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Opinion No. 03-153

Effect of criminal summons statute on private citizen arrests.

QUESTION

Does the new legislation regarding the issuance of a criminal summons instead of a warrant of arrest, codified at Tennessee Code Annotated § 40-6-215, preclude the issuance of a warrant of arrest when a person has been arrested by a private citizen for a public offense such as shoplifting?

OPINION

No. The new legislation requires the issuance of a criminal summons instead of a warrant of arrest only when the affiant providing probable cause is not a law enforcement officer. If a private citizen making an arrest for a public offense delivers the person to a law enforcement officer who then becomes the affiant or one of the affiants, a warrant of arrest may be issued.

ANALYSIS

Pursuant to statute, a private person may arrest another for a public offense committed in the arresting person's presence. *See* Tenn. Code Ann. § 40-7-109(a)(1). That person must then, "without unnecessary delay, take the arrested person before a magistrate or deliver the arrested person to an officer." Tenn. Code Ann. § 40-7-113(a). If the arrested person is delivered to an officer, the officer may then take the person before a magistrate. *See* Tenn. Code Ann. § 40-7-113(b).

When a person who has been arrested without a warrant is brought before a magistrate, "an affidavit of complaint shall be filed forthwith." Tenn. R. Crim. P. 5(a). The magistrate must then make a probable cause determination. *See* Tenn. R. Crim. P. 4(a). If the magistrate determines that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant of arrest is typically issued, even though the person has already been arrested. The Commission Comment to Rule 4 of the Tennessee Rules of Criminal Procedure explains:

> The form of the arrest warrant, as set out in Rule 4(c)(1), makes no distinction between warrants issued for persons not yet arrested and those warrants issued for persons already arrested without a warrant. Arrest warrants have historically made no such distinction in Tennessee. See § 40-6-207. Such a warrant serves a dual function, first, as the authority for an arrest (where an arrest has not already been

> lawfully made) and, secondly, as a statement of the charge which the accused is called upon to answer. The commission did not recommend two separate warrant forms, one for use where the accused had not yet been arrested, and the second to merely state the charge against one already under arrest, because it is more utilitarian to have only the one form. The command to arrest is obviously surplusage where the warrant is directed against one already in custody; but a warrant in such cases still serves as the official charging instrument, issued after a judicial finding of probable cause, and gives notice of the charge which must be answered.

Tenn. R. Crim. P. 4, Commission Comment; *see also* Raybin, *Criminal Practice and Procedure*, §3.4.

The new legislation addressing the issuance of a criminal summons instead of a warrant of arrest, which goes into effect on January 1, 2004, provides:

> As an alternative to a warrant of arrest as provided in §§ 40-6-201 — 40-6-214, the magistrate, judge or clerk may issue a criminal summons instead of a warrant of arrest *except when an affiant is not a law enforcement officer* as defined by § 39-11-106(21), or none of the affiants in the case of multiple-affiants is a law enforcement officer as defined by § 39-11-106(21), *in which instance the magistrate, judge or clerk shall issue a summons.*[1]

Tenn. Code Ann. § 40-6-215(a) (emphasis added). The statute further provides that the summons shall command the defendant to appear for booking and processing at the appropriate law enforcement agency, and a court date will be set following the booking process. *See* Tenn. Code Ann. § 40-6-215(b), (f).

Although it would defeat the purpose of the criminal summons statute to require a criminal summons to issue and direct a defendant to appear at a later date when the defendant has already been lawfully arrested by a private citizen and brought before a magistrate, the statute does not make an exception for such situations. Thus, the statute appears to require the issuance of a criminal summons instead of a warrant of arrest when a private citizen brings the person before a magistrate and serves as the only affiant.

If, however, the affiant, or one of the affiants in the case of multiple-affiants, is a law enforcement officer, then a warrant of arrest may issue. *See* Tenn. Code Ann. §§ 40-6-205, -215(a). Therefore, if an individual is arrested by a private citizen for a public offense such as shoplifting, and if that individual is delivered to a law enforcement officer who takes the individual before a

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[1]The statute provides an exception to this rule if the magistrate or judge has probable cause to believe that the issuance of a warrant of arrest rather than a criminal summons is necessary to prevent an immediate threat of imminent harm to a victim as defined in Tennessee Code Annotated § 36-3-601, dealing with domestic abuse. *See* Tenn. Code Ann. § 40-6-215(a).

magistrate and becomes the affiant, the magistrate may issue a warrant of arrest instead of a criminal summons.[2]

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[2]However, a law enforcement officer who takes custody of an individual arrested by a private citizen for misdemeanor theft has the discretion to issue a citation to the arrested person to appear in court in lieu of the continued custody and taking of the arrested person before a magistrate. *See* Tenn. Code Ann. § 40-7-118(b)(1), (3).