate
502 Gressette Building
Columbia, South Carolina 29202

Dear Senator Shealy:

In a letter to this Office you requested an opinion as to whether or not a parent can consent to a search of an automobile owned by the parent at a time when the automobile is being driven by that parent's child. You referenced a situation whereby the parent would affix a decal to an automobile owned by the parent which would thereby authorize law enforcement officers to stop the vehicle so that trained dogs could "sniff" the automobile for the presence of drugs. By affixing the decal, the parent is waiving the obligation of the officers to have a warrant or probable cause for the stop and search of the automobile by the dogs. You indicated that based upon a positive reaction by the dog, the vehicle would be further searched for the presence of drugs.

I am unaware of any court decisions which have specifically addressed the situation outlined above. In State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981) the State Supreme Court noted that

> (w)arrantless searches are per se unreasonable unless an exception to the warrant requirement is presented. The burden is upon the State to justify the warrantless search.

276 S.C. at 35. In Bailey the Court noted that several exceptions to the warrant requirement are recognized. These are search incident to a lawful arrest, "hot pursuit", stop and frisk, the automobile exception, the "plain view" doctrine, and consent.

The situation addressed by you would fall under the consent exception. 1/ Generally, an individual may consent to a search. In such circumstances, a search warrant or probable cause is not necessary. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). In the circumstances described by you, the parent-owner of the automobile would given prior blanket consent to the inspection or search by trained dogs.

A consent to search which is effective to authorize a warrantless search may be given by a person other than the individual who is the subject of the search. Schneckloth v. Bustamonte, supra. However, a third party consent is valid only where that party is authorized to give it. United States v. Matlock, 415 U.S. 164 (1974). The South Carolina Supreme Court recognized that a parent may consent to a search affecting their child. See: State v. Miller, 260 S.C. 1, 193 S.E.2d 802 (1972); State v. Middleton, 266 S.C. 251, 222 S.E.2d 763 (1976) (upheld the right of a parent to consent to the search of their child's bedroom in circumstances where child was living with parent). In United States v. Matlock, supra, the United States Supreme Court stated as to consent searches:

> ... when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that

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1/ The automobile exception noted above would appear to be inapplicable to your situation where stops are being made without probable cause and initially, no arrests are being made. However, generally, the "automobile exception" authorizes warrantless searches of an automobile in certain circumstances. The United States Supreme Court in Carroll v. United States, 267 U.S. 132 (1925) authorized the warrantless search of motor vehicles. As expressed by the State Supreme Court in State v. Cox, 290 S.C. 489 at 491, 351 S.E.2d 570 (1986), the bases for the warrant exception are

> (t)he ready mobility of automobiles and the potential that evidence may be lost before a warrant is obtained; and the lessened expectation of privacy in motor vehicles which are subject to governmental regulation.

Therefore, if there is probable cause to believe that a particular automobile contains evidence of a crime, Carroll would authorize a search.

> consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to, the premises or effects sought to be inspected.

415 U.S. at 171. In State v. Wagster, 361 So.2d 849 (1978) the Louisiana Supreme Court specifically recognized the authority of a parent to consent to the search of a motor vehicle used by their child. See also: People v. Shelton, 442 N.E.2d 928 (Ill. 1982); Soehle v. State, 208 N.W.2d 341 (Wis. 1973); Annot., 4 ALR 4th 196 (1981).

Referencing the above, arguably a parent could give blanket consent to have a vehicle owned by the parent but being driven by that parent's child stopped and searched for the presence of drugs. Of course, potential problems may exist in the manner suggested by you in providing the consent, i.e. use of a decal affixed by a parent to his or her automobile. Obviously there could be claims that the parent did not affix the decal but instead it was done by someone else. As stated at 68 Am.Jur.2d, Searches and Seizures §46 p. 699, "(c)onsent to a search is not to be lightly inferred, but should be shown by clear and convincing evidence .... The government has the burden of proving the alleged consent." Assuming the voluntariness test could be met, assertions could also be made that there was not knowledgeable consent to such a search by affixing the decal. Also, questions may exist as to whether the consent to search would include other individuals who are not the children of the owner and their possessions being carried in the automobile. In United States v. Block, 590 F.2d 535 at 540 the court stated

> (t)hird person consent, no matter how voluntarily and unambiguously given, cannot validate a warrantless search when the circumstances provide no basis for a reasonable belief that shared or exclusive authority to permit inspection exists in the third person from any source; nor even more certainly, when the circumstances manifest to the contrary that the absent target of the search retains an expectation of privacy in the place or object notwithstanding some appearance or claim of authority by the third person; nor, still more certainly, when the retained expectation of privacy is manifest in the circumstances and the third person actually disclaims any right of access.

The court in People v. Stage, 86 Cal. Rptr. 701 (1970) held that the consent of an automobile owner to the search of his automobile did not entitle law enforcement officers to search a passenger's jacket found in the car where the officers knew the jacket belonged to a passenger. See also: State v. Williams 616 P.2d 1178 (Or. 1980) (consent by van's owner to search of van did not validate warrantless search of cassette tape case belonging to the defendant which was placed behind the passenger seat where owner did not know defendant had placed his possessions in the van.) However, in State v. Cody, 446 So.2d 1278 (La. 1984) the court held that the owner of an automobile which was used by three defendants in a bank robbery did have the authority to consent to a search of the vehicle and that the occupants had assumed the risk that the common areas of the vehicle might be searched. In light of the conflicting opinions, only a court could resolve the questions raised by your proposal with finality.

This Office is strongly in agreement with your objective of curbing drug abuse in this State. Whether or not the proposal suggested by you would be an effective means of pursuing such goal is a matter for resolution by the General Assembly.

If there are any questions, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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