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ATTORNEY GENERAL OPINION NO. 82- 67

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Re: Probate Code -- Care and Treatment for Mentally Ill Persons -- Authority of Peace Officers Regarding Transportation of Mentally Ill Persons

Synopsis: If the physician on duty at a treatment facility believes a person who is detained pursuant to K.S.A. 1981 Supp. 59-2908(b) to be a mentally ill person, but the treatment facility will not admit such person, the peace officer who has taken the person into custody is responsible for transporting the suspected mentally ill person to a "suitable place" of detention, even if the only suitable place available is outside the officer's normal territorial jurisdiction. Cited herein: K.S.A. 22-2401a, 59-2902, K.S.A. 1981 Supp. 59-2908.

* * *

Gentlemen:

In separate requests presented to this office you have requested our opinion as to who is responsible for transporting a mentally ill person to a suitable place for detention when there is no such facility willing to admit the mentally ill person within the territorial jurisdiction of the officer who has taken the person into custody.

K.S.A. 1981 Supp. 59-2908 provides:

> "(a) Any peace officer who has reasonable belief upon observation, that any person is a mentally ill person and is likely to do physical injury to himself or herself or others if allowed to remain at liberty may take such person into custody without a warrant. Said officer shall transport such person to any treatment facility where such person shall be examined by a physician on duty at such facility. If no physician is on duty at the time such person is transported to the facility, such examination shall be made within a reasonable time not to exceed seventeen (17) hours. If a written statement is made by such physician at the treatment facility that after preliminary examination such physician believes such person to be a mentally ill person and because of such person's illness is likely to do physical injury to himself or herself or others if allowed to remain at liberty, and if such treatment facility is willing to admit such person the peace officer shall present to such treatment facility the application provided for in subsection (b) of K.S.A. 1978 Supp. 59-2909. If the physician on duty at the treatment facility does not believe such person to be a mentally ill person, the peace officer shall release such person.
>
> "(b) If the physician on duty at the treatment facility states that said physician believes such person to be a mentally ill person but the treatment facility is unwilling to admit such person, or if there is no treatment facility available to receive such person within the territorial limits of the peace officer's jurisdiction, the peace officer may detain such person in any other suitable place until the close of the first day such court is open for the transaction of business, unless

> the court orders that such person remain in custody pursuant to the provisions of K.S.A. 1978 Supp. 59-2912. If a peace officer detains a person pursuant to this subsection, the peace officer shall file the application provided for in subsection (a) of K.S.A. 1978 Supp. 59-2912 as soon as the court is open for the transaction of business." (Emphasis added.)

We note the term "peace officer" is defined by K.S.A. 59-2902(14) as follows:

> "The term 'peace officer' shall mean any sheriff, regularly employed deputy sheriff, state highway patrolman, a regularly employed city police officer or a law enforcement officer of any county law enforcement department."

The allocation of responsibility between the city police and the sheriff's department is basically a matter of statutory construction. The key provision for our purposes is the first sentence in K.S.A. 1981 Supp. 59-2908(b). If the physician on duty agrees that the person is mentally ill, but the facility is unwilling to admit such person, "the peace officer may detain such person in any other suitable place" until the court deals with such person.

It is well settled that phrases or sentences within a statute must be construed in pari materia with other portions of the statute. Easom v. Farmers Insurance Co., Inc., 221 Kan. 415, 560 P.2d 117 (1977). The phrase " the peace officer" must therefore be construed to mean the same officer referred to earlier in the statute, i.e., the same officer who observes the person, decides to take the person into custody and thereafter transports the person to a treatment facility.

We conclude that the plain language of the statute requires the officer who has taken the person into custody to transport the person to a "suitable place" if the treatment facility will not admit such person. If a regular jail cell is not deemed to be a suitable place for detention of the individual, the officer is responsible for finding some other suitable place of detention. If there is no such place within the territorial jurisdiction, the officer is responsible for taking the person to a suitable place elsewhere -- in your particular situation, to the Osawatomie State Hospital.

While it is certainly true that law enforcement officers are empowered to exercise their powers as law enforcement officers only within their particular territorial jurisdiction, we note that there are statutory exceptions to this limitation. K.S.A. 22-2401a permits law enforcement officers to exercise their powers as law enforcement officers outside their territorial jurisdiction when in fresh pursuit or when a request for assistance is made by law enforcement officers from another jurisdiction. In our opinion, the language of K.S.A. 1981 Supp. 59-2908 creates an implied authority and expands the territorial jurisdiction which is otherwise limited by K.S.A. 22-2401a. By authorizing an officer to detain a mentally ill person "in any other suitable place" when there is no treatment facility within the officer's territorial limits which is willing to admit the person, the legislature necessarily implies the authority for such officers to transport mentally ill persons beyond the normal jurisdictional boundaries in such cases.

The general rule set forth at 67 C.J.S. Officers, §197, p. 649, provides that:

> "Generally, the duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes."

In accord with this general principle is the following statement of the Kansas Supreme Court in The State, ex rel., v. Younkin, 108 Kan. 634 (1921):

> "While the powers of a public officer or board are those and those only which the law confers, yet when the law does confer a power or prescribe a duty to be performed or exercised by a public officer, the powers granted and duties prescribed carry with them by necessary implication such incidents of authority as are necessary for the effectual exercise of the powers conferred and duties imposed. In Throop on Public Officers, §542, the correct rule is stated:

> "'The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.' (See, also, Comm'rs of Brown Co. v. Barnett, 14 Kan. 627.)" Id. at 638.

Other cases have also considered the concept of implied powers in situations where, without them, the governmental agency would have no way to carry out its express statutory powers. See, e.g., Edwards County Commissioners v. Simmons, 159 Kan. 41 (1944); Womer v. Aldridge, 155 Kan. 446 (1942); The State, ex rel., v. Wooster, 111 Kan. 830 (1922); Young v. Regents of State University, 87 Kan. 239 (1912); and Brown County v. Barnett, 14 Kan. 627 (1875).

Clearly, in this instance, absent the authority to transport a suspected mentally ill person to a suitable place of detention located outside of an officer's territorial jurisdiction, where no such suitable place is situated within said territorial jurisdiction, the officer would be unable to effectively carry out his or her statutory duties. Therefore, based upon the foregoing principles of law and a consideration of the applicable statutes in pari materia, we conclude that an officer acting pursuant to K.S.A. 1981 Supp. 59-2908(b) may transport mentally ill persons to a suitable place which is outside the territorial limits of such officer's jurisdiction as established by K.S.A. 22-2401a.

Very truly yours,

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RTS:JEF:may