

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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March 19, 2008

Opinion No. 08-60

Application of the “Under Color of Office” Doctrine Regarding a Revenue Agent’s Collection of Evidence Out of State

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**QUESTION**

Does an agent of the Tennessee Department of Revenue act “under color of office” when the agent, as part of the agent’s official duties, travels outside of Tennessee to collect evidence?

**OPINION**

A Tennessee Revenue agent who, as part of the agent’s official duties, travels outside of Tennessee to collect evidence continues to be a Revenue agent and an agent of the State of Tennessee. However, the agent may not operate “under color of office” in another state because a Tennessee Revenue agent does not exercise any governmental authority outside of Tennessee. The agent’s authority in the other state is simply that of any private citizen, and the agent acts within the law so long as the agent collects evidence as could any private citizen in that jurisdiction, without claiming to possess any law enforcement authority there.

**ANALYSIS**

On January 15, 2008, this Office issued Op. Tenn. Att’y Gen. No. 08-05, which opined that an agent of the Department of Revenue may travel outside of Tennessee to establish probable cause for a subsequent warrantless search of an automobile in Tennessee as long as the agent’s actions are not performed “under color of office.”

The following two paragraphs from Opinion No. 08-05 describe the “under color of office” doctrine and the actions that may be taken by an agent without violating it:

Pursuant to this doctrine, “law enforcement officials” located outside of their jurisdictions may not use “the powers of their office to observe unlawful activity or gain access to evidence not available to a private citizen.” *Phoenix v. State*, 455 So. 2d 1024, 1025 (Fla. 1984) (citing *United States v. Hernandez*, 715 F.2d 548 (11th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984)). As private citizens, officers are limited to “gather[ing] evidence only through the use of their own senses and through the voluntary cooperation of citizens.” *Phoenix v. State*, 428 So. 2d 262, 266 n.2 (Fla. Dist. Ct. App. 1982), *approved and remanded*, 455 So. 2d 1024 (Fla. 1984).

The doctrine's purpose "is to prevent officers from improperly asserting official authority to gather evidence not otherwise obtainable." *Id.* at 266.

Officers can perform covert surveillance outside of their jurisdiction and make observations without violating the doctrine, even when the officers are in uniform or use marked vehicles. *See Phoenix*, 428 So. 2d at 266 (officers perform surveillance on a ranch, including the use of a surveillance aircraft); *Hernandez*, 715 F.2d at 551 (officers on a state marine patrol smell marijuana and see several bales of the drug in plain view on another vessel); *State v. Gustke*, 516 S.E.2d 283, 286 (W. Va. 1999) (officer in uniform and driving a marked police cruiser observes erratic driving); *Wilson v. Commonwealth*, 609 S.E.2d 612, 618 (Va. Ct. App. 2005) (deputy sheriff observes erratic driving and behavior indicating insobriety); *Hudson v. Commonwealth*, 585 S.E.2d 583, 584 (Va. 2003) (officer in uniform driving unmarked police car observes erratic driving). Furthermore, if the officer informs a person that the officer is outside of his or her jurisdiction, the evidence thereafter collected from the person is not collected "under the color of office." *Wilson*, at 618.

Because the "under color of office" doctrine concerns the improper assertion of authority by an officer, the application of the doctrine focuses on the manner in which an officer collects evidence. *See Phoenix*, 428 So.2d at 266-67; *State v. Mingus*, 1981 WL 5602, at 2 (Ohio Ct. App. May 22, 1981); *Hernandez*, 715 F.2d at 551; *Wilson*, 609 S.E.2d at 618. Thus, a court that applies the doctrine will examine whether the officer displayed any indicia of authority or whether the persons from whom evidence was collected knew the officer was outside of his or her jurisdiction. The fact that the officer collects the evidence as part of his or her official duties is not determinative because it does not affect the manner in which the officer performed the work. Furthermore, regardless of whether such evidence collection is part of the officer's duties, the officer must collect the evidence without violating the doctrine. *See Phoenix*, 428 So.2d at 266 n. 2 (Florida appellate court acknowledges that officers often perform investigatory work outside of their jurisdiction as part of their official duties and, when doing so, must not act "under color of office").

The assertion that a Tennessee Revenue agent outside of Tennessee cannot simultaneously act as both an agent and a private citizen is a misinterpretation of the "under color of office" doctrine. The application of the doctrine merely attempts to ensure that an agent does not assert any authority that the agent does not have. When a Tennessee Revenue agent is outside of Tennessee, the agent is still a Tennessee Revenue agent; however, because the agent's law enforcement authority does not extend past Tennessee's borders, the agent's authority in another jurisdiction is similar to that of a private citizen there. Thus, the agent may act, or collect evidence, only in the same manner as a private citizen (*i.e.*, by not performing such collection "under color of office").

In short, a Revenue agent remains a Tennessee Revenue agent in another state, but the agent cannot purport to exercise any authority as a government official there. If the agent nevertheless can obtain evidence by acting as a private citizen in that state, then that evidence will have been properly obtained and may be used to establish probable cause for a subsequent automobile search in Tennessee.

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