



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 87- 94

John R. Stanley
Hamilton County Attorney
P.O. Box 870
301 North Main
Syracuse, Kansas 67878

Re: Public Health -- Alcoholism and Intoxication
Treatment -- Emergency Hospitalization; Authority
of Law Enforcement Officer

Probate Code -- Care and Treatment for Mentally Ill
Persons -- Emergency Observation; Authority of Law
Enforcement Officer

Synopsis: In order to act under the emergency hospitalization provisions of K.S.A. 1986 Supp. 59-2908 or K.S.A. 65-4027, the officer need not observe first-hand all elements required for such hospitalization. Rather, the statutory purpose is best served by allowing the officer to act when the totality of circumstances, which necessarily include the officer's observations, indicate the necessity of emergency action. Supplemental information may increase the reasonableness of such emergency action. Cited herein: K.S.A. 1986 Supp. 59-2902, 59-2908, 59-2909; 65-4003; K.S.A. 65-4027.

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Dear Mr. Stanley:

As County Attorney for Hamilton County, you have requested our opinion regarding the authority of a law enforcement officer

to take a person into custody for emergency observation or hospitalization. Specifically, you have inquired whether the phrase "reasonable belief upon observation by the officer" means actual firsthand knowledge that the individual may be harmful to himself or others. The authority to take an individual into custody when the officer has a reasonable belief upon observation of circumstances indicating a likelihood that such individual will be dangerous to himself or others is enumerated in K.S.A. 1986 Supp. 59-2908 and K.S.A. 65-4027.

The Act for Obtaining Treatment for a Mentally Ill Person, K.S.A. 59-2901 et seq., and the Act for Alcoholism and Intoxication Treatment, K.S.A. 65-4001 et seq., are devices by which the state exercises its police power for the protection of others, and by which the state acts in its role of *parens patriae* for the protection of individuals from themselves. The two acts, while serving both functions, apply to separate categories of persons.

Article 29 of Chapter 59 provides the procedure for initiating treatment of mentally ill persons. A mentally ill person is defined as one who suffers from a "severe mental disorder" in need of treatment, is unable to understand the nature and effects of treatment and make an informed decision regarding such treatment, and is "likely to cause harm to himself or others." K.S.A. 1986 Supp. 59-2902(h). A "severe mental disorder" does not include a condition which results from the use of alcohol or drugs. K.S.A. 1986 Supp. 59-2902(o). Pursuant to K.S.A. 1986 Supp. 59-2908, a law enforcement officer may take a person into custody for observation which may ultimately result in the individual's release or in the commencement of civil commitment proceedings.

In comparison, Article 40 of Chapter 65 provides the procedure for initiating treatment of persons who are intoxicated or incapacitated by alcohol. An intoxicated person is "an individual whose mental or physical functioning is substantially impaired as a result of the use of alcohol." K.S.A. 1986 Supp. 65-4003(10). A person who is incapacitated by alcohol is either incapable of making a decision regarding treatment for the condition, or is incapable of making responsible decisions regarding the individual's well-being or estate. K.S.A. 1986 Supp. 65-4003(8). Such an individual, if likely to cause harm to self or others if allowed to remain at liberty, may be taken into custody pursuant to K.S.A. 65-4027.

Whether an officer acts under authority of K.S.A. 1986 Supp. 59-2908 or K.S.A. 65-4027, the initial requirements are the same for all practical purposes. First, the person must be either a mentally ill person or intoxicated or incapacitated by alcohol within the meaning of the respective acts. Second, the person must be likely to cause harm to himself or others. Third, these circumstances must reasonably be believed by the officer to exist, and that belief must arise out of observations made by the officer. We believe that the qualifier "upon observation" does not mean that the officer must actually witness individual acts of violence to self or others as a condition precedent to exercising the authority specified in K.S.A. 1986 Supp. 59-2908 or K.S.A. 65-4027. However, we believe that the officer may not act solely on statements of others.

Individuals have a substantial liberty interest in remaining free from custody, whether the confinement is for penal or for civil commitment purposes. Addington v. Texas, 441 U.S. 418, 425-26, 99 S.Ct. 1804, 60 L.Ed.2d 323, 330-31 (1979). The state may infringe on that liberty interest under its parens patriae power or under its police power. 441 U.S. at 426, 60 L.Ed.2d at 331. This state interest becomes compelling when persons threaten violence to themselves or others, and thus emergency procedures for hospitalization may be used without a prior hearing. Lessard v. Schmidt, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972) (vacated and remanded on other grounds), 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974), reinstated, 379 F. Supp. 1376 (E.D. Wis. 1974) (vacated and remanded on other grounds), 421 U.S. 957, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975), reinstated 413 F. Supp. 1318 (E.D. Wis. 1976).

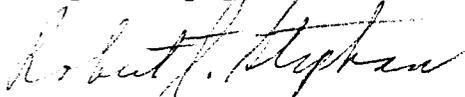
The legislature has determined that the state's authority may be exercised when the officer acts upon a "reasonable belief upon observation" of events justifying such emergency confinement. The language of the statute is a clear directive that the officer must have more than mere probable cause, but need not observe all pertinent events first-hand. While each incident must be determined on a case-by-case basis, other statutes give some guidance. If the only information available to the officer at the scene is the statement of a witness, then the procedures set forth in K.S.A. 1986 Supp. 59-2909(c) (detention upon application of any individual) are preferred. This procedure may be inadequate when the individual exhibits behavior indicating that time is of the essence in order to prevent harm. The purpose of the statutes would not be served if conditions exist which indicate that

the emergency procedure is appropriate to protect the individual and/or the public, but the officer could not act because he did not observe the incident first hand. Such a reading of the statute would do little to diffuse the dangers involved in an emergency situation. We do not believe that the legislature intended to limit law enforcement officers to a requirement that in every case they observe first-hand both mental illness, or intoxication or incapacitation by alcohol, and a likelihood of harm to self or others. Rather, we believe the intent of the legislature was to authorize law enforcement officers to take persons into custody when the officer's observations would lead a reasonable person to believe such necessity exists. Information from witnesses may be useful to strengthen the reasonability of the officer's belief.

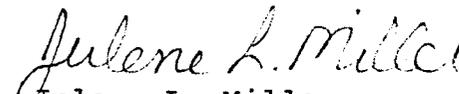
Our opinion effectuates, rather than nullifies the statutory language. If an officer acted only upon information from a witness, the phrase "upon observation" and the procedure in K.S.A. 1986 Supp. 59-2909(c) would be meaningless. Likewise, if an officer acted only upon first-hand information, the phrase "reasonable belief" would be negated, and the danger to the individual, as well as the public, would not be diminished. The language of the statute indicates that neither was the intent of the legislature.

In conclusion, it is our opinion that, in order to act under the emergency hospitalization provisions of K.S.A. 1986 Supp. 59-2908 or K.S.A. 65-4027, the officer need not observe first-hand all necessary elements required for such hospitalization. Rather, the purpose sought to be served by these statutes is best furthered by allowing the officer to act when the totality of circumstances, which necessarily includes observations by the officer, indicate the necessity of emergency action. Supplemental information may be used to support the reasonableness of such action.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Julene L. Miller
Deputy Attorney General