

CRIMINAL LAW:
ARREST:
POLICE:

A regularly employed police officer of a third class city retains the same powers to arrest while off duty which he possesses while on duty;

the liability of a police officer of a third class city for false arrest and other related torts depends upon the lawfulness of the arrest; the lawfulness of an arrest made by a police officer from a third class city does not depend upon whether the policeman was on or off duty; and a private citizen may only arrest for those misdemeanors which involve breaches of the peace, petit larceny committed in his presence, or pursuant to those powers granted him by virtue of Section 537.125, RSMo 1969, and Section 560.415, RSMo 1969.

November 20, 1970

OPINION NO. 3

Honorable John A. Grellner
State Representative
Fortieth District
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Grellner:

This official opinion is in response to two questions you submitted for this office's resolution. Those questions, together with our responses thereto, are as follows:

"1. Does a person who is regularly employed as a police officer of a 3rd class city, while off duty, still retain the power to arrest as he has while on duty? What is the result if the police officer, while off duty, is engaged in a purely private pursuit such as, employment for an employer completely outside the scope of his activities as a police officer?"

Within the context of your question, the "power to arrest" involves (1) the ability to make a valid arrest, i.e., one which will support a valid prosecution and conviction of the offender,

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and (2) the ability to arrest a probable offender without fear of liability for false imprisonment, false arrest, assault and battery, etc. These two aspects of the power to arrest will be considered by this opinion within the context of your question.

I. The power of a regularly employed police officer from a third class city to make valid arrests while off duty.

Obviously, whether a policeman is either on or off duty will be important only if his powers to arrest will be affected by this status. If an off duty policeman may be considered to be in the position of a private person insofar as his power to arrest is concerned, and if the power of a private person to make arrests is less than that of an on duty policeman, then the policeman's off duty status may affect the validity of certain arrests. This opinion, therefore, will first consider whether there are any differences between the power of an on duty policeman to make an arrest and the power of a private citizen to make an arrest. To facilitate an analysis of these powers, we have categorized the various offenses as being either (1) city ordinance violations, (2) felony violations, or (3) state misdemeanor violations.

Section 85.561(3), RSMo 1969, important with regard to the powers of policemen in third class cities, provides in relevant part as follows:

"3. Every member of the police department shall have power at all times to make or order an arrest with proper process for any offense against the laws of the city, . . . and shall also have power to make arrests without process in all cases in which any offense against the laws of the city shall be committed in his presence. . . ."
(Emphasis added.)

In our opinion, the phrases "at all times" and "any offense against the laws of the city" indicate a clear legislative intention to authorize city policemen, whether on or off duty, to make arrests for offenses committed in their presence against the laws of the city. Thus, if a third class city's off duty policeman observes the violation of a city ordinance inside that city's limits, the off duty policeman may make a valid arrest for that offense.

For the purpose of considering the validity of an arrest made by an off duty policeman for the commission of a felony, the assumption is necessarily made that a felony was actually committed by the person arrested. With that assumption, the case of State v.

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Keeny, 431 S.W.2d 95 (Mo. 1968), becomes relevant. In that case, a city policeman from a third class city was advised by the victim of a robbery as to the description of the robber's automobile and as to its general direction of travel from the scene of the robbery. He sighted a car fitting this description approximately ten miles outside the city limits, and succeeded in getting it to stop. Upon arresting the occupants and searching the automobile, evidence was produced which lead to the occupants' conviction for the robbery. In affirming this conviction, the Missouri Supreme Court held:

"This arrest was lawful and this being so, the ensuing search of the automobile as here described, was lawful, as incident thereto. The fact that policeman Grimes was outside his jurisdiction does not make the arrest unlawful under the circumstances before us. A private citizen could lawfully have proceeded as Grimes did. The facts are that there was a robbery; within a few minutes after it occurred, Grimes learned from a reliable source that the perpetrator was a man with a gun who left the scene in a particular style and color car, . . . Within 16 minutes from the time he was first called about the robbery he overtook such a car. . . . Under these circumstances, Grimes had reasonable grounds to believe that the men in the car were the ones who committed the robbery and could lawfully arrest them without warrant, . . ." (Id. at 97).

See also State v. Murray, 445 S.W.2d 296 (Mo. 1969), where an arrest similar to the one occurring in the Keeny case was upheld as valid even though made outside the city limits by a city police officer. Thus, it appears to be the law in Missouri that a police officer or a private citizen who has "reasonable grounds to believe" a felony has been committed by the person he seeks to arrest, may apprehend and arrest that person. Nor does there appear to be any difference in the amount of force available to a private person effecting a lawful arrest and that available to a policeman making the same arrest. State v. Parker, 199 S.W.2d 338 (Mo. 1947). Thus, again, a policeman's on or off duty status would not appear to affect the validity of an arrest made for the commission of a felony.

It is in the third area -- arrest for state misdemeanor violations -- that a policeman's on or off duty status may be important. The common law rule is that a private citizen may not arrest for a misdemeanor unless it constitutes a breach of the peace. 5 Am.Jur.

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2d "Arrests", Section 35, page 727. The case of State v. Parker, 378 S.W.2d 274 (Spr.Mo.App. 1964), recognizes this rule as being in effect in Missouri, but further states that a private citizen may arrest for a petit larceny committed in his presence. Id. at 282. Thus it may be said that as a general rule in Missouri, a private citizen may only arrest for state misdemeanor violations which constitute either a breach of the peace or a petit larceny. However, a police officer may arrest for any misdemeanor violation which occurs in his presence. State ex rel. Patterson v. Collins, 172 S.W.2d 284 (St.L.Mo.App. 1943). This difference in the arrest powers of a policeman and a private citizen forces us to consider the question of whether an off duty policeman is to be considered as having only those powers of arrest available to a private citizen.

As will be shown by the following discussion, it is our opinion that an individual who is a city policeman may not behave inconsistently with the nature of that office. In other words, employment as a policeman involves a service to the public of such a nature that they are under a special duty at all times to use their best efforts to apprehend criminals.

The nature of the office of policeman has been variously defined, but the below quotations are particularly appropriate to this opinion:

"We think the term 'policeman,' as that term is generally used and understood, means a person who is a member of an organized civil force for maintaining peace and order, preventing and detecting crime, and enforcing the law. A policeman of a city is a person who has been authorized and empowered by the city to perform duties which relate to its governmental function of maintaining peace and order. . . ." Tezeno v. Maryland Casualty Company, 166 So.2d 351, 356 (La.App. 1964).

"A public office has been defined as ' a public trust or agency created for the benefit of the people.' State ex rel. Nagle v. Sullivan, supra. A public officer is bound by a very high standard of conduct. A law enforcement official has a higher responsibility than mere strict compliance with the letter of the law. When the people delegate to an officer the right to enforce a standard of conduct on themselves,

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they may reasonably expect him to carry out his duties with a high degree of intelligence and devotion to the law which he is entrusted to enforce." State ex rel. Hollibaugh v. State Fish and Game Commission, 365 P.2d 942, 948 (Mont. 1961).

". . . The primary duty of a police officer is to preserve peace. He is an officer of the law whose duties require him to come in daily contact with crime and law enforcement. He is paid out of the public treasury to devote his time to his duties. . . ." State v. Butts, 159 S.W.2d 790, 793 (Mo. 1942).

The above quotations indicate that a police officer is a public official engaged in performing a governmental function, and may take no action or position inconsistent with this status. Obviously, an off duty policeman need not be as diligent or as active in his pursuit of criminal offenders as an on duty policeman. Nevertheless, if a policeman devotes part of his off duty hours to the apprehension of a criminal offender, it would be inconsistent with those publicly imposed obligations of a policeman discussed above for an off duty policeman to be simultaneously handicapped by a diminution of his arrest powers. In other words, if the state may require a policeman to behave consistently with the public trust imposed upon him because of the nature of his office twenty-four hours a day, then it follows that all the official powers which are normally available to an on duty police officer should likewise be available to the policeman twenty-four hours a day.

No case was found directly bearing on this issue. However, the issued involved in the case of Kick v. Merry, 23 Mo. 72 (1856), involved an issue very similar to the one at hand. In that case, a city policeman sought to claim a reward upon apprehending a criminal, contending that when he acted in effecting this arrest, he was doing so as a private citizen and not as a member of the police. In holding that the policeman was not entitled to the reward, the Supreme Court stated:

". . . [policemen] are required, to the best of their ability, to preserve order, peace and quiet throughout the city. . . . Under the circumstances, the officer has no right to insist that he acted as an individual in his private capacity. The case falls within the mischief of the rule of the common law

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which prohibits an officer from taking a reward as an inducement to do his duty. He received a stated salary for his services. The services rendered were within the duties of his office. All his energies had been devoted to the service of the city. . . ." (Id. at 75-76).

While the Kick case did not concern itself with the off duty -- on duty question, several other jurisdictions have cited the Kick case for the proposition that it is contrary to public policy for a peace officer, acting within the scope of his authority and line of duty, to receive a reward for an arrest, even though this arrest is made when the police officer is off duty. See, e.g., Oklahoma Ry. Co. v. Morris, 48 Okla. 8, 148 P. 1032 (1914); Hanmer v. Wells Fargo & Co. Express, 160 N.Y.Supp. 651 (1916); and Beck v. Sulser, 48 Okla. 187, 150 P. 107 (1915).

Finally, the case of People v. Derby, 2 Cal.Rptr. 401 (Cal. App. 1960), is important. In that case, the defendant was convicted of resisting a public officer in the discharge of the duties of his office, and he appealed contending that the police officers, who made the arrest immediately after ending their tour of duty for that day, were not "engaged in performing a duty of their office" at the time of the arrest. The California Court of Appeals noted that there was sufficient evidence in the record to sustain a finding that the officers were still on duty when the arrest was made, but noted further that:

". . . it is clear that a breach of the peace was committed in the officers' presence, and they were not required to ignore this conduct on the part of the appellant whether or not their particular hours of duty had been completed. (Emphasis added). (Id. at 404).

Thus, the California Court of Appeals noted that public peace officers are considered to be "on duty" twenty-fours a day.

In our opinion, the above discussed authority indicates a judicial recognition of the fact that employment as a police officer cannot be considered as merely another form of gainful employment. The position of policemen is not analogous to the ordinary employer-employee relationship, where the employee is authorized to perform his employment only during working hours. Of primary importance is the fact that in arresting criminals, the policeman acts in the public interest, and not selfishly. Thus, although an ar-

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rest of a criminal prevents the theft of an individual's chattel, not only is that individual benefited, but the state as a whole benefits as well. Therefore, both the individual and the state benefit by a policeman's zealous devotion to his duty.

II. The liability of an off duty police officer for unlawful arrest and other related torts.

If a good faith arrest is made of an innocent individual, the extent to which the person making the arrest will be liable for false imprisonment, or other related torts, will greatly depend upon whether he is a policeman or a private citizen. In the case of State v. Nolan, 192 S.W.2d 1016 (Mo. 1946), the Supreme Court of Missouri noted that a police officer may lawfully arrest an individual that the police officer has reasonable grounds to suspect that he has committed a felony, even though no felony in fact was committed, but that a private citizen may justify the arrest only if a felony was in fact committed. Id. at 1019.

" . . . It is the right and privilege of any citizen, knowing that one has committed or is in the act of committing a crime, to arrest the offender or cause him to be arrested without waiting for a warrant; but in doing so the unofficial citizen takes this risk, to wit: If it should turn out that the man whom he has arrested was not guilty of the crime, the citizen causing the arrest is liable in a civil action for whatever damages the arrested man sustained in consequence of his arrest and imprisonment. In such case it is no answer to the plaintiff's demand for damages for the defendant to say: 'I had reasonable cause to believe the plaintiff was guilty. I acted without malice. I took the advice of counsel learned in law.' The only plea of justification or excuse is that plaintiff was guilty of the crime for which he was arrested. . . ." Pandjiris v. Hartman, 94 S.W. 270, 272 (Mo. 1906).

The above quote should be compared with the following statement of the case of Winegar v. Chicago, B. & Q. R. Co., 163 S.W.2d 357, 365 (K.C.Mo.App. 1942):

"The police officers had a lawful right to arrest plaintiff when there was reasonable grounds to believe that he had committed an

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offense, even though he was not convicted, and the officers would not be liable in damages. This immunity, however, in behalf of the officers does not absolve an individual who furnishes information that an offense has been committed and encourages and requests officers to make an arrest of an innocent party . . . If party is arrested at the direction of an unofficial citizen, the only ground of justification is that the party arrested is guilty. . . ." (Citations omitted).

Thus, the following generalizations may be made: (1) a policeman may arrest an innocent individual without fear of false arrest liability where he has reasonable grounds to suspect that a felony has been committed and reasonable grounds to suspect that the individual he arrests committed the felony; (2) a private citizen may escape false arrest liability only if he is able to show the person arrested was guilty of the crime for which he was arrested and reasonable grounds to suspect the person he arrested. The gist of an action for false arrest and false imprisonment is a wrongful arrest or an unlawful arrest. Gerald v. Caterers, Inc., 382 S.W.2d 740 (K.C.Mo.App. 1964). Thus, the final important generalization becomes: (3) false arrest liability depends upon whether the arrest was lawful.

You inquire as to the effect the foregoing statements of law have upon an off duty policeman assuming employment completely unrelated to his job as a policeman. Naturally, this office is unable to make predictions as to the probable outcome of potential litigation absent a specific fact situation. Nevertheless, the following discussion will highlight the various problems in this area.

As was discussed earlier, it is our opinion that an off duty police officer retains the same powers to arrest as those possessed by an on duty police officer. Thus, if an off duty police officer makes an arrest which would be valid and lawful if made by an on duty police officer, then no liability should result.

The case of Nelson v. R. H. Macey & Co., 434 S.W.2d 767 (K.C.Mo.App. 1968), is important. That case, an off duty police officer was employed as a store detective by a department store. This off duty policeman made what the jury found to be an unlawful arrest for shoplifting, and turned the suspect over to store authorities. The suspect-plaintiff sued the department store for false imprisonment, and his recovery against the corporation was affirmed on appeal. Significant was the court's determination that

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the police officer's status as a police officer was irrelevant insofar as the employer's liability was concerned:

" . . . If the jury found, as they did, that Henthorn (the police officer) was acting within the scope of his employment, then he could not be acting in a dual capacity, or, to put it another way, if Henthorn was acting within the scope of his employment, then the fact that he was also a police officer became unimportant and no effect on the defendant's liability." (Id. at 776-777).

Thus, an employer may not shield himself from liability merely because his employee is an off duty police officer.

In our opinion, the Nelson v. R. H. Macey & Co. case is not authority for the proposition that an off duty police officer may act in such a way as to expose himself to personal liability for actions which would be lawful if performed while he was on duty. Rather, the case involves an arrest which would have been unlawful even if made by an on duty police officer. It is of course possible, however, that an off duty police officer could behave in such a way as to negate any presumption that he was acting for the benefit of the state or pursuant to his employment as a police officer, and thus, his personal liability might result. Again, we refuse to express an opinion as to the probability or validity of such a result.

Your second question was as follows:

"2. Does a private citizen have the legal right to arrest for a misdemeanor committed within his presence, but not amounting to a breach of the peace?"

As a general rule, a private citizen may arrest for a misdemeanor violation only if it involves a breach of the peace. 5 Am.Jur.2d "Arrests", Section 35, page 727. The case of State v. Parker, 378 S.W.2d 274 (Spr.Mo.App. 1964), also states that a private citizen may arrest for a petit larceny which is committed in his presence. Id. at 282. This statement, which is dicta in the Parker case, is the only expression of this right found by us in any Missouri case. While this absence of similar authority tends to cast doubt on the existence of such a right, the statement nevertheless exists in a reported Missouri decision, and is, therefore, entitled to the weight normally accorded similar statements of law.

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At any rate, Missouri statutes have substantially altered this area of the law in those areas most likely to create problems. Section 537.125, RSMo 1969, provides in relevant part as follows:

"2. Any merchant, his agent or employee, who has reasonable grounds or probable cause to believe that a person has committed or is committing a wrongful taking of merchandise or money from a mercantile establishment, may detain such person in a reasonable manner and for a reasonable length of time for the purpose of investigating whether there has been a wrongful taking of such merchandise or money. Any such reasonable detention shall not constitute an unlawful arrest or detention, nor shall it render the merchant, his agent or employee, criminally or civilly liable to the person so detained.

"3. . . . the finding of such unpurchased merchandise concealed upon the person or among the belongings of such person shall be evidence of reasonable grounds and probable cause for the detention . . . by a merchant, his agent or employee, in order that recovery of such merchandise may be effected, and any such reasonable detention shall not be deemed to be unlawful, nor render such merchant, his agent or employee criminally or civilly liable."
(Emphasis added).

Thus, here, if the private citizen is either a merchant or the merchant's agent or employee, he may arrest for a misdemeanor pursuant to the terms of Section 537.125, RSMo 1969.

Also important is Section 560.415, RSMo 1969, which sets out particular instances where any person found in the actual perpetration of certain offenses (which generally consist of the malicious destruction of certain property) may be arrested by the owner or person in possession of the premises or property upon which the offense is committed:

". . . without warrant, and taken before the nearest magistrate, to be dealt with according to law." Section 560.415, supra.

Other than the Parker case and the above two statutory exceptions to the general common law rule, no expansion of the right of

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the private citizen to arrest for the commission of a misdemeanor was found. It is our opinion that a private citizen's right to arrest for the commission of a misdemeanor is limited to the above common law rule and the three noted exceptions.

CONCLUSION

It is, therefore, our opinion that a regularly employed police officer of a third class city retains the same powers to arrest while off duty which he possesses while on duty; that the liability of a police officer of a third class city for false arrest and other related torts depends upon the lawfulness of the arrest; that the lawfulness of an arrest made by a police officer from a third class city does not depend upon whether the policeman was on or off duty; and that a private citizen may only arrest for those misdemeanors which involve breaches of the peace, petit larceny committed in his presence, or pursuant to those powers granted him by virtue of Section 537.125, RSMo 1969, and Section 560.415, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Craig A. Van Matre.

Very truly yours,



JOHN C. DANFORTH
Attorney General