



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 84- 89

Gary D. Denning  
Assistant City Attorney  
219 North Santa Fe  
P.O. Box 1245  
Salina, Kansas 67401

Re: Crimes and Punishments--Identification and Detection  
of Crimes and Criminals--Officers to Take Finger-  
prints of Suspected Violators

Synopsis: Where a law enforcement officer detains a person  
without a warrant for misdemeanor theft, and the  
officer does not arrest the person but instead  
serves upon him a notice to appear in court, the  
officer must, pursuant to K.S.A. 22-2408, release  
the person upon receiving a written promise to  
appear in court. Under such circumstances, the  
officer may not detain the person to take finger-  
prints and photographs. Cited herein: K.S.A.  
21-2501 (as amended by L. 1984, ch. 115, §4),  
22-2202 (as amended by L. 1984, ch. 112, §6),  
22-2408, 77-109.

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Dear Mr. Denning:

You request our opinion as to whether a law enforcement officer  
may detain a person accused of "shoplifting" (misdemeanor theft)  
for the purpose of obtaining fingerprints and photos, under  
circumstances where the accused person is not arrested, but  
instead is given a notice to appear in court pursuant to the  
provisions of K.S.A. 22-2408.

K.S.A. 22-2408 provides, in part, as follows:

"(1) Except as otherwise provided in subsection (6) of this section, whenever a law enforcement officer detains any person without a warrant, for any act punishable as a misdemeanor, and such person is not immediately taken before a magistrate for further proceedings, the officer may serve upon such person a written notice to appear in court. Such notice to appear shall contain the name and address of the person detained, the crime charged, and the time and place when and where such person shall appear in court.

. . . .

"(4) The person detained, in order to secure release as provided in this section, must give his or her written promise to appear in the court by signing the written notice prepared by the officer. The original of the notice shall be retained by the officer; a copy delivered to the person detained, and the officer shall forthwith release the person."

"(5) Such law enforcement officer shall cause to be filed, without unnecessary delay, a complaint in the court in which a person released under subsection (4) is given notice to appear, charging the crime stated in said notice. If the person released fails to appear as required in the notice to appear, a warrant shall be issued for his or her arrest." (Emphasis added.)

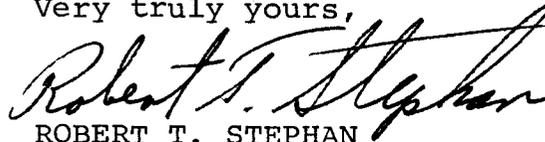
K.S.A. 21-2501, as amended by L. 1984, ch. 115, §4, imposes a duty upon law enforcement officers to take fingerprints of arrested persons under certain circumstances, including where the person "may be in possession at the time of arrest of any goods or property reasonably believed to have been stolen by the person." In our judgment, there is no statutory duty to take fingerprints where the accused person is given a notice to appear, since the giving of such a notice is not an "arrest." See K.S.A. 22-2202, as amended by L. 1984, ch. 112, §6.

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Although there is no statutory duty to take fingerprints of a person who is given a notice to appear, it is necessary to consider whether there is a common law right to take fingerprints and photos of such a person for purposes of identification. This office has previously concluded that K.S.A. 21-2501 imposes a duty to take fingerprints, but does not limit the common law authority of police officers to take fingerprints and photos as a means of identifying an accused. See V Opinions of the Attorney General 233 (1966).

Assuming arguendo there is a common law right of detention to take fingerprints and photos of an accused who is charged with a misdemeanor but not arrested [which assumption appears to be correct--see United States v. Laub Baking Co., 283 F.Supp. 217 E.D. Ohio (1968)], such common law right has been modified by the language of K.S.A. 22-2408(4) which prescribes that an officer "shall forthwith release" the accused person upon receiving his or her written promise to appear in court. This statutory provision, which is in derogation of the common law, must be liberally construed to promote its object. See K.S.A. 77-109. Accordingly, in our opinion, where a law enforcement officer detains a person without a warrant for misdemeanor theft, and the officer does not arrest the person but instead serves upon him a notice to appear in court, the officer must, pursuant to K.S.A. 22-2408, release the person upon receiving a written promise to appear in court. Under such circumstances, the officer may not detain the person to take fingerprints and photographs.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General

RTS:JSS:TRH:jm