

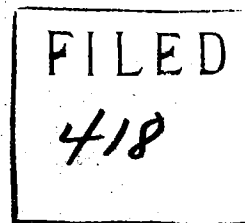
ESCAPE FROM
COUNTY JAILS:

Pursuant to § 557.390, RSMo 1959,
an individual allegedly absent
without leave from the military,
detained by civilian law enforcers is "lawfully imprisoned
or detained . . . upon any criminal charge . . . for the
violation of any penal statute," and may be convicted for
escaping from such detention.

December 24, 1969

OPINION NO. 418

Honorable Edward M. Wetton
Prosecuting Attorney
Carter County
Van Buren, Missouri 63965



Dear Mr. Wetton:

This official opinion is issued in response to your
request for a ruling submitted to this office and asking the
following question:

Can an individual held by a sheriff
in a county jail at the request of
military authorities for allegedly
being absent without leave be prose-
cuted for breaking jail under the
provisions of § 557.390, RSMo 1959?

Section 557.390, RSMo 1959, reads as follows:

If any person lawfully imprisoned or
detained in any county jail or other
place of imprisonment, or in the custody
of any officer, upon any criminal charge,
before conviction, for the violation of any
penal statute, shall break such prison or
custody and escape therefrom, he shall,

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upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding two years, or in a county jail not less than six months.

In order for an offense to qualify for prosecution under the foregoing statute section, the persons committing the alleged offense must (1) have been "lawfully imprisoned or detained" and (2) have been so detained by reason of "any criminal charge . . . for the violation of any penal statute." These separate prerequisites shall be considered in reverse order.

The term "criminal charge" has often been afforded a strict construction requiring that a formal charge be actually pending. See United States, v. Patterson, 150 U.S. 65, 68 (1893). However, the term, as used in § 557.390, RSMo 1959, has recently been construed by the Missouri Supreme Court as not requiring procedural formalities. In State v. Testerman, 408 S.W.2d 90, 94 (Mo. 1966), the Court concluded that:

. . . The fact that no charge was pending or warrant issued at the time of the alleged escape would not preclude conviction for escaping custody under § 557.390, RSMo 1959, V.A.M.S. See People v. Serrano, 123 Cal.App. 339, 11 P.2d 81; 30A C.J.S. Escape §5, p. 883. . . .

As we construe the language of the Missouri Supreme Court, one detained, under color of law, by law enforcement officials, may not employ self-help in escaping from such lawful detention under the guise that no formal criminal charge was pending against him. As applied to the case you pose, the detention of a member of the armed forces, at the request of proper military authorities, for allegedly being absent without leave, would qualify as detention "upon any criminal charge" as required to invoke the operation of § 557.390 in the case of escape from such detention.

Section 557.340, RSMo 1959, further requires that the detention be "for the violation of any penal statute." Title 10 U.S.C. § 886, one of the "punitive articles" of the Uniform Code of Military Justice, sets forth the offense of absent without leave as follows:

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Any member of the armed forces who, without authority--

- (1) fails to go to his appointed place of duty at the time prescribed;
 - (2) goes from that place; or
 - (3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;
- shall be punished as a court-martial may direct.

The only requirement of a penal statute is that it be a law imposing a penalty, punishment, or forfeiture recoverable on behalf of the public as by a government. See Tabor v. Ford, 240 S.W.2d 737, 740 (Mo. 1951), where, as in the situation you pose, the interpretation of a federal statute was involved. In our opinion, 10 U.S.C. § 886 is a penal statute as required under § 557.390, RSMo 1959.

The second question, to which we address ourselves, is whether one detained by civil authorities at the request of the military for being absent without leave is, in fact, "lawfully imprisoned or detained." The resolution of this question centers on whether the military has actual authority to make such a request of civilian law enforcement agencies. We find that there is such authority. Pursuant to 10 U.S.C. § 807 (b):

Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it. (Emphasis added).

Under the authority of the above section, the following regulations have been established by the Department of the Army:

a. AR 630-10, Section IX, paragraph 41 reads, 'Any civil officer . . . may apprehend an absentee when requested by military authorities';

b. AR 630-10, Section IX, paragraph 45a reads, 'Major CONUS commanders will seek cooperation of local police authorities. They

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will inform the authorities that the absentee or deserter will be apprehended only upon receipt of DD Form 553 or other confirmed notice that the individual is AWOL and that his return to military control is desired';

c. AR 190-9, paragraph 12 states, 'Major commanders will, whenever necessary, arrange with civil law enforcement agencies for the use, . . . of confinement facilities to detain apprehended absentees';

d. AR 190-9, paragraph 3e states, 'Provost marshals are responsible for initiation of local action to recover reported absentees and for timely notification of such absenteeism to appropriate . . . civilian law enforcement agencies.'

We find these regulations to be valid authority enabling civilian law enforcers to "lawfully imprison or detain" persons absent without leave when requested to do so by the military.

CONCLUSION

It is the opinion of this office, pursuant to § 557.390, RSMo 1959, an individual, allegedly absent without leave from the military, detained by civilian law enforcers is "lawfully imprisoned or detained . . . upon any criminal charge . . . for the violation of any penal statute," and may be convicted for escaping from such detention.

The foregoing opinion which I hereby approve was prepared by my Assistant, Michael L. Boicourt.

Yours very truly,



JOHN C. DANFORTH
Attorney General