

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
SECOND FLOOR CORDELL HULL BUILDING
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0488

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Opinion No. 01-020

Review of Bounty Hunter Powers

QUESTIONS

1. Can a bounty hunter carry weapons in Tennessee without a permit from this state or another state?
2. Can a bounty hunter legally break and enter into a residence to make an arrest if it is the suspect's residence?
3. Can a bounty hunter legally break and enter into a residence to make an arrest if it is not the suspect's residence?
4. Does Tenn. Code Ann. §40-11-133 apply to bounty hunters arresting a suspect wanted by another state or do bounty hunters arresting a person wanted in another state have to comply with Tenn. Code Ann. §40-9-104 and other applicable extradition statutes?

OPINIONS

1. No. Only law enforcement officers covered under Tenn. Code Ann. §39-17-1315 are exempt from the requirements of Tenn. Code Ann. §39-17-1351, requiring a permit to carry a handgun. A bounty hunter from another state must possess a permit or license in compliance with the requirements of Tenn. Code Ann. §39-17-1351(r)(1).
2. Yes. Tenn. Code Ann. §40-11-133 allows a bounty hunter to arrest a bail jumper "at any place in this state," necessarily including the bail jumper's residence. Tennessee courts would likely conclude that a bounty hunter may, if necessary, use reasonable force to enter the bail jumper's residence.
3. No. Although Tenn. Code Ann. §40-11-133 allows a bounty hunter to arrest a bail jumper "at any place in this state," Tennessee courts would likely conclude that a bounty hunter cannot violate applicable criminal statutes with respect to a third party while doing so.

4. Tenn. Code Ann. §40-11-133 applies to bounty hunters arresting a suspect wanted by another state; Tenn. Code Ann. §40-9-104 and other extradition statutes may be applicable to bounty hunters.

ANALYSIS

1. You have inquired whether a bounty hunter can carry a weapon without a permit from this state or another state. For the purposes of this analysis, it will be assumed that you are referring to handguns. Any citizen of Tennessee wishing to carry a handgun in Tennessee is subject to the requirements of Tenn. Code Ann. §39-17-1351. Only law enforcement officers, as set forth in Tenn. Code Ann. §39-17-1315, are authorized to carry handguns without a permit. Bounty hunters, as defined in Tenn. Code Ann. §40-11-318, are not law enforcement officers. Therefore, bounty hunters, as well as other individuals, must comply with the mandates of Tenn. Code Ann. §39-17-1351 to carry a handgun in Tennessee. Bounty hunters and other individuals who fail to do so are subject to prosecution under the statutes proscribing the possession of weapons.¹

With regard to bounty hunters from other states, Tenn. Code Ann. §39-17-1351(r)(1) provides that a handgun permit or license from another state shall be valid in this state if it meets the requirements of Tenn. Code Ann. §§39-17-1351(r)(1)(A) and (B). Therefore, a bounty hunter from another state with such a permit or license may carry a handgun in Tennessee. A bounty hunter from another state carrying a handgun without such a permit, or with no permit at all, is also subject to prosecution under the statutes proscribing the possession of weapons.

2. At common law, bounty hunters were authorized to break and enter into a bail jumper's residence to effectuate the arrest of the suspect. *Poteete v. Olive*, 527 S.W.2d 84 (Tenn. 1975), citing *Taylor v. Taintor*, 16 Wall (83 U.S.) 366, 21 L.Ed. 287 (1873). In *Taylor* the United States Supreme Court stated:

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once, they

¹Tenn. Code Ann. §§39-17-1301 through 1322 proscribe the possession of weapons. For example, Tenn. Code Ann. §39-17-1302 prohibits the possession of certain weapons such as machine guns and short barrel rifles and shotguns unless one of the enumerated defenses to prosecution is applicable. Tenn. Code Ann. §39-17-1307 prohibits the possession of a firearm, including a handgun, shotgun or rifle, with the intent to go armed unless one of the enumerated defenses to prosecution is applicable under Tenn. Code Ann. §39-17-1308.

may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest, by the sheriff, of an escaping prisoner. The bail have their prisoner on a string, and may pull the string whenever they please, and render him in their discharge. . . .

Id. at 290. (Citations omitted.)

However, in *Poteete*, the Tennessee Supreme Court held that in Tennessee “the bail’s power of arrest is prescribed exclusively by statute.” *Id.* at 88. Tenn. Code Ann. §40-11-133 governs the arrest of a defendant by a bail bondsman or his authorized agent and provides that “(a) . . . the bail bondsman or surety may arrest the defendant on a certified copy of the undertaking, *at any place in this state*. . . .” (emphasis added). Because this statute exclusively governs the bail’s power of arrest, a bounty hunter, as defined in Tenn. Code Ann. §40-11-318, may arrest a bail jumper at any place in the State of Tennessee. This necessarily includes any residence. Tenn. Code Ann. §40-11-133 requires that the arrest be made on a “certified copy of the undertaking,” with a proper endorsement by the bail bondsman authorizing the agent, if any, to make the arrest. The Tennessee Supreme Court, in *Poteete v. Olive*, *supra*, indicated that the bondsman’s agent must present a copy of the *capias* to the principal, or bail jumper.

No Tennessee case has addressed the question of whether this statutory authority to arrest the bail jumper “at any place in this state” still authorizes bail bondsmen and their agents to break and enter into the bail jumper’s residence. Tennessee has enacted criminal statutes prohibiting a person from entering the home of another without the owner’s consent and from entering or remaining on the property of another without the owner’s consent.² Any action on the part of a bounty hunter which meets the elements of any of these offenses would appear to subject the bounty hunter to criminal prosecution. However, other jurisdictions which have enacted statutes authorizing bail bondsmen to arrest bail jumpers have held that they are authorized to break and enter into the residence of a bail jumper. *See Mishler v. State*, 660 N.E.2d 343 (In. App. 1996)(bail agents occupy special position under law which includes right and obligation to break and enter house of principal in order to take him back into custody);³ *State v. Kole*, 2000 WL 840503 (Ohio App. 9 Dist., June 28, 2000)(bail bondsmen have broad authority to use

²Tenn. Code Ann. §§39-14-403 through 39-14-406, setting forth the offenses of aggravated burglary, especially aggravated burglary, criminal trespass and aggravated criminal trespass, proscribe the entering of a habitation without the consent of the owner and entering or remaining on property without the consent of the owner.

³Ind. Code §27-10-2-7 provides that “the surety may apprehend the defendant before or after the forfeiture of the undertaking or may empower any law enforcement officer to make apprehension by providing written authority endorsed on a certified copy of the undertaking and paying the lawful fees therefor.”

reasonable and necessary force against fugitives, including, where reasonable, a forced entry into the home of a fugitive)(copy attached);⁴ *State v. Mathis*, 509 S.E.2d 155 (N. C. 1998)(surety may use reasonable force to apprehend the principal and may even forcibly enter the principal’s residence).⁵ In *State v. Tapia*, 468 N.W.2d 342, 344 (Minn. App. 1991), a Minnesota appeals court recognized that a bail bondsman’s authority to arrest the principal “derives from three overlapping sources: (1) the common law principles enunciated by the Supreme Court in *Taylor v. Taintor*, 83 U.S. (16 Wall) 366, 21 L.Ed. 287 (1872); (2) statutory authorization;⁶ and (3) the contract between the surety and the principal.” *Id.* at 343. With regard to the contractual relationship between the surety and the principal, the court noted that “[t]he surety-principal contract generally authorizes the bail bondsman, or his agent, to exercise jurisdiction and control over the principal during the period for which the bond is executed.” *Id.* at 344. Based on these sources, the court recognized the authority of a bail bondsman to break and enter into a principal’s house to make an arrest. *Id.* at 344. Although in Tennessee the bail’s power of arrest is governed exclusively by statute, this contractual relationship between the surety and the principal would support a finding that a bail bondsman or his agents may forcibly enter the residence of a fugitive in order to effectuate an arrest.

Based on the foregoing authorities, it is likely that Tennessee courts would find that a properly authorized bail bondsman or his agents may, if necessary, use reasonable force to effectuate the arrest of a fugitive, including a forced entry into the home of the fugitive. Accordingly, it is the Opinion of this Office that a bounty hunter who is properly authorized and who possesses the proper paperwork required by Tenn. Code Ann. §40-11-133 may enter a bail jumper’s residence, with reasonable force if necessary, to effectuate his or her arrest.

3. Again, in Tennessee the bail’s power of arrest is prescribed exclusively by Tenn. Code Ann. §40-11-133. Because a bounty hunter may arrest a bail jumper “at any place in this state,” which necessarily includes any residence, a properly authorized bounty hunter may enter into a third party’s residence to effectuate the arrest of a bail jumper with the consent of the third party. However, you have asked whether a bounty hunter may legally break and enter into the residence of a third party. As previously noted, Tennessee has enacted criminal statutes prohibiting a person from entering the home of another without the owner’s consent and from entering or remaining on the property of another without the

⁴Ohio R.C. §2713.22 provides that “[f]or the purpose of surrendering the defendant, the bail may arrest him *at any time or place* before he is finally charged. . . .” (Emphasis added).

⁵N.C.G.S.A. §1-435 provides that “the bail, *at any time or place*, before they are finally charged, may themselves arrest him, or by a written authority endorsed on a certified copy of the undertaking may empower any person over 21 years of age to do so.” (Emphasis added).

⁶Minn. Stat. §629.63 provides that “[i]f a surety believes that a defendant for whom the surety is acting as a bonding agent is (1) about to flee, (2) will not appear as required by the defendant’s recognizance, or (3) will otherwise not perform the conditions of the recognize, the surety may arrest or have another person or the sheriff arrest the defendant.”

owner's consent. Most jurisdictions which have addressed the question of whether a bounty hunter may break and enter into the residences of third party's have relied on common law authority in holding that such a bounty hunter is subject to prosecution.⁷

Ohio and North Carolina are two previously mentioned jurisdictions with statutes substantially similar to Tenn. Code Ann. §40-11-133. They have also held that a bondsman or his agents may not enter the residence of a third party without the party's consent. In *State v. Kole*, 2000 WL 840503 (Ohio App. 9 Dist., June 28, 2000)(copy attached), an Ohio appeals court held that the authority of a bail bondsman to apprehend a fugitive does not extend to infringe upon third parties who are not parties to the bail contract. The court announced the policy reasons for such a holding when it stated the following:

In reaching this conclusion, this Court is mindful of the important function that bail bondsmen perform in returning fugitives before the law. It is beyond peradventure that the profession of the bail bondsman can be dangerous. Yet reposing unfettered power in bail bondsmen over third persons presents a danger to the community, devolving its peace into a Wild West like spate of forced entries, drawn guns, and third party abductions. This Court will not sanction lawlessness visited upon third parties in the name of a bail contract. To hold otherwise would render the rights of third parties a nullity upon a bail contract to which they were never a party. The image of the freewheeling bounty hunter bursting into the homes of third parties in pursuit of their bounty, heedless of the law or the constitution, may be the romantic archetype, but it is an image unsupported by controlling authority in Ohio. In short, some lines must be drawn upon the broad authority of the bail bondsman.

⁷See *Mishler v. State*, 660 N.E.2d 343, 345 (Ind. App. 1996)(neither statute empowering surety to apprehend defendant nor citizen's arrest statute authorize bail bondsman to forcibly enter private dwelling of third party to arrest principal); *State v. Portnoy*, 718 P.2d 805, 811 (Wash. App. 1986)(bondsman may not sweep from his path all third parties who he thinks are blocking his search for his client, without liability to the criminal law); *State v. Woods*, 984 S.W.2d 201 (Mo. App. 1999)(evidence was sufficient to establish that defendant bondsman knowingly unlawfully entered residence that was not bond jumper's to support trespass conviction); *State v. McFarland*, 598 N.W.2d 318 (Ia. App. 1999)(defendant, a purported bondsman, was not entitled to break into a trailer home and use force against innocent third parties to perfect arrest of felon, where occupants were not interfering with felon's arrest and did not know felon); *But See Livingston v. Browder*, 285 So.2d 923, 927 (Ala. Civ. App. 1973)(allowing a bondsman to enter a third party's premises without consent to recapture his principal when the bondsman sees his principal in the dwelling; when he properly identifies himself; and when he acts in a reasonable manner to enter the dwelling to effectuate the arrest.)

Id. at 9.

In *State v. Mathis*, 509 S.E.2d 155 (N. C. 1998), the North Carolina Supreme Court held that the surety's authority to exercise certain powers as to the principal does not extend to cases where the surety is seeking the principal in the home of a third party where the principal does not reside. Rather, in those cases the surety must first have the consent of the homeowner to enter the premises and conduct a search. *Id.* at 513.

Other jurisdictions have also addressed the issue. The United States Court of Appeals for the Sixth Circuit, in analyzing the holding of *Taylor v. Taintor*, 16 Wall (83 U.S.) 366, 21 L.Ed. 287 (1873), held that a licensed bail bond underwriter from Florida did not have a constitutional right to enter the home of a third party in Ohio and arrest an alleged bail jumper without a warrant and without providing for the safety and care of two small children left in the home. In so holding the court found that “[t]he bondsman may be authorized under the law of the state where a bond is made to retrieve bail jumpers, but he must abide by the law of the state he enters to pursue his fugitive. Federal constitutional law does not preempt state law or immunize bondsmen from violations of local law. Plaintiff’s argument that ‘the bondsman is basically permitted to break the [local] law to rearrest his fugitive’ is simply wrong.” *Lund v. Seneca County Sheriff’s Department*, 230 F.3d 196, 198 (6th Cir. 2000). A New Mexico court of appeals reached a similar conclusion when it held that “a bondsman, while empowered by statute with the authority to arrest his principal under Section 31-4-14, is not immunized from liability for violations of this state’s criminal laws perpetrated against third parties or the property of others while carrying out such arrest.” *State v. Lopez*, 734 P.2d 778 (N.M. App. 1987). A Maryland court of appeals set forth the difference between the rights of a bail jumper and those of a third party in *Herd v. Maryland*, 724 A.2d 693, 714 (Md. App. 1999), when it stated:

[T]he decided trend is that the bondsman lacks the broad authority over a third person that he possesses with respect to the fugitive who has violated the conditions of bail. The pivotal difference is that the defendant who agreed to the terms of the bail bond has contracted away rights that he would otherwise possess vis-a-vis the bondsman, whereas a third person has not contracted away any rights.

Id. at 724.

A Minnesota court of appeals also applied a similar rationale in *State v. Tapia, supra*, when it held that while a surety may break and enter into a principal’s house to make an arrest, neither common law as enunciated in *Taylor v. Taintor, supra*, Minnesota statutory authority nor the contractual authority of a bondsman provide justification to infringe on third party rights:

The surety-principal contract generally authorizes the bail bondsman, or his agent, to exercise jurisdiction and control over the principal during the period for which the bond is executed. However, this contractual authority does not include the authority to infringe upon the rights of persons who are not parties to the contract.

Id. at 344.

Based on these authorities, it is likely that Tennessee courts would conclude that a bondsman or his agents, while authorized to arrest a bail jumper, may not violate applicable criminal statutes with respect to a third party while doing so. Accordingly, it is the Opinion of this Office that a bounty hunter may not enter the residence of a third party without the consent of that party.

4. Historically, bounty hunters have been allowed to pursue a principal into another state. *Poteete v. Olive*, 527 S.W.2d 84 (Tenn. 1975), citing *Taylor v. Taintor*, 16 Wall (83 U.S.) 366, 21 L.Ed. 287 (1873). Tenn. Code Ann. §40-11-133 allows a bail bondsman to authorize another person to make the arrest on a certified copy of the capias. Tenn. Code Ann. §40-11-308 defines “bounty hunting” and provides, in pertinent part:

- (c) Before a bounty hunter takes into custody any person who has failed to appear in court, such bounty hunter shall present to the office of the appropriate law enforcement officer of the political subdivision where the taking will occur:
 - (1) A copy of the applicable warrant;
 - (2) A copy of the bond; and
 - (3) Proper credentials from a professional bondsman in Tennessee or another state verifying that the bounty hunter is an agent of a professional bondsman.

Obviously, this statute contemplates that out-of-state bounty hunters will effect arrests in Tennessee and only requires that they present the proper authorization to local law enforcement officials.⁸ Historically, bail bondsmen and their agents have been considered private actors who are therefore free from

⁸See also Op. Atty. Gen. No. 77-345 (October 7, 1977)(copy attached), where this Office opined that an out-of-state surety could arrest a principal in Tennessee and forcibly remove the principal from this State without committing the offense of kidnapping.

constitutional restraints.⁹ They have also been considered immune from the warrant requirement and their searches and seizures have not been required to be “reasonable” under the Fourth Amendment.¹⁰

Tennessee, however, is one of 47 states which have enacted some form of the Uniform Criminal Extradition Act (hereinafter referred to as “UCEA”).¹¹ No Tennessee case has addressed whether the UCEA applies to bail bondsman or their agents. Only a few other jurisdictions have addressed the question of whether the UCEA, as enacted in those jurisdictions, applies to bounty hunters. Of those, several have held that bounty hunters must comply with the mandates of the UCEA. *See Epps v. Oregon*, 585 P.2d 425, 429 (Or. App. 1978)(warrantless arrest in Oregon by a private person of a person accused of a crime in another state is authorized and regulated by the UCEA); *State v. Lopez*, 734 P.2d 778, 782-83 (N.M. App. 1987)(bondsman may not, without consent of principal, remove principal from State and redeliver him to custody of court to exonerate bond, unless he complies with provisions of UCEA); *Commonwealth v. Wilkinson*, 613 N.E.2d 914, 917 (Mass. 1993)(UCEA abrogates right of foreign bondsman to seize a fugitive within the Commonwealth without resort to the legal system for surrender in another state); *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 206 (9th Cir., 1996)(under Texas law, accused was “fugitive from justice,” subject to UCEA, and bondsman’s arrest of principal in Texas was authorized by the Act, since bondsmen were private citizens acting upon arrest warrant). *See also Ouzts v. Maryland Nat’l Ins. Co.*, 505 F.2d 547, 552-553 (9th Cir. 1974)(California Penal Code totally abrogates foreign bondsman’s common law right to pursue, apprehend, and remove his principal from California);

Other jurisdictions, however, have found the UCEA either inapplicable to bondsman or its application to them “unforeseeable.” In *Lopez v. O.L. McCotter*, 875 F.2d 273 (10th Cir. 1989), the court recognized that the New Mexico Court of Appeals had held that a foreign bondsman must comply with the UCEA in seeking the arrest of his principal. However, the court found that the decision of the New Mexico court of appeals was “unforeseeable” and retroactive application of the UCEA to the defendant bail bondsman would violate the due process clause. *Id.* at 277. In so holding, the court noted that:

⁹*See United States v. Rose*, 731 F.2d 1337, 1345 (8th Cir. 1984)(insulating bounty hunters from the strictures of the Fourth Amendment). *But see Jackson v. Pantazes*, 810 F.2d 426, 428-29 (4th Cir. 1986)(holding that a bounty hunter working jointly with police to effect an arrest could be constrained by the Fourth Amendment). *See also When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System* (Jonathan Drimmer), 33 Hous. L. Rev. 731; *Running from the Law: Should Bounty Hunters Be Considered State Actors and thus Subject to Constitutional Restraints?* (Andrew DeForest Patrick), 52 Vand. L. Rev. 171.

¹⁰*See, e.g., Rose*, 731 F.2d at 1345.

¹¹Tenn. Code Ann. §§40-9-101 through 40-9-130. Tenn. Code Ann. §40-9-104 provides that, following a lawful, warrantless arrest by a law enforcement officer or private citizen under this section, “the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section.” The preceding section governs warrants issued upon “the oath of any credible person before any judge or magistrate of this State.” Tenn. Code Ann. §40-9-103.

State v. Lopez is the only case we have encountered holding that the long-standing UCEA, by itself, modifies the established rule that a bail bondsman need not resort to process - particularly extradition - in rearresting his principal in another state. As such, we do not believe that Mr. Lopez could have anticipated the court's holding. The state courts relied on *State v. Epps*, 36 Or. App. 519, 585 P.2d 425, but in *Epps* the Oregon court in turn relied heavily on the fact that the Oregon legislature had effected "a complete abandonment, not a reform, of the bail system." 585 P.2d at 429. Consonant with this approach, the legislature had there repealed the statute authorizing a bail bondsman to arrest his principal, adopted an entirely new "security release system," and amended the UCEA to conform with these changes. . . . [T]he court believed that the legislature expressly rejected the common-law bail system when it adopted the security release system. New Mexico, of course, retains the bail system and provisions giving bondsman the power to arrest.

Id. at 277.

Tennessee, of course, has retained the bail system and provisions giving the bondsman the power to arrest. An unpublished opinion of the United States Court of Appeals for the Sixth Circuit held that the UCEA was inapplicable to a bail bondsman arresting his principal. In *Cramblit v. Fikse*, 978 F.2d 1258 (6th Cir. 1992)(copy attached), the court stated:

Specifically, *Cramblit* contends that §5-1-9 of the West Virginia Code required Deputy Adams and Hargis to present *Cramblit* to a magistrate after they apprehended him. That section, however, is part of West Virginia's Uniform Criminal Extradition Act. Reliance on this act confuses the law of extradition with the law of bail. . . . The State of California made no demand for the return of *Cramblit*. West Virginia's version of the Uniform Criminal Extradition Act therefore does not apply. Hargis, acting upon a private contract, was entitled to apprehend *Cramblit* and return him to California. Since *Cramblit* was not being extradited to California, but, instead, was being apprehended by a representative of his

surety, Deputy Adams was not required to follow the procedures set out in §5-1-9 of the West Virginia Code.

Id. (Citations omitted.)

In light of these conflicting views, it is unclear what position Tennessee courts would take in applying the provisions of the UCEA to bail bondsmen and their agents. Although Tennessee has retained the bail system, the arrest of an out-of-state fugitive may be exclusively governed by the UCEA. Just as the Tennessee Supreme Court held in *Poteete v. Olive*, 527 S.W.2d 84, 88 (Tenn. 1975) that “the bail’s power of arrest is prescribed exclusively by statute,” the arrest in Tennessee of an out-of-state fugitive may likely be found to be controlled exclusively by statute as enacted in the UCEA. Such an interpretation of Tennessee law would require that a bondsman or his agents conform with the provisions of the UCEA. Accordingly, it is the Opinion of this Office that bondsmen and their agents should comply with the provisions of the UCEA when apprehending out-of-state fugitives in Tennessee.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

MARK E. DAVIDSON
Assistant Attorney General

Requested by:

Honorable James G. (Jerry) Woodall
District Attorney General
State of Tennessee, 26th Judicial District
Criminal Division
P.O. Box 2825
Jackson, Tennessee 38302