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Opinion No. 03-018

Licensed Security Officers and Citizen Arrests

QUESTIONS

1. Can a licensed security officer, armed or unarmed, make an arrest?
2. Does Tenn. Code Ann. § 40-7-106 apply to state licensed security officers, unarmed or armed?
3. Does Tenn. Code Ann. § 40-7-109 apply to state certified unarmed and armed security officers?
4. a) Does Tenn. Code Ann. § 40-7-113(a) mean that “a private person/unarmed or armed security officer” may transport the arrested person to the magistrate in a personal or company vehicle?
b) If yes regarding transport, may the private citizen/security officer be held liable for any injuries to the arrested person sustained while transporting?
5. a) Under Tenn. Code Ann. § 40-7-113(b), does a law enforcement officer have the option to refuse to transport a person arrested by a private person/security officer or bystander to the magistrate, and if so, under what circumstances.
b) If the law enforcement officer refuses to transport the arrested individual, may the private person/security officer take the individual before the magistrate?
6. Under what circumstances may a law enforcement officer refuse to take before a magistrate a person arrested and delivered to him by a private person/security officer?
7. When does the detainment of an individual become an arrest?

8. May a private person/security officer use handcuffs or other legal restraining devices in order to effectuate an arrest under Tenn. Code Ann. § 39-11-621?
9. Under what authority may a private person/security officer use force to make or enforce an arrest of another person?
10. What determines the amount of force that may be used by a private person/security officer in making or enforcing the arrest?
11. May a private person/security officer search a person whom they have arrested? If so, to what extent can the search be made?
12. What constitutes an arrest by a private person/security officer?
13. Under what authority, if any, does a “bounty hunter” have the ability to carry a firearm while working as a “bounty hunter?”
14. Are persons who are not working as full or part time employees of a licensed bail bond company (e.g., those individuals who are working as freelance bail recover agents, bail enforcement officers, bounty hunters, fugitive recover agents and who are not off-duty law-enforcement officers) required to be licensed under Title 62 or any other statute?

OPINIONS

1. Yes. While security officers may not make an arrest as law enforcement officials, under Tennessee law, any private person may make an arrest. Security officers have the same power of arrest as that afforded to private citizens.
2. No. Tenn. Code Ann. § 40-7-106(a), specifies that *officers* must provide notice of their authority and grounds for arrest. However, under Tenn. Code Ann. § 40-7-111, as private citizens making an arrest, security officers must provide grounds for an arrest, but not notice of authority.
3. Yes. Since security officers are proscribed from acting as law enforcement officials, their power to arrest exists only as private citizens. Since Tenn. Code Ann. § 40-7-109 sets forth the grounds for arrest by private citizens, it governs arrests by security officers.
4. a) Yes. The statute places no prohibition on the mode of transport, requiring only that the arrested person be taken to a magistrate or officer “without unnecessary delay.”

b) Yes. A private person or security officer does not possess the immunity granted officers. Thus, ordinary rules of liability would apply.

5. a) Yes. By use of the word “may,” the statute makes discretionary the decision of officers to take persons arrested by private persons before a magistrate. The officer should decline to take the arrested person before the magistrate if the officer does not have reasonable cause to believe the arrested person has committed an offense.

b) Yes. The statute places no obligation upon a private person to take the arrested individual before an officer prior to taking the arrested individual before a magistrate. Therefore, an officer’s decision not to take the arrested person before a magistrate has no bearing on the decision of the citizen to take the arrested person before a magistrate.

6. A law enforcement officer should refuse to take the person arrested by a private person/security officer to a magistrate when the officer lacks reasonable cause to believe the arrested person has committed an offense. See question 5(a).

7. A detainment becomes an arrest when the arresting individual performs any act that indicates an intention to take the person into custody and subjects the person arrested to the actual control and will of the person making the arrest. The specific determination is highly fact based.

8. Yes. Tenn. Code Ann. § 39-11-621 authorizes private citizens making an arrest to “use force reasonably necessary,” to effectuate an arrest, but only if the arrested individual has fled or otherwise resisted arrest.

9. The statutory authority for a private person or a security guard to use force to effectuate an arrest lies in Tenn. Code Ann. § 39-11-621. See question 8.

10. Whether the person has fled or resisted arrest and how much force is necessary will determine how much force may be used to arrest an individual.

11. There is no constitutional prohibition against a private person or security guard searching a person whom they have arrested. However, the person executing the search risks civil liability.

12. An arrest is constituted by the performance of any act that indicates an intention to take a person into custody and subjects the person arrested to the actual control and will of the person making the arrest. Because a private citizen making an arrest must provide grounds for the arrest, the arrest generally occurs at this point in time.

13. No specific authority governs the use of firearms by bounty hunters. General authority for citizens of Tennessee to carry firearms can be found in Tenn. Code Ann. § 39-17-1351.

14. Bounty hunters must have a pocket card certifying that the bounty hunter has completed the requisite training or another state's equivalent training before they may take a person into custody. The failure to present the proper credentials before taking an individual into custody is a Class A misdemeanor.

ANALYSIS

1. Arrest by licensed security officers

Licensed security officers may make an arrest as private citizens as authorized under Tennessee law. Tenn. Code Ann. § 40-7-101 (2002). The Tennessee Supreme Court has observed that “[i]t is basic statutory law in this state that a private person may arrest another for an offense committed in the presence of the arresting individual, or for a felony not committed in his presence.” *State v. Smith*, 695 S.W.2d 954, 959 (Tenn. 1985). Furthermore, Tennessee statutes specifically authorize security guards to, *inter alia*, enforce State and local laws on private property. Tenn Code Ann. § 62-35-103(16)(C) (2002).

2. Notice of authority and grounds for arrest

When arresting a person, security guards are not required under Tenn. Code Ann. § 40-7-106 to provide notice of their authority or grounds for arrest. Tenn. Code Ann. § 40-7-106(a) reads: “the *officer* shall inform the person of the officer’s authority and the cause of the arrest, and exhibit the warrant if the officer has one, except when the person is in the actual commission of the offense or is pursued immediately after an escape.” Tenn. Code Ann. § 40-7-106(a) (2002)(emphasis added). In so specifying, the statute exclusively contemplates governmental law enforcement officers. Because security guards are not law enforcement officers, Tenn. Code Ann. § 40-7-106(a) does not apply to them.

Indeed, Tenn. Code Ann. § 62-35-134(c)(5) makes it unlawful for a private security guard to knowingly make any statement which would reasonably cause another person to believe that such security guard functions as a sworn peace officer or other government official. Further, it is unlawful for a private security guard to wear any badge, insignia or uniform that would indicate or tend to indicate that the security guard is a sworn peace officer or other governmental official. Tenn. Code Ann. §§ 62-35-127, 128 (2002). Far from being required to provide official authority, therefore, security guards are, in actuality, prohibited from holding themselves out as governmental agents.

A security officer, though, must provide notice of the grounds of an arrest under Tenn. Code Ann. § 40-7-111, which governs arrests made by private persons. It should be noted also, that Tenn.

Code Ann. § 40-7-106(b) states that “[n]o person under arrest by any officer *or private citizen* shall be named in any book, ledger or any other record until such time that the person has successfully completed a telephone call to an attorney, relative, minister or any other person that the person shall choose, without undue delay.” Tenn. Code Ann. § 40-7-106(b) (2002)(emphasis added). Thus, while a security guard is not required under Tenn. Code Ann. § 40-7-106 to provide notice of authority and grounds for arrest, the same statute does prohibit a security guard from “booking” an arrested individual until the individual has placed a telephone call.

3. Applicability of Tenn. Code Ann. § 40-7-109 to security officers.

Tenn. Code Ann. § 40-7-109, which governs arrests by private persons, fully applies to security officers. Arrest powers for security officers exist only as they do for private citizens. Tenn. Code Ann. § 40-7-101 (2002). As explained above, security officers are specifically prohibited by statute from holding themselves out as officers. Tenn. Code Ann. § 62-35-134(c)(5) (2002). Security officers therefore may not be regarded as officers. *See* Tenn. Code Ann. § 62-35-103(16) (defining “security guard and patrol services” by listing the duties entrusted to security guards).

4. Transport of persons arrested by security guards to magistrate

a. A security guard who arrests an individual may transport that person in a personal or company vehicle. Tenn. Code Ann. § 40-7-113 provides that a “private person who has arrested another for a public offense shall, without unnecessary delay, take the arrested person before a magistrate or deliver the arrested person to an officer.” Since Tenn. Code Ann. § 40-7-113 places no restrictions upon the mode of transport, it would not bar a security guard from transporting an arrested person to a magistrate or officer in either a company or personal car. The statute does require that the person be taken “without unnecessary delay.”

b. A private citizen or security officer could be liable for any injuries incurred by an arrested person during transport. While a police officer acting as a governmental agent may have immunity in such a scenario, Tenn. Code Ann. § 29-20-205, a security officer is a private individual who does not fall under the ambit of governmental immunity. Thus, the liability of the security guard would be decided under basic tort law.

Depending on the specific facts, the security guard’s employer may also be liable under the doctrine of *respondeat superior*. Recently, the Tennessee Supreme Court held that ordinary principles of agency law govern the liability of an employer for torts committed by security guards, even when the security guard is an off-duty officer. *White v. Revco Discount Drug Centers, Inc.*, 33 S.W.3d 713, 723 (Tenn. 1995).

5. Appearance before a magistrate

a. A law enforcement official has the option to refuse to take a person arrested by a private person/security officer before a magistrate. Tenn. Code Ann. § 40-7-113(b) reads as follows: “An officer may take before a magistrate, without a warrant, any person, who, being engaged in the commission of a public offense, is arrested by a bystander and delivered to the officer, and anyone arrested by a private person as provided in §§ 40-7-109— 40-7-112, and delivered to the officer.” Because the statute reads that an officer “*may* take before a magistrate,” rather than “*shall* take before a magistrate,” it renders the decision to take the arrested person before a magistrate discretionary on the part of the officer.

A law enforcement officer should not take the person before a magistrate if the officer does not have reasonable cause to believe that the arrested person has committed an offense. Tenn. Code Ann. § 40-7-113(b) permits an officer to transport the arrested person to a magistrate provided that the person has committed an offense. Although no authority has squarely resolved this issue with regard to persons arrested by private individuals, the ordinary rules governing arrests by an officer without a warrant for offenses committed outside the officer’s presence should apply. An officer should only arrest an individual for an offense committed outside the officer’s presence when the officer has reasonable cause for believing the person has committed a felony. Tenn. Code Ann. § 40-7-103(a)(3) (2002); *Wadley v. State*, 634 S.W.2d 658, 663 (Tenn. Crim. App. 1982). So if the facts do not give the officer reasonable cause that the arrested individual has committed an offense, the officer may decide to not take the arrested person before a magistrate

a. The private person/security guard may transport the individual before the magistrate if the officer declines to do so. Tenn. Code Ann. § 40-7-113(a) requires a private person who has arrested an individual to take that person “before a magistrate *or* deliver the arrested person to an officer.” As this requirement is couched in the disjunctive, the person delivering the arrested individual is not required to take the arrested individual to an officer at all. Thus, if an officer declines to take the individual before a magistrate, the arresting individual would retain the statutory authority if not obligation, to do so under his or her own initiative.

7. Detention/Arrest

Tennessee courts have long defined an arrest as “the taking, seizing, or detaining of the person of another, either by touching or putting hands on [the person], or by any act which indicates an intention to take [the person] into custody and subjects the person arrested to the actual control and will of the person making the arrest.” *West v. State*, 425 S.W.2d 602, 605 (Tenn. 1968) (citations omitted); *Robertson v. State*, 198 S.W.2d 633, 635-636 (Tenn. 1947) (citations omitted). While an arrest may be effected without formal words or a station house booking, there must be actual restraint on the arrested individual's freedom of movement under legal authority of the arresting officer. *State v. Crutcher*, 989 S.W.2d 295, 300-1 (Tenn. 1999).

The determination of whether an individual has been arrested is fact-based and thus largely determined by the specifics of the incident at hand. *Crutcher*, 989 S.W.2d at 299. In *Crutcher*, 989 S.W.2d at 302, the Court looked at whether the “words or actions” used by the officers would “make it clear to the arrestee that he or she is under the control and legal authority of the arresting officer, and not free to leave,” in arriving at its determination.

8. Use of force by private person to effectuate an arrest

Tenn. Code Ann. § 39-11-621 permits a private person, making an arrest authorized by law, to use “force reasonably necessary to accomplish the arrest of an individual who flees or resists the arrest.” Therefore, the use of handcuffs or restraining devices is permissible by private persons and security guards provided it is reasonably necessary to accomplish an arrest. This is not a blanket approval of the use of restraining devices. The statute contemplates the use of force only upon an individual who has fled or resisted arrest. The statute restricts the use of deadly force to that used in self-defense or in the defense of a third party. Tenn. Code Ann. § 39-11-621 (2002).

Whether the person has fled or resisted arrest will determine whether force may be used to arrest an individual. The statute allows the use of force “reasonably necessary to accomplish the arrest of an individual who flees or resists the arrest.” Tenn. Code Ann. § 39-11-621 (2002). The force “reasonably necessary to accomplish the arrest,” will vary greatly from situation to situation.

A citizen who makes an arrest does so “at his own peril,” and will therefore be held legally accountable for the mistaken belief that the arrest was proper, even when the citizen has probable cause to believe an offense had been committed. *Martin v. Castner-Knott Dry Goods Co.*, 181 S.W.2d 638, 642 (Tenn. App. 1944); Tenn. Code Ann. § 39-11-621, Sentencing Commission Comments (2002).

9. Authority for use of force

See question 8. In a more specific provision, Tenn. Code Ann. § 40-7-116 permits the detention of individuals by merchants or their agents who have probable cause to believe a theft has occurred or is about to occur.

10. Amount of force

See question 8.

11. Search incident to arrest by private citizen

If a private person or a security guard searches a person that he or she has arrested, the constitution is not implicated. The prohibition against unlawful searches and seizures is rooted in

the Fourth Amendment of the United States Constitution and Article One, Section Seven of the Tennessee Constitution. U. S. Const., Amend. IV; Tenn. Const. art. 1, § 7. Both prohibitions preclude the invasion of home and person by governmental officials; they are not protections against actions undertaken by non-governmental private individuals. *State v. Burroughs*, 926 S.W.2d 243, 246 (Tenn. 1996). Security guards and private persons are not governmental officials. Indeed, the Code specifically prohibits security guards from indicating that they are. Tenn. Code Ann. § 62-35-134(c)(5) (2002).

However, the private person who performs a search does so at his or her own risk. Probable cause to believe an offense was committed will not justify an arrest by a private person if in fact no offense was committed. *Martin*, 181 S.W.2d at 642. Thus, a search incident to an improper arrest may subject a private person, and possibly his or her employer, to liability. *Id.*; *White* 33 S.W.3d at 722.

12. Arrest by private individual

See questions 2, 7.

13. Bounty Hunters carrying firearms

Bounty hunters may carry firearms in Tennessee, but only to the same extent as may private citizens. The portion of the Tennessee Code governing professional bondsmen contains no specific authorization for the use of firearms. Tenn. Code Ann. § 40-11-301 to -320 (2002). The use of firearms by bounty hunters is therefore governed by Tenn. Code Ann. § 39-17-1301 to-1360, just as it is for citizens.

Under these provisions, it is unlawful to carry a firearm with the intent to go armed. Tenn. Code Ann. § 39-17-1307(a)(1) (2002). Pursuant to the statute, the carrying of firearms is prohibited when it is carried in a manner so as to be “readily accessible and available for use in the carrying out of purposes either offensive or defensive.” *Kendall v. State*, 101 S.W. 189 (Tenn. 1906). A person wishing to circumvent this general prohibition may obtain a lawful permit, subject to the directives of Tenn. Code Ann. § 39-17-1351.

14. License requirements of bounty hunters

Freelance bounty hunters must have a pocket card attesting to their training before they may take an individual into custody. Tenn. Code Ann. § 40-11-318 (2002). Before taking a person into custody, a bounty hunter must have a “pocket card certifying that the bounty hunter has completed the training required by this section or, if the bounty hunter is from a state other than Tennessee, proof that such bounty hunter successfully completed an equivalent amount of training in the bounty hunter’s home state within the last year.” Tenn. Code Ann. § 40-11-318(c)(4) (2002). The failure

to present the proper credentials before taking a person into custody is a Class A misdemeanor.
Tenn. Code Ann. § 40-11-318(d) (2002).

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