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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 2, 1996

Norman A. Allen, Chief
Department of Public Safety
Trident Technical College
7000 Rivers Avenue
North Charleston, South Carolina 29418

Re: Informal Opinion

Dear Chief Allen:

You note that, as Chief of Public Safety for Trident TEC, your officers "have been encountering civil process servers and persons paid by finance companies to repossess vehicles on campus." Further, you state the following:

> I have always taken the position that police officers should neither assist nor prevent these persons from carrying out their business as long as it does not disturb school activities or present a threat to public safety.
>
> Routinely, we have persons serving subpoena on our admissions and records officer or a former student who is applying for a job has a signed waiver for release of records. These persons are not at issue here.
>
> If another police officer or agency requests assistance in serving warrants or obtaining information pursuant to an ongoing criminal investigation, we gladly assist the officer or that agency.

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> My question is: 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.

In Op. No. 84-3 (January 16, 1983), this Office addressed a somewhat similar situation in considerable detail. There, we concluded that an outside police officer has jurisdiction to serve process on a college campus provided he is within his jurisdiction generally, and that the officer "does not have to notify the administration of his intention" to serve process. Moreover, we also concluded that the outside police officer is "not required to wait until the administration notifies the student." With respect to campus police assisting the outside police officer, we stated that campus security officers

> ... are not required to assist in the execution of a warrant. Nor is the outside officer required to seek their assistance. It is difficult to imagine an administration ordering campus officials (police or otherwise) not to assist an officer in execution of an arrest warrant. But if campus officials willfully refuse to provide information on a student's location, they could be held to have violated Sec. 16-5-50 (a), by their hindrance of the officer, or (c) by concealing the student.

The general duties of police officers, sheriffs and peace officers are set forth at 80 C.J.S., Sheriffs and Constables, § 42. There, it is stated that

> [a]t common law and under statutes declaratory thereof, sheriffs and deputy sheriffs and undersheriffs are peace officers. The duties of a sheriff are in large measure the same as are imposed on police officers; he necessarily exercises police powers, and must enforce the laws enacted for the protection of the lives, persons, property, health and morals of the people. Accordingly, a sheriff must enforce the criminal law. He is under a legal duty to investigate crimes, to suppress them, and, and in a proper case, to arrest and prosecute persons who commit them. It is also his right and duty to arrest all persons, with their abetters, who oppose the execution of process. As a peace officer it is the sheriff's duty to act as a conservator of the peace within his county,

> using, however, such force as may be necessary to preserve the peace. So it is his duty to prevent breaches of the peace and assaults and batteries, to suppress an affray, a riot, an insurrection, or an unlawful assembly, and to arrest one provoking an assault.
>
> In 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 reasonable alert with respect to possible violations of law, and to use all proper efforts to secure obedience to the law.

Moreover, 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 (Ia. 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 Seibring v. Parcell's, Inc., 512 N.E.2d 394, 397 (Ill. 1987), it was stated that

> ... 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 alteration at the same time, and it is often impracticable for police officers to consult with their superiors in order to arrange their priorities.

A number of courts have addressed the question of the impact when a police officer does not actively assist in the types of activities which you describe in your letter. For example, in Asmar v. Keilman, 756 F.Supp. 332 (E.D. Mich. S.D. 1991), the issue before the Court was whether the actions of the police constituted "state action" for purposes of a civil rights suit. The plaintiff alleged that police and private process servers conspired to deprive him of his constitutionally guaranteed civil rights. The Court noted that "[i]n the present case the only involvement by defendants West Bloomfield Township Police

Department and Officer Keilman to meet process servers Johnson and Dempsey prior to their attempt to serve their efforts to effect service of such process." Continuing, the Court noted that

> Officer Keilman followed Johnson and Dempsey to plaintiff's residence and observed their actions as they attempted to serve process. After Johnson and Dempsey's initial attempt to serve process failed, Officer Keilman left the previous and continued on with his officials duties. Officer Keilman was not present during the subsequent attempt by Johnson and Demsey to serve plaintiff with process.

756 F.Supp. at 333. Concluding that the officer's actions did not constitute "state action", the Court stated:

> [i]n the case sub judice, it appears that any action taken by defendants West Bloomfield Township Police Department and Officer Keilman amounted to a "mere approval of or acquiescence in the initiatives of" the manner and method in which the private parties, Johnson and Dempsey, attempted to serve process on plaintiff. The actions of the West Bloomfield Township Police Department and Officer Keilman were not overt or coercive as required by the Fourteenth Amendment, in order to establish state action.

765 F.Supp. at 334.

Moreover, in United States v. Coleman, 628 F.2d 961 (6th Cir. 1980), the Court opined:

> ... [u]nder the standard articulated by the Supreme Court in Flagg Bros. [v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978)], the actions of a private party will not be attributed to the state unless the state actually compels the backing.
>
> The involvement of the police here falls far short of compulsion. The police neither encouraged nor directed Clarke to repossess the truck in a particular manner. Their presence at the scene was not an indispensable prerequisite for

> repossession of the truck. Their benign attendance was not designed to assist Clarke in repossession of the truck; rather, it was in furtherance of their official duties. The position assumed by the police was devised to anticipate and prevent any violent confrontation between debtor and creditor which repossession of collateral can entail. Under the facts of this case, mere acquiescence by the police to "stand by in case of trouble" was insufficient to convert the repossession of the truck into state action.

Similarly, in Harris v. City of Roseburg, 664 F.2d 1121 (9th Cir. 1981), the Court reasoned that

> ... there may be a deprivation within the meaning of § 1983 not only when there has been an actual "taking" of property by a police officer, but also when the officer assists in effectuating a repossession over the objection of a debtor or so intimidates a debtor as to cause him to refrain from exercising his legal right to resist a repossession. While mere acquiescence by the police to "stand by in case of trouble" is insufficient to convert a repossession into state action, police, intervention and aid in the repossession does constitute state action.

664 F.2d at 1127.

Waisner v. Jones, 755 P.2d 598 (N.M. 1988) is another case which analyzes the degree of police involvement in private self-help procedures such as you describe in your letter. In Waisner, the Court commented as follows regarding police involvement:

> [h]ere, we do not have the "total absence of overt official involvement." We do not entertain any doubts that once a law enforcement officer is introduced into to the actual self-help repossession and confronts the defaulting party, the purely private nature of the remedy is compromised. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970) ("The involvement of a state official ... plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment .. rights, whether or not the actions of the police were officially

> authorized, or lawful." ... The introduction of law enforcement personnel constitutes state action and results in an unconstitutional deprivation unless the defaulting party is afforded proper notice and an opportunity to be heard. Walker v. Walthall, 121 Ariz. 121, 588 P.2d 863 (Ct. App. 1978). See also Stone Machinery Co. v. Kessler, 1 Wash.App. 750, 463 P.2d 651 (1970); Harris v. City of Roseburg, 664 F.2d 1121 (9th Cir. 1981); but see Massey-Ferguson Corp. v. Peterson, 102 Idaho 111, 626 P.2d 767 (1980) (where the court in dicta ruled that it was not wrongful for a sheriff to cut the lock securing a combine in order to effectuate a self-help repossession where the combine was not on the defaulting party's property, the lock did not belong to the defaulting party and the owner of the lock observed its removal without protest.

755 P.2d at 601-602.

As can be seen from these various authorities, 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 to assist 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".

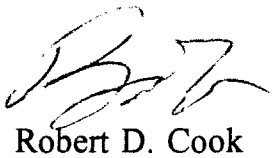
Each situation is unique, of course, and thus no "hard and fast" rule can be given. Your policy of letting the process take its course unless there is any sign of trouble or call for assistance or backup seems to be in accord with the cases that I have outlined above. Obviously, your job is do your duty 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.

Therefore, 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.

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/ph