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ATTORNEY GENERAL OPINION NO. 92- 34

Paul J. Morrison
District Attorney
Johnson County Courthouse
P.O. Box 728, 6th Floor Tower
Olathe, Kansas 66061

Re: Criminal Procedure -- Preliminary Proceedings --
Domestic Violence Calls; Written Policies Adopted
by Law Enforcement Agencies; Contents; Liability

Procedure, Civil -- Protection from Abuse Act --
Commencement of Proceedings; Personal Service

Synopsis: A law enforcement officer acting within the scope of employment who arrests the "primary aggressor" pursuant to a written agency policy regarding domestic violence calls adopted pursuant to K.S.A. 1991 Supp. 22-2307 is not liable for damages resulting from the enforcement of such policy. In addition, the administrative judge may appoint law enforcement officers as process servers for purposes of serving protection from abuse documents. The plaintiff in a protection from abuse case may be considered an agent of the clerk for purposes of delivering appropriate documents to an appointed process server. Cited herein: K.S.A. 21-3721; K.S.A. 1991 Supp. 22-2307; 22-2308; 60-303; 60-3101; 60-3104; 60-3105; 60-3106; 60-3107.

* * *

Dear Mr. Morrison:

You ask our opinion regarding potential for police officer liability in carrying out policies established for handling domestic violence calls. In addition you ask our opinion regarding the requirement of personal service of emergency protection from abuse orders.

Concerning the first issue, you inform us that pursuant to K.S.A. 1991 Supp. 22-2307 your jurisdiction has adopted a written policy regarding domestic violence calls. Your policy advocates the arrest of the "primary aggressor" in a domestic violence situation. You inform us that in many domestic violence situations both parties may have technically committed a battery. In light of these situations you ask whether an officer who follows the written policy by arresting the "primary aggressor" may be exposed to civil liability for selecting the party to be arrested.

K.S.A. 1991 Supp. 22-2307 requires all law enforcement agencies in Kansas to adopt written policies regarding domestic violence calls. The policy is to include statements of various persons' responsibilities and procedures, including:

"[A] statement describing the responding officers' responsibilities and procedures to follow when responding to a domestic violence call and the suspect is at the scene;" K.S.A. 1991 Supp. 22-2307(b)(4).

We assume the policy of arresting the "primary aggressor" was adopted pursuant to the foregoing subsection. We also assume that in the scenario you present that the "primary aggressor" is identifiable.

It appears that in enacting K.S.A. 1991 Supp. 22-2307, the Kansas legislature considered the issue you raise and simultaneously enacted K.S.A. 1991 Supp. 22-2308:

"No law enforcement agency or employee of such agency acting within the scope of employment shall be liable for damages resulting from the adoption or enforcement of any policy adopted under this act unless a duty of care, independent of such policy, is owed to the

specific individual injured." (Emphasis added).

In the situation you present the officer would be acting within the scope of employment and would be enforcing a written domestic violence call policy adopted under this act. Absent a duty of care owed to the "primary aggressor" independent of the domestic violence call policy and given the protection provided by K.S.A. 1991 Supp. 22-2308, it is our opinion that a police officer would not be found liable for failing to also arresting the "secondary aggressor."

In addition, the Kansas tort claims act provides:

"A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

. . . .

"(c) enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, regulation, ordinance or resolution;" K.S.A. 75-6104(c).

This subsection provides immunity from civil liability to police officers who may fail to enforce the battery statute against the "secondary aggressor" in the situation you describe.

Your next question involves the interplay of the criminal trespass statute, K.S.A. 21-3721, with the protection from abuse act, K.S.A. 1991 Supp. 60-3101 et seq.

Pursuant to K.S.A. 1991 Supp. 60-3105, upon the filing of a verified petition, an emergency protection from abuse order may be issued ex parte,

"[g]ranteeing possession of the residence or household to a party to the exclusion of the other party, and further restraining the party not granted possession from entering or remaining upon or in such residence or household, subject to the limitation of subsection (c). Such order shall contain a statement that if such

order is violated, such violation shall constitute criminal trespass as provided in subsection (c) of K.S.A. 21-3721, and amendments thereto." K.S.A. 1991 Supp. 60-3107(a)(2).

Such an emergency order expires when the court is available or within 72 hours, whichever occurs first. At that time, the plaintiff may seek a temporary protection from abuse order from the court. K.S.A. 1991 Supp. 60-3105(b). A temporary order may be entered pending a hearing on the plaintiff's allegation of abuse. K.S.A. 1991 Supp. 60-3106.

As you point out, before such an emergency order becomes valid and enforceable it must be personally served on the defendant-abuser. K.S.A. 1991 Supp. 60-3104(c). In addition the abuser may not be arrested for criminal trespass until personally served with the order. K.S.A. 21-3721(c).

You inform us that you regularly encounter situations where an abuser enters or remains in the residence when an emergency order has been issued but not yet personally served. If the police are called they are unable to arrest the abuser for criminal trespass. You ask whether the following would provide a method to resolve this situation: The administrative judge appoints all law enforcement officers within the county as process servers for purposes of the protection from abuse act. The clerk provides the plaintiff-victim with a certified copy of the protection from abuse emergency order. When the police arrive the plaintiff-victim gives the order to the officer who then personally serves it on the defendant-abuser who may then be arrested for criminal trespass if such person continues to remain on the premises.

The legal procedure for personal service is set forth in K.S.A. 1991 Supp. 60-303(c):

"(1) When the plaintiff files a written request with the clerk for service other than by certified mail, service of process shall be made by personal or residence service. Personal service shall be made by delivering or offering to deliver a copy of the process and accompanying documents to the person to be served. . . .

"(2) When process is to be served under this subsection, the clerk of the court shall deliver the process and sufficient copies of the process and petition, or other document to be served, to the sheriff of the county where the process is to be served or, if requested, to a person appointed to serve process or to the plaintiff's attorney.

"(3) Service of all process under this subsection shall be made by a sheriff within the sheriff's county, by the sheriff's deputy, by an attorney admitted to the practice of law before the supreme court of Kansas or by some person appointed as a process server by a judge or clerk of the district court, except that a subpoena may also be served by any other person who is not a party and is not less than 18 years of age. Process servers shall be appointed freely and may be authorized either to serve process in a single case or in cases generally during a fixed period of time. . . ." (Emphasis added).

Pursuant to subsection (c)(3), the administrative judge may appoint law enforcement officers as process servers for a fixed period of time. In addition the statute does not prevent the judge from limiting the authority of such process servers to service of protection from abuse documents if that is desired.

While K.S.A. 1991 Supp. 60-303(c)(2) requires the clerk to deliver the process and documents to be served to a person appointed to serve process, the method of such delivery is not specified. We see no reason why the plaintiff-victim could not be considered an agent of the clerk for purposes of delivering the appropriate documents to an appointed process server, in this case a law enforcement officer called to the scene. The officer could then arrest the defendant-abuser for criminal trespass if such person refuses to leave the residence or household.

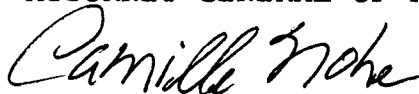
In conclusion, a law enforcement officer acting within the scope of employment who arrests the "primary" aggressor pursuant to a written agency policy regarding domestic

violence calls adopted pursuant to K.S.A. 1991 Supp. 22-2307 is not liable for damages resulting from the enforcement of such policy. In addition, the administrative judge may appoint law enforcement officers as process servers for purposes of serving protection from abuse documents. The plaintiff in a protection from abuse case may be considered an agent of the clerk for purposes of delivering appropriate documents to an appointed process server.

Very truly yours,



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