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ATTORNEY GENERAL OPINION NO. 79- 191

Tom Smyth
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Re: Criminal Procedure -- Search and Seizure -- Fourth Amendment Inapplicability as to the Searcher

Synopsis: Employees of a hospital organized under K.S.A. 1978 Supp. 80-2113 et seq. are not subject to search and seizure restrictions imposed by the Fourth Amendment of the Constitution of the United States, when searching patients' effects. However, the search may be unreasonable, creating civil liability for intrusion.

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Dear Mr. Smyth:

You inquire whether employees of a hospital organized pursuant to K.S.A. 1978 Supp. 80-2113 et seq. have authority to search the effects of patients who are admitted in order to determine whether or not they are carrying weapons or illegal drugs.

The Fourth Amendment of the Constitution of the United States made applicable to the states through Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961), and the virtually identical provisions of Section 15 of the Bill of Rights of the Constitution of the State of Kansas protect persons against unreasonable searches and seizures conducted by or at the behest of law enforcement officers. History indicates this protection was afforded as a restraint upon sovereign authority and was not directed at nongovernmental agencies. Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1920).

Burdeau relates at 256 U.S. 475-76:

> "The 4th Amendment gives protection against unlawful searches and seizures, and, as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the 4th Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued. In the present case the record clearly shows that no official of the Federal government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the 4th Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another.
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> "The papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character."

It has been held in other jurisdictions that employees of a county hospital are not agents of the government, but act as private individuals. In Commonwealth v. Gordon, 431 Pa. 512, 246 A.2d 325 (1968), cert.den. 394 U.S. 937, 22 L.Ed.2d 469, 89 S.Ct. 1215 (1969), employees of a county hospital drew blood from an accident victim. In holding the evidence admissible, the court states:

> "It is true that in Schmerber v. State of California, supra, [384 U.S. 757, 1966] the Court held that blood taken from an accused at the direction of the police constituted a search. But this is not the instant case. Herein, the blood was not

> extracted from Gordon at the direction or request of the police. As noted previously, it was extracted by a hospital employee purely for medical reasons and before any police contact occurred with the hospital employees involved. The police were in no way connected with the extraction, and merely received from the hospital a sample of blood already on hand and extracted for proper purposes." (Emphasis in original.) Commonwealth v. Gordon, supra., p. 328.

An earlier decision, decided shortly after Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961), specifically excludes county hospital employees from "government agent" status. Here again, blood was extracted from the defendant and later turned over to police. The court admitted the evidence as a result of a private search.

> "It is our opinion there was no violation of the Fourth Amendment in this case because the seizure of appellant's blood was not made by state officials but was performed by private individuals, to wit, the hospital personnel." Commonwealth v. Tanchyn, 200 Pa. Super. 148, 188 A.2d 824 (1963), cert.den. 375 U.S. 866, 11 L.Ed.2d 92, 84 S.Ct. 138 (1963). (Emphasis supplied.) See also State v. Gordon, 219 Kan. 643, 549 P.2d 886 (1976) citing Tanchyn, supra. with approval.

An additional case is United States v. Winbush, 428 F.2d 357 (6th Cir. 1970), cert.den. 400 U.S. 918, 91 S.Ct. 179, 27 L.Ed.2d 157 (1970), where evidence was discovered by a hospital employee during a search of the patient/plaintiff's pockets. The court specifically holds at p. 359: "[T]he Fourth Amendment is not concerned with lawful private searches not conducted for or stimulated by law enforcement officers." (Emphasis supplied.) There was no indication that law enforcement officers instigated, had knowledge of or participated in the search of the patients' personal effects.

It is thus our opinion that county hospital employees are not transformed into government officials or agents of the government simply by virtue of their employment in a county hospital. However, it is additionally our opinion hospital employees who act as agents of or on behalf of law enforcement officers are subject to Fourth Amendment restrictions. See for example State v. Becich, 13 Or.App. 415, 509 P.2d 1232 (1973); Williams v. State, 501 P.2d 841 (1972); United States v. Small, 297 F.Supp. 582 (D.Mass. 1969); State v. Boswell, 219 Kan. 788, 549 P.2d 919 (1976).

An issue which you have not specifically raised, but one which deserves our comment is the possible civil liability of hospital employees conducting

such searches. Even if hospital employees are not subject to Fourth Amendment prohibitions, they may be civilly liable for their actions. Kansas has adopted the Restatement of the Law Second, Torts formulation outlining invasion of privacy actions. Froelich v. Adair, 213 Kan. 357, 358, 516 P.2d 993 (1973). The intrusion must be substantial and conducted in a manner highly offensive to a reasonable man. Froelich v. Werbin, 219 Kan. 461, 548 P.2d 482 (1976).

Although a patient's suitcase may be an item which the patient reasonably expects to be private, it is our opinion that a search limited to the detection of weapons or contraband is not unreasonable. The hospital is better able to monitor a patient's symptoms and treatment if the hospital is able to control the patients' intake of drugs. In addition the hospital may be liable for negligence if it fails to prevent suicidal patients from harming themselves with weapons. See Pietrucha v. Grant Hospital, 447 F.2d 1029 (7th Cir. 1971).

Thus, in our opinion a search of the patient's effects restricted to detecting weapons or drugs would not be unreasonable or offensive if conducted by a private person. The appropriateness of a search which extends further would be determined on the specific facts and circumstances of the search. The propriety thereof would only be a source of speculation by this office upon which we cannot comment.

Very truly yours,

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Thomas D. Haney
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RTS:TDH:may