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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 18, 1995

The Honorable J. Al Cannon, Jr.
Sheriff, Charleston County
2144 Melbourne Avenue
Charleston, South Carolina 29405

Re: Informal Opinion

Dear Sheriff Cannon:

You have asked us to review certain information in the July, 1995 issue of Crime to Court. Noting that the issue cites a recent case, McCabe v. Town of Lynn, 875 F.Supp. 53 (D. Mass. 1995), you indicate that your office "picks up a large number of mental patients each year based on orders issued by Probate Court judges." Referencing the McCabe case and the information you have enclosed, you have asked the following questions:

1. With a Probate Court Order, signed by a probate judge, can forcible entry be made into a domicile when there are no other exigent circumstances other than what is stated on the Order of Detention?

2. When a physician issues emergency commitment papers, without an attached order of detention signed by a probate judge, can forcible entry be made into a domicile when no other means of entry are available to the law enforcement officer?

You further note that the issue of Crime to Court which you enclose "also contains a 'post-test.'" You state as follows:

> We are particularly concerned over questions number 1, 9 and 10 of this test. We have been advised that the answer to all three questions is (b) False. Sections 44-17-440 of the S.C. Code of Laws authorizes "any officer of the peace "to take individuals into custody based upon physician emergency commitment papers issued under Section 44-17-410. Section 44-24-70 and 44-24-80 provides authority for law enforcement officers to take children into custody based on certificates issued by physicians or probate court orders. Sections 44-52-50 and 44-52-70 provide the same authority for chemically dependent persons.

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 patriae 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 373 (1979).

In addition to 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 as 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.

72 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. 90 A.L.R.2d 570, 571-572. Cases have applied this common law rule in a variety of circumstances. See, e.g. Furh v. Arizona Bd. of Regents, 139 Ariz. 83, 676 P.2d 1141 (1983); Patrick v. Menorah Medical Center, 636 S.W.2d 134 (Mo. App. 1982).

Various statutes provide for law enforcement officers to take into custody and detain persons believed mentally ill and dangerous to themselves or others. S.C. Code Ann. Sec. 44-17-440 provides that the certificate authorized by Section 44-17-410 [by licensed physician] requires "a state or local law enforcement officer, preferably in civilian clothes, to take into custody and transport the person to the hospital designated by the certificate." Section 44-17-530 states that within three days after the petitions for judicial commitment set forth in Section 44-17-510, the probate court shall appoint two designated examiners to examine the patient and if they report a refusal to submit to such examination, the court shall order such examination; if the patient still refuses to be examined, the court "may require a state or local law enforcement officer to take the person into custody for a period not exceeding twenty-four hours during which time the person must be examined by two designated examiners." Section 44-17-430 authorizes a probate judge to issue a detention order where a person cannot be examined, and his whereabouts are unknown.

Likewise, Section 44-24-70 and 44-24-80 authorize law enforcement officers to take children into custody for mental examination based upon court order or physician's

certificate. Such authority is also given for chemically dependent persons by Section 44-52-70. And finally, Section 44-13-10 provides that, pending his removal to a State mental health facility, an individual taken into custody or ordered to 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 property care of an individual temporarily detained under this section.

The Fourth Amendment to the United States Constitution, which protects against unreasonable searches and seizures, also governs the restraint of a person believed to be mentally ill and dangerous to himself or others. Consistent with the common law, the courts have stated in this regard:

> [a] civil commitment is a seizure, and may be made only upon probable cause, that is, only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard, not here challenged. Chothas v. Smith, 884 F.2d 980, 987 (7th Cir. 1989); Gooden v. Howard County, 954 F.2d 960, 968 (4th Cir. 1992) (en banc); Baltz v. Shelley, 661 F.Supp. 169, 178 n. 36 (N.D. Ill. 1987). There is no requirement of a warrant issued by a judicial officer. For that matter, even an arrest warrant is required only when a person is to be arrested in his home. Payton v. New York, 445 U.S. 573, 583-590, 100 S.Ct. 1371, 1378-1382, 63 L.Ed.2d 639 (1980); McKinney v. George, 726 F.2d 1183, 1188 (7th Cir. 1984).

Thus, in accord with the common law rule referenced above, the Fourth Amendment generally does not require the issuance of a warrant or judicial order prior to detention of a mentally ill person; but instead the constitutional standard is that there be probable cause that the individual is mentally ill and dangerous to himself or others.

The issue here, however, is whether there is a different standard when it becomes necessary to enter a home or dwelling without authorization in order to secure the detention of a mentally ill person. McCabe v. Lynn, referenced in the July, 1995 issue of Crime to Court which you enclose, faced that issue squarely. In McCabe, doctors had signed a petition for involuntary commitment of a 64 year old woman, with both physical and psychological problems. Law enforcement officers were instructed to serve the civil commitment papers, but were advised that the woman would not cooperate, and thus they would have to force their way into the dwelling. Pending also was an eviction order against the woman. Officers forced their way in the home, handcuffed the woman, and finally placed her on a stretcher. She died shortly thereafter.

A suit was brought under 42 U.S.C. § 1983 on behalf of the woman. The principal legal issue before the Court was the validity of the City's policy that in serving civil commitment papers, the police were authorized to use the degree of force necessary to effectuate service of the warrant. The Court described this procedure thusly:

> There was no requirement that a neutral magistrate intercede, or that a warrant be sought prior to the seizure of a human being or to the entry of a home. The officer on the line, armed only with a ten day commitment authorization, could decide when and whether to break down the door to someone's home and seize them.

875 F.Supp. at 58.

The Court noted that "[t]he City of Lynn argues that an application for an order of an involuntary commitment -- completed by a physician -- by statute obviates the need for a warrant." The relevant Massachusetts statute provided that, based upon a finding by a physician "of a likelihood of serious harm by reason of a mental illness", a person could be restrained and hospitalized for up to ten days.

At issue therefore, was the Fourth Amendment's requirements for seizure in the setting of forced entry. The Court held that the Fourth Amendment required the intervention of a court in such circumstances:

> [i]t might be suggested that this is a valid procedure because civil commitment processes are medical, or therapeutic, and as a result, less invasive than a traditional criminal search .... Indeed, one might argue that the fact that a physician is apparently in charge, and that this is "only" a

> ten-day institutionalization subject to a court review makes it a "reasonable" civil entry, without requiring the formal protection of a warrant. ...
>
> I disagree. Although a certified physician or psychologist might be uniquely qualified to evaluate the emotional condition of a patient, he or she is not qualified to determine whether probable cause exists to support an unconsented entry of an individual's home or seizure of an individual. The Constitution specifically imparts that responsibility to the judiciary....

875 F.Supp. at 61. The Court went on to conclude that there were no exigent circumstances in the case before it which would justify dispensing with judicial intervention.

Based on the McCabe case, the July, 1995 issue of Crime to Court presented several "true-false" questions for officers. These questions (1, 9, 10) and the answers thereto are set forth below:

1. Police may make warrantless entry into the home of the subject of a civil mental commitment order to seize the subject if a state statute permits such entry.

   (b) False.

9. If a physician certifies that the subject of a commitment order is dangerous to others, such certification constitutes exigent circumstances justifying warrantless police entry into the home.

   (b) False.

10. A civil order of a court directing the seizure and hospitalization of a subject carries with it the right of a police officer to make warrantless entry into a home to seize the subject.

    (a) True.

Thus, it is the apparent reading by the author of the Crime to Court article that McCabe requires an "order of a court directing the seizure and hospitalization of a subject", but that such order "carries with it the right to make a warrantless entry into a home to seize the subject." Anything less than such a judicial order would not allow the seizure of an individual from the home.

This is a reasonable reading of McCabe. The Court speaks only of the "judiciary" making a probable cause determination. While there is language in this case suggesting a warrant, the case does not so hold. Moreover, a judicial order requiring detention and hospitalization would normally protect from liability the officer so executing it. As was stated in Zuranski v. Anderson, 582 F.Supp. 101, 108-109 (N.D. Ind. 1984),

> [t]he defendant sheriff and warden have no choice under Indiana law but to carry out the order of a judge when that judge is acting in this judicial capacity in a matter over which he has jurisdiction. To require the sheriff or warden to investigate each order or commitment by a judge and to independently determine if the sentence was legally imposed would be absurd. Here when carrying out a direct order of a court, the sheriff and warden enjoy the immunity afforded the committing judge.

See also, Op. Atty. Gen., March 7, 1991 [order of court valid on its face sufficient to protect employee disclosing records pursuant to such order]; Soldal v. Cook County Illinois, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) [(a)ssuming for example that the officers were acting pursuant to a court order ... a showing of unreasonableness on these facts would be a laborious task indeed."]; Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (1987) [the taking into custody of person by an officer pursuant to order of probate judge precludes an action for false imprisonment]; Section 44-17-440 [immunity from civil liability for officer acting "in accordance with this article."]

Of course, the McCabe case is a District Court decision and I am unaware of any circuit court case or a decision of the United States Supreme Court which directly addresses this issue. The Soldal case, involving eviction, clearly implies that a judicial order without a warrant is sufficient for entry into a dwelling, but also strongly implies that the absence of an order would be deficient.

There is one other case, however, which at least suggests that, contrary to McCabe, a certification procedure by physicians for emergency commitment would be sufficient to authorize officers to enter a dwelling to seize a patient suspected of being

mentally ill. In Moore v. Wyoming Medical Center, 825 F.Supp. 1531 (D. Wyo. 1993), the Court commented at length upon the relationship of the Fourth Amendment and emergency commitment procedures requiring doctor's certification without judicial intervention:

> [t]his Court reasons that the Wyoming Emergency Detention statute effectively authorizes the seizure of a mentally ill individual under legislative designated "exigent circumstances." These exigent circumstances occur when an officer or medical examiner has "reasonable cause" to believe that an individual is mentally ill and the officer or examiner further determines that the individual is "dangerous" as a result of mental illness. WYO.STAT. §§ 25-10-109(a), 25-10-101(ii); see also, Gooden v. Howard County, Maryland, 954 F.2d 960, 968 (4th Cir. 1992) (after explaining that the concept of "dangerousness" is a slippery one, the court stated that "Of course, the law in no way permits random or baseless detention of citizens for psychological evaluations.") Plaintiff Moore alleges that defendants Weaver and Hendershot, acting on behalf of Wyoming Medical Center, broke into her home, forcibly detained her, and then removed her from home against her will. In other words, Moore alleges that the defendants performed an unreasonable seizure of her person which included the use of excessive force.

825 F.Supp. at 1546. Quoting from Graham v. Connor, 490 U.S. 386, 393-395, 109 S.Ct. 1865, 1870-71, 104 L.Ed.2d 443 (1989), the Court emphasized:

> ... Today we ... hold that all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard rather than under a "substantive due process" approach.

As a result, of this requirement said the Moore court,

> ... the critical issue at trial will be whether the defendants seized or detained Moore in a reasonable manner. See Villanova v. Abrams, 972 F.2d 792, 795-97 (7th Cir. 1992).

> Plaintiff Moore contends that the defendants did not have probable cause to detain her, and seized her from her home in an unreasonable fashion. By contrast, the defendants contend Moore acted in accordance with the Wyoming Emergency Detention statute and, therefore, in a reasonable manner. This Court finds that the factual disputes between the parties are substantial and material on these issues, and, thus, the case must be presented to a fact-finder.
>
> In turn, whether the defendants had probable cause or performed the seizure in a reasonable fashion depends on whether, in fact, Moore was mentally ill at the time and whether, in fact, Moore's mental illness caused her to be dangerous at the time. The Supreme Court has held that the state actor must prove these facts by clear and convincing evidence to justify the detention. Addington v. Texas, 441 U.S. 418, 423, 431-32, 99 S.Ct. 1804, 1807, 1812-1813, 60 L.Ed.2d 323 (1979) .... Thus, under Addington, the defendants will have to prove that they complied with the standards articulated in the Wyoming Emergency Detention Statute by clear and convincing evidence to prevail at trial.

825 F.Supp. at 1546-1547.

McCabe and Moore are the only cases I have found that deal directly with the issue of the authority to use force to go into a dwelling to seize an individual suspected of being mentally ill and dangerous. McCabe requires a judicial order of at least some kind, which would, of course, greatly help protect the officer from liability. Crime to Court concludes that such an order makes the officer's conduct legal without a warrant and I would agree with that assessment.

Based upon Moore, however, there is at least some authority which concludes that the standard is merely one of reasonableness, depending substantially upon whether there was probable cause on the issue of mental illness and dangerousness. Moore suggests that a showing by clear and convincing evidence of mental illness and dangerousness, would make legal a forcible entry into a dwelling to seize a person based only upon the physicians certificate (pursuant to Section's 44-17-410 and 440).

CONCLUSION

The Fourth Amendment questions you have raised are evolving in the courts at present time. Until the issue is further clarified by courts higher than the District Court level, it would be prudent to follow the advice set forth in Crime to Court, which I believe is consistent with McCabe. At present, the courts require you to have in hand a judicial order of some kind when forcibly entering a house or dwelling to seize a suspected mental patient. Such an order would ordinarily provide the officer with protection from civil liability, Manley v. Manley, supra. McCabe suggests and the issue of Crime to Court, confirms that this does not have to be an arrest warrant, but can be a judicial order (presumably from a Probate Court) concluding that the individual is mentally ill and dangerous. While I note also for your information that there is at least one case which suggests that a doctor's certification pursuant to emergency commitment statutes, would be sufficient for an officer to make such a forcible entry if there is clear and convincing evidence of mental illness and dangerousness with respect to the patient, still, for the protection of your officers, you would be wise to follow McCabe until the law is further clarified.

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

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