

April 17, 2008

Jeffrey B. Moore, Executive Director
South Carolina Sheriffs' Association
112 Westpark Boulevard
Columbia, South Carolina 29210-3856

Dear Mr. Moore:

In a letter to this office you indicated that a certified deputy sheriff has "contracted" with his wife's business to provide drug sweeps of schools and private businesses utilizing the deputy's personally owned drug sniffing dog. You indicated that because he intends to operate as a private citizen, the moonlighting laws do not apply. The deputy has indicated that it will be his policy to inform the school or business if his dog reacts to a drug scent. As he will be acting as a private citizen, he does not intend to act under color of law as a law enforcement officer.

The sheriff is of the opinion that the deputy cannot act as a civilian in such instances, but rather has an obligation to act as the law enforcement officer he is when confronted with an obvious unlawful act. According to your letter, the sheriff does not believe that the law enforcement officer can simply "inform" his client of the presence of illegal drugs, abdicate his sworn law enforcement duties, and just walk away leaving it up to the client to decide what further action to take, if any.

S.C. Code Ann. § 17-13-30 states that

[t]he sheriffs and deputy sheriffs of this State may arrest without warrant any and all persons who, within their view, violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter.

(emphasis added). See also S.C. Code Ann. § 23-13-60 ("[t]he deputy sheriffs may for any suspected freshly committed crime, whether upon view or upon prompt information or complaint, arrest without warrant and, in pursuit of the criminal or suspected criminal, enter houses or break and enter them, whether in their own county or in an adjoining county.").

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In its decision in Arthurs v. Aiken County, 338 S.C. 253, 525 S.E.2d 542 (Ct.App. 2000), *affirmed as modified*, 346 S.C. 97, 551 S.E.2d 579 (2001), the State Court of Appeals construed S.C. Code Ann. § 16-25-70 as then in effect which stated that

...a law enforcement officer *may* arrest, with or without a warrant, a person at his place of residence or elsewhere if the officer has probable cause to believe that the person is committing or has committed any misdemeanor or felony...(under the Criminal Domestic Violence Act)....

The Court stated that

[a]s used in this statute, the word “may” is precatory rather than mandatory. The use of the word “may” clearly imposes no affirmative duty on law enforcement. It simply gives officers flexibility and discretion to arrest a person who violates the provisions of the Criminal Domestic Violence Act.

338 S.C. at 267. See also State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997) (as to Highway Patrol officers, “...as law enforcement officers, they are charged with the discretionary exercise of the sovereign power.”). (emphasis added).

An opinion of this office dated May 21, 2002 stated that as to a law enforcement officer’s discretion when determining whether to make an arrest,

[a] probable cause analysis “includes a realistic assessment of the situation from a law enforcement officer’s perspective...Further, in determining the presence of probable cause for arrest, the probability cannot be technical, but must be factual and practical considerations of everyday life on which reasonable and cautious men, not legal technicians, act...The officer’s determination of probable cause involves broad discretion in gathering facts and evaluating existing conditions....

Another opinion of this office dated July 2, 1996 stated that

...it is well-recognized that, by definition, police officers must retain a wide degree of discretion in carrying out their duties of enforcing the laws. In Hildebrand v. Cox, 369 N.W.2d 411, 415 (Ia. 1985), the Court stated that “[p]olice officers necessarily exercise broad discretion...in determining the manner in which they will enforce laws.” In Bodzin v. City of Dallas, 768 F.2d 722, 726 (5th Cir. 1985), the Court observed that “the executive task of law enforcement carries a range of discretion ultimately exercised by police officers daily on their beat.” And in Sebring v. Parcell’s, Inc., 512 N.E.2d 394, 397 (Ill. 1987), it was stated that

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...efficient law enforcement necessarily involves a grant of broad discretion to police officers in determining whether to restrain, detain or arrest an individual. This discretion is required by the facts that there are often matters deserving of a police officer's attention at the same time, and it is often impractical for police officers to consult with their superiors in order to arrange their priorities.

The opinion concluded by stating

...I would advise that you continue to exercise sound discretion and good judgment as each situation arises. As I mentioned earlier, police officers and agencies are afforded by law broad discretion to carry out their arduous daily tasks of enforcing the law. This being the case, you will have to evaluate each particular situation as it arises and gauge whether there is a likelihood of trouble or a violation of the law.

While such opinions of this office and case law support a law enforcement officer's discretion in carrying out their duties as to making an arrest, such discretion must be read in association with their discretion in matters such as determining probable cause to make an arrest. Therefore, there is the discretion to determine facts or make further investigation but such should not be read as authorizing an officer's systematically ignoring criminal activity. As stated in Wuethrich v. Delia, 341A.2d 365 at 370 (N.J. 1975),

[p]olice officers have the right, indeed the duty, to investigate seemingly criminal behavior or activity...When an officer recognizes apparent criminal activity, he has the right to detain the persons involved in such activities and to make inquiries of them. (emphasis added).

In United States v. Trullo, 809 F.2d 108 (1st Cir. 1987), the First Circuit Court of Appeals recognized that while an officer does not have "unfettered discretion" in conducting searches and seizures, he does have a duty to use his judgment in such regard. See also: Op. Atty. Gen. dated May 20, 1996 (S.C. Code Ann. § 23-13-70 requires deputy sheriffs to "patrol the entire county" when they serve as deputies. Such enactment obligates deputies "to prevent or detect, arrest and prosecute...(for crimes)...detrimental to the peace, good order, and the morals of the community."); S.C. Code Ann. 23-13-20 which prescribes the oath of office of a deputy sheriff obligates the officer to be "alert and vigilant to enforce the criminal laws of the State and to detect and bring to punishment every violator of them...." Therefore, in the opinion of this office, a deputy does not have the discretion to simply walk away from what appears to be criminal activity and this lack of discretion would apply to an officer at all times. A deputy cannot simply assert, as in the situation addressed in your letter, that he is acting only in a private capacity and, therefore, ignore what appears to be criminal activity meriting further investigation and possible arrest.

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Also, consideration should be given to review of the issue by the State Ethics Commission. One possible provision that may be applicable to the situation addressed is S.C. Code Ann. § 8-13-720 which states

[n]o person may offer or pay to a public official, public member, or public employee and no public official, public member, or public employee may solicit or receive money in addition to that received by the public official, public member, or public employee in his official capacity for advice or assistance given in the course of his employment as a public official, public member, or public employee.

That provision, along with possibly others, may impact on a public officer's attempting to act in a private capacity such as described in your letter.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General