ALAN WILSON
ATTORNEY GENERAL

May 2, 2012

Steven A. Gantt, City Manager
City of Columbia
P.O. Box 147
Columbia, SC 29217

Dear Mr. Gantt:

We received your letter requesting an opinion of this office concerning the handling of shoplifting cases by the City of Columbia Police Department (the "Department"). By way of background, you state that:

> [i]n the typical situation, a police officer is dispatched to a store at the request of a store employee. The officer is met by a store employee who has the suspect in custody for shoplifting. The store employee relates that he or she observed the suspect shoplifting and shows the officer the merchandise that was allegedly taken. Occasionally, the suspect will confess to the officer or there will be videotape evidence of the theft. Usually, however, there is no additional evidence to corroborate the information provided by the store employee. A 2005 directive of the City Manager at that time prohibited police officers from making a custodial arrest under those circumstances. The [Department] implemented a practice in which the officer makes an incident report to permit the store employee to obtain a courtesy summons to charge the suspect with shoplifting. The suspect is not taken into custody at that time.

Given this background, you indicate that the Department is considering possible changes to the above practice. You ask under what circumstances may police officers charge a suspect with shoplifting on a Uniform Traffic Ticket ("UTT") and make a custodial arrest.[1] You further ask whether police officers may take a shoplifting suspect into custody based upon a citizen's arrest.

Law/Analysis

The UTT is provided for in S.C. Code Ann. §56-7-10 for "all traffic offenses" as well as a number of additional offenses expressly enumerated. The provision further provides that "[t]he service of the uniform traffic ticket shall vest all traffic, recorders' and magistrate's courts with jurisdiction to hear

[1]For purposes of this opinion, we presume the particular offense is one within the jurisdiction of magistrate's or municipal court. See S.C. Code Ann. 16-13-110 (B)(1).

and dispose of the charge for which the ticket was issued and served." While §56-7-10 enumerates those specific offenses in addition to traffic offenses for which a UTT may be written, such does not, however, end the inquiry as to whether the UTT may be written for the offense of shoplifting.

However, §56-7-15 further provides that the UTT established under the provisions of §56-7-10 "may be used by law enforcement officers to arrest a person for an offense committed in the presence of a law enforcement officer if the punishment is within the jurisdiction of magistrate's court and municipal court." Section 56-7-15 provides "for the use of the uniform traffic ticket for any offense which falls within the jurisdiction of magistrate's court and municipal court when the offense is committed in the presence of a law enforcement officer," which South Carolina courts have extended to include crimes "freshly committed." See Ops. S.C. Atty. Gen., November 13, 2003; September 23, 2003; June 12, 1998.

In your letter, you state that:

> . . . law enforcement would benefit from more specific advice as to when a crime has been "freshly committed." It appears from State v. Martin and State v. Mims that the consideration is more than temporal and requires the officer to determine by observation or other senses that a crime has been committed. In a shoplifting situation, that would seem to be met if the suspect gave a written or oral confession or if there was videotape evidence clearly establishing guilt. Those facts, however, are unusual and, in most cases, the officer has the representations made by the store employee to rely upon. In your opinion, is that sufficient to justify a custodial arrest based upon a [UTT]?

This question is answered by the opinion of our office dated May 21, 1997. There, we addressed whether a UTT would serve as a valid charging document in magistrate's or municipal court in lieu of an arrest warrant for the offense of shoplifting, where the offense has been "freshly committed" at the time the officer arrives at the scene. In that instance, we noted that:

> . . . our Supreme Court has recognized on several occasions that "while generally an officer cannot arrest, without a warrant, for a misdemeanor not committed in his presence, an officer can arrest for a misdemeanor when the facts and circumstances observed by the officer give him probable cause to believe that a crime has been freshly committed." State v. Martin, 275 S.C. 141, 268 S.E.2d 105 (1980). In Martin, the Court referenced S.C. Code Ann. Sections 17-13-30, 23-13-60 (deputy sheriffs may arrest without warrant for any freshly committed crime), 23-5-40 (highway patrolman possess same powers of arrest as deputy sheriffs) and State v. Sims, 16 S.C. 486 ("upon fresh and immediate pursuit") in reaching this conclusion. There, a State Highway Patrolman was deemed to have sufficient basis to arrest without a warrant for the misdemeanor offense of DUI because when the officer arrived at the scene, based upon the facts within his observation, it was evident that "the crime had been freshly committed." 268 S.E.2d at 107. The Court cited with approval the language contained in State v. Mims, 263 S.C. 45, 208 S.E.2d 288, where it was

> stated that a "crime is committed in the presence of an officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case." Subsequently, in State v. Clark, 277 S.C. 333, 287 S.E.2d 143 (1982), the Court applied this same principle to an arrest by a municipal police officer. See also, State v. Retford, 276 S.C. 657, 281 S.E.2d 471 (1981). Thus, where the law enforcement officer possesses probable cause that the misdemeanor was freshly committed, an arrest without warrant for such offense is valid.

Applying these general principles, as well as the language of §56-7-15, we concluded:

> . . . where an officer has probable cause to believe that a misdemeanor offense (such as shoplifting) has been "freshly committed" and subsequently serves a [UTT] upon the defendant for such offense, such would be sufficient to give a magistrate or municipal court jurisdiction to hear the offense. This conclusion is consistent with the case of State v. Biehl, 271 S.C. 201, 246 S.E.2d 859 (1978) where the Court held with respect to a citation for a traffic offense (Section 56-7-10), that "the issuance of a uniform traffic ticket vests jurisdiction in the traffic court, even though the officer may not have personally seen the accused person commit the offense with which he is charged." While Section 56-7-15 requires that the offense be committed in the officer's "presence," I believe that where there is probable cause to believe the misdemeanor was "freshly committed," Section 56-7-15's "presence" requirement is met for purposes of vesting the magistrate or municipal court with jurisdiction through the use of the [UTT]. Of course, I would caution that the offense must truly have been "freshly committed" based upon all the facts and circumstances. Moreover, where a warrant can be obtained prior to trial such would obviously be the safest course. Nevertheless, even where a warrant cannot be obtained and a Uniform Traffic Ticket is written for an offense which has been freshly committed, I believe that such ticket would serve as the charging document and would give the summary court jurisdiction.

Further, in Fradella v. Town of Mt. Pleasant, 325 S.C. 469, 482 S.E.2d 53 (Ct. App. 1997), the South Carolina Court of Appeals reiterated the rule that so long as the officer had probable cause to believe the misdemeanor offense was "freshly committed," an arrest made upon such information was legally valid. In Fradella, Mt. Pleasant police officers arrived at the scene of an accident. During the course of the investigation, an individual, Copeland, told the officers that they had given the driver of one of the vehicles a ride home. The driver, Fradella, smelled of alcohol at the time. Copeland agreed to lead the officers to the address where he had left Fradella. In the meantime, the officers had received a dispatch that Fradella had called 911 and informed police he had been in an accident at the same location. Arriving at Fradella's residence, the officers called him outside and he admitted he was the driver of the wrecked vehicle. Copeland also identified Fradella as the driver. After observing Fradella's bloodshot eyes and the smell of alcohol on his breath, the officers told Fradella he was under investigation for

possible DUI. Subsequently, he admitted he had had three beers and was deemed to be "definitely impaired" following the administration of field sobriety tests. Fradella was then arrested for DUI. He was later convicted. Id., 482 S.E.2d 54-55. The circuit court reversed Fradella's conviction, holding that his warrantless arrest was for a misdemeanor which had not been committed in the officer's "presence" as required by §17-13-30. The Court of Appeals disagreed, concluding that "the facts and circumstances surrounding the incident satisfy the requirement that a misdemeanor be committed in an officer's presence in order to justify a warrantless arrest." Id., 482 S.E.2d at 55.

The Court of Appeals thoroughly reviewed prior decisions interpreting the State's "misdemeanor in the presence" requirement, noting the following:

> South Carolina Code Ann. §17-13-30 (1985), states that sheriffs and deputy sheriffs "may arrest without warrant any and all persons who, within [[the officer's] view, violate any of the criminal laws ... if such arrest be made at the time of such violation of law or immediately thereafter." However, in State v. Martin, 275 S.C. 141, 268 S.E.2d 105 (1980), the court noted that the rule in § 17-13-30 must be interpreted in light of S.C. Code Ann. §23-13-60 (1989), which provides that such officers "may for any suspected freshly committed crime, whether upon view or upon prompt information or complaint, arrest without warrant. . . ." Thus, Martin holds "an officer can arrest for a misdemeanor [not committed within his presence] when the facts and circumstances observed by the officer give him probable cause to believe that a crime has been freshly committed." 275 S.C. at 146, 268 S.E.2d at 107 (emphasis in original). Our Supreme Court has extended the operation of these statutory rules to town policemen. State v. Clark, 277 S.C. 333 287 S.E.2d 143 (1983) (citing State v. Retford, 276 S.C. 657, 281 S.E.2d 471 (1981)).
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> In Martin, the officer discovered (1) two cars which obviously appeared to have recently collided, (2) a highly intoxicated man who admitted to being one of the drivers, and (3) a group of people gathered at the scene. 275 S.C. 141, 268 S.E.2d 105. The court held these circumstances sufficient to justify the warrantless arrest. Id. A number of subsequent opinions have construed Martin. See Retford, 276 S.C. 657, 281 S.E.2d 471 (1981) (holding a warrantless arrest justified when (1) the subject fit the description of the perpetrator of a recent auto theft, (2) a witness identified the subject as one who was entering automobiles, and (3) the subject was behaving in a disorderly manner); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (holding that an undercover agent serving as a lookout could arrest subjects without a warrant when he arrived at the drug-laden plane's landing site); Clark, 277 S.C. 333, 287 S.E.2d 143 (holding that a warrantless arrest for discharge of a firearm was permissible when (1) officers arrived at the scene shortly after being summoned, (2) officers found the subject armed and an expended shell nearby, and (3) the subject's mother told the officers that the subject had fired the gun). Notably, State v. Sawyer, 283 S.C. 127, 322 S.E.2d 449 (1984) held that the defendant's

> admission that he was the driver satisfied the presence requirement in the breathalyzer statute, because the admission "should be treated as part of the officer's sensory awareness of the commission of the offense."

The Fradella Court thus concluded that the facts presented warranted application of the Martin exception, stating:

> . . . [h]ere, the officers arrived shortly after being summoned to the scene, and found Fradella's car involved in a single car accident. The officers received information from Copeland who claimed he drove the driver home and reported the driver smelled of alcohol. Copeland identified Fradella as the driver. The officers arrived at Fradella's residence about twenty minutes after they arrived at the scene of the wreck. Importantly, Fradella reported to the dispatcher that he was involved in the accident, and he admitted to the officers and Copeland that he was the driver of the wrecked car. Both officers testified that it was obvious Fradella was impaired after administration of field sobriety tests and their conversation with him. Based on the facts and circumstances observed by these officers within their sensory awareness, we hold that they had probable cause to believe Fradella had "freshly committed" the crime of DUI.

Fradella, 482 S.E.2d at 56.

Significantly, the Fradella Court rejected an argument that the Martin line of cases was confined to what the officer may have observed or learned at the crime scene. The Court conceded that its ruling was "an extension of Martin," but stated that

> ... neither Martin nor subsequent cases interpreting Martin expressly mandated that the officer observe all of the facts and circumstances at the scene. We believe such a holding would construe Martin too narrowly. Therefore, we hold that as long as the facts and circumstances observed or perceived by an officer justify the conclusion that a crime has been freshly committed, then the Martin rule is satisfied.

Fradella, 482 S.E.2d at 56.

We would note that the probable cause analysis "includes a realistic assessment of the situation from a law enforcement officer's perspective." State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (1994). Further, in determining the presence of probable cause for arrest, the probability cannot be technical, but must be factual and practical considerations of everyday life on which reasonable and cautious men, not legal technicians, act. Summersell v. S.C. Department of Public Safety, 377 S.C. 19, 522 S.E.2d 144 (Ct. App. 1999).

A prior opinion of this office dated July 10, 1995, referenced generally that:

> . . . the Fourth Amendment requires a "prompt" determination of probable cause by a judicial official as a prerequisite to any extended pretrial detention following a warrantless arrest.

That opinion was referenced in another opinion of this office dated October 12, 1998, which discusses the holding of a defendant after a warrantless arrest. Reference was also made in the opinion to §22-5-200, which requires that "[w]hen an arrest is made by a deputy sheriff without a warrant . . . the person so arrested should be forthwith carried before a magistrate and a warrant of arrest procured and disposed of as the magistrate shall direct." Also referred to in the opinion was the decision by the United States Supreme Court in Riverside v. McLaughlin, 500 U.S. 44 (1991), which generally provides a forty-eight hour rule within which an arrested defendant must be formally charged. The opinion concluded that:

> [p]robable cause determinations for arrest without warrant are still controlled by 22-5-200's mandate that a person arrested without a warrant ". . . should be forthwith carried before a magistrate and a warrant of arrest procured and disposed of as the magistrate should direct." We have consistently read the "forthwith" requirement as being within a reasonable period of time. The Riverside case establishes that the 4th Amendment sets 48 hours as the general constitutional parameter to be followed for a probable cause determination.

See Op. S.C. Atty. Gen., March 28, 2007. Additionally, in a prior opinion of this office dated January 9, 1992, we quoted the South Carolina Bench Book for Magistrates and Municipal Court Judges, which states:

> [i]f an arrest has been made without a warrant, the arresting officer should take the person to a magistrate or municipal judge without unreasonable delay so that the judge may investigate the circumstances of the arrest and if proper, issue an arrest warrant. The issuance of an arrest warrant after arrest serves informational and administrative purposes. It protects the police officer from prosecution under §17-13-50 which provides that it is a criminal offense for an arresting officer not to inform the arrested person of the grounds of the arrest. It constitutes the charging paper in a magistrate or municipal court and informs the defendant of the charges against him. [Emphasis in original].

An opinion of this office dated May 21, 2002, stated that as to a law enforcement officer's discretion when determining whether to make an arrest:

> [a] probable cause analysis "includes a realistic assessment of the situation from a law enforcement officer's perspective. . . . Further, in determining the presence of probable cause for arrest, the probability cannot be technical, but must be factual and practical considerations of everyday life on which reasonable and cautious men, not legal technicians, act. . . . The officer's determination of probable cause involves broad discretion in gathering facts and evaluating existing conditions. . . .

Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime had been committed by the person being arrested. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216, 220 (2006). "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal." Id. In determining whether probable cause exists, "all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received." South Carolina Dept. of Motor Vehicles v. McCarson, 391 S.C. 136, 146, 705 S.E.2d 425, 430 (2011); State v. Roper, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979).

Another opinion of this office dated July 2, 1996, stated that:

> . . . it is well-recognized that, by definition, police officers must retain a wide degree of discretion in carrying out their duties of enforcing the laws. In Hildebrand v. Cox, 369 N.W.2d 411, 415 (Iowa 1985), the Court stated that "[p]olice officers necessarily exercise broad discretion . . . in determining the manner in which they will enforce laws." In Bodzin v. City of Dallas, 768 F.2d 722, 726 (5th Cir. 1985), the Court observed that "the executive task of law enforcement carries a range of discretion ultimately exercised by police officers daily on their beat." And in Sebring v. Parcell's, Inc., 512 N.E.2d 394, 397 (Ill. 1987), it was stated that:
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> > . . . efficient law enforcement necessarily involves a grant of broad discretion to police officers in determining whether to restrain, detain or arrest an individual. This discretion is required by the facts that there are often matters deserving of a police officer's attention at the same time, and it is often impractical for police officers to consult with their superiors in order to arrange their priorities.

The opinion concluded by stating:

> . . . I would advise that you continue to exercise sound discretion and good judgment as each situation arises. As I mentioned earlier, police officers and agencies are afforded by law broad discretion to carry out their arduous daily tasks of enforcing the law. This being the case, you will have to evaluate each particular situation as it arises and gauge whether there is a likelihood of trouble or a violation of the law.

At this point, it is necessary to restate the position and policy of this office concerning factual determinations. We have previously stated that, "[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as . . . a court, we do not possess the necessary fact-finding

authority and resources required to adequately determine . . . factual questions. . . ." See Ops. S.C. Atty. Gen., April 16, 2004; March 15, 2000.[2]

In an opinion dated June 12, 1998, we addressed the legality of an arrest by a police officer who acted upon information received from an off-duty and out-of-uniform reserve police officer. The reserve officer had observed a violation of a municipal code by occupants of a vehicle. He then went to get a regular, uniformed police officer. They both approached the vehicle and observed marijuana, weapons, and open alcohol in plain view. Arrests were made and evidence seized. During the preliminary hearing, the defense argued that, since the initial violation was observed by the off-duty reserve police officer who was not wearing his uniform, the case and all the evidence was invalid. Some of the cases were dismissed by the magistrate. Based upon our reading of Fradella, we opined:

> . . .the reserve officer could be deemed to be acting in the capacity of a private citizen rather than as a reserve officer. Viewed in this light, certainly it could be argued that the regular police officer was acting upon information which gave him probable cause to believe that the offense had been "freshly committed" in much the same way as the Court in Fradella had done. Of course, each situation would depend upon all its own facts; however, when an off-duty reserve officer is out of uniform and observes a misdemeanor being committed and reports that immediately to a regular police officer who conducts his own investigation and ends up subsequently arresting the individual, I believe it can clearly be argued that the officer had probable cause to believe the offense had been "freshly committed" under the Martin analysis. Moreover, Fradella makes it clear that all the information does not have to have been obtained by the officer at the scene. The regular police officer could use the reserve officer's observation of the offense (acting as any other citizen would) together with any other evidence gathered in the course of his investigation. So long as the Martin test is met by the arresting officer (here, the regular police officer), the arrest is valid.

Also relevant to your inquiry is the opinion of this office dated August 1, 2000, where we addressed the following:

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[2]You have inquired about the necessity of a "Request and Indemnification Agreement" to mitigate the Department's liability when a UTT is issued and the individual is subsequently taken into custody. As stated above, when an officer has probable cause to believe that a misdemeanor offense (such as shoplifting) has been "freshly committed" and subsequently serves a UTT upon the individual for this offense, such would be sufficient to give a magistrate's or municipal court jurisdiction to hear the offense. However, we would have to refer you to the city attorney for more specific information about liability which could or could not fall upon the Department under particular circumstances. We would also note previous opinions of this office advising that government agencies, in the absence of specific authority, do not have authority to execute "hold harmless" or indemnity agreements. See Ops. S.C. Atty. Gen., March 18, 2011; September 29, 2004; October 6, 1980.

> [i]n breach of trust cases involving local merchants, the store's loss prevention agents have been investigating an employee suspected of stealing merchandise or money. The employee may have been under surveillance for weeks while the agent has observed and documented incidents of theft, but has not taken any action. At some point the store's agent interviews the employee, who then admits to the theft and signs a confession. The agent then calls the police, an officer is dispatched to the store, and the employee is placed under arrest. The handcuffed employee is then transported to the detention center and placed in a holding cell until the store's agent obtains an arrest warrant from an Administrative Judge.

While noting that a police officer may arrest a person without a warrant for any crime "freshly committed," we concluded:

> [i]n the circumstances you describe, however, the officer is called to the store after the detention of the employee and the signing of a confession for thefts committed earlier. The crime was not committed in the officer's view, and in this case, was neither freshly committed before the officer's arrival. Thus, the officer could not initiate a valid arrest without first obtaining an arrest warrant.

Significantly, we opined that even if the police officer could not perform the arrest, he could take custody of an individual lawfully detained pursuant to a valid citizen's arrest, "subject to the limitation that the officer reasonably believe[d] in the legality of the citizen's arrest." In State v. McAteer, 340 S.C. 644, 532 S.E.2d 865, 868 (2000), the South Carolina Supreme Court considered the scope of the State's laws with regard to a citizen's arrest. The Court held that "there is no common law right to make warrantless citizen's arrests of any kind and that such rights as exist are created by statute in South Carolina." See State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011).The Court in McAteer noted that the provisions allowing for citizen's arrests are found in §§17-13-10 and -20. Section 17-13-10 provides that a person may arrest a felon or thief as follows:

> [u]pon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law. [Emphasis added].

Additionally, §17-13-20 provides the following:

> [a] citizen may arrest a person in the night time by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person: (a) has committed a felony; (b) has entered a dwelling house without express or implied permission; (c) has broken or is breaking into an outhouse with a view to plunder; (d) has in his possession stolen property; or (e) being under circumstances with raise just suspicion of his design to steal or to commit some felony, flees when he is hailed.

Therefore, private citizens have the power to arrest anywhere in the State for any crime covered by either §17-13-10 or §17-13-20. Both statutes provide that a person can make a citizen's arrest when he has witnessed a larceny.

Larceny is the felonious taking and carrying away of the goods of another against the owner's will or without his consent. See Broom v. State, 351 S.C. 219, 569 S.E.2d 336 (2002); State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002). Further, "[l]arceny is . . . implicit within the crime of shoplifting." State v. Al Amin, 353 S.C. 405, 578 S.E.2d 32, 43 (Ct. App. 2003); see Ops. S.C. Atty. Gen., March 24, 2003; September 18, 1967. Therefore, if a shoplifting incident has been witnessed, a person can make a citizen's arrest.[3]

In the August 1, 2000, opinion, we advised that:

> [g]enerally, "promptness in taking action is also a requirement of a valid citizen's arrest." 6A C.J.S. Arrest §15. If a private citizen "fails to make an arrest immediately after commission of an offense, his power to do so is extinguished and a subsequent arrest is illegal." Id. While there appears to be no applicable case law in South Carolina, other jurisdictions have held that the arrest for a misdemeanor committed within the citizen's presence must occur immediately after the perpetration of the offense. See, *e.g.*, McWilliams v. Interstate Bakeries, Inc., 439 F.2d 16 (5th Cir. 1971) (stating that store employee falsely imprisoned suspect she recognized as having indecently exposed himself before her four days earlier). Thus, it is the opinion of this Office that the detention of the employee by the loss prevention agent days or weeks after the agent views the commission of the crime would likely constitute an invalid citizen's arrest. Indeed, the arrest may expose the loss prevention agent, or his employer, to liability for false imprisonment. See McWilliams v. Interstate Bakeries, 439 F.2d 16 [(5th Cir. 1971)].

We also refer to an opinion of the office dated September 8, 1980, which addressed the transportation of an individual who had been detained by a security guard. In the opinion, we noted that "a private security guard, having lawfully arrested a defendant on property to which he is assigned and upon which he is empowered to make arrests, should then deliver the defendant to the proper authorities without leaving the assigned property." As to the law enforcement officer's liability for an unlawful arrest made by the security guard, we concluded that, generally speaking, the officer "transporting a prisoner lawfully arrested by a private security guard" would be immune from liability if he immediately transported the prisoner to jail or to a committing magistrate." We also noted:

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[3]We note that §16-13-140 provides a defense to an action for a delay by a merchant or his employee or agent to investigate a possible theft from his establishment. If "the person was delayed in a reasonable manner for a reasonable time to permit such investigation, and reasonable cause existed to believe that the person delayed had committed the crime of shoplifting," the merchant or employee or agent is not subject to liability for the delay to investigate. Id.

> [t]he law enforcement officer's duty in transporting a prisoner arrested by a citizen to the committing magistrate or to jail terminates upon the officer's turning custody of the prisoner over to the magistrate or to the jailer if no magistrate is immediately available. Generally, a person who is neither active himself in the commission of the false imprisonment or false arrest, nor responsible for the acts of others who are active in the commission of the tort, is not liable for false imprisonment. 23 Am.Jur.2d, False Imprisonment, Section 30 at pages 94-95. Thus, if the law enforcement officer was not active in the commission of an unlawful arrest on the part of a security guard or citizen, and has no reason to believe that the arrest of his prisoner was unlawful, he is not liable to the prisoner for the improper acts of the arresting guard or citizen. Likewise, the officer who takes a prisoner immediately to a committing magistrate or to jail, and who is not active in some subsequent delay in securing the release of the prisoner, is not liable to the prisoner for the subsequent conduct of others. The law enforcement officer who properly transports the prisoner from the place of his arrest by a citizen to a committing magistrate or to jail for imprisonment pending his release by a judicial officer is not liable for the actions of any other during the course of the prisoner's arrest and subsequent imprisonment. 32 Am.Jur.2d False Imprisonment, Section 30, supra; see also Plummer v. Northern Pacific Railway Company, 79 Mont. 82, 255 P. 18.

The opinion went on to state "[i]t must be remembered, that the law enforcement officer's belief in the legality of his actions must be reasonable." [Emphasis added]. Examples given where such belief would not be reasonable were such as where a private citizen had arrested without a warrant for a misdemeanor not committed in his presence. See State v. Nall, 304 S.C. 332, 404 S.E.2d 202 (Ct. App. 1991) [private person can arrest for misdemeanor committed in presence of breach of peace, but he has no authority to arrest for a misdemeanor committed out of his presence].

On the other hand, we indicated in the 1980 opinion that if the police officer possessed no reason to believe that the arresting individual was without the authority or power to arrest:

> . . . he is likewise under no duty to investigate the circumstances surrounding the arrest but may simply provide transportation of that prisoner to jail or to the committing magistrate to be dealt with according to law. . . . [Thus] . . . [U]nless the police officer assuming custody from a security guard has reason to know or believe that the guard's arrest of a prisoner was unlawful, such police officer generally cannot be held liable for any previous unlawful conduct of the security guard merely by assuming custody of and transporting the prisoner to jail.

In addition, we note the charging document referred to as a "courtesy summons" was created by 2002 S.C. Acts No. 348, which added §22-5-115. This provision states:

> [n]otwithstanding any other provision of law, a summary court or municipal judge may issue a summons to appear for trial instead of an arrest warrant, based upon a sworn statement of an affiant who is not a law enforcement officer investigating the case, if the sworn statement establishes probable cause that the alleged crime was committed. The summons must express adequately the charges against the defendant. If the defendant fails to appear before the court, he may be tried in his absence or a bench warrant may be issued for his arrest. The summons must be served personally upon the defendant.

Importantly, pursuant to §22-5-110, as amended by 2011 S.C. Acts 70, §1:

> (B)(1) An arrest warrant may not be issued for the arrest of a person unless sought by a law enforcement officer acting in their official capacity.
>
> (2) If an arrest warrant is sought by someone other than a law enforcement officer, the court must issue a courtesy summons. [Emphasis added].

A courtesy summons is issued by a summary court judge based upon the sworn statement of an affiant "who is not a law enforcement officer" or is issued to "nonlaw enforcement personnel." See Ops. S.C. Atty. Gen., May 25, 2011; December 16, 2008. We have stated that a courtesy summons is to be utilized where an individual is charged with a misdemeanor offense and the affiant is nonlaw enforcement personnel. See Op. S.C. Atty. Gen., August 7, 2008 (". . . a courtesy summons must be used for summary level crimes involving victims charging a misdemeanor offense when the affiant is non-law enforcement personnel"). Therefore, consistent with such, a courtesy summons instead of an arrest warrant should be utilized where an individual is charged with a misdemeanor offense and the affiant is nonlaw enforcement personnel.

In an opinion dated August 18, 2008, we addressed the courtesy summons as it applies to the offense of shoplifting:

> You have questioned whether the requirement for a courtesy summons applies to a business when the bad check itself represents prima facie evidence that a crime has been committed. You also questioned whether such requirement applies when an individual has been detained for shoplifting. You referenced that "[i]n each of these cases, it is not a private citizen who seeks the arrest warrant but a business that seeks the warrant through an employee or business owner in the name of and on behalf of the business effected." . . .
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> [I]n the opinion of this office, as to your contention that in shoplifting and fraudulent check cases, it is not a private citizen who seeks an arrest warrant but, instead, it is a business that seeks the warrant through an employee or business owner "in the name of and on behalf of the business effected", such would not change the determination that it is an individual who serves as the affiant on an arrest warrant. Any assertion that the individual would not be

> considered as seeking the warrant but instead would seek the warrant "in the name of and on behalf of the business affected" would not change the result. A business could not be considered in any respect as serving as the affiant on an arrest warrant. Inasmuch as subsection (B) of Section 22-5-110 provides that ". . . a person charged with any misdemeanor offense requiring a warrant signed by nonlaw enforcement personnel to ensure the arrest of a person must be given a courtesy summons", in the opinion of this office, a courtesy summons would be applicable in shoplifting and fraudulent check cases involving misdemeanor offenses where the warrant is signed by nonlaw enforcement personnel, including personnel associated with a business.

Also pertinent is an opinion of this office dated November 4, 1993, where we addressed the issue of who may be an affiant on an arrest warrant. We stated that:

> . . . any citizen who has reasonable grounds to believe that the law has been violated has the right to cause the arrest of a person who he honestly and in good faith believes to be the offender . . . The affiant to an arrest warrant must be able to satisfy an inquiring magistrate that sufficient facts and information exist to support the warrant which determination is entirely within the magistrate's judgment. . . .

Further, we have recognized that probable cause expressed in the affidavit of an arrest warrant may be based on personal knowledge or hearsay. See Ops. S.C. Atty. Gen., May 25, 2011; August 5, 1996; cf. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621, 623 (1976) [finding a search warrant affidavit may be based on hearsay information]. The same reasoning would apply here. In an opinion dated September 29, 1999, we discussed whether it was proper for a court employee to sign as the affiant on an arrest warrant for a person who willfully failed to appear before the court as required by a uniform traffic citation without having posted bond or been granted a continuance by the court, in violation of the law. We concluded that a court employee would be authorized to act as the affiant on a warrant, just as any other citizen would be authorized to act, who in good faith believed the individual violated the law. See Op. S.C. Atty. Gen., January 11, 2001 ["an arrest warrant can be based on probable cause established by any citizen"].

Conclusion

It is the opinion of this office that the UTT serves as a valid charging document to give the magistrate's and municipal court jurisdiction over a misdemeanor charge of shoplifting. The UTT may be used to charge an individual for shoplifting even if the investigating law enforcement officer arrives on the scene after the offense has been committed. So long as the officer has probable cause to believe that the offense of shoplifting has been "freshly committed," the officer may make the charge by way of a UTT and such ticket would bestow jurisdiction upon the magistrate's or municipal court over the case. We caution that the offense must have been "freshly committed" based upon all the facts and circumstances presented to the officer. Such determination must be made on a case-by-cases basis. If the crime was neither committed in the officer's presence nor "freshly committed" before the officer's

arrival, then the officer should not initiate a valid arrest without first obtaining an arrest warrant. The safest course is to obtain a warrant prior to trial in order to constitute a charging document for purposes of trial and to put the defendant on notice of the charges alleged. In lieu of an arrest warrant, an individual may be charged with a misdemeanor shoplifting charge utilizing a courtesy summons signed by nonlaw enforcement personnel, provided there is probable cause shown that the alleged crime was committed. In addition, a private citizen has the power to arrest, provided such person witnessed the shoplifting. An officer who is requested to take custody of a subject who has been arrested by a private citizen is under a legal duty to make all necessary inquiry to satisfy him/herself that the initial arrest was lawful.

If you have any further questions, please advise.

Very truly yours,

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