

**STATE OF TENNESSEE**

OFFICE OF THE  
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Opinion No. 10-31

Exceptions for Citations Under Tenn. Code Ann. § 40-7-118

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**QUESTIONS**

1. According to Tenn. Code Ann. § 40-7-118, a person shall be issued a citation for a misdemeanor that occurred in an officer's presence unless one of eight exceptions applies. One exception is if "a reasonable likelihood exists that the arrested person will fail to appear in court." Tenn. Code Ann. § 40-7-118(c)(5). Does a "failure to satisfy traffic citation" entry on the arrested person's driver's license history or criminal history in connection with a previously charged offense constitute a reasonable likelihood that he or she will fail to appear in court?

2. Another exception applies if "a reasonable likelihood exists that the offense would continue or resume, or that persons or property would be endangered by the arrested person." Tenn. Code Ann. § 40-7-118(c)(2). Does a prior conviction appearing on the misdemeanor's criminal history for the same offense that is the subject of a current arrest constitute a reasonable likelihood that the current arrest offense would continue or resume?

**OPINIONS**

1. The legality of a custodial arrest rather than issuance of a citation under the circumstances you describe will depend upon whether it was objectively reasonable for the officer effecting the arrest to determine that the exception applied based on the information available to him at the time.

2. No. The use of a prior conviction to conclude that the arrestee is likely to commit the same offense in the future is not objectively reasonable.

**ANALYSIS**

By statute, officers are authorized to arrest without a warrant when they observe an individual committing a public offense or a breach of the peace. Tenn. Code Ann. § 40-7-103(a)(1). With regard to misdemeanors, Tennessee has adopted a "cite and release" statute that requires an officer to cite and release the misdemeanant rather than effect a custodial arrest. 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 the peace officer's presence . . . shall issue a citation to the arrested person to appear in court in lieu of the continued custody and the taking of the arrested person before a magistrate.

Such 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 the person is unable to care for the 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 the person could be a danger to the person's own self or to others; or
- (8) There are one (1) or more outstanding arrest warrants for the person.

Tenn. Code Ann. § 40-7-118(c). Thus, the "cite and release" statute creates a presumptive right to be cited and released for the commission of a misdemeanor. *State v. Walker*, 12 S.W.3d 460, 464 (Tenn. 2000). In order to validate a custodial arrest for a misdemeanor, the prosecution bears the burden of proving the existence of one of the eight exceptions. *Id.* at 465. Furthermore, the statute mandates that, if an officer determines that a citation cannot be issued because of one of the eight exceptions, the officer must note the reason for not issuing a citation on the arrest ticket. Tenn. Code Ann. § 40-7-118(j). Subsection (j) also provides that an officer must make his decision regarding custodial arrest based on the "facts reasonably known or reasonably believed to exist" at the time of the arrest.

In *Walker*, the defendant was issued a citation for violating a city noise ordinance but did not have any identification on his person. The defendant gave the officer his name, date of birth and driver's license number and offered to take the officer to his mother's home two blocks away to get his wallet. Even though the officer verified the information given by the defendant, the defendant was taken into custody because "he could not offer satisfactory evidence of

identification.” Conducting a search incident to the custodial arrest, the officer found marijuana and cocaine. On the issue of what is satisfactory evidence of identification, the Tennessee Supreme Court adopted a test requiring the prosecution to prove that it was objectively reasonable for the officer to reject the evidence of identification given by the defendant, and held that the reasonableness of the officer’s decision must be determined on a case-by-case basis. Applying the standard to the facts of the case, the court concluded that the custodial arrest in lieu of a citation was not justified and, therefore, that the search incident to the arrest was illegal.

It is the opinion of this Office that the “objectively reasonable” test adopted in *Walker* for determining the applicability of the identification exception to the cite and release statute would likewise be used to determine the applicability of any other exception to the statute. Accordingly, when a custodial arrest made in lieu of citation is challenged, the State has the burden to prove that the officer’s decision to arrest was objectively reasonable. The officer must have specific articulable reasons to support invoking the exception to cite and release. The inquiry would necessarily be fact intensive, and resolution will depend on the circumstances and information known to the officer at the time of the arrest.

Turning to the specific questions you raise: in the case of an arrestee with a “failure to satisfy” on his driver’s license history, the analysis would turn on facts such as whether the record entry resulted from a failure to pay a fine imposed by the court at a court appearance or from a fine imposed by default upon the defendant’s non-appearance in court, the length of time since the entry of the notation, and the number or frequency of such entries. A custodial arrest based on a single “failure to satisfy” notation entered several years before the present arrest likely would not provide an objectively reasonable basis for an officer to determine that the misdemeanor will not appear in court if cited. Conversely, a custodial arrest may be justified under this exception if the person has a history of frequently failing to pay fines imposed by the court or failing to appear as directed by previous traffic citations. The outcome of any particular case would turn on its individual facts and circumstances.

Addressing your second question, it is the opinion of this Office that a custodial arrest is not appropriate when the arrestee has a prior conviction for the same misdemeanor offense as the one for which he or she is currently being arrested. The fact that the arrestee has a criminal history does not, without more, support a determination that the offense would continue or resume, or that persons or property would be endangered unless a custodial arrest is made. This exception to cite and release has been applied only in situations such as driving on revoked, suspended, or cancelled license or driving under the influence, where the *same* offense would continue or resume if the person is not taken into custody. *See, e.g., State v. Tywan Faulk*, No. M1999-01124-CCA-R3-CD, 2000 WL 1278375 (Tenn. Crim. App. 2000) (“In this case, because the offense was driving on a revoked license, if [the officer] merely cited the appellant, the appellant would have little choice but to drive away in continuing violation of the law.”) This exception also could be applied to situations where the arrestee is assaulting someone or damaging property and must be removed from the scene to prevent resumption of the criminal conduct. In the example you give of a shoplifter who has a prior conviction for shoplifting, a custodial arrest could not likely be justified merely on the basis of the arresting officer’s prediction of the person’s propensity to steal in the future. Our courts are unlikely to find such a determination to be reasonably objective. The person’s future criminal acts would be new

offenses, not a continuation or resumption of the shoplifting offense for which he is being cited and released.

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