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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 16, 1998

The Honorable Johnny Mack Brown
Sheriff, Greenville County
4 McGee Street
Greenville, South Carolina 29601

Re: Informal Opinion

Dear Sheriff Brown:

You state that a local repossessing company has approached you with concerns regarding increasing violence towards his personnel. Believing that there is a relevant Supreme Court decision regarding law enforcement and repossessions, you seek advice concerning the following issues:

1. rights and restrictions of repossessors;

2. to what extent can repossessors protect their personal safety;

3. how can they protect the collateral they are repossessing;

4. what, if any, is the role of law enforcement?

You have a concern regarding the repossession of property based solely on a signed contract and not a court order.

Law / Analysis

This Office has rendered a number of advisory opinions regarding this area of the law. I will briefly review these for you.

Request Letter

On July 2, 1996, we issued an Informal Opinion to the Chief of the Department of Public Safety at Trident Technical College concerning the question of "what duty or responsibility do police officers have to assist process servers in the service of civil process or in the repossession of a vehicle on campus or bondsmen in apprehending their clients who have not paid their fees on campus where no subpoena or judicial order signed by a judge or magistrate is present at the time." We referenced therein an earlier opinion, Op. Atty. Gen. No. 84-3 (January 16, 1983) which had concluded that an outside police officer could serve process on a college campus and that campus security officers are not required to assist in the execution of a warrant. The campus officer could not, however, willfully refuse to provide information on a student's location on campus. In addition, we cited general law authority which makes it the duty of a sheriff or his deputies to act as a conservator of the peace within his county, using such force as may be necessary to preserve the peace. We further recognized therein that

> [i]n the discharge of his duty to prevent and suppress breaches of the peace and other offenses, the sheriff is bound to use all the means provided by law to accomplish such end, and he cannot shut his eyes to what is common knowledge in the community, or purposely avoid information, easily acquired which will make it his duty to act. He is under a duty to be active and vigilant, to exercise initiative, to be reasonably alert with respect to possible violations of law, and to use all proper means to secure obedience to the law.

The 1996 opinion also cited several cases concerning the role of police officers in so-called "self-help" situations where the officer was asked to assist a process server or a person repossessing property. These cases principally addressed the issue of whether "state action" was triggered by the police officer's actions for purposes of civil rights liability. Based upon these authorities, we summarized as follows:

> ... typically, law enforcement officers and agencies assume a "standby in case of trouble" posture regarding private self-help situations regarding repossession or private process servers. The officer is put in a difficult position in these situations. He cannot completely ignore the situation, because often times trouble or violence may occur. However, if he proceeds too far in the self-help, he runs the risk of creating a "state action" situation for purposes of § 1983 (civil rights) liability. Thus, the typical role of the police officer is one of "stand by status".

> Each situation is unique, of course, and thus no "hard and fast" rule can be given. Your policy of letting the process take its course unless there is any sign of trouble or call for assistance or back-up seems to be in accord with the case that I have outlined above. Obviously, your job is to do your duty to enforce the laws on campus and quell violence at the first sign thereof, but you also do not want to create liability for your department where none would otherwise exist.

Another Opinion, Op. Atty. Gen., No. 78-30 (February 16, 1978), dealt with the issue of whether a creditor possesses the right to break into and "hot wire" a car in order to retake possession of the collateral. We concluded therein that the creditor could not.

The Opinion referenced the Consumer Protection Code as governing "a creditor's right to repossess collateral due to a default in a consumer transaction ...." Specifically, we noted that § 37-5-112 (of the Consumer Protection Code) provides as follows:

> [u]pon default by a consumer with respect to a consumer transaction, unless the consumer voluntarily surrenders possession of the collateral to the creditor, the creditor may take possession of the collateral without judicial process only if possession can be taken without entry into a dwelling used as a current residence and without the use of force or other breach of the peace. (emphasis in original).

We found that the key issue was thus whether "breaking into and 'hot wiring' a car constitutes a breach of peace or use of force in violation of Section 37-5-112 of the 1976 Code." Our analysis of this question was as follows:

> [t]he Consumer Protection Code does not define 'force' or 'breach of peace'. Black's Law Dictionary (4th ed) defines force as 'strength directed to an end'. In Buchanan v. Crites, 150 P.2d 100, 106 Utah 428 (1944), the court said that where a 'defendant who entered dwelling of which he had right to possession and of which plaintiff was tenant at will, by unlocking the door from its hinges, entered by 'force'. Also cited in Buchanan was Winchester v. Becker, 4 Cal. App. 382, 88 P. 296 (1906), which held that 'force is to be regarded' as breaking open the door or window of the house'. Applying the ordinary meaning of force and court interpretations of acts

constituting force, it appears certain that breaking into a car constitutes an act of force.

Willis v. Whittle, 82 S.C. 500, 64 S.E. 410 (1908) is the classic South Carolina case involving breach of the peace in a repossession situation. The case involved a mortgagee's right to seize mortgaged chattels after the condition of sale was broken. The Court stated that,

> [t]here is one restriction, however which the law imposes upon this right. It must be exercised without provoking a breach of the peace; and if the mortgagee finds that he cannot get possession without committing a breach of the peace he must stay his hand and resort to the law, for the preservation of the public peace is of more importance to society than the right of the owner of a chattel to get possessing of it. Id. at 502.

The District Court of South Carolina recently interpreted what constituted a breach of peace in Thompson v. Ford Motor Credit Co., 324 F.Supp. 108 (DCSC 1971). In that case a creditor had located the car in a public parking lot, with the keys in the ignition, and took possession of it. The debtor claimed that the creditor breached the peace in repossessing the car, thereby violating Section 36-9-503 of the 1976 Code (section 37-5-112 had not yet been enacted). The district court cited several South Carolina cases establishing the offense of breach of peace. Quoting Lyda v. Cooper, 169 S.C. 451, 169 S.E. 236 (1933), the court said,

> In general terms, a breach of the peace is a violation of public order, a disturbance of public tranquility, by any act or conduct inciting to violence. By peace is meant the tranquility which is enjoyed by the citizens of a community, where good order reigns among its members, which is the right of all persons in political society ... . 324 F.Supp. at 115.

Based on this general definition, the court in Thompson held there was no breach of the peace. As stated,

> [T]he stipulated facts do not reveal that anyone was caused, or exhibited any excitement at the parking lot where the car was repossessed. Id.

The court also noted, however, that no element of violence is needed in order for repossession of collateral to constitute a breach of the peace within the contemplation of the UCC.

In light of the foregoing cases, it appears that the method of repossession in question would constitute a breach of peace since it is reasonable to assume that breaking into and 'hot wiring' a car would cause a 'disruption in the public tranquility' or excitement where the act is being performed. Other cases addressing the issue of creditor repossessions support this conclusion. See, Ford Motor Credit Co. v. Ditton, 14 UCC Rep. Serv. 1474 (Ala. Civ. App. 1974), which involved a credit company which repossessed a car by towing it from a public parking lot. The court held there was no breach of the peace. The court quoted Street v. Sinclair, 71 Ala. 110, stating that the right to seize is 'subject to the limitations that recaption must not be perpetrated in a riotous manner or attended with a breach of peace.'

It should be emphasized that the above-mentioned cases interpreted less restrictive statutes governing self-help repossession, breach of peace being the only limitation. However, the controlling statute in the present situation prohibits the use of force, as well as breach of peace. Therefore, it must be concluded that in the usual situation repossessing a car by breaking into and 'hot wiring' it involves the use of force and a breach of the peace, both of which violate Section 37-5-112 of the 1976 Code. This does not mean that the creditor may not repossess the collateral. However, he must proceed in accordance with the limitations established in Section 37-5-112 of the 1976 Code and other relevant provisions.

See also, Foster v. Ford Motor Credit Co., 302 S.C. 450, 395 S.E.2d 440 (1990) [referencing § 37-5-112].

One other Attorney General's opinion should be referenced. In Op. Atty. Gen., Op. No. 79-7 (January 12, 1979), we concluded that a sheriff or his deputy does not have the authority to break and enter a house after request and refusal, in order to distrain sufficient property upon the rented premises to pay rent and costs under the authority of a distress warrant. In addition, we opined that a judgment in an ejectment action does not authorize an officer to use physical force to remove the property and person in possession of the disputed premises; however, in our opinion, a magistrate may, in his discretion, after adjudication of the rights of the parties, issue a Writ of Possession which would authorize a proper officer to use such force as is necessary to put the plaintiff in possession.

The 1979 Opinion referenced an Opinion of June 15, 1978 which concluded that the authority to break and enter a residence building under civil process may be exercised in claim and delivery only; unless the authority to use force is specifically granted in other types of civil actions by statute, it does not exist, we stated. The provisions relating to distraint for rent do not authorize such use of force.

Likewise, with respect to ejectment, we noted that the Opinion of June 20, 1978 had "stated that inasmuch as the referenced section (27-37-40) did not specifically grant authority to a constable or sheriff to forcibly enter to eject a particular tenant, such authority did not exist."

By contrast, in claim and delivery actions, § 15-69-180 expressly permits forcible entry; where the property is not delivered after the public demand therefor by the sheriff, "... he shall cause the building or enclosure to be broken open and take the property into his possession and, if necessary, he may call to his aid the power of his county. We also referenced § 22-3-1420 which grants magistrate's constables the right to forcibly enter.

The 1979 Opinion also stated that "[a] review of previous decisions of the South Carolina Supreme Court indicates that forcible entry of particular premises for the purpose of enforcing a distress warrant is also not permitted." Distress warrants are authorized pursuant to § 27-39-240 of the Code. We noted that decisions such as Jones v. Parker, 81 S.C. 214, 62 S.E. 261 and State v. Christiansen, 194 S.C. 131, 9 S.E.2d 555 (1940) stand for the rule that property taken pursuant to a distress warrant must be removed in a peaceful manner. Accordingly, we concluded that "forcible entry in an attempt to levy a distress warrant is not authorized."

We also recognized that the Christiansen case concluded that while an individual could not lawfully break and enter to levy a distress warrant, "[t]he proper legal remedy ... upon being able to obtain peaceable possessions of the property ... (is) ... to secure a claim and delivery or other legal process authorizing a proper officer to enter the premises." 194 S.C. at 140.

However, the 1979 Opinion also recognized two other means by which forcible entry of a law enforcement officer to repossess goods was possible. We stated that

> Section 23-15-60 of the 1976 Code authorizes a sheriff or his deputy to break and enter any house after request and refusal to seize the goods of anyone in such house provided that the sheriff or his deputy have process requiring the seizure of such goods. If a Court of Equity, therefore, directed the sheriff or his deputy to seize such goods, the statute clearly permits the breaking and entry of the premises. As previously pointed out, however, we have been unable to find what legal process is available to enforce a distress warrant. The party asserting such a right would have the burden of establishing a cause of action.

The 1979 Opinion also observed that a magistrate possessed the authority to issue a Writ of Possession for such purposes. We thus opined:

> [i]t appears, however, that a magistrate's court has the jurisdiction to issue the same type of writ. A Writ of Possession is the process commonly resorted to by the successful party in an action of ejectment, for the purpose of being placed by the sheriff in the actual possession of the land recovered ... . This writ is technically known as a Writ of Habere Facias Possessionem. It is clear that this process is recognized and available in this State. See Sections 23-15-20, 23-19-10, and 14-19-20 of the 1976 Code. The purpose of this writ is to enforce a judgment in ejectment. Hill v. Resort Development Company, 251 N.C. 52, 110 S.E.2d 470 (1959). It is an order entered in aid of judgment whereby the court in which judgment has been rendered orders that possession of the premises be immediately given up.

As you can see, while every situation depends upon the particular facts, the use of force with respect to repossession of property is thus quite limited under the law. Certainly, a writ such as claim an delivery or a writ of possession or court order of some kind is almost always necessary. In self-help situations, where a law enforcement officer is simply asked to assist a process server or a person repossessing property (on his own), our recommendation to police agencies has consistently been to "standby in case of trouble." If trouble arises or is about to happen, obviously, in that instance, law enforcement officers must act to preserve the peace.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an