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Opinion No. 02-116

Madison County Constables - Searches Incident to Arrest - Domestic Abuse

QUESTIONS

1. Are Madison County constables conservators of the peace?

2. Is escorting a funeral procession, for hire, a law enforcement purpose?

3. May a constable escort a funeral procession, for hire, while using blue or red lights and/or a siren?

4. Do the provisions of Tenn. Code Ann. § 40-7-118(h) provide officers the authority to make searches incident to an arrest before issuing a citation in "lieu of continued custody?"

5. May a law enforcement officer make a warrantless arrest for domestic abuse when an offender maliciously damages property jointly owned by the offender and the abused party?

OPINIONS

1. Madison County constables are conservators of the peace within the meaning of Tenn. Code Ann. § 8-10-109.

2. Escorting a funeral procession, for hire, is not a law enforcement purpose.

3. A constable may not escort a funeral, for hire, while using blue or red flashing lights and/or a siren because such a service is not being performed in an official capacity.

4. Yes, but only if an officer has reasonable suspicion that a subject is armed and dangerous or when there is a need to preserve evidence.

5. Yes, according to the plain language of Tenn. Code Ann. § 36-3-601(1) (Supp. 1999).

ANALYSIS

1. Under Tenn. Code Ann. § 8-10-109(a) (Supp. 2000):

> Every constable, so elected and sworn, in those counties set out in § 8-10-108(b), including counties added to subsection § 8-10-108(b) at any time subsequent to 1969, is a conservator of the peace and vested with all the power and authority belonging to the office of constable by common law.

Tenn. Code Ann. § 8-10-108(b) makes the statute applicable in counties falling within any one of several population brackets "according to the 1960 federal census or any subsequent federal census . . . ." Madison County fell within one of the population brackets listed in Tenn. Code Ann. § 8-10-108(b) according to the 1960 federal census. Thus, Madison County constables are conservators of the peace.

2. The applicable oath of office sets forth the duties of a constable with common law powers. Tenn. Code Ann. § 8-10-108(b). In addition, the legislature has set out, in different parts of the code, various other duties to be handled by constables. *See, e.g.* Tenn. Code Ann. §§ 40-6-212; 55-8-152; 57-5-202; 57-9-101; 57-9-103 and 57-9-201. It does not appear that escorting a funeral, for hire, is a law enforcement purpose. However, there is no statutory prohibition against a constable escorting funerals for a private party on his or her own time, if such activity does not interfere with the constable's performance of his or her official duties.

3. If a constable is escorting a funeral for a private party, he or she should take care not to convey the impression that the service is being performed in an official capacity. Thus, the constable should not perform such services while in uniform or driving an official car using red or blue flashing lights and/or a siren. Tenn. Code Ann. § 55-8-183(a) provides in part:

> Funeral processions properly identified by a **flashing amber light on the lead vehicle or led by a properly identified escort** shall have the right-of-way on any street, highway, or road through wich they may pass, subject to the following provisions:

(Emphasis added).

4. Under Tennessee law, a police officer may arrest a person who has committed a misdemeanor in the officer's presence. Tenn. Code Ann. § 40-7-103(a)(1). However, Tenn. Code Ann. § 40-7-118 (b) (1) provides in part:

> A peace officer who has arrested a person for the commission of a misdemeanor committed in such peace officer's presence...shall issue a citation to such arrested person to appear in court in lieu of the continued custody and the taking of the arrested before a magistrate.

A person may not be placed under custodial arrest unless one of eight exceptions is applicable:

> (1) The person arrested requires medical examination or medical care, or if such person is unable to care for such person's own safety;
> (2) There is a reasonable likelihood that the offense would continue or resume, or that persons or property would be endangered by the arrested person;
> (3) The person arrested cannot or will not offer satisfactory evidence of identification, including the providing of a field-administered fingerprint or thumbprint which a peace officer may require to be affixed to any citation;
> (4) The prosecution of the offense for which the person was arrested, or of another offense, would thereby be jeopardized;
> (5) A reasonable likelihood exists that the arrested person will fail to appear in court;
> (6) The person demands to be taken immediately before a magistrate or refuses to sign the citation;
> (7) The person arrested is so intoxicated that such person could be a danger to such person or to others; or
> (8) There are one (1) or more outstanding arrest warrants for the person.

Tenn. Code Ann. § 40-7-118(c); *State v. Chearis*, 995 S.W. 2d 641, 644 (Tenn. Crim. App. 1999); *State v. Adam George Colzie*, Williamson County, No. M1998-00253-CCA-R3-CD (Tenn. Crim. App., filed Nov. 30, 1999, at Nashville)(copy attached).

Tenn. Code Ann. § 40-7-118(h) specifically directs that "[n]othing herein shall be constructed to affect peace officers' authority to conduct a lawful search even though the citation is issued after arrest." There are two historical rationales for the "search incident to arrest" exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. *Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 488, 142 L.Ed.2d 492 (1998). In *Knowles*, the defendant challenged a search conducted pursuant to a similar Iowa statue. Noting that the defendant had not alleged that the statute could never be lawfully applied, the United States Supreme Court found that neither of the two historical rationales for the search incident to arrest exception was sufficient to justify the search in that particular case. *Id.* at 116-18. The Tennessee Court of Criminal Appeals reached a similar conclusion in *State v. Chearis*, 995 S.W.2d 641 (Tenn. Crim. App. 1999).

Therefore, it is the opinion of this office that Tenn. Code Ann. § 40-7-118(h) authorizes a peace officer to make a search incident to arrest before issuing a citation in "lieu of continued custody" when an officer has reasonable suspicion that a subject is armed and dangerous or when there is a need to preserve evidence. *Chearis*, 995 S.W.2d at 644.

5. Domestic abuse is defined as: "[i]nflicting or attempting to inflict physical injury on an adult or minor by other than accidental means, placing an adult or minor in fear of physical harm, physical restraint, or **malicious damage to the personal property of the abused party**." Tenn. Code Ann. § 36-3-601 (Emphasis added). Tenn. Code Ann. § 36-3-619(a) states:

> If a law enforcement officer has probable cause to believe that a person has committed a crime involving domestic abuse, whether the crime is a misdemeanor or felony, or was committed within or without the presence of the officer, the preferred response of the officer is arrest.

The purpose of statutory interpretation is to ascertain and give effect to the legislative intent. *Anderson v. Outland*, 210 Tenn. 526, 360 S.W.2d 44 (Tenn. 1962). The legislative intent must be determined from the plain language of a statute, read in the context of the entire statute, without any forced or subtle construction that would extend or limit its meaning. *National Gas Distrib., Inc. v. State*, 804 S.W.2d 66 (Tenn. 1991). Where the words of a statute are clear and plain and fully express the legislative intent, there is no room to resort to additional rules on construction. *Anderson v. Outland*, 210 Tenn. 526, 360 S.W.2d 44 (Tenn. 1962).

Black's Law Dictionary defines personal property in part as "everything that is the subject of ownership, not coming under denomination of real estate." Black's Law Dictionary 1097 (5th ed. 1979). *See also* Tenn. Code Ann. § 67-5-502(12) (tangible personal property is defined as "goods, chattels, and other articles of value which are capable of manual or physical possession, and certain machinery and equipment, separate and apart from any real property, and the value of which is intrinsic to the article itself"). Concerning joint ownership, the Supreme Court in *Jones v. Jones*, 597 S.W.2d 886, 887 (Tenn. 1979), held:

> [T]he words in the statute, "jointly owned," are not the equivalent of "jointly held" and, so, do not limit the inquiry to interests represented by instruments of conveyance at law but include every legal or equitable interest recognized at law or by equity in any kind of property held in the name of either party, or both parties, which either party is able to establish by competent evidence.

Thus, it appears that Tenn. Code Ann. § 36-3-619(a) on its face authorizes an officer to arrest an offender who the officer has probable cause to believe has maliciously damaged any personal property in which the abused party has an ownership interest.

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