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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 29, 1995

Greg A. Hoover, Chief of Police
Moncks Corner Department of Public Safety
118 Carolina Avenue
Moncks Corner, South Carolina 29461

Re: Informal Opinion

Dear Chief Hoover:

You have questioned the authority of a law enforcement officer to briefly restrain or detain combative mental patients or students where there has been no court order of detention or arrest. Specifically, you state:

> Moncks Corner Police officers are frequently called by medical staff at Roper-Berkeley Hospital to restrain combative patients who are refusing examination or treatment. These persons are not under arrest nor are they under any court order of detention. The officers are asked to physically restrain the patient.
>
> Similarly, police officers are called to the Berkeley County Mental Health Center to restrain clients who enter their facility voluntarily but then refuse treatment and desire to leave. In these situations officers are asked to prevent the person from leaving while efforts are made through the Berkeley Probate Court to seek an Order of Detention for Examination.
>
> Lastly, police officers are called to Berkeley County Schools to restrain emotionally handicapped students, both

> juvenile and adult, who may be disruptive but have not committed a criminal offense.

We begin our analysis with the fundamental proposition of law that is completely familiar to every police officer:

> [t]he legality of the warrantless arrest turns upon (1) whether the officers either had probable grounds upon which to arrest appellant for having committed a felony or (2) appellant committed a misdemeanor in their presence; for it is settled that peace officers, including town police could lawfully arrest with a warrant persons (1) reasonably suspected of having committed a felony or (2) when the facts and circumstances observed by them give their probable cause to believe that a crime has been freshly committed.

State v. Retford, 276 S.C. 657, 659-60, 281 S.E.2d 471 (1981). Equally fundamental is the constitutional standard for the "seizure" of an individual where there has been no warrant issued for that person's arrest:

> [t]he Fourth and Fourteenth Amendment's prohibition of searches and seizures that are not supported by some objective justification governs all seizures that involve only a brief detention short of traditional arrest. Thus, wherever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person and the Fourth Amendment requires that the seizure be "reasonable."

68 Am.Jur.2d, Searches and Seizures, § 50. It is also well-recognized that the United States Supreme Court

> ... has generally adopted the view that, in order for a law enforcement officer to initiate a stop absent probable cause to arrest a person, the officer must have an articulable and reasonable suspicion of the person's involvement in criminal activity.

Anno., "Stop and Frisk", 104 L.Ed.2d 1046, 1050; Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Of course, pursuant to these firmly-established principles of law, if an individual's disruptive behavior also constitutes a violation of the criminal laws of South Carolina, the police officer possesses the legal authority to arrest the person for such violations. For, it is settled that a mentally ill person "who is committing a breach of the peace may be arrested without process under the same circumstances as one "who is not mentally ill, such cases "being governed by the principles which apply to cases of arrest on probable cause without process ...." 35 C.J.S., False Imprisonment, § 16.

Apparently, however, your concern is whether you possess the authority to subdue and detain the mental patient for disruptive behavior which may not rise to the level of a criminal violation. It is my opinion that you do, as will be explained more fully below.

Generally speaking, the authority of a police officer to detain or restrain a mental patient who is dangerous to himself or others is found in a statute authorizing such detention. It has been written that

> [u]nder some statutes, peace officers or physicians are given authority to take into custody mentally disordered persons who pose a danger to themselves or others, and to transport or deliver such persons to mental health facilities. Such detention and transportation may be undertaken without a warrant, but it must, where required, be based on probable or reasonable cause.

56 C.J.S., Mental Health, § 48.

Such a procedure, responding to a dangerous emergency, has been held not to offend the Due Process Clause. Logan v. Arafeh, 346 F.Supp. 1265 (D. Conn. 1972), affd., Briggs v. Arafeh, 411 U.S. 911, 93 S.Ct. 1556, 36 L.Ed.2d 304 (1973). Indeed, the United States Supreme Court has held that a state

> ... has a legitimate interest under its parens patrice power in providing care to its citizens who are unable because of emotional disorders to care for themselves; the State also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

One statute is particularly pertinent to your situation. S.C. Code Ann. Sec. 44-13-10 provides:

> [p]ending his removal to a State mental health facility an individual taken into custody or ordered to be admitted may be temporarily detained in his home, a licensed foster home or any other suitable facility under such reasonable conditions as the county governing body, supervisor or manager may fix, but he shall not except because of and during an extreme emergency, be detained in a nonmedical establishment used for the detention of individuals charged with or convicted of penal offenses. The county governing body, supervisor or manager shall take such reasonable measures, including provision of medical care, as may be necessary to assure proper care of an individual temporarily detained under this section.

While we have concluded that "absent extreme emergency", a mentally ill person should not be detained in a jail see, Op. Atty. Gen. May 3, 1979, 1957-58 Op. Atty. Gen., p. 80 (January 17, 1958), this statutory provision, nevertheless, authorizes the temporary detention of a mentally ill person "[p]ending his removal to a state mental health facility ...". The Section specifically authorizes detention in the individual's home, a licensed foster home "or any other suitable facility". Certainly, this would include a hospital such as Berkeley-Roper or the Berkeley Mental Health Center.

Moreover, in addition to this statute, the common law also authorized the temporary restraint of mentally ill persons who are dangerous to themselves or others. It is recognized that

> [o]ne is justified in restraining, without legal proceedings, a [mentally ill] ... person who is dangerous to himself or others, and generally an action for false arrest or imprisonment will not lie for the arrest or detention. [Mental illness] ... which does not render the ... person dangerous to himself or others, however is not usually a lawful excuse for restraint without judicial proceedings.

32 Am.Jur.2d, False Imprisonment, § 90. It is also written elsewhere:

> [the] basic common law rule is that a person who is so [mentally ill] ... as to be dangerous to himself or others may be arrested and detained without judicial or quasi judicial proceedings when there is an urgent need to prevent immediate injury to such person or others.

Anno, 92 A.L.R.2d 570, 571-2.

My search has revealed no South Carolina case which has formally adopted this common law rule. However, this Office has recognized the common law authority of a mentally ill person to be detained temporarily for dangerousness on at least two previous occasions. In Opinion No. 1446, p. 229 (December 14, 1962), we stated the general common law rule:

> [u]nder certain circumstances one is justified in restraining a [mentally ill] ... person who is dangerous to himself and others, however this applies, in the absence of judicial proceedings, only where the person is dangerous. [citing] 22 Am.Jur., False Imprisonment, Section 77.

Further, the January 17, 1958 opinion, referenced above, concluded the common law rule was applicable in South Carolina:

> [u]nder the Common Law a person who was so insane as to be dangerous to himself or others could be arrested by anyone without a warrant or judicial proceedings but this was justifiable only when the urgency of the case demanded immediate intervention. This rule had its foundation in reasonable necessity, ceasing with the necessity. Any person making the arrest took the responsibility of an error of judgment. This kind of arrest was not governed by the general law of arrest but arose purely out of the necessity of the occasion.
>
> In the general overhauling of the Mental Health Laws of this State in 1952 the Legislature sought to relax some of the harsh rules of the Common Law. The Legislature certainly meant to stop having mental patients kept in county jails over long periods of time ....

However, the opinion concluded that "reading all these laws together" the Common Law rule remained in effect. In short, the Common Law rule of temporary detention of dangerous mentally ill persons remains the law in South Carolina even though only in cases of "extreme emergency" may such persons be detained in a jail.

Other jurisdictions have recently applied the common law rule of temporary detention to a wide variety of situations. For example, in Furrh v. Arizona Bd. of Regents, 139 Ariz. 83, 676 P.2d 1141 (1983), a university student brought an action against Arizona University, a professor and another employee alleging that defendants assaulted and unlawfully restrained him on a university field trip. Unknown to those involved, the student had a chronic mental and emotional disorder and had been under the care of a psychiatrist for years. On the trip, the student first displayed signs of eccentricity, then obtained possession of a knife on two occasions on the trip. Finally, he left the group and went to a local village under the delusion that group members were going to harm or kill him. He attempted to jump from a moving vehicle, had to be restrained and in the ensuing struggle obtained possession of a knife. The student subsequently escaped and ran. Members of the group finally subdued and restrained him without excessive force.

The Court thoroughly reviewed the existing law in this area, holding that the restraint of the student was lawful and that an action for false imprisonment and assault and battery did not lie.

> We hold ... that where a person is a danger to himself or others because of his mental condition, that it is lawful to restrain him so long as necessary until other lawful measures can be followed.

676 P.2d at 1146. See also, Christiansen v. Weston, 36 Ariz. 200, 284 P. 149 (1930); Emmerich v. Thorley, 35 App. Div. 452, 54 N.Y.S. 791 (1898); Maxwell v. Maxwell, 189 Iowa 7, 177 N.W. 541, 10 A.L.R. 482 (1920); Crawford v. Brown, 321 Ill. 305, 151 N.E. 911, 45 A.L.R. 1457 (1926); Appeal of Sleeper, 147 Me. 302, 87 A.2d 115 (1952); Stizza v. Essex Co. Juvenile and Domestic Relations Ct., 132 N.J.L. 406, 40 A.2d 567 (1945); Re Allen, 82 Ut. 365, 73 A. 1078, 26 L.R.A., N.S. 232 (1909). [As the Court stated in Furrh, "all of these opinions recognize that at common law a person dangerous to himself or others may be temporarily restrained without legal process." 676 P.2d, supra.] See also, Restatement (2d) Torts, §§ 120, 156 (1965).

Likewise, in Patrick v. Menorah Medical Center, 636 S.W.2d 134 (Mo. App. 1982), plaintiff sued the hospital and physicians for alleged false imprisonment and assault and

battery. Plaintiff was found in a comatose condition from an apparent drug overdose. He was placed in intensive care in the hospital and was detoxified. Upon reawakening, it became apparent to the hospital staff that he suffered from mental illness. The plaintiff became "angry, hostile, uncooperative and argumentative with the staff and almost wholly uncommunicative with the physicians." 636 at 135. The plaintiff's complaint focused upon the fact that "he was forcibly removed from intensive care and transported to the facility for the treatment of the mentally ill at Menorah hospital." Supra at 136.

The Court found it "unnecessary to reach or decide" the issue of construction of the Missouri statute authorizing a health or police officer to take a dangerous mentally ill person into custody for emergency commitment. Instead, the issue involved a "fundamental principle of the common law with respect to the issue of restraint of persons like the plaintiff." Supra at 136.

> At common law, a private person could, under some circumstances, legally restrain one believed to be mentally ill. Keleher v. Putnam, 60 N.H. 30 (1880); "It is well established that an insane person, without any adjudication, may lawfully be restrained of his liberty for his own benefit, either because it is necessary to protect him against a tendency to suicide, or to stray away from those who would care for him, or to protect others from his assaults, or other depredations, or because medical attention requires it."

The Court held this common law principle justified any action in restraining the plaintiff, and thus no false imprisonment was actionable.

This general common law rule, authorizing temporary restraint, because of dangerousness to self of others, has been applied to a number of other situations as well. See, Macks v. Brusser, 244 App.Div. 672, 280 N.Y.S. 435 (1935) [temporary detention for drunkenness where necessary to prevent person from injuring himself or others, is not false imprisonment]; Garland v. Dustman, 19 Ohio App.2d 292, 251 N.E.2d 153 (1969) [where father was arrested, deputy sheriff was justified in detaining son until mother could come and get son]; 35 C.J.S., False Imprisonment, § 17 ["... when acting in good faith, police officers, representing the police power of the state, may detain without process a child alleged to be a delinquent, pending an investigation of his delinquency, and this is so, although they did not comply with the procedure outlined in the Juvenile Delinquency Act."]; Sindle v. New York City Tr. Autho., 33 N.Y.2d 293, 352 N.Y.S.2d 183, 307 N.E.2d 245, 248 (1973) ["Generally, restraint or detention, reasonable under the circumstances and in time and manner, imposed for the purpose of preventing another

from inflicting personal injuries or interfering with or damaging real or personal property in one's lawful possession or custody in not unlawful." Thus, school bus driver entrusted with the care of his student passengers "has the duty to take reasonable measure for the safety and protection of both -- the passengers and the property."]; 1986 Op. Atty. Gen. No. 86-66, p. 212 (June 10, 1986) [magistrate may delay bond hearing up to 24 hours to require prisoner to submit to examination for venereal disease]; Op. Atty. Gen. August 31, 1971 [police authorities may hold an intoxicated person in jail until such time as he is reasonably sober, i.e. "the position of this Office is that a jail custodian should not release a prisoner who is intoxicated."]; Section 20-7-610 [emergency protective custody of a child].

Accordingly, I believe that a South Carolina court would conclude that the temporary detention or restraint of a dangerous individual, particularly one who is mentally ill, in order to initiate commitment proceedings, is lawful. I emphasize that the individual must be considered dangerous, as virtually every case I have examined has emphasized that the individual must either be dangerous to himself or others.[1] Whether an individual is dangerous, of course, depends upon all the facts. Moreover, the courts have held that the officer can administer only so much force as is reasonably necessary under the circumstances to subdue the individual until the danger ceases. As has been stated, "[e]mergency detention, without a hearing on its appropriateness and necessity can only justifiably be maintained or continued for the length of time required to arrange for a hearing to determine whether probable cause for detention exists." 56 C.J.S., Mental Health, § 48, supra.

This letter is an informal opinion only. It has been written by a designated Assistant 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.

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[1] I must caution that there is a division of authority with respect to whether "the arrester's reasonable and bona fide belief that the arrestee was mentally incompetent" is sufficient to protect the officer from liability. See, 32 Am.Jur.2d, False Imprisonment, § 90. Compare, Wittee v. Haben, 131 Minn. 71, 154 N.W. 662 (1915) with Kenny v. Warden, 476 F.Supp. 197 (E.D. Va. 1979). Of course, this issue has not been addressed by our courts. While it may not be the majority rule, it is our view that the better reasoned authority would indeed allow for the police officer's good faith belief that the individual detained or restrained is mentally ill or suffering from mental problems to protect him from liability.

I trust this information responds to your inquiry. With kindest regards, I remain

Very truly yours,

Robert D. Cook
Assistant Attorney General

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