

1983 S.C. Op. Atty. Gen. 16 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-6, 1983 WL 142677

Office of the Attorney General

State of South Carolina

Opinion No. 83-6

March 22, 1983

***1 SUBJECT: Criminal Law-Search and Seizure**

Under state law, it is permissible to search any building, dwelling or otherwise, for stolen goods during the nighttime, provided a proper warrant is issued by a magistrate, supported by an affidavit setting forth probable cause, a description of the place to be searched, and a description of the articles to be seized.

TO: The Honorable John Tally
Representative

QUESTION:

You have inquired as to whether it is permissible to search any building, including a dwelling, for stolen goods after dark.

OPINION:

It is permissible for law enforcement officers to conduct a search of any building, whether it be a dwelling or other type building, for stolen goods during the nighttime. However, it must be emphasized that a proper search warrant should be obtained from a magistrate, or other judge, and that the search warrant be supported by an affidavit setting forth probable cause, an accurate description of the place to be searched, and a description of the articles to be seized. Fourth Amendment, United States Constitution; [Art. I, § 10, Constitution of South Carolina](#); [§ 17–13–140, Code of Laws of South Carolina \(1976\)](#).

The Fourth Amendment of the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

[Article I, § 10 of the Constitution of South Carolina](#) contains essentially the same language.

The General Assembly has codified those requirements, consistent with applicable case law, in [§ 17–13–140, Code of Laws of South Carolina \(1976\)](#), which provides for the issuance, execution and return of search warrants for, *inter alia*, property connected with the commission of a crime. That section provides that a magistrate or other judge having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize stolen property. It is further provided that the property described in the search warrant may be seized from:
any place where such property may be located, or from the person, possession or control of any person who shall be found to have such property in his possession or under his control.

[Section 17–13–140, Code of Laws of South Carolina \(1976\)](#).

The above section requires certain perquisites. First, the magistrate or judge issuing the warrant must have jurisdiction over the area where the property sought is located. Second, the search warrant must be supported by a sworn affidavit, setting forth the grounds for the warrant. Those grounds must establish probable cause to believe that the stolen goods exist, at the location named in the affidavit. In addition, the affidavit must identify the place to be searched, and the items to be seized, or the person to be searched. Finally, any warrant issued under § 17-13-140 shall be executed and returned within ten (10) days after it is dated.

*2 It should be noted that § 17-13-140's predecessor, § 17-271, enacted in 1964, contained the following provision:
The warrant shall direct that it be served in the daytime.

53 Stat. 1821 (1964). That language remained until 1969, when it was stricken in a revision of the section. See 56 Stat. 218 (1969). Shortly thereafter, an informal opinion by this office to a county sheriff, dated November 23, 1971, advised that a search warrant could be served day or night.

Therefore, the present statute, and the cases construing it, contain no distinction between searches in the daytime or searches at night. The only requirement is that probable cause be established, and that the affidavit contain information identifying the place to be searched, and the items to be seized.

Accordingly, in [State v. Shupper](#), 263 S.C. 53, 207 S.W.2d 799 (1974), a nighttime search was upheld, even though the warrant specified that the search be conducted during the daytime only. The Supreme Court examined the facts of the case, and found that the offense involved concerned illicit drugs. Officers had applied to a magistrate at approximately 1:00 a.m., and conducted a search at 2:00 a.m. The Court observed that the warrant was issued under the provisions of § 17-13-140, which authorized searches upon affidavit establishing probable cause, without distinction between searches in the daytime or the nighttime. Therefore, it was unnecessary for the search warrant to specify time, and any such specification was unnecessary verbiage. In any event, the Court noted that it was clear from the facts of the case that the magistrate had been contacted during the early hours of the nighttime, and was aware that the officers were going to conduct an immediate search during those hours, prior to daylight. The Court found no prejudice to the defendant, and refused to strike down the search warrant, and the resulting evidence, on what it regarded as a technicality.

Also, in [State v. Chandler](#), 267 S.C. 138, 226 S.E.2d 553 (1976), the Court upheld a search warrant that specified 'daytime only', and was executed at night. A review of the warrant showed that it had been lawfully issued, supported by probable cause and the other requirements contained in § 17-13-140. The Court noted that the intent of the exclusionary rule, under the Fourth Amendment was to safeguard rights under that Amendment to the United States Constitution. Further, the Court noted the 'core' of the Fourth Amendment was protection of privacy. The Court held that exclusion of evidence should be limited to a constitutional violation, not a statutory violation, at least where the appellant could not demonstrate prejudice. Since the warrant was lawfully issued, any invasion of privacy was inevitable. The warrant was upheld.

From a practice standpoint, it should be noted that there will be many situations where dwellings or other buildings will have to be searched during the nighttime, or as soon as possible after a warrant is obtained, whatever the time. Many offenses involve goods that may be disposed of quickly, such as drugs or stolen property, and it is in the interest of justice that such contraband be located as soon as possible, and seized by law enforcement officers, provided the requirements of § 17-13-140 are met, and probable cause is established.

*3 In conclusion therefore, it is the opinion of this office that it would be permissible to search any building, dwelling or otherwise, for stolen goods after dark, provided a search warrant is obtained in accordance with § 17-13-140, [Code of Laws of South Carolina \(1976\)](#).

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