



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

February 23, 1973

OPINION LETTER NO. 51

Honorable Gene McNary  
Prosecuting Attorney  
St. Louis County  
St. Louis County Courts Building  
7900 Carondelet  
Clayton, Missouri 63105

Dear Mr. McNary:

This is in response to your request for an opinion from this office as follows:

"May a defendant, who strikes a police officer in the official discharge of that officer's duty, be charged with the violation of either the misdemeanor provisions of 557.220 R.S.Mo. or with the violation of the felony provisions of 557.215 R.S.Mo.? Further, if a defendant is charged with violation of the felony provision of 557.215 R.S.Mo. are the misdemeanor provisions of 557.220 R.S.Mo. 'a lesser-included offense' requiring a lesser-included offense instruction at trial?"

"Assume a factual situation as follows: Police officer while on duty within his jurisdiction receives call from dispatcher to respond to a certain location for a fight in progress. Upon arriving at the scene, police officer attempts to arrest one of the persons involved in the melee and one of the by-standers in the crowd jumps upon the back of the police officer, strikes the police officer with his fist about the head and shoulders, and also attempts to

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wrestle the police officer's gun from his position. Which statute would more appropriately apply in this situation considering no serious injury done to the officer--557.215 R.S.Mo., a felony, or 557.220 R.S.Mo., a misdemeanor?"

You inquire specifically concerning the provisions of Sections 557.215 and 557.220, RSMo, and their application to the offense which you describe. In order to construe these sections, it is necessary to consider their legislative history together with other statutory provisions.

Section 557.200, RSMo, provides in substance that if any person or persons knowingly and willfully obstruct, resist or oppose any sheriff or other ministerial officer in the service or execution of any writ, warrant or process, or in the discharge of any official duty, in any felony case, such person shall be punished by imprisonment in the penitentiary for a period as provided therein.

Section 557.210, RSMo, provides in substance that if any person or persons shall knowingly and willfully obstruct, resist or oppose any sheriff or any other ministerial officer in the service or execution of any writ, warrant or process or in the discharge of any other duty in any case, civil or criminal, other than a felony, such person shall be adjudged guilty of a misdemeanor.

Section 557.220, RSMo, provides as follows:

"Every person who shall knowingly and willfully assault, beat or wound any such officer, while engaged in the service or execution, or attempt to serve or execute any writ, warrant or process, original or judicial, or any order or rule of court, or while in the discharge of any other official duty, shall, on conviction, be adjudged guilty of a misdemeanor."

(Emphasis added)

These statutory provisions have been the same in substance since 1879.

It is our view "such officer" in Section 557.220, supra, means the sheriff or ministerial officer as described in Sections 557.200 and 557.210.

It is our view that these sections should be construed together in determining the provisions of Section 557.220. The offenses described in these sections apply only to an assault on a sheriff or other ministerial officer.

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Section 557.215, RSMo, was enacted by the General Assembly in 1965, H.C.S.S.B. No. 190, Laws of Missouri 1965, pages 668-669 which reads as follows:

"Any person who shall wilfully strike, beat or wound any police officer, sheriff, highway patrol officer or other peace officer while such officer is actively engaged in the performance of duties imposed on him by law, and every person who shall aid or assist in doing any such striking, beating or wounding, is guilty of a crime and, upon conviction, shall be punished by imprisonment by the department of corrections for a term of not more than five years, or by confinement in the county jail for not less than six months nor more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment."

This statute was not enacted as an amendment to any other statute and in our opinion was intended to create a new offense by making it a felony for any person to willfully strike, beat or wound any police officer, sheriff, highway patrol officer or any peace officer while actively engaged in the performance of their official duties, and making it an offense for any person who shall aid or assist in such striking, beating or wounding of such officers.

No doubt Section 557.215 was numbered and placed in sequence with the above sections by the committee on legislative research as authorized by Section 3.050, RSMo, but such designation had no legislative authority to expand or change the meaning of the law by their arbitrary insertion in the Revised Statutes between Sections 557.210 and 557.220. State v. Maurer, 164 S.W. 551 (Mo. 1914). It should be construed as though it created a separate and distinct offense without regard to the provisions of the other statutory provisions above referred to.

Section 556.230, RSMo, provides as follows:

"Upon an indictment for an assault with intent to commit a felony, or for a felonious assault, the defendant may be convicted of a less offense; and in all other cases, whether prosecuted by indictment or information, the jury or court trying the case may find the defendant not guilty of the offense as charged, and find him guilty of any offense, the commission of which is necessarily included in that charged against him."

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Under Section 557.215, supra, any person who shall willfully strike, beat or wound any police officer, sheriff, highway patrol officer, or other peace officers while such person is actively engaged in the performance of their duties or who aid such person in striking, beating or wounding is guilty of the crime punishable by imprisonment in the penitentiary or by confinement in the county jail as provided therein. It constitutes a felony and is a felonious assault within the provisions of Section 556.230, supra.

The question now arises under the facts as you have submitted whether such person may be charged with a felony as provided in Section 557.215, supra, or with a lesser offense.

It is our opinion that it is a discretionary matter with the prosecuting attorney to determine whether a person is to be charged under the provisions of Section 557.215, or with a lesser offense which the facts and evidence will support. It is often true a single act will constitute an offense under two different statutes. Under such circumstances the state may elect to prosecute for either offense. State v. Smith, 422 S.W.2d 50 (Mo. banc 1967); State v. Koen, 468 S.W.2d 625 (Mo. 1971).

Section 559.220, RSMo, provides as follows:

"Any person who shall assault or beat or wound another, under such circumstances as not to constitute any other offense herein defined, shall, upon conviction, be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

The factual situation which you have submitted is that a police officer while on duty receives a call from the dispatcher to respond to a certain location for a fight in progress and upon arriving at the scene the police officer attempts to arrest one of the persons involved in the melee one of the bystanders in the crowd jumps upon the back of the police officer, strikes the police officer with his fist about the head and shoulders, and also attempts to wrestle the police officer's gun from his position.

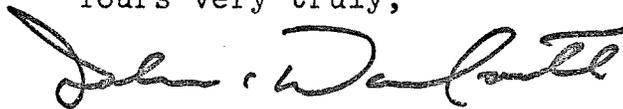
It is our view that under these assumed facts the bystander who jumped upon the back of the police officer and striking such police officer with his fists may be charged under the provisions of Section 557.215, supra, a felony statute, or under Section 559.220, supra, a misdemeanor statute.

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If he is charged under the felony statute, the court should instruct the jury that the defendant may be convicted of the offense of common assault.

It is therefore our opinion that it is a discretionary matter for the prosecuting attorney to decide whether a person should be charged with a greater or lesser offense depending upon the facts of each case. A person charged under the provisions of Section 557.215 with felonious assault on a police officer may be convicted of the lesser offense of common assault under the assumed facts as submitted.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General