



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

March 16, 1976

ATTORNEY GENERAL OPINION NO. 76- 90

Honorable Ross O. Doyen
President, Kansas Senate
State Capitol Building
Topeka, Kansas 66612

Re: Criminal Procedure -- Arrest -- Private Citizens
Assisting a Law Enforcement Officer

Synopsis: A law enforcement officer investigating a reported breach of the peace taking place nearby has the authority to command the assistance of a private citizen in guarding a prisoner in the officer's custody provided the officer has the intent at the time of the command to make an arrest if the report providing the officer's "probable cause" is confirmed by his immediate investigation.

* * *

Dear Senator Doyen:

You have asked whether a law enforcement officer has the authority to command the assistance of a private citizen in guarding a prisoner while the law enforcement officer investigates a reported breach of the peace taking place nearby.

K.S.A. 22-2407(1) provides, "A law enforcement officer making an arrest may command the assistance of any person who may be in the vicinity." This rule is basically a restatement of the power as it existed at common law. In 1917, the Kansas Supreme Court found that the trial court stated the law fairly when it instructed the jury that the deputy sheriff has the right to call on any citizen to assist him in making a warrantless arrest; and that it is the duty of the citizen to obey the call

Senator Ross O. Doyen
March 16, 1976
Page Two

and to act under the orders and directions of the deputy sheriff; and that while so acting the citizen is clothed with the same duties, responsibilities and protection as the deputy sheriff, Harvey v. City of Bonner Springs, 102 Kan. 9, 20, 169 P. 563.

In Kansas, the common law has been abrogated in that there is currently no specific criminal penalty provided for a citizen's failure to obey the command to assist, otherwise the common law rights, liabilities and protections apply.

The type of assistance that may be rendered is, of course, very diverse and includes more than physically restraining the person to be arrested. The general rule with respect to the scope of assistance permitted is stated in 70 Am.Jur.2d, Sheriffs, Police and Constables §30 at p. 152:

"[A]ny police officer may summon to his assistance any bystander, or any number of bystanders, when he deems it necessary to effect an arrest or to recapture an escaped prisoner, and such summons invests those called upon with full authority to render him all needed assistance."

A citizen who is summoned by a law enforcement officer may do any act to promote the arrest that he could lawfully do if he were himself the sheriff. In order to have the benefit of this protection it is not necessary for the summoned citizen to be and remain in the actual physical presence of the sheriff, 70 Am.Jur.2d, Sheriffs, etc. §30.

It is clear that in the right circumstances a law enforcement officer may command a private citizen to assist him by guarding a prisoner in the custody of the officer. The question in this case then becomes whether a law enforcement officer investigating a reported breach of the peace taking place nearby may command the assistance of a private citizen.

If a police officer has probable cause to believe that a misdemeanor is being committed and that the person committing the breach of the peace may cause injury to himself or others unless immediately arrested, the officer may arrest that person, K.S.A. 22-2401(c)(2)(ii). A law enforcement officer confronted with this situation could certainly possess the intent to make

Senator Ross O. Doyen
March 16, 1976
Page Three

an arrest if his immediate investigation and observations confirmed the report. Intent on the part of the arresting officer is one of the requirements of an "arrest", United States ex rel. Spero v. McKendrick, 266 F.Supp. 718, 724. Whether the law enforcement officer intended to make an arrest at the time he commanded the assistance of the private citizen is a subjective finding which will turn on the facts of each case. However, the reasonableness of the officer's actions must be judged in the context of the facts and surrounding circumstances known to the officer at the time he commanded the private citizen to assist as opposed to knowledge acquired after the fact, especially where there is no allegation that anyone's constitutional rights were violated.

It is my opinion that a law enforcement officer investigating a reported breach of the peace taking place nearby has the authority to command the assistance of a private citizen in guarding a prisoner in the officer's custody provided the officer has the intent at the time of the command to make an arrest if the report providing the officer's "probable cause" is confirmed by his immediate investigation.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:JAW:en