

STATE HIGHWAY PATROL: Patrolman cannot arrest party suspected of possessing intoxicating liquor or seize the liquor;

Patrolman has equal powers with any peace officer except power to execute civil process and right of search and seizure

Patrolman is not subject to suit for false arrest.

September 1, 1934.



Honorable Elliott M. Dampf,
Prosecuting Attorney,
Cole County,
Jefferson City, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of August 30, 1934 containing questions on which you desire the official opinion of this office. The facts are:

"A highway patrolman stops a car on the highway upon the theory that there has been a misuse of a license plate. Finding no violation of the law in that respect, he proceeds to search the car, without writ or warrant. Finding packages he believes to contain alcohol, he takes the driver of the car before the county sheriff, who proceeds to make the arrest."

We shall attempt to analyze and answer your questions separately:

QUESTION I

"Was that a legal procedure under the Highway Patrol Law, especially in view of the provisions of Section 16 of that Act?"

The duties of the Highway Patrol are set forth in Section 12, page 234, Laws of Missouri 1931 and are as follows:

"It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the

highways; to enforce and prevent thereon the violation of the laws relating to the size, weight and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution. It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes."

Under Section 13 of the same page entitled "Officers of State of Missouri" the members of the Highway Patrol appear to have equal and concurrent powers with the peace officers of the county. Said section provides:

"The members of the patrol are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of the state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

The Highway patrolmen may have general powers and may have equal powers, save and except one restriction, which is contained in Section 16 of the Act creating the Highway Patrol (Laws of Missouri 1931, page 235), which is as follows:

"The members of the patrol shall not have the right or power of search nor shall they have the right or power of seizure except to take from any person under arrest or about to be arrested deadly or dangerous weapons in the possession of such person."

You state in your letter that a highway patrolman "stops a car on the highway upon the theory that there has been a misuse of a license plate." We assume that he had information in advance or had reasonable grounds for suspecting the driver of the car of violating the law with respect to auto licenses. The patrolman was, therefore, within his duties under Section 12, supra, insofar as stopping the car and making the arrest is concerned. As to the legality of the arrest, we shall treat the same in another paragraph of this opinion.

You further state that "he proceeds to search the car without writ or warrant". This, we hold, he has no authority to do under Section 16, supra. By the plain wording of the statute it was evidently the intention of the Legislature to restrict the power of the patrolmen, first, as to search; and second, as to seizure of anything except, after a person has been arrested or is about to be arrested, a deadly or dangerous weapon. The power of search and seizure is common to peace officers, but is restricted and taken away from highway patrolmen.

The situation now is that the patrolman has arrested the supposed offender, made a search, and believing that he has found alcohol, takes the driver of the car before the sheriff who proceeds to make the arrest. You do not state that the sheriff ever made any search and seizure himself, and referring again to Section 16, the evidence could not be used, and a motion to suppress would undoubtedly be sustained.

In order to clarify this question and to fit a state of facts which might arise in the future, we take the liberty to make this suggestion: If the patrolman had arrested the supposed offender in the manner in which he did on a charge of violating a license section and had been informed in advance that the party was in the habit of violating the Prohibition laws and there was strong evidence to support such a reputation, he could then refrain from search or seizure, take the offender to the sheriff or call the sheriff to the offender, inform the sheriff of his reasons to believe that intoxicating liquor was in the car, along with any other evidence he may possess, and the sheriff could then make the search of the car and seize whatever liquor of an intoxicating nature which might be

found therein. In our opinion, that evidence would be sufficient for prosecution. We base this conclusion on the case of State v. Davis, 329 Mo., l.c. 747, wherein the Court said:

"The defendant also complains of the action of the trial court in overruling his motion to suppress the State's evidence, by which he challenged the legality of the search of the automobile and the seizure of the liquor found therein.

The sheriff and his deputy were the only witnesses offered in support of the motion, and their testimony in that connection was substantially the same as the testimony given by them at the trial of the case, as to the arrest of the defendant, the search of the automobile and the seizure of the liquor found in the automobile. But, in connection with the motion, the sheriff further testified that he had seen the defendant in Troy on two occasions prior to the occasion in question; that he was reliably informed that the defendant had been stopping his car in the alley behind the barber shop and peddling whiskey in Troy; that, about four o'clock in the afternoon of January 31, 1931, he was informed by a reliable business man of Troy that the defendant would be in the alley behind the barber shop about 8:30 o'clock that night and would have whiskey in his possession; and that he recognized the defendant as soon as he stepped out of the automobile at the mouth of the alley that night. Under such circumstances, the sheriff had reasonable grounds to believe that the defendant was committing a felony; and so believing, the sheriff was authorized to arrest the defendant without a warrant, and, as incidents to the arrest, to search the automobile without a search warrant and to seize the liquor found therein. (State v. Harlow (Mo. Sup.) 327 Mo. 231, 37 S.W. (2d) 419; State v. Howard, supra; State v. Williams (Mo. Sup.), 14 S.W. (2d) 434; State v. Bailey, 320 Mo. 271, 8 S.W. (2d) 57). The motion to suppress the State's evidence was properly overruled."

Conclusion

In view of the statute limiting the power and right of a highway patrolman to search and seize, we are of the opinion that

the evidence could not be used in the prosecution of the supposed offender; that the procedure of the Highway patrolman was legal except as to the feature of his searching even though the facts do not reveal that he actually seized the package containing the alcohol. We are of the further opinion that the patrolman has the power, and was within his rights, in arresting the supposed liquor law violator, but he should refrain from search and seizure. He should follow the course as outlined above and turn over the supposed offender to a recognized peace officer in order that the search might be legally made.

QUESTION II

"Does a highway patrolman have all the powers of a sheriff, and if not, to what extent is his power limited, taking the act as a whole?"

We again call your attention to Section 13 of the Act creating the Highway Patrol, supra, and more particularly to the following words:

"The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order of process any person detected by him in the act of violating any law of the state."

Conclusion

It is the opinion of this department that, with the exception of the power and right to execute civil process, and the restriction as contained in Section 16 denying the patrolmen the right and power of search and seizure with the exception of deadly and dangerous weapons, a highway patrolman has equal, concurrent, and the same power as any sheriff or peace officer of the State.

QUESTION III

"Was the taking into custody by the patrolman a false arrest in the circumstances above stated?"

Referring again to Section 12 of the State Highway Patrol Act, Laws of Missouri 1931, page 234, we find that it contains the following:

"To enforce thereon the laws of this state relating to the operation and use of vehicles on the highways"

and,

"It shall be the duty of the Patrol to cooperate with the Secretary of State and the Motor Vehicle Commissioner in the collection of motor vehicle registration fees."

This puts the Highway patrolman within his rights to stop automobiles on the highway and determine whether or not there has been a violation of the laws relating to licenses, if he has reasonable grounds to suspect anyone of violating the same.

In the instant case we assume that for the purpose of this opinion he did have reasonable grounds to suspect the offender of violating the license law. We would presume that he is not in the habit of stopping automobiles promiscuously and irritating the public generally. Proceeding on that assumption, we quote from the decision in the case of Hanser v, Bieber, 271 Mo. 326, relative to probable cause:

"The statute (Sec. 9805, R.S. 1909) authorizing police officers of St. Louis to 'prevent crimes and arrest offenders' does not in all cases make lawful the arrest by such officer without a warrant. To make lawful an arrest for a misdemeanor not committed in his presence, the officer must have reasonable grounds to suspect that the offense has been committed. The existence of such reasonable grounds rests upon the facts in each particular case, and their force and sufficiency must be determined by the officer before he acts, and they **must** be sufficient to establish a substantial belief in his mind that an offense has been committed. If the facts afford no basis for such reasonable suspicion, and the officer by due diligence could have ascertained that the plaintiff, at the time the officer arrested him and defendants capriciously charged him with disturbing the peace, was in an orderly discharge of his duties, the trial court should submit the issue of false imprisonment to the jury."

We quote from Judge Bond's dissenting opinion, not for its legal value, but because it contains facts which might readily be applied to the instant case. It was held:

"If the arrest was lawful there can be no recovery of damages for false imprisonment, even though made without a warrant; and an unlawful arrest may be justified by the ultimate conviction of the party of the crime for which he was taken into custody; and even though the conviction be reversed upon appeal, a police officer in St. Louis who has reasonable grounds to suspect that a misdemeanor has been committed may arrest the suspected party without a warrant; and evidence adduced by plaintiff tending to prove that an altercation between himself and defendants occurred, that a police officer was called in and a complaint made to him of a breach of the peace, and that upon an assurance by defendants that they would prosecute the charge, the plaintiff was taken to the police station where a formal charge was made and the trial had, in which plaintiff was convicted, established a reasonable ground for a belief on the part of the officer that plaintiff had been guilty of a breach of the peace, and a demurrer to plaintiff's evidence was rightly ruled."

In the case of *Billingsley v. Kline Cloak Co.*, 196 Mo., 1.c. 539, the Court said:

"We have already called attention to the fact that plaintiff alleged the arrest and imprisonment were without probable cause and that she tried her case on that theory, and she concedes that she must abide by that theory in this court. In order then to sustain the judgment she must have shown not only her innocence, but that defendant was without probable cause to believe her guilty."

And again, in the same case the Court made the following statements with reference to probable cause (1.c. 539-540):

"Probable cause 'which will relieve a prosecutor from liability, is a belief by him in the guilt of the accused, based upon circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man'. (*Vansickle v.*

Brown, 68 Mo. 627, 635; Stubbs v. Mulhol-land, 168 Mo. 47, 74). 'Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution.' (James v. Phelps, 11 Ad. & El. 483, 489). If we applied this definition to the facts of the case, we would be relieved from the necessity of saying that plaintiff was a party to obtaining the goods on bogus checks, by acquiescence, if not by participation. For it seems too plain for dispute that not only were the circumstances sufficiently strong to induce belief of her complicity in the mind of a reasonable man, but it would have required a most dense and abnormal mind not to have believed it."

Conclusion

It is the opinion of this department that if the patrolman acted in good faith, without malice, and with the judgment of a reasonable and cautious officer, the same would not constitute a false arrest even though the arrested person be innocent of the charge preferred against him.

Respectfully submitted,

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Assistant Attorney General.

APPROVED:

ROY MCKITTRICK,
Attorney General