



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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December 2, 1980

ATTORNEY GENERAL OPINION NO. 80- 252

Mr. Craig Kershner
Lane County Attorney
P.O. Box 967
144 South Lane
Dighton, Kansas 67839

Re: Automobiles and Other Vehicles -- Rules of the Road --
Authority of Police Officer to Remove Vehicles from Roadway

Synopsis: A police officer has express authorization stated in the law to impound a vehicle driven by a defendant arrested under certain circumstances. However, even though such officer is responsible for taking appropriate measures to protect the property of an arrested person, the question of whether the officer's failure to impound such vehicle constitutes a breach of duty, creating an exposure to tort liability, must be resolved by a competent trier of fact in light of all relevant facts and circumstances. Cited herein: K.S.A. 8-1570, K.S.A. 1979 Supp. 75-6103.

* * *

Dear Mr. Kershner:

You request our opinion as to whether Lane County is legally responsible for damage done to a vehicle by an unknown vandal while such vehicle was parked on a side street after the driver thereof was arrested by a Lane County deputy sheriff for driving while under the influence of intoxicating liquor.

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The county's exposure in this matter must be considered in light of K.S.A. 1979 Supp. 75-6103 of the Kansas Tort Claims Act:

"Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state. Except as otherwise provided in this act, the code of civil procedure shall be applicable to actions within the scope of this act."

From the facts you have presented, it would appear that a successful tort action against Lane County pursuant to the foregoing statutory authority must be predicated on the failure of the deputy sheriff to impound the vehicle following the driver's arrest. Of course, such failure would constitute tortious conduct only if there exists authority for the deputy to impound the vehicle and there was a duty for the deputy to exercise such authority.

Guidelines for impoundment of vehicles by police were stated by the Kansas Supreme Court in State v. Boster, 217 Kan. 618, (1975). As a general rule, impoundment of a car is lawful if authorized by statute or ordinance, and in the absence of such express authority, it has been held that police may still be considered to have lawful custody of a vehicle when there are "reasonable grounds" for impoundment. State v. Montague, 73 Wash.2d. 402, 438 P.2d 571 (1968), State v. Jones, 2 Wash. App. 627, 472 P.2d 402 (1970), State v. Singleton, 9 Wash. App. 327, 511 P.2d 1396 (1973), State v. Boster, supra. The Court in State v. Boster quoted the Singleton case in which the Washington Court of Appeals gave the following examples of what might be considered reasonable grounds for impoundment:

"Reasonable cause for impoundment may, for example, include the necessity for removing (1) an unattended-to car illegally parked or otherwise illegally obstructing traffic; (2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver; (3) a car that has been stolen or used in the commission of a crime when its retention as evidence is necessary;

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- (4) an abandoned car; (5) a car so mechanically defective as to be a menace to others using the public highway;
- (6) a car impoundable pursuant to ordinance or statute which provides therefor as in the case of forfeiture." 217 Kan. at 624.

Based on the foregoing authorities, it is our opinion that, subsequent to arresting the driver of the vehicle in question for driving under the influence of intoxicating liquor, the deputy sheriff was authorized to impound such vehicle. Not only do the facts you have described clearly demonstrate the existence of "reasonable grounds" within the context of State v. Boster, supra, but there also exists express statutory authority for impoundment of the vehicle under these circumstances. K.S.A. 8-1570(c) provides in pertinent part:

"(c) Any police officer is hereby authorized to remove or cause to be removed to the nearest garage or other place of safety any vehicle found upon a highway when:

"(1) Report has been made that such vehicle has been stolen or taken without the consent of its owner;

"(2) The person or persons in charge of such vehicle are unable to provide for its custody or removal; or

"(3) When the person driving or in control of such vehicle is arrested for an alleged offense for which the officer is required by law to take the person arrested before a judge of the district court without unnecessary delay."

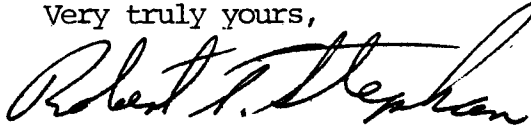
However, even though it is clear that authority exists in the law for the removal and impoundment of the vehicle, the county's exposure to tort liability, in our judgment, depends on whether the deputy was under a duty to exercise such authority. The provisions of K.S.A. 8-1570(c) do not mandate such duty, and our research has not disclosed any case law specifically on point, although we note that, in an aggravated assault case in which the suspect was not a resident of the county in which he was apprehended, the Kansas Court of Appeals held that impoundment of the suspect's car was necessary in that he had to be transported to the county in which the assault occurred, stating: "[W]e recognize the necessity of the State to protect by appropriate measures the property of an arrested person and the possible liability for tort claims. State v. Urban, 3 Kan.App.2d 367 (1979).

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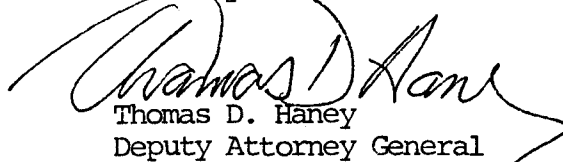
From this we can conclude that the deputy sheriff had a duty to take appropriate measures to protect the vehicle. However, we cannot state as a matter of law that the deputy's failure to impound the arrested person's vehicle constitutes a breach of that duty. That is a question of fact to be determined only by a competent trier of fact, in light of all the pertinent circumstances.

Thus, even though we have detailed what we believe to be the pertinent legal considerations having relevance to your inquiry, it would be inappropriate for this office to opine as to the ultimate liability of the county under the situation which you describe, since it involves questions of fact, such as the negligence or good faith of the deputy. These issues, unless amicably settled, must be resolved by a court or jury.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Thomas D. Haney
Deputy Attorney General

RTS:TDH:may